



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC CASE NO. 187 OF 2013

HENRY GATEI HIUHU 1ST PLAINTIFF

JAMES MUNENE HIUHU2ND PLAINTIFF

VERSUS

MARY NJOKI WAWERU1ST DEFENDANT

THE REGISTRAR OF LANDS, NAIVASHA.....2ND DEFENDANT

JUDGMENT

Pleadings

1. By plaint dated 15th February 2013, the plaintiffs aver that they jointly acquired the parcel of land known as Kijabe/Kijabe Block 1/2767 (the suit property) by virtue of their shareholding in Mai Mahiu Longonot Co. Ltd and balloting conducted by the said company. Despite such shareholding and balloting, the 2nd defendant illegally and fraudulently registered the first defendant as proprietor of the suit property on 19th April 1989. Consequently, the plaintiffs seek judgment against the defendant for:

a. A declaration that the plaintiffs are the legal proprietors of the land parcel No. Kijabe/Kijabe Block 1/2767 to the exclusion of the 1st defendant.

b. An order directing the Registrar of Lands Naivasha to cancel the title deed for the land parcel No. Kijabe/Kijabe Block 1/2767 issued in the name of the 1st defendant and in her place, cause the plaintiffs to be registered as the proprietors of the said land.

c. That the defendant do bear the costs of this suit.

2. Despite being served with Summons to enter appearance, through advertisement, the 1st defendant neither entered appearance nor participated in the proceedings.

3. The 2nd defendant filed statement of defence in which he generally denied the plaintiffs' averments and asserted that registration of the 1st defendant as proprietor of the suit property was done procedurally and lawfully. He therefore urged the court to dismiss the plaintiffs' suit with costs. Despite being served with notice of hearing, counsel for the 2nd defendant neither attended the hearing nor filed any submissions. The 2nd defendant did not tender any evidence.

Evidence and submissions

4. The 1st plaintiff testified as PW1 after which the plaintiffs' case was closed. He told the court that James Munene Hiuhu, the 2nd plaintiff is his brother. He testified on his own behalf and on behalf of the 2nd plaintiff. He and the 2nd plaintiff acquired the plot known as Kijabe/Kijabe Block 1/2767 by buying one share from Mai Mahiu Kijabe Longonot Company Ltd. They were issued with share certificate No. 3692. He produced it as plaintiff's exhibit No.1. They participated in balloting for the plot and were issued with voting card No. 2767. The card number represented the plot number. He produced the original of the voting card as plaintiff's exhibit No.2. They were later issued with another certificate No. 2767 which shows owners of plot No. 2767 as Munene Hiuhu and Gatei Hiuhu and share certificate number as 3692. He also produced a letter from the District Land Adjudication and Settlement Officer Naivasha dated 22nd February 2011 written to the District Land Registrar Naivasha and a rates demand note addressed to the plaintiffs. Despite all this, the plaintiffs were not eventually registered as owners of the plot. When they went to have themselves registered they found that a title had been issued to Mary Njoki Waweru, the 1st defendant on 19th April 1989. PW1 produced a certificate of search as at 14th February 2011 and a certified copy of the

green card or extract from the register. Owing to the developments the plaintiffs registered a caution against the title.

5. PW1 further testified that he does not know 1st defendant and that he has never met her. He got to know her name from the certificate of search. He added that the plaintiffs have been occupying the suit land since 1984. Nobody has ever disturbed their occupation of the land since 1984.

6. Counsel for the plaintiff filed written submissions on 25th August 2017. He urged the court to find that the plaintiffs have proven their case on a balance of probabilities and to enter judgment in their favour as prayed.

Analysis and Determination

7. As already pointed out, none of the defendants tendered any evidence. They did not also challenge the plaintiffs' evidence through cross examination. From the material placed before me, I am satisfied that the plaintiffs were shareholders of Mai-Mahiu Kijabe Longonot Company Ltd as demonstrated by share certificate No. 3692 and that they participated in a balloting exercise and were allocated plot No. 2767. Indeed, their allocation of the said plot is confirmed by letter dated 22nd February 2011 from District Land Adjudication and Settlement Officer, Naivasha. In the said letter, the plot number is indicated as Kijabe/Kijabe Block 1/2767 which corresponds to the suit property herein. In the absence of any evidence to the contrary, I accept PW1's testimony that the plaintiffs have been occupying the suit property since 1984 and that the 1st defendant is a stranger who has no connection with the suit property. It is important to note that though the 2nd defendant contended that the registration of the 1st defendant as proprietor of the suit property was done procedurally, the 2nd defendant did not tender evidence to show how such registration came about.

