



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 241 OF 2013

JOSEPH KARUA NGAREH.....PLAINTIFF

-VERSUS-

MARY GATHONI KIHARA.....1ST DEFENDANT

GERALD MBUTHIA MUREITHI.....2ND DEFENDANT

THE LAND REGISTRAR LAIKIPIA.....3RD DEFENDANT

JUDGMENT

1. The plaintiff herein, Joseph Karua Ngareh, instituted this suit seeking judgment against the defendants, jointly and severally, for among other orders; a declaration that the transfer, registration and issuance of a title deed in favour of the 1st defendant was fraudulently done and hence of no legal consequence (was worthless).

2. It is the plaintiff's case that the process which led to the transfer of the suit property (LR. No. Euaso Nyiro/Suguroi Block IV/125) from its original proprietor Eliud Ngare Kabue (deceased) was tainted with misrepresentation, deception and irregular, dishonest, invalid and fraudulent hence null and void *abnitio*.

EVIDENCE

The Plaintiff's case

3. When the suit came up for hearing, the plaintiff informed the court that the 1st defendant was issued with a title deed before registration of transfer and payment of stamp duty; that when he learnt about the 2nd title, he complained to the Land Registrar who informed him that they had established fraud in the transfer of the land and advised him to file a case in court. He filed a caution to restrict dealings with the suit property. He also reported the matter to the police but they were unable to carry out any meaningful investigations.

4. He informed the court that in 2008, they conducted a search and established that the suit property was still in the name of their father.

5. When he carried out another search in 2012, he found that the land was registered in the name of the 1st defendant and that it had previously been registered in the name of two other persons after his father transferred it in 1996.

6. He stated that his father, who passed on in 2001, never sold or transferred the suit property to any person.
7. Upon being cross examined by counsel for the defendants, he admitted that the letter dated 27th August, 2013 (Pexibt 8) states that the contents of the search he conducted in 2008 and which he produced as Pexibt 5 could not be verified as the register could not be traced.
8. With regard to the contents of the letter dated 24th September, 2013 (Pexibit 9) which shows that the title issued to the 1st defendant is regular he disputed those contents.
9. Because his family has the original title deed for the suit property, he stated that his father did not sell or transfer the suit property to Ndiritu Julius.
10. Concerning failure to sue Ndiritu Julius, he stated that there was no address in the lands office or any way he could trace him.
11. With regard to when the fraud was committed, he stated that it is not possible for him to establish when the fraud occurred. All what he knew is that the title he holds is authentic and that of the 1st defendant void *abinitio*.
12. He blamed the Land Registrar for falsifying the register and issuing the 2nd title deed. He contended that the Land Registrar was part of the fraud because he made the impugned entries and issued the title deeds.

The 1st defendant's case

13. The 1st defendant informed the court that the suit property belongs to her; that she purchased it from the 2nd defendant, Gerald Mbuthia Mureithi, for Kshs. 1, 770,000/= . Before paying for the land, she conducted a search in respect of the suit property (She produced the certificate of official search as Dexbit 3) and found the land belonged to the 2nd defendant. Thereafter, she and the seller went to the Land Control Board and obtained consent to have the suit property transferred to her. After the land was transferred to her, she took possession, put up a worker's house and started cultivating therein.
14. She denied the plaintiff's contention that she obtained her title deed fraudulently.
15. Terming herself an innocent purchaser for value, she stated that she followed due process in acquiring the suit property.
16. On cross examination, she admitted that she has not attached a sale agreement or agency agreement and explained that she trusted the people who got the suit property for her. In addition she had conducted a search in respect of the suit property and verified ownership details from the green card.
17. She acknowledged that the two title deeds presented before the court appear genuine and stated that it is the court which will determine which one is authentic.
18. She acknowledged having been summoned by the police over the suit property and stated that she referred them to the District Officer (D.O) who chaired the Land Control Board meeting that gave consent for transfer of the suit property to her.
19. She further acknowledged that there appears to be anomalies in the transfer of the suit property to her in that her title deed was issued about 5 days before the transfer in her favour was registered and before payment of stamp duty in respect of the transaction. Nevertheless, she maintained that there was no fraud in the transfer of the suit property to her.

The 2nd and 3rd defendant's case

20. The 2nd and 3rd defendant's chose only to rely on their statements of defence.

21. At the close of hearing of the case, the plaintiff, 1st and 2nd defendants filed submissions which I have read and considered.

Analysis and determination

22. From the pleadings filed in this suit and the submissions made in respect thereof, I find the issues for the court's determination to be?

(i) Whether there was fraud in the transfer of the suit property from Eliud Ngari Kabue to Ndiritu Julius and thereafter to Gerald Mbuthia Mureithi and subsequently Mary Gathoni Kihara?

(ii) Whether the alleged fraud, if any can be proved against Ndiritu Julius who has not been made a party to the suit?

(iii) What is the legal effect of the plaintiff's failure to sue Ndiritu Julius as the transferee of the suit property?

(iv) Whether the plaintiff has made up a case for being granted the orders sought?

(v) What order or orders should the court make?

23. Starting with the second issue for determination, *to wit*, whether the alleged fraud, if any, can be proved against Ndiritu Julius who was not made a party to this suit, on behalf of the 1st defendant, it is submitted that the plaintiff did not offer any satisfactory explanation as to why he did not sue Ndiritu Julius yet the documents he relied on and in particular the letter dated 24th September, 2013 suggests that fraud was committed when the suit property was transferred to the said Ndiritu Julius.

