



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.275 OF 2016

GEOFFREY MANYARA WANGUHU GITHIOMI and DAVIS KAMAU (Suing as the Legal Representative of the Estate of Davis Kamau Wanguhu (Deceased)).....**PLAINTIFFS**

VERSUS

BADIIH MIKE SIOYI.....1ST DEFENDANT

JULIA MUTHONI MWANGI2ND DEFENDANT

COUNTY GOVERNMENT OF NAKURU....3RD DEFENDANT

JUDGMENT

(Suit by plaintiffs claiming that their late father was allotted land after purchase by the defunct Municipal Council of Nakuru which is succeeded by the County Government of Nakuru named as 3rd defendant; title to same land issued to 1st defendant who later sold it to 2nd defendant; not clear how 1st defendant acquired title but no evidence that the same was acquired fraudulently or that the sale to the 2nd defendant was fraudulent; plaintiffs however holding legitimate expectation that 3rd defendant or its predecessor would issue them with title; judgment entered for the plaintiffs against 3rd defendant for the value of the land)

PART A : INTRODUCTION AND PLEADINGS

1. This suit was commenced through a plaint which was filed on 26 July 2016. The plaintiffs are the legal representatives of one Davis Kamau Wanguhu (deceased) and they bring this suit on behalf of the estate of the said deceased. It is pleaded that through a sale agreement dated 10 July 1990, the deceased purchased from one Samson Alex Mulando, the Plot described as Plot No. 38 situated in D.K Kanyi Estate-Misonge Site & Service Scheme for a consideration of Kshs. 60,000/= which is said to have been paid in full. It is pleaded that the vendor duly transferred the said plot to the deceased at the offices of the Nakuru Municipal Council as the said plot was at that time still unregistered. It is pleaded that the deceased was then issued with a fresh letter of allotment dated 20 May 1988 and he became the rate payer of the plot. It is pleaded that the deceased paid the land fees and rates, and that upon his death, his widow continued to effect payments until the year 2012 when the rates card disappeared from the rate offices of the Municipal Council of Nakuru. It is averred that in the month of December 2015, the plaintiffs learnt that the County Government of Nakuru has a new rate payer for the said plot and that the land had been surveyed and registered on 21 April 2014, in the name of the 1st defendant as Nakuru Municipality Block 15/314. The 1st defendant thereafter transferred the land to the 2nd defendant on 8 April 2014. It is the contention of the plaintiffs that the registration of the land parcel Nakuru Municipality Block 15/314 (hereinafter also referred to as the suit land) in the name of the 1st defendant was fraudulent and illegal. The following particulars of fraud are pleaded against the 1st defendant being :-

(a) Procuring an illegal letter of allotment;

(b) Colluding with the 3rd defendant to procure allocation in his name of the suit land;

(c) presenting illegal, forged or irregular documents to facilitate registration of the suit land into his names;

(d) Failing to pay the requisite fees;

2. The following particulars are pleaded against the 2nd defendant being :-

(a) Colluding with the 1st and 3rd defendants to have the suit property registered in her name.

3. Against the 3rd defendant the following particulars of fraud are pleaded being :-

(a) Illegally and unlawfully allocating the suit land to the 1st defendant;

(b) Colluding with the 1st and 2nd defendants.

4. In the suit, the plaintiff has sought the following prayers (slightly paraphrased):-

(i) A declaration that the estate of the deceased is the rightful and lawful owner of the suit land;

(ii) Cancellation of the Certificate of Title of the 2nd defendant and a fresh one be issued in favour of the plaintiffs as administrators of the estate of the deceased;

(c) A permanent injunction restraining the defendants from interfering with the suit land;

(d) An eviction order against the defendants;

(e) Alternatively, the defendants jointly and/or severally be ordered to compensate the plaintiffs for the value of the suit land;

(f) Costs of the suit.

5. All the defendants were duly served but the 1st defendant neither entered appearance nor filed defence. On the part of the 2nd defendant, she pleaded in her statement of defence, that she purchased the suit land from the 1st defendant on a willing buyer willing seller basis. She averred that she did her due diligence, conducted an official search, and checked the rates and rents demand request. She then purchased the land at a consideration of Kshs. 1,800,000/= which she paid and also paid stamp duty. The land was then transferred to her and she is currently the registered owner. She pleaded that she has been paying rates to the 3rd defendant and has also been paying land rents to the Commissioner of Lands. She has further pleaded that the agreement of sale and the allotment letter contain contradicting information as the allotment letter is dated 2 years prior to the sale agreement, and further, that the allotment letter indicates that it was issued after a ballot exercise of 1986. It is pleaded that there is no evidence that the deceased complied by the terms of the Allotment Letter and that there is no evidence tendered that the Plot No. 38 D.K Kanyi Estate is the same as Nakuru Municipality Block 15/314. It is further pleaded that the payment receipts provided by the plaintiff are peculiar, as from the year 2004, they show payments for the plot No. 38, yet for the years 1994, 1999 and 2001, they show the plot Block 15/314. All the allegations of fraud pleaded were denied.

