



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 14 OF 2017

MOSES THUKU MWANGI.....1ST PLAINTIFF

TABARNO BUSIENEI *alias* MARTHAR JEPKIMO BUSIENEI...2ND PLAINTIFF

VERSUS

WILLIAM KIPKOSKEI SEREM.....DEFENDANT

JUDGMENT

1. The Plaintiffs brought this suit vide a plaint dated 2/2/2017 filed on the same date seeking the following orders:-

a)An order cancelling the registration of the defendant as owner by transmission of the land comprised in title No Trans Nzoia /Sinyerere/36.

b)A temporary and permanent injunction to restrain the defendant from occupying, selling, charging or in any other way interfere with the plaintiff's user of Trans-Nzoia/Sinyerere/36.

c) Costs;

d)Interest;

e)Any other relief that this court may deem fit to grant.

The Plaintiff's Case.

2. The plaintiff's case is that there was a judgement of this court issued on 6/10/2014 in **HCCC. No. 119 of 2012**, in which the present plaintiffs were the plaintiffs and one Susan Kiprono was the defendant; that there was a Power of Attorney donated to the present defendant by the said Susan Kiprono; that the current defendant gave evidence in that suit on behalf of the defendant therein; that he was present when the judgement in the case was delivered; that the judgement of the court had the effect of cancelling the registration of Susan Kiprono as proprietor of land comprised in **Title No. Trans-Nzoia/Sinyerere/36**; that the judgement the court ordered that two portions of **10 acres** and **11 acres** be transferred to the 1st and 2nd plaintiffs respectively; that this court has earlier on refused an application for stay of execution of the judgement in that case.

3. The plaintiff avers that after the said judgement, the defendant herein, without revealing that the title registered in Susan Kiprono's name in respect of **Title No. Trans-Nzoia/Sinyerere/36** had been cancelled, obtained a Grant of Letters of Administration to the Estate of Susan Kiprono after her demise. He subsequently had the Grant confirmed and the land transferred to him. All along, the plaintiffs herein had been in possession of the land and Susan Kiprono had never been on the land. Therefore, it was submitted, the interference by the defendant with the land may defeat the judgement of this court in **HCCC. No. 119/2012**.

4. The judgement of the court in **HCCC. No. 119/2012 - Kitale Tabarno Busienei and Moses Thuku Mwangi -vs- Susan Kiprono** was produced in evidence as P.Exhibit 1". From that judgment, it is the correct position that the registration of the land in the name of Susan Kiprono was cancelled and that it was ordered that 11 acres thereof be registered in the name of the 1st plaintiff and 10 acres be registered in the name of the 2nd plaintiff. The defendant was also enjoined permanently from interfering with the plaintiffs' parcels. The defendants' counterclaim in that suit was dismissed.

5. The plaintiffs' case is that despite their rights being clarified in the judgement in **Kitale HCC. No. 119/2012**, the defendant has fraudulently conducted himself in that he obtained registration of the land in his name in order to defeat the import and purposes of that judgement.

The Defendant's Defence.

6. The defendant filed his defence in this matter on the 14th March, 2017 in which he avers that due process of the law was followed in his registration as owner by way of transmission upon his mother's demise. He seems to place great emphasis on the fact that the **High Court in Kitale Succession Cause No. 237/2009** rejected the objection proceedings of the plaintiffs herein. He did not annex or produce the proceedings or final decision of the **High Court in Kitale Succession Cause No. 237 of 2009**. He avers that in **High Court in Kitale Succession Cause No. 237 of 2009** the High Court gave him a clean title to the suit land and the decision has not been appealed since.

DETERMINATION.

Issues for Determination.

7. The questions that arise for determination in this matter are as follows:

(a) Whether the registration of the suit land in the name of the defendant was procured by way of fraud;

(b) What orders should issue.

(a) Whether the registration of the suit land in the name of the defendant was procured by way of fraud

8. It is true that the judgement of this court in **Kitale HCC. No. 119 of 2012** has not been set aside or stayed by any court.

9. The decree produced by the plaintiffs in evidence shows that the order made in Kitale **ELC 119 of 2012** was to the effect that the registration of the suit land in the name of Susan Kiprono be cancelled. Her title to the suit land was by that decree extinguished.

10. A further order was that an 11-acre and 10-acre portion of the suit land be transferred to the 1st and 2nd plaintiff in that suit respectively. The decree intimates that there were other proceedings prior to that suit over the same land, in which courts had also ruled in favour of the plaintiffs herein.

11. The succession proceedings that the defendant cites as having given him a clean title over the suit land were filed by the defendant. He was under a duty to disclose the existence, full import and tenor of the decree in **Kitale HCCC No. 119/12** as well as in the previous proceedings as it is apparent that he was aware of them.

12. The defendant never gave evidence in this matter and so this court did not have the benefit hearing his version. Be that as it may, it is possible to deduce his stance in this matter from the contents of the defence that he has filed in this suit, which this court analysed herein before.

13. Nevertheless, it is not possible to see how the succession proceedings in **Eldoret High Court Succession Cause No 26 of 2016** could resurrect a title whose existence had been extinguished in the year 2015 by a judgment of this court.

14. It has been submitted that the defendant cannot feign ignorance of the proceedings in **Kitale HCC. No. 119/2012** as he testified in them on behalf of Susan Kiprono the then registered owner. It is the conclusion of this court that the defendant never made full disclosure to the court in those succession proceedings, hence the grant. He is therefore guilty of fraud against the plaintiffs.

15. The transmission of the land to him cannot stand. A title can only be as clean as the process vide which it was obtained. If there is the slightest element of fraud of which the defendant can be deemed to have been aware of or participated in, that title cannot stand.

16. In the first place, the defendant, fully aware that the title in the name of Susan Kiprono had been extinguished lodged succession proceedings in which he listed the said title as if it was in existence. Secondly he obtained a confirmation of grant which led to its transmission into his name on 24/10/2016, about two years after the judgment that had extinguished Susan's title to the land. This is fraud that committed by the defendant albeit cloaked as a proper succession cause legal process.

(b) What orders should issue?

17. In my view the title resulting from that process cannot be called a clean title, otherwise a bad precedent would be set whereby any party against whom an order cancelling his title would only have to lodge fresh proceedings of his choice, such as succession proceedings, by which the previous order would be defeated. The orders leading to registration of the land in the defendant's name and the title resulting therefrom are therefore null for want of disclosure of material facts and fraud.

CONCLUSION

18. In the circumstances the prayers in the plaint are merited. I hereby grant **prayers No (a), (b) and (c)** as prayed in the plaint dated **2nd February, 2017**.

Dated, signed and delivered at Kitale on this 30th day of May, 2018.

MWANGI NJOROGE

JUDGE

30/5/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Nyamu holding brief for Kiarie for plaintiffs

N/A for the defendants

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

30/5/2018