8. There is no dispute that the 1st defendant is the registered proprietor of the suit property. This is confirmed by the Certified Copy of the extract from the register or "Green Card" which was produced as plaintiffs' exhibit No. 7. Ordinarily such registration would confer upon the registered proprietor the interests and rights accorded by **Sections 24 and 25 of the Land Registration Act**. Pursuant to Section 26 of the Act, the 1st defendant's certificate of title is to be held as conclusive evidence of ownership and shall not be subject to challenge except as provided under the said Section. The Section provides:

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

(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.

9. The circumstances under which a Certificate of title can be cancelled were discussed by the Court of Appeal in **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**:

As recently as November 2013, this Court, differently constituted, confirmed the finality of the construction and application of Section 23 of RTA by the Court of Appeal in a long line of previous decisions. The Court refused leave to a party who sought to challenge those decisions in the Supreme Court, particularly on the definition of Fraud and its effect on the doctrine of indefeasibility of Title. The case was **Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR**. In that case, evidence of fraud in the context of the Registration of Titles Act was considered by both the High Court and the Court of Appeal and found to have existed from the attendant primary facts and circumstances of the transaction in issue. It was held that the law on fraud and indefeasibility of Title has been settled and there was no need for involvement of the Supreme Court.

66. The law is typically stated in the case of **Dr. Joseph Arap Ngok V. Justice Moiwo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997** where this Court categorically declared that:-

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

There are numerous other decided cases to the same effect, some of which have been referred to by the parties herein.

66. We have found already, on evaluation of the recorded evidence, that fraud was committed both at the registry of companies as well as the Lands office. ...

10. The plaintiffs herein maintain that the 1st defendant was not lawfully registered as proprietor of the suit property. Among the particulars of fraud and illegality pleaded by the plaintiffs is that the 1st defendant caused herself to be registered as the proprietor of the suit property while knowing that she had no proprietary interest in the land. The 2nd defendant is faulted for agreeing to register the 1st defendant as proprietor.

11. Despite being given a chance to explain how the registration came about, both the 1st and 2nd defendants have failed to do so. Pursuant to **Section 6 of Registered Land Act** (repealed) which was applicable as at the date the 1st defendant was registered as proprietor, the land registry was required to have parcel files containing instruments and documents that support entries in the register as well as a presentation book wherein all applications were to be recorded consecutively in the order in which they were presented to the registry. Similar provisions are found at **sections 7 (1) (c) and (e) of the Land Registration Act**. Failure by the 2nd defendant to testify and to produce these records lends credence to the plaintiffs' case that the registration of the 1st defendant was obtained illegally and unprocedurally. It is unlikely that such registration would have taken place without the participation of the 1st defendant.

12. For all the foregoing reasons, I am persuaded that the plaintiffs have proven their case on a balance of probabilities. I therefore enter judgment in favour of the plaintiffs as follows:

a. It is hereby declared that the plaintiffs are the legal proprietors of the parcel of land known as Kijabe/Kijabe Block 1/2767 to the exclusion of the 1st defendant.

b. The Registrar of Lands Naivasha is hereby ordered to cancel the title deed for the parcel of land known as Kijabe/Kijabe Block 1/2767 issued in the name of the 1st defendant herein and in her place, register the plaintiffs as the proprietors of the said parcel of land.

c. Costs of the suit are awarded to the plaintiffs. Such costs shall be paid by the 1st defendant herein.

13. It is so ordered

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

D. O. OHUNGO

JUDGE

In the presence of:

Mr Mugambi for the plaintiffs

No appearance for the 1st defendant

No appearance for the 2nd defendant

Court Assistants: Gichaba & Lotkomoi