6. On the part of the 3rd defendant, it was pleaded inter alia that there is no nexus between the Plot No. 38 D.K Kanyi Estate and the land parcel Nakuru Municipality Block 15/314, and if there is, the 3rd defendant is not involved in transfer of registered properties. The particulars of fraud were denied and the plaintiffs put to strict proof.

7. Upon close of pleadings the matter was fixed for hearing on 20 February 2018, a date that I gave on 9 October 2017. On the hearing date, Mr. Katithi, learned counsel for the 3rd defendant, applied for an adjournment, which I declined to give, and ordered that the matter do proceed. Neither Mr. Katithi nor any counsel from the law firm of M/s Hari Gakinya & Company Advocates, on record for the 3rd defendant, participated in the proceedings of the case thereafter.

PART B : EVIDENCE OF THE PARTIES

8. The plaintiffs' sole witness was Mr. Githiomi Davis Kamau, the 2nd plaintiff. He is a son of the deceased and he produced a limited grant to demonstrate capacity to sue. He also produced the sale agreement dated 10 July 1990 between his late father and Mr. Samson Alex Mulando. He averred that the agreement showed that the full purchase price has been paid, and that it was a condition of the agreement, that the vendor would request the Municipal Council of Nakuru to issue an alternative allotment letter. He stated that pursuant to this condition, another letter of allotment dated 20 May 1988, was issued to the deceased. The same indicated that the allotment was for Plot No. 38 D.K Kanyi Estate, and with a pen, were inserted the numerals "15/314". He thought that what happened was that the parties went to the Municipal Council and typed in the new owner of the plot in the allotment letter. He availed payment receipts of Kshs. 2,800/= for the stand premium; conveyancing fees of Kshs. 800/=; registration fees of Kshs. 100/=; stamp duty of Kshs. 450/= and survey fees of Kshs. 1,130/=; and Kshs. 50/= for the Certificate of Lease. The said payments were made on 2 July 2004. He testified that they have been paying rates, and he produced three receipts for payment of rates being receipts dated 21 September 1999 for Kshs. 15,934.90/=; receipt dated 30 October 2000 for Kshs. 1,462/=; and receipt dated 16 May 2001 for Kshs. 1,320/=. He also stated that they paid money for ground rent, and he produced two receipts dated 4 September 2001 for Kshs. 6,820/=. and the other dated 19 May 2004 for Kshs. 1,860/=. He did aver that in the year 1994, his father paid Kshs. 20,000/= for relocation of a sewer line and he produced a receipt for this amount dated 10 November 1994. He testified that when he went to pay rates in the year 2013, he was informed that the records are not available. He was given the same information in the year 2014. When he went to pay rates in the year 2015, he was given the name of Julia Muthoni as the rate payer. He did a search which showed that title is now with the 2nd defendant after a transfer from the 1st defendant. He was of the view that the 1st and 2nd defendants got title fraudulently as the land was allocated to the deceased and no notice of repossession was ever issued. He testified that he knows the plot on the ground, and that the plot has been vacant, save that the deceased had allowed some neighbours to cultivate vegetables.

9. Cross-examined on the apparent conflict between the sale agreement and the letter of allotment, he testified that the mistake is not of their making. He accepted that they did not pay rates between the years 2004 and 2012 and he explained that this is the reason they paid a sum of Kshs. 28,000/= in the year 2012. He admitted not producing anything to demonstrate that Plot No. 38 is the same as the parcel number Nakuru Municipality Block 5/314.

10. With the above evidence the plaintiffs closed their case.

11. In her defence, the 2nd defendant testified inter alia, that she purchased the land, and upon purchase, she was issued with title. She entered into an agreement to purchase the land from the 1st defendant on 13 February 2014 which agreement she produced as an exhibit. She also produced the demand for payment of stamp duty for the transfer. She stated that since transfer of the land to her, she has been paying land rates, and she produced a receipt for the same for the year 2017. Cross-examined, she testified that she did a search before purchasing the land and the same showed that it is the 1st defendant with title. She also confirmed that the 1st defendant was the rate payer but she did not check whether there was a previous rate payer. She did not know the 1st defendant before and only got to know that he was selling the suit property through friends.

