



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC NO. 30 OF 2014

BETTY MUTHONI.....PLAINTIFF

VERSUS

HELLEN KUTHOKA M'IKIARA.....DEFENDANT

JUDGMENT

Background

1. The dispute herein has a rather turbulent history spanning 39 or so years. The present defendant (Hellen Kuthoka) in yester years owned a parcel of land no. Nyaki/Kithoka/23 which was 2.4 ha (about 6.8 acres). On 31.1.1998, she entered into an agreement with one Esther Mboroki whereby she was to sell to Esther Mboroki a portion of this land to the tune of 2 ½ acres.
2. For one reason or another the transaction was not completed and Esther Mboroki sued the present defendant for specific performance in Nyeri H.C.C No. 201 of 1979, which case was later transferred to Meru and it became Meru H.C.C No. 181/1987. In the course of litigation in the aforementioned suit the original parcel of land No. Nyaki /Kithoka/23 was subdivided into Ntima/Kithoka 74 and 75 whereby Esther Mboroki got her share, the same being parcel No. 74. Apparently the other parcel no. Nyaki/Kithoka/75 was sold to the current plaintiff (Betty Muthoni) through a public auction which occurred in 2000 or thereabout. Thereafter, Betty Muthoni became the registered owner of parcel No. 75 and was issued with a title deed on 23.1.2007 which has the acreage of 1.388 ha.
3. Betty Muthoni has since caused further subdivision of land parcel no.Nyaki/Kithoka/75 into 5 parcels namely Nyaki/Kithoka/Mwanika 239/240/241, 242 and 243 (the first 4 all registered in her name). She has also allegedly sold parcel no. 243 to someone. Despite this subdivision, Hellen Kuthoka remained in occupation of the part of the land which was no. Nyaki/Kithoka – Mwanika/75.
4. On 27/2/2014, Betty Muthoni filed the present suit, Meru ELC No. 30 of 2014 against Hellen Kuthoka where she was seeking orders of eviction of defendant and her family from parcel no. Nyaki/Kithoka – Mwanika/75 plus costs of the suit. The present suit between Betty Muthoni and Hellen Kuthoka is therefore intricately webbed into the issues in the earlier case Meru H.C.C.No. 187/87 between Esther Mboroki and Hellen Kuthoka. Against this background, the advocates for the parties herein were in consensus (during the pre-trial proceedings) that the older file was to be secured and to be available during the hearing of this case.

Plaintiff's case

5. Plaintiff's case is contained in her amended plaint filed on 20th April 2017. She avers that through a public auction conducted by quickline auctioneers pursuant to execution of a judgment in HCC no. 181/1987, she purchased land parcel no. L.R. Nyaki/Kithoka – Mwanika/75. She avers that the land was transferred to her on 28.12.2004. She took possession of the said land and she also applied for consent to subdivide the said parcel of land which yielded the following parcels of land: Nyaki/Kithoka/239, 240, 241, 242 and 243.
6. Plaintiff avers that she requested the defendant to give vacant possession of the suit land but defendant declined. Plaintiff has further pleaded that during the pendency of this suit (on 29.10.2016), defendant's husband passed on and was buried on the suit land on 3.11.2016 despite the existence of a court order barring the defendant from proceeding with the said burial. Defendant's continued occupation of the suit land is what prompted the plaintiff to file this suit initially on 27.2.2014.
7. Plaintiff testified and she also adopted her statement (dated 25.2.2014) as her evidence. Her evidence is that parcel of land No. Nyaki/Kithoka/Mwanika/75 is her property having bought the same in a public auction through quick-line auctioneers pursuant to a judgment of the court in Meru H.C.C.C No. 181 of 1987. Plaintiff avers that defendant and her family have obstructed her quest to take over possession of the suit land. She further states that land parcel no. Nyaki/Kithoka/75 no longer exists as she has since caused the subdivision of this land into parcel no. 239, 240, 241, 242 and 243.