24. The plaintiff explained that he failed to sue Ndiritu Julius because there was no address in the land register which he could use to access him and had no way of tracing him.

25. I find the explanation offered by the plaintiff to be unsatisfactory to explain his failure to sue the person who allegedly was responsible for the fraud.

26. The plaintiff should have sued the said Ndiritu and if need be, moved the court to be allowed to effect service against him by substituted service.

27. Because the said Ndiritu Julius was not made a party to this suit, this court cannot make any adverse orders against him because if the court made such orders, it would amount to condemning the said Ndiritu unheard. In that regard, see the case of **Pashito Holdings Limited & Another vs Paul Ndungu & 2 OTHERS[1197]eKLR** where the Court of Appeal stated:-

"... The respondents could not have established a *prima facie* case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)

"It is an indispensable requirement of justice that the party who had to decide shall

hear both sides, giving each an opportunity of hearing what is urged against him".

There is an unpronounceable Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right".

The learned Judge quite erroneously in our view said:

"However, my view is that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings".

With respect, he should have seen that it was not up to the appellants to fill up the gaping holes in the respondents' case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief."

28. That being the case, and despite there being evidence suggesting that there was fraud in transfer of the suit property from the plaintiff's father to the said Ndiritu Julius, this court is incapable of making a declaration of the said pleaded fraud at least as against the said Ndiritu.

29. As to whether the said Ndiritu is anecessary party before the urged fraud can be proved against the other parties to the suit, being of the view that the plaintiff cannot prove that transfer of the suit property from his father to Ndiritu was effected fraudulently without affecting the said Ndirutu's right to defend himself against such finding, I find and hold that the said Ndiritu is a necessary party for purposes of proving the alleged fraud in the transfer of the suit property to the 2nd defendant without whom the alleged fraud cannot be urged against the 2nd defendant or even the 1st defendant to whom the suit property was subsequently transferred.

30. The foregoing notwithstanding, by dint of the provisions of **Section 26(1)(b)**, of the Land Registration Act (LRA) 2012 the title held by the 1st defendant may be successfully challenged if the plaintiff is capable of proving that it was acquired illegally, unprocedurally or through a corrupt scheme. In that regard, see the above cited provision of the law which provides as follows:-

"The certificate of title issued by the registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner...and the title of the proprietor shall not be subject to challenge, except-

a. On the ground of fraud or misrepresentation to which the person is proved to be party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

31. In a bid to show that the title held by the 1st defendant was obtained unprocedurally or through a corrupt scheme, the plaintiff adduced evidence showing that the title held by the 1st defendant was issued about five days before the transfer in respect thereof was registered. He also adduced evidence showing that the stamp duty in respect of the transfer was paid after transfer had been effected. It was also pointed out that no sale agreement between the 1st defendant and the 2nd defendant was produced.

32. The 1st defendant acknowledged that there were irregularities in the process of the transfer of the suit property but maintained that she was not party to those irregularities.

33. Based on the provisions of **Section 80(2)** of the LRA 2012 which prohibits cancellation of a title held by a bona fide purchaser for value without notice of defect, it is contended that the title held by the 1st

defendant cannot be cancelled because fraud has not been proved against her or any defendant and that it has not been proved that the sale of the suit property to her was effected fraudulently.

34. Concerning the foregoing contention, I have already pointed out that under **Section 26(1)(b)** of the LRA 2012 aforementioned, the title held by the 1st defendant may be successfully challenged if the plaintiff is capable of proving that it was acquired illegally, unprocedurally or through a corrupt scheme. All what the plaintiff needs to prove is that the title held by the 1st defendant is vitiated by illegality in the process of its acquisition.

35. Upon considering the totality of the evidence adduced in this case which shows that there were serious procedural flaws in the acquisition of the title held by the 1st defendant *to wit*, the title deed was issued way before the transfer in respect thereof was effected; the requisite stamp duty in respect of the transfer was paid after the transfer was effected and the 1st defendant having failed to convince the court that the title she holds could lawfully be issued to her before the transfer in respect thereof or even before the requisite stamp duty had been paid in respect thereof, I find and hold that the title held by the 1st defendant was unprocedurally obtained and as such, incapable of being accorded the protection envisaged under **Section 26** of the Land Registration Act, 2012. In reaching this determination I have considered among other provisions of the law **Section 19(2)** of the Stamp Duty Act, Cap 480 laws of Kenya which provides as follows:-

“No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.”

36. The upshot of the foregoing is that the plaintiff’s case has merit and is allowed in the following terms:-

- (a) The transfer, registration and issuance of the title deed (Euaso Nyiro/Suguroi Block IV/125) held by the 1st defendant is found to be irregular.
- (b) The title deed held by the 1st defendant be cancelled.
- (c) The 1st defendant is ordered to vacate the suit property within 45 days from the date hereof, failing which she be evicted therefrom.
- (d) Costs of the suit are awarded to the plaintiffs.

Dated, signed and delivered in open court at Nyeri this 15th day of May, 2018.

L N WAITHAKA

JUDGE

Coram:

Ms Mwikali for the 2nd defendant and h/b for Ms Muthee for the 1st defendant

Mr. Mshila h/b for Peter Muthoni for the plaintiff

Court assistant - Esther