



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO. 146 OF 2011

ELIZABETH KARIMI CHABARI.....PLAINTIFF

VERSUS

STELLA CYPRIAN MWENDA.....DEFENDANT

JUDGMENT

INTRODUCTION

1. In a plaint dated 29.9.2011 the plaintiff sought the following orders:

(a) A declaration that all the transaction affecting land reference no. Igoji/Kianjogu/66 leading to the transfer of the land to the defendant are null and void.

(b) That the L.R No. Igoji/Kianjogu/66 reverts back to the name of Chabari Murika and the register of the land be so rectified.

(c) Costs of the suit

(d) Any other better or further relief as the honourable court may deem fit to grant.

2. In a statement of defence dated 6th January 2012, the defendant denied the plaintiffs claim and all particulars of fraud and or illegality and puts the plaintiff to strict proof. In the alternative and without prejudice basis the defendant averred that the plaintiff's suit is res judicata as the issues being raised were the same issued heard and determined in CC no. 168/1997 (Meru)

3. The defendant further averred that the plaintiff's suit is time barred. The defendant further contends that a decision, determination, and/or ruling was made on 16.2.1998 wherefore the plaintiff filed HC Misc. application no. 25 of 1998 for leave to file appeal out of time which was dismissed. The defendant finally contends that the plaintiff's suit is defective as it is supported by a faulty verifying affidavit.

4. In a brief summary the plaintiff who is the legal representative of the estate of Chabari Murika Rabaga who died on 1/1/1983 contends that the deceased was registered as the sole proprietor of the suit property on 11/12/1972 and settled on the suit property together with his family. Upon the demise of the said Chabari Murika in 1983 the suit land was fraudulently and illegally transferred to the defendant. Particulars of the alleged fraud and/or illegality have been shown at paragraph 6 of the plaint.

5. The parties filed their witness statements, list of documents, issues for determination and pre-trial questionnaire pursuant to order 11 civil procedure rules.

PLAINTIFFS CASE

6. When this matter came up for hearing, the plaintiff stated that she is the widow to the late Chabari Murika who passed away in 1983. Prior to his demise, the late Chabari Murika was registered as the sole proprietor of the suit property registered as Land registration Igoji/Kianjogu/66 where he had settled his entire family and made extensive developments. The plaintiff further contends that upon demise of her late husband the suit land was illegally unlawfully and fraudulently and irregularly transferred to one Kaaria Chabari who subsequently transferred the same to the defendant herein. The plaintiff averred that the transfer of the suit land from her late husband to Kaaria Chabari was tainted with fraud and illegality and that the said Kaaria Chabari could not therefore have passed a good title to the defendant herein. The plaintiff submitted that the defendant cannot by any stretch of imagination be said to be a purchaser for value without notice and wants this Honorable court to declare all transactions affecting the suit property land registration No. Igoji/Kianjogu/66 null and void.

DEFENDANT'S CASE

7. The defendant on the other hand submitted that this suit is time barred as the alleged transfer took place in the year 1998 and the plaintiff filed this case in 2011. The defendant further submitted that there is a difference of 14 years from the date of discovering and the occurrence of cause of action to institution of the suit.
8. The defendant cited section 7 of the limitation of actions act which provides that for an action of recovery of land time limitation is 12 years. The plaintiffs has not sought leave to institute this suit.
9. The defendant also submitted that this case is res judicata as there was a previous suit instituted by the same plaintiff against the defendant being CMCC no. 168 of 1997 (Meru).
10. The plaintiff also submitted that the plaintiff had instituted another suit being miscellaneous application no. 25 of 1998 between the same parties over the same subject matter.
11. The defendant only availed copies of these proceedings but did not produce the original copies.