8. In support of her case, plaintiff produced the following documents as her exhibits:

- (i) Plaintiff exhibit 1; a copy of green card for land parcel No. Nyaki/Kithoka, Mwanika/75
- (ii) Plaintiff exhibit 2; Copy of official search for parcel No. Nyaki/Kithoka – Mwanika/75 showing that this land is registered in the name of plaintiff and title was issued on 23.1.2007. The land is 1.388 hectare.
- (iii) Plaintiff exhibit 3; Extract of an order dated 9.3.2004 authorizing the E.O of the court to sign documents to effect transfer of land No. 75 to plaintiff
- (iv) Plaintiff exhibit 4; A document titled memorandum of sale from quick-line auctioneers
- (v) Plaintiff exhibit 5; Application for consent to the land control board as a & b whereas mutation forms are 5c.
- (vi) Plaintiff exhibit 6; Copies of title to land parcel no. Nyaki/Kithoka/Mwanika/239, 240,241 and 242 all in the name of the plaintiff

9. In her submissions, plaintiff avers that there is only one decree in case no. 181/87, that is the one issued pursuant to the court's ruling of 13.4.1982. Plaintiff prays for eviction of defendant and her family

Defence case

10. Defendant filed her statement of defence with a counter claim on 19/5/2017. She contends that her niece Esther Mboroki sued her in high court civil case no. 187 of 1987 regarding the ownership of land title Nyaki/Kithoka/Mwanika/23, which was later sub-divided into Nyaki/Kithoka/Mwanika/74 and 75 and judgment in the matter was entered in favour of the defendant's niece on 26th June 2002 by awarding her that parcel registered as Nyaki/Kithoka/Mwanika/74 and the defendant was awarded Nyaki/Kithoka/Mwanika/75.

11. She further states in her pleadings that costs amounting to Kshs.156,000 were awarded to Esther Mboroki (the plaintiff in HCCC 187/1987) on 26th June 2002 who gave an undertaking to the defendant by way of an affidavit sworn on 30th June, 2008 that she had settled her advocate's legal fees and she would not be pursuing the costs as awarded by the court against the defendant.

12. She has also pleaded that it was not possible for the alleged public auction to have taken place on 6th October, 2000 in satisfaction of a judgment debt/deed of a case which was still continuing and was not determined until 26th June 2002, when such costs were awarded. Defendant avers that the alleged sale by public auction of her land parcel No. Nyaki/Kithoka/75 was fraudulent, illegal and invalid.

13. The particulars of the alleged fraud are set out in paragraph 17 of the counterclaim as follows; That plaintiff was;

(i) Claiming that she purchased the land on public auction held on 6th October 2000 when judgment for costs in the matter was granted on 26th June 2002

(ii) Claiming that she saw the advertisement by quickline auctioneers for the public auction of Nyaki/Kithoka/Mwanika/75 on 28th September 2000.

(iii) Claiming that she participated in the auction purportedly held on 6th of October 2000 when no such auction took place.

(iv) Colluding with the auctioneer and the advocates to purportedly sell the land parcel number known as Nyaki/Kithoka/Mwanika/75 when both the advocate and the auctioneer did not have the authority.

(v) Purporting to transfer the land, which was an agricultural land, without the requisite land control board consent as required by law.

(vi) Purporting to subdivide land when there was a caution in place restraining any interference with the title deed.

(vii) Colluding with the auctioneer and the advocates to advertise for sale of defendant's property and allegedly carry out the sale and confer the property to the plaintiff at a gross undervalue.

14. Three witnesses testified on the side of defendant namely; defendant, her daughter and defendant's niece, Esther Mboroki- (note that this is the person who had sued defendant in case Meru H.C.C.C no. 181/87).