12. With the above evidence, the 2nd defendant closed her case.

PART C : SUBMISSIONS OF COUNSEL

13. I invited counsel to file written submissions which was done by counsel for the plaintiff and 2nd defendant.

14. In his submissions, Mr. Mutonyi, learned counsel for the plaintiffs, inter alia submitted that the plaintiffs have proved ownership of the suit land in favour of the deceased and referred me to the documents produced by the plaintiffs. He submitted that the description of the Plot No. 38 and the land parcel Nakuru Municipality Block 15/314 refer to the same ground and that the 3rd defendant uses them interchangeably. He submitted that there is no evidence that the 1st defendant was ever allocated the suit property as no letter of allotment was produced. He referred me to the case of *Metian Kitaei Nkoboino vs Richard Salaton Torome, HCCC No. 339 of 2008 (unreported)* to support his clients' case.

15. On the other hand, Mr. Keli, learned counsel for the 2nd defendant, inter alia submitted that no formal document has been tendered to support the claim that the Plot No. 38 is the same as the land parcel Nakuru Municipality Block 15/314. He further submitted that fraud has not been proved. He submitted that despite the allegation of the plaintiffs that the rates card disappeared in the year 2012, there is no evidence that any complaint was not raised, nor was any suit filed on that issue. He further pointed out to the fact that the letter of allotment comes two years before the sale agreement. He submitted that if the plaintiffs' case succeeds, they will have succeeded in their scheme to grab the suit land from the 2nd defendant. He relied on Sections 24, 25, 26, 30, and 35 of the Land Registration Act, 2012. He further referred me to the case of *Charles Gathuma Munge vs Peter Icharia Munge & Another (2014) eKLR* on the standard of proof for fraud. He urged me to dismiss the plaintiffs' case.

PART D : ANALYSIS AND DECISION

16. I have considered the pleadings, the evidence, the submissions of the parties and all relevant factors in arriving at my decision.

17. It is the position of the plaintiffs that the deceased deserves the suit land which was originally identified as Plot No. 38 D.K Kanyi Estate. It is the case of the plaintiffs that title therefore ought to have been issued to the estate of the deceased, and that the title issued to the 1st defendant, and later transferred to the 2nd defendant, was acquired fraudulently. This is of course denied by the 2nd defendant who has averred that she purchased the suit land after doing all due diligence and has asserted that she is now properly registered as the proprietor of the suit land. I believe the following issues are open for determination.

(i) Is the Plot No. 38 D.K Kanyi Estate the same as the land parcel Nakuru Municipality Block 15/314 ?

(ii) Has it been proved that the 1st defendant acquired the land parcel Nakuru Municipality Block 15/314 fraudulently?

(iii) Was the transfer to the 2nd defendant of the land parcel Nakuru Municipality Block 15/314 done fraudulently or in collusion with the 1st and 3rd defendants?

(iv) Do the plaintiffs deserve any remedy?

18. On the first issue, it is the claim of the plaintiffs that the land described as Plot No. 38 D.K Kanyi estate is the same as the land parcel Nakuru Municipality Block 15/314. The 2nd defendant has certainly invited strict proof of this. Having gone through the documents availed, I am prepared to hold that the Plot No. 38 is the same as Nakuru Municipality Block 15/314. The allotment letter dated 20 May 1988, has on it handwritten the numerals 15/314. I have also seen the various payment receipts issued by the Municipal Council of Nakuru, some of which bear Plot No. 38 and some of which bear the identity "Block 15/314". I think on a balance of probabilities, these documents indicate that the Plot No. 38 is the same as the land parcel Nakuru Municipality Block 15/314 and I am prepared to hold that position.

19. I will deal with the other three issues collectively, as follows hereunder.

20. The plaintiffs allege that the title issued to the 1st defendant, which was later transferred to the 2nd defendant, was acquired fraudulently. Their main, if not sole ground, for holding this position, is the assertion that the deceased, after purchasing the land, was issued with a letter of allotment, paid for the same, and continued to make other payments in respect of the said plot. Putting aside for a moment, the controversy of whether the letter of allotment should have come before the sale agreement, as it is claimed by the plaintiffs that the deceased purchased the Plot No. 38 from the original allottee, I have not seen any evidence of fraud on the part of the 1st defendant or 2nd defendant. It is not enough to merely plead fraud; the same must be proved, and I am guided by the principle in the case of *Patel v Makanji (1957) EA 314*, that the burden of proof on a case of fraud, though not as heavy as beyond reasonable doubt, needs something more than a mere balance of probabilities.