ANALYSIS AND DETERMINATION

12. The plaintiff who is the widow to the late Chabari Murika Rubaga (deceased) has brought this case seeking a declaration that all transactions affecting land reference no. Igoji/Kianjogu/66 leading to the transfer of the land to the defendant herein are null and void. The plaintiff also seeks an order that the suit land Registration no. Igoji/Kianjogu/66 reverts back to the name of Chabari Murika and that the register of the land be so rectified. The plaintiff produced a green card of the suit property as p. exhibit no. 1 which indicates that the plaintiff's husband Chabari Murika (deceased) was first registered as proprietor on 11.12.1972. From the certificate of death no. 985891, the said Chabari Murika passed away on 1st January 1983. From the said green card, the suit property was transferred to one Kaaria Chabari on 2.10.1990. On 16.02.1996, the property was transferred to Stella Cypriano Mwenda. The plaintiff stated that the late Kaaria Chabari who was her son passed away on 30th September 2000. She produced the death certificate no. 711719 in evidence as p. exhibit no. 4.
13. Despite these damning allegations of fraud, the defendant has merely denied the plaintiffs claim and all particulars of fraud and/or illegality in the transfer of the suit property. The defendant has not even demonstrated how she acquired the suit property from the late Kaaria Chabari (deceased). The green card produced by the plaintiff as p. exhibit no. 1 shows that her late husband Chabari Murika Rubaga was the first registered owner on 11.12.1972.
14. The death certificate produced by the plaintiff no. 985891 shows that the said Chabari Murika Rubaga (deceased) died on 1st January 1983. It is therefore untenable that the suit property could have been transferred to Kaaria Chabari on 2.10.1990 without obtaining letters of administration. Once the plaintiff has pleaded fraud in the process in which the defendant was registered as proprietor in the suit land, it behoves upon the defendant to come out clean and show how he obtained his title from the previous owner. The defendant has not even shown how he acquired the suit land from the previous owner Kaaria Chabari and got it registered in her name on 6th March 1996.
15. The defendant did not show whether she bought the suit property or was given as a gift. The defence put up a spirited argument that the plaintiffs claim is time barred. That argument is not a serious submission as a claim based on fraud and/or illegality cannot be subject to the principle of Limitation.
16. The defendant has also submitted that the plaintiff's suit is res judicata. The principles of res judicata are provided under section 7 of the civil procedure Act (cap 21) Laws of Kenya where it states that:

“No courts shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same properties or between parties under who they or any of them claim litigating under. The same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court”.

17. The defendant has not produced before this honourable court any certified copies of proceedings showing that the issues in this case has been heard and determined in a previous suit. As regards the sanctity of title the law protects the sanctity of title under Section 25 and 26 of the Land Registration Act, 2012. To enable me cancel the defendant's title as sought by the plaintiff, I have to be convinced that the provisions of section 26 of the Land Registration Act no. 3 of 2012 have been met. As can be seen from that provision, the law is jealousy protective of title to land and provides only two instances where a title can be challenged. From the evidence adduced, there is no proof that the defendant was a party to the alleged fraud or illegality. However, the defendant in my view has failed to disclose material facts to assist this court arrive at a just decision.
18. The defendant has not stated how he acquired the suit land from Kaaria Chabari (deceased) who himself is suspected to have perpetrated the alleged fraud and/or illegality. Failure to disclose material facts to assist the court in my view is abetting a crime. It is important to note that for section 26 (1) (b) to be operational, it is not necessary to proof that the title holder was a party to the vitiating factors noted therein which are that the title was obtained illegally unprocedurally or through fraud or corrupt scheme. The import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder; it means that the title of an innocent person is impeachable as long as the same was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors.
19. The evidence produced by the plaintiff puts no doubt in my mind that the title deed issued to the defendant was obtained illegally, unprocedurally and through some corrupt scheme. The documents that conveyed title to the defendant were not produced by the defendant.

As such, the title could not therefore have been obtained legally or procedurally. In the upshot, I am satisfied that the provisions of section 26 (1) (b) have been met and that the title of the defendant is liable to be cancelled which I hereby do on the following terms:

(I) A declaration that all the transactions affecting L.R No. Igoji/Kianjogu/66 leading to the transfer of the suit land to the defendant are null and void.

(II) That the L.R No. Igoji/Kianjogu/66 reverts back to the name of Chabari Murika and that the land registration to rectify the records accordingly.

(III) The defendant to bear the costs of this suit.

Read, delivered and signed in the open court this 14th day of June, 2018

E.CHERONO

ELC JUDGE

In the presence of:

CC: Galgalo

Waigwa for defendant present

No appearance for plaintiff