15. DW 1 Hellen Kuthoka testified and also adopted her statement (undated but filed on 17.8.2014) as her evidence. During the trial, the court observed that defendant is a very old woman. She gave an account of how in 1979, she entered into an agreement with her niece DW 3 to sell to the latter a portion of land No. Nyaki/Kithoka/23 to the tune of 2 ½ acres. DW 1 avers that a dispute arose and she was then sued by DW 3 in case no. 181/87 whereby a judgment was apparently delivered in June 2002 in favour of DW 3, and that the latter was awarded costs. Years later, DW 1 avers that she came to learn that her remaining part of the land which is her matrimonial property was also sold via a public auction without her notice. DW 1 contends that the suit land is where she resides and that is where she buried her husband in 2016.

16. DW 2 a daughter of DW 1 gave evidence more or less similar to that of her mother save to add that their family was never aware of the public auction of their family land. She also adopted her statement filed on 16/10/2017 as her evidence.

17. DW 3, Esther Mboroki confirmed that indeed she had sued defendant herein in case no. 181/87. She also adopted her statement filed on 23/11/2017 as evidence. She avers that in case no. HCC 181/87, judgment was delivered in her favour on 26.6.2002 and she was also awarded costs of Kshs.156,000 which costs she gave instructions not to be pursued.

18. The defence contends that the purported auction of property no. 75 could not have been legal since judgment was delivered on 26.6.2002 yet the purported auction occurred in 2000.

19. DW 3 also emphasized that he did not owe her advocate B.G Kariuki advocate any money and that neither the firm of B.G Kariuki nor the auctioneers had any justifiable reason to auction the property no. 75 on account of case no. 181/87.

20. Defence also avers that DW 1 was never served with a demand notice of costs allegedly awarded to DW 3, and that DW 1 was also never served with auctioneer's notice of intention to auction her property.

21. In support of her case, defendant had produced the following documents as exhibits:

(i) Defendant exhibit 1; Chamber summons in HCC no. 181/87 dated 13.9.2007 whereby the present plaintiff is seeking for eviction of defendant from land parcel Nyaki/Kithoka/Mwanika/75. The chamber summons contains annexures including the notification of sale dated 31.3.2000.

(ii) Defendant exhibit 2; Affidavit of DW 3 (Esther Mboroki) sworn on 30.6.2008.

(iii) Defence exhibit 3: copy of application for a caution.

(iv) Defendant exhibit 4: Copy of official search for parcel No. Nyaki/Kithoka – Mwanika/75 showing that plaintiff was registered as owner of land on 28.12.2004, issued with a title deed on 23.1.2007 and the land was cautioned on 2.4.2012 by defendant.

22. Defendant's prayer in the counter claim are as follows;

(i) Aggravated damages for the fraud committed in respect of her land.

(ii) A declaration that plaintiff's title to the property was illegally and fraudulently acquired and that defendant is the legal owner of the land parcel known as Nyaki/Kithoka/Mwanika/75.

(iii) A declaration that the sale by public auction and transfer of Nyaki/Kithoka/Mwanika/75 from the defendant to the plaintiff was un-procedural and illegal.

(iv) An order for cancellation of tiles of the plaintiff directing that plaintiff's name be removed as the registered owner of land parcel number Nyaki/Kithoka/Mwanika/75 and for defendant to be registered as the owner of that land parcel Nyaki/Kithoka/Mwanika/75.

(v) An order of permanent injunction restraining the plaintiff, her agents, servants or any person whomsoever acting through the plaintiff from entering into, dealing or in any way interfering with the defendant's peaceful and quiet enjoyment of Nyaki/Kithoka/Mwanika/75.

(vi) Costs of this suit and the counterclaim including interest at court rates.