21. The allegations of fraud leveled and pleaded against the 1st defendant are that he procured an illegal letter of allotment; that he colluded with the 3rd defendant to procure title to the suit land; that he presented illegal, forged and irregular documents to facilitate the registration of

the suit land into his names; and that he failed to pay the requisite fees. Now, I have not been shown any letter of allotment by the plaintiffs which we can interrogate and reach the conclusion that it was illegal. It is not enough to say that a letter of allotment was issued illegally when the said letter of allotment has not even been tabled before court. I cannot therefore hold that the 1st defendant held any illegal letter of allotment. In fact, I am not told, and I do not know whether he had a letter of allotment or not. I have also not been shown any evidence that the title of the 1st defendant was procured through illegal, forged and/or irregular documents, for the simple reason that these documents have not been availed to me. You see, you cannot claim that a certain document is forged, if you have not availed it in the first instance. You must avail such document then point out the features that lead you to the conclusion that the document is forged. I have also absolutely no evidence that there was any collusion between the 1st and 2nd defendants for the 2nd defendant to procure a transfer of the title to her.

22. What the evidence has shown, is that, yes, the deceased had a letter of allotment for the Plot No. 38, which as I have said I am prepared to hold that it is the same as the land parcel Nakuru Municipality Block 15/314, but the evidence does not reveal to me that the title of the 1st and/or 2nd defendant is illegal or fraudulent. Demonstrating that one has an allotment letter to a certain land is not similar to the person demonstrating that there has been fraud on the party who has title to the same land referred to in the allotment letter. I think the plaintiffs needed to table more in order to reach the standard of proof required to prove a case of fraud.

23. Neither have I seen any evidence of felonious collusion between the 1st and 2nd defendant. From the evidence that I have, and I have no reason to doubt it, the 2nd defendant got interested in purchasing the suit land, did her due diligence, which showed that the land belonged to the 1st defendant, and on that basis, she entered into a contract of purchase and the property was thereafter transferred to her. To me, all this appears to have been above board. I cannot fault the 2nd defendant for all documents did show that the suit property is registered in the name of the 1st defendant. There is really nothing which could have led her to doubt the title of the 1st defendant. I also have nothing before me which would enable me reach the conclusion that the title that the 1st defendant held was a dubious title.

24. As we speak, it is the 2nd defendant who has title. Her title is only impeachable pursuant to the provisions of Section 26 of the Land Registration Act, Act No. 6 of 2012, which provides as follows :-

Certificate of title to be held as conclusive evidence of proprietorship.

26. (1) 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

25. It flows from the above that the title of the 2nd defendant can only be impeached if it was acquired through fraud or misrepresentation to which the 2nd defendant is proved to be a party; or if the 2nd defendant is shown to have acquired her title illegally, unprocedurally, or through a corrupt scheme. I have already said that I have not seen any evidence of fraud or misrepresentation on the part of the 2nd defendant. She merely purchased the suit property from the 1st defendant. I have also not seen any evidence that what the 2nd defendant holds is a title that was acquired illegally, unprocedurally or through a corrupt scheme. I am therefore not persuaded that the plaintiffs can succeed in their quest to have the title of the 2nd defendant cancelled and they be registered in place thereof.

26. However, I have ample evidence that the predecessor of the 3rd defendant did lead the deceased to believe that he has been allotted the suit land. They asked him to pay the stand premium, and all other fees that a title holder would be required to pay. They also accepted his money for payment of land rates. I believe that the deceased, and now the estate of the deceased, held a legitimate expectation that they would be issued with a lease to the suit land by the predecessor of the 3rd defendant, and now the 3rd defendant. The 3rd defendant opted not to come to court to explain how come the plaintiffs held an allotment letter yet they have not been issued with title. The 3rd defendant has not tendered any evidence to explain itself. Given that position, I am of the opinion that the plaintiffs are entitled to succeed in their alternative prayer for compensation for the value of the suit land as against the 3rd defendant. The value of the suit property was not provided and I therefore issue orders for the Government Valuer in charge of Nakuru District, to proceed and value the property, so that the actual amount can be particularized.

27. I believe that I have dealt with all issues and now make the following final orders :-

(i) That the plaintiffs do not succeed in their prayer to have the title of the 2nd defendant cancelled and for them to be registered as proprietors thereof.

(ii) That the plaintiffs do succeed in their alternative prayer for compensation for the value of the land parcel Nakuru Municipality Block 15/314 as against the 3rd defendant.

(iii) That the land parcel Nakuru Municipality Block 15/314 be valued by the Government Valuer of Nakuru District within 30 days from the date hereof and the report be tabled before this court for the court to make specific the award of compensation due to the plaintiffs.

28. On costs I award costs to the plaintiffs as against the 3rd defendant but make no award of costs for or against the 1st and 2nd defendants.

29. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 13th day of June 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Mathenge holding brief for Mr. Mutonyi instructed by M/s Mutonyi Mbiyu & Company Advocates for the plaintiffs.

No appearance entered for the 1st defendant: absent.

No attendance on the part of M/s Mutisya Kiamba & Company Advocates for the 2nd defendant.

No attendance on the part of M/s Hari Gakinya & Company Advocates for the 3rd defendant.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU