



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 126 OF 2017

SAMUEL NJUGUNA KABUE.....PLAINTIFF

VS

SIMON THUKU KIARIE.....DEFENDANT

JUDGMENT

1. By a Plaint dated 13.05.2016 and filed on 18.06.2018 the Plaintiff sued the Defendant herein seeking the following orders;

- a. An order that the Defendant do withdraw the caution lodged against land Loc.1/KIGIO/497 upon judgement.
- b. Costs of the suit
- c. Interest in (b) above
- d. Any other or further relief that the Court deems fit to grant.

2. The Plaintiff's claim is premised on a proprietorship interest over all that parcel of land known as LOC.1/KIGIO/497 (herein referred to as the suit land). The Plaintiff claims to be the registered owner of the suit land having purchased the same in the year 1976 from the then registered owner one Wambui Kamau at a consideration of Kshs. 18,000/-. He averred that he has been in possession and use of the suit land since. That upon purchase the suit land was transferred to him with no encumbrances.

3. The Plaintiff concedes that at the time of the purchase the Defendant's father one Mburu Wainaina was cultivating part of the suit land which had been leased to him by one of the sons of the vendor by the name Gitau Kaniu. The Plaintiff adds that when Mburu Wainaina learnt that the Plaintiff had purchased the suit land he sued the Plaintiff jointly with Gitau Kaniu claiming adverse possession in the HCCC No. 761/1980(OS). That that suit was disallowed on 15.11.1996. In oral evidence the Plaintiff testified that the Defendant's father vacated the suit land soon after the Plaintiff took possession.

4. The Plaintiff claims that he later discovered the Defendant had placed a caution over the suit land claiming a beneficial interest over the suit land. That was on or about the 04.04.2016 when the Plaintiff went to inquire into the title over the suit land as he wanted to guarantee a loan to a third party. The Plaintiff contends that the said caution is unlawful and illegal. That the Defendant has no legal or equitable right over the suit land. The Plaintiff laments that the said caution has hindered him from exercising his proprietary rights over the suit land. He urged that the same be withdrawn by an order of this Court. The Plaintiff further claims that the Defendant has failed to honour his demand issued to the Defendant requiring him to withdraw the caution precipitating the current suit.

5. In further support to his claim the Plaintiff produced a judgment from Kandara law Courts in Succession cause no. 3 of 1975 in respect to the estate of Kaniu Igecha (deceased). In that cause, Wambui Kaniu the deceased widow was confirmed to be the administrator of his estate. The Court ordered that the suit land be registered in her name. Additionally, the Plaintiff produced a sale agreement between the Plaintiff and Wambui Kaniu dated 27.09.1976. He also produced a copy of the title to the suit land in his name having been registered in as owner on 08.10.1976.

6. The suit is contested through a statement of defence filed on behalf of the Defendant dated 27.06.2016 and filed 28.06.2016. In it, the Defendant concedes that the Plaintiff is indeed the registered owner of the suit land but contends that the Plaintiff used fraudulent means to acquire the same. He continues to generally deny the averments in the plaint including being issued with a demand notice. He points out that there is a pending suit in respect to the suit land before the High Court at Nairobi being HCCC no. 1061 of 2004(O.S) between the Plaintiff and Mburu Wainana (the Defendant's father) deceased which awaits substitution of the deceased.

7. The Defendant further contends that his deceased father had purchased the suit land from the original owner Kaniu Igecha for a consideration of Kshs. 2,550/- in 1964 with the final instalment paid in 1967. That unfortunately the vendor passed on before he could transfer the suit land to his deceased father who died in 2007. The Defendant claims that though he was absent at the time of the purchase his mother was present and has attested to the sale. Both the Defendant and his mother claim not to know the Wambui Kamau referred to by the Plaintiff as the seller of the suit land to the Plaintiff. He claims that his family has been in possession and use of the suit land since 1976 which is now over 50 years. He further contends that if the caution is removed his family will be rendered destitute. In oral evidence the Defendant conceded that he and his family do not reside on the suit land but they cultivate nappier grass thereon.

8. In support of his defence the Defendant produced a copy of the adjudication register dated 21.06.1963 which shows Kaniu Igecha was the original registered owner to the suit land, a translated sale agreement dated 27.08.1967 between the Defendant's father Wainaina mburu and Gitau Kaniu s/o Kaniu Igecha in respect to the suit land. He also produced a copy of the judgement in Criminal Case No. 1645/2013 against the Defendant in which he was acquitted for lack of sufficient evidence.

9. The matter proceeded by way of viva voce evidence with the Plaintiff testifying on his own behalf and the Defendant and his mother for the defence case whose testimonies have been summarized as above.

10. I have read and considered the rival submissions as filed by counsel for both parties.

11. The Plaintiff has conducted evidence that lays a chronology of events that put him in possession and ownership of the suit land and supported the same with documentary evidence. It is not in dispute that Kaniu Igecha was the original registered owner of the suit land after adjudication in 1963 and that later Kaniu Igecha passed on and was survived by a widow called Wambui Kaniu and four Children. The Plaintiff has produced evidence to show that Wambui Kaniu was duly appointed the legal representative of her deceased husband's estate. The estate comprised of the suit land vide a judgment from the Kandara Magistrate's Court in Succession cause no. 31 of 1975. That the suit property was then passed on and registered in the name of Wambui Kaniu. Upon becoming owner she entered into a sale agreement with the Plaintiff dated 27.09.1976 in respect to the suit land. When the Plaintiff discharged his obligations under the said agreement, consent was obtained and the suit land was transferred and registered in the Plaintiff's name on 08.10.1976 as per the copy of title produced by the Plaintiff. A copy of search done in the year 2016 (at the time of filing suit) reveals that the Plaintiff remains the registered owner to the suit land to date.

12. The Defendant on his part has not done much to challenge the weighty evidence adduced by the Plaintiff. The Defendant has relied on a sale agreement between his father and one Gitau Kaniu who from the records produced was never at any time a registered owner of the suit land. He has also failed to tell the Court why if at all his late father indeed purchased the suit land as alleged way back in the year 1964, he never put any effort to have it transferred in his name before his demise decades later in 2007. The Defendant has pleaded fraud against the Plaintiff in the manner in which he acquired the title to the suit land but has not tabled any particulars of fraud nor has he raised any counterclaim against the Plaintiff. The Defendant has pleaded that he is in occupation and use of the suit land and that in the event the caution is lifted his family would be rendered destitute. That notwithstanding, in his oral evidence the Defendant conceded that neither himself or his family reside on the suit land. The Court was informed of a pending matter before the High Court in respect to the suit land which the Defendant later adopted to abandon.

13. Section 26 of the Land Registration Act, 2012 provides;

“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.

14. The Defendant has failed to raise any sufficient grounds to challenge the title of the Plaintiff to the suit land. I find that the Plaintiff has proved his case on a balance of probability and the Defendant has failed to prove any beneficial interest over the suit land. In view of the above the Defendant lacks any legal right to caution the Plaintiff's land.

15. **Final orders;**

a. The caution lodged against land Loc.1/KIGIO/497 be and is hereby removed.

b. The Plaintiff shall have the costs of the suit.

It is so ordered

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31ST DAY OF JULY 2018.

J G KEMEI

JUDGE

Judgment read in open Court in the presence of;

Mr Wainaina Kinyanjui HB for Mr Mwangi Kamau for the Plaintiffs.

Defendant – Absent

Ms.Irene and Ms Njeri, Court Assistants.