Analysis and findings

The Record:

23. I am in agreement with plaintiff's submissions that this suit is intertwined and largely hinged on the proceedings of Meru HCC No. 181/1987, which file is now secured to the present suit as per the pre-trial directions. The plaintiffs' counsel had also intimated to the court that he had a typed record of the proceedings in H.C.C 187/87 and the court directed that he avails a copy of the same to defence side and to the court. The proceedings which were availed are running from the date of 5.2.1980 to 5.9.1989. File no. 181/87 is very old, however, the hand written record appears to be intact. The said hand written records runs from 16.3.1982 to 27.3.2014. A problem arises in that the crucial events, particularly the public auction occurred in year 2000 or there about. However, in the hand written records, nothing happened in the file from 9.9.1998 to 17.10.2001 when case was simply marked S.O.G. Even in the year 2000, nothing much happened in the aforementioned file.

24. I will still proceed to determine the issues raised herein based on the evidence of the parties, the rival submissions as well as the proceedings in H.C.C No. 181/87.

Facts not in dispute:

25. The undisputed facts are that plaintiff became the registered owner of parcel no. Nyaki/Kithoka/Mwanika/75 sometime in year 2007

which parcel she has since subdivided into parcel no. 239, 240, 241, 242 and 243. It is also not disputed that defendant is the one who is in occupation of the suit land.

Issues for determination:

26. The dispute herein clearly revolves around the public auction of parcel no. Nyaki/Kithoka-Mwanika/75. I will proceed to frame issues for determination as follows:

- (i) Whether the alleged sale of parcel no. Nyaki/Kithoka-Mwanika/75 by public auction was legal/illegal.
- (ii) Whether plaintiff acquired a good title via the public auction of the sale of the aforementioned piece of land.
- (iii) Which relief is available to either party?

The public auction

27. The sale of land by public auction of land no. Nyaki/Kithoka/Mwanika/75 occurred on 6.10.2000. It is alleged that this land was sold pursuant to the Judgment of the court in H.C.C NO.181/87. I have not seen any decree or judgment of the court of June 2002 as alleged by defence. The plaintiff avers that the judgment/decreed was given on 13.4.1982.

28. A history of the case no. HCC 181/87 reveals that DW 3 herein (plaintiff in 181/87 had filed an application to strike out defence. A ruling allowing that application was given on 13.4.1982 by Judge E. Okubasu (as he then was). That ruling is what became the subject of litigation for decades thereafter. Defendant had tried all avenues to have the ruling set aside to no avail. One of such instance is the application made by Hellen Kuthoka dated 14.7.1989 for review of Judge Okubasu's ruling of 13.4.1982, whereby Hellen Kuthoka wanted to be allowed to defend the suit. Judge Oguk (R.I.P) dismissed this application on 5.9.1989. It follows that by 1984 the ruling of Judge Okubasu of 13.4.1982 was in force.

29. I have stumbled upon a typed order of D.C Porter Judge dated 14.5.1992 whereby the judge had apparently reviewed the order of Judge Okubasu and had also allowed Hellen Kuthoka to defend the suit. That order of 14.5.1992 is however not supported by the hand written proceedings. I would say not much about this order since from 5.9.1989 when J. Oguk delivered a ruling dismissing Hellen Kuthoka's application to defend the suit, the next coram is for 25.2.1993.

30. I have also not seen any proceedings of June 2002 where judgment was allegedly entered for DW 3 as against DW 1.

31. It follows that the only document that can closely be termed as giving effect to the Ruling of 13.4.1982 ,where judgment was entered for the plaintiff against defendant is the extracted order given on 5.10.1982 and issued on 19.10.1982 which reads as follows:

“It is ordered that the deputy registrar of this court be and is hereby authorized to sign all necessary documents to effect the transfer of 2.5 acres of parcel no. Nyaki/Kithoka/23 from the defendant/respondent to the plaintiff/applicant.

32. I have no doubts that it is in pursuant to the aforementioned order that defendant's original parcel of land was divided into two giving rise to Nyaki/Kithoka/Mwanika/74 now owned by Esther Mboroki (DW 3 herein) and parcel No. Nyaki/Kithoka/Mwanika/75 which is the suit land. At this juncture, I must point out that the subdivision of the original parcel No. 23 occurred during the pendency of the suit no.181/87, which suit remained in the courts arena for many years until 6.5.2014 when the suit was dismissed.

33. The question is how did the land parcel no. 75 become the subject of sale through a public auction?. It is not clear as to how proceedings to effect the sale of parcel no. 75 occurred in 2000. What appears certain is that defendant was never informed of this sale.

34. Defence have cited the provisions of rule 15 of the auctioneers rules of 1997 which stipulate that ***“Upon receipt of a court warrant or letter of instruction, the auctioneer shall in the case of immovable property –***

(a) Record the court warrant or letter of instruction in the register;

(b) Prepare a notification of sale in the form prescribed in sale form 4 set out in the second schedule indicating the value of each property to be sold:

(c) Locate the property and serve the notification of sale of property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect:

(d) Give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instructions;

(e) On expiry of the period of notice without payment, arrange sale of the property not earlier than fourteen days after the first newspaper advertisement”.

35. The plaintiff herein has not demonstrated in any way that the aforementioned rules were complied with. In particular, there is no evidence

to indicate that defendant was ever notified of the sale.

36. I therefore find that the case cited by the defence in their submissions, Maina Wanjigi & another vs Bank of Africa Kenya Ltd. & 2 others (2015) eKLR is applicable. There in it was held that; ***“Since there was no auction deemed by the law, whatever transpired on 3rd June, 2014 purported to be a public auction, was not a public auction, was an unlawful process which was incapable of conferring any title or proprietary rights to the alleged successful bidder – the 3rd defendant. I therefore reject the submissions that the third defendant had acquired title which needs to be protected by law. A title can only be acquired through a lawful process which this was not”.***

37. I conclude that the sale of land parcel no. Nyaki/Kithoka/Mwanika/75 by public auction in 2000 was illegal.

Whether plaintiff acquired a good title in respect of land no. Nyaki/Kithoka/Mwanika/75.

38. Section 26 of the land registration Act provides that; ***“ 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 tile 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 tile has been acquired illegally, un-procedurally or through a corrupt scheme”.

39. In order to determine if a title to land can be impeached or not one has to go into the root of the title. In the present case, parcel of land Nyaki/Kithoka-Mwanika/75 belonged to defendant. The court has already ruled that the sale of such land by public auction was illegal. From the advertisement put up by quickline auctioneers, one of the conditions of sale was that ***“prospective buyers were required to view and verify the details as those are not warranted by the auctioneers and their advocates”.***

40. Plaintiff herein was therefore expected to view the land and to verify details therein. If she did, then she must have noted that the land was not idle. It was occupied by defendant and her family. Failure to conduct due diligence or to comply with the conditions of sale puts the plaintiff at fault.

41. I have also taken into account the subsequent dealings in land parcel no Nyaki/Kithoka-Mwanika/ 75 from the time it was transferred to plaintiff. Plaintiff has alleged that she came to know defendant in 2012 (as per her evidence). However it has emerged that in 2007, plaintiff had unsuccessfully sought for the eviction of defendant in case no. 181/87. Despite having knowledge that defendant was in occupation of the suit land, plaintiff went ahead to cause the subdivision of the suit land into parcels no. 239-243. It is clear that plaintiff was trying to get the suit land out of reach of the defendant who was still in occupation of the land to date.

42. Another issue the court has considered is the lodging of the caution on the suit land by defendant. Defendant had lodged the caution on 2.4.2012. This is crystal clear that defendant had been persistent in her claim, that she was the owner of the land.

43. Finally I have considered that the original dispute in case no.181/87 concerned a claim of 2 ½ acres out of a possible 6.8 acres in respect of land no. Nyaki/Kithoka/Mwanika/23. There is no rocket science in calculating the remainder of the land if 2 ½ acres is taken off. The balance is 4.3 acres or there about. It is not fathomable to this court that defendant had somehow lost 4.3 acres of land no. Nyaki/Kithoka/23 due to litigation where DW 3’s entitlement or claim was only close to a third of that original land parcel (No. 23). This loss is certainly not in tandem with the accepted norms of social justice, equity and human dignity as outlined in article 10 of the constitution.

44. **In the case of Alice Chemutai Too versus Nickisa Kipkurui Korir and 2 others (2015) eKLR** cited by defence , Justice Munyao Sila stated thus; ***“.. Where a person intends to indict a title on the ground that the title has been acquired illegally, un-procedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part..... I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC case no. 609 B of 2012 where I stated as follows:- “It needs to be appreciated that for section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy 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 so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”.***

45. In light of the foregoing, I find that plaintiff did not acquire a good title and the title deeds she holds ought to be impeached.

What relief is available to the parties?

46. I have already stated that the conditions of sale required the prospective buyers in the public auction to visit the land and do their own verification. However, whether the plaintiff complied with this procedure is not clear. It follows that Plaintiff’s input in respect of the illegal public auction cannot be ascertained. It may be a situation whereby she ignored to inspect the property. The bottom line is that the auction was illegal but plaintiff cannot be said that she committed fraud. I therefore find that the claim of damages for fraud lodged by defendant in the counterclaim has not been proved.

47. Having found that the public auction whereby land no. 75 was sold to plaintiff was illegal, I then find that the subsequent dealings in that land including the subdivision of the suit land to parcels no. 239 – 243 are also illegal.

48. **Final orders:**

(1) Plaintiff's case is hereby dismissed

(2) Defendant counterclaim is allowed in the following terms:

(i) A declaration is hereby issued to the effect that plaintiff's title to the property was illegally and fraudulently acquired.

(ii) It is hereby declared that defendant is the legal owner of the land parcel known as Nyaki/Kithoka-Mwanika/75

(iii) A declaration is hereby to the effect issued that the sale by public auction and transfer of Nyaki/Kithoka/Mwanika/75 from the defendant to the plaintiff was unprocedural and illegal.

(iv) An order is hereby issued for the cancellation of titles in parcels of land No. Nyaki/Kithoka-Mwanika 239, Nyaki/Kithoka-Mwanika/240, Nyaki/Kithoka-Mwanika/241, Nyaki/Kithoka-Mwanika/242 and Nyaki/Kithoka-Mwanika/243 and for these parcels to revert back to title no. Nyaki/Kithoka- Mwanika/75 to be registered in the name of HELLEN KUTHUKA M'IKIARA.

(v) An order of permanent injunction is hereby issued restraining the plaintiff, her agents, servants or any person whomsoever acting through the plaintiff from entering into, dealing or in any way interfering with the parcels of land No Nyaki/Kithoka-Mwanika 239, Nyaki/Kithoka-Mwanika/240, Nyaki/Kithoka-Mwanika/241, Nyaki/Kithoka-Mwanika/242 and Nyaki/Kithoka-Mwanika/243 (or Nyaki/Kithoka - Mwanika/75).

(3) The Deputy Registrar of this court is hereby authorized to sign any requisite document to give effect to this Judgment.

(4) Any orders of prohibition, inhibition or restriction that may be registered in respect of parcel No. Nyaki/Kithoka-Mwanika 239, Nyaki/Kithoka-Mwanika/240, Nyaki/Kithoka-Mwanika/241, Nyaki/Kithoka-Mwanika/242 and Nyaki/Kithoka-Mwanika/243 are hereby lifted to facilitate the implementation of this Judgment.

(5) Defendants claim for damages against the plaintiff is dismissed.

(6) Considering the litigation history of this case, I hereby direct that each party bears their own costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF JULY, 2018

IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Mokua for plaintiff

Munene for defendant

HON. LUCY. N. MBUGUA

ELC JUDGE