



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 151 OF 2013

JOSEPH GITHUNDI PLAINTIFF

VERSUS

HANNAH NJERI KUNG'U DEFENDANT

JUDGMENT

(Plaintiff filing suit claiming that the defendant has acquired title fraudulently and wanting the same to be cancelled; plaintiff's suit dismissed for non-attendance and later reinstated; plaintiff's suit dismissed for want of prosecution; defendant having a counterclaim seeking to be declared owner of the suit properties and permanent injunction against the plaintiff; defendant producing documents of title which are uncontroverted by the plaintiff; judgment entered for the defendant)

1. The plaintiff commenced this suit by way of a plaint which was filed on 24 April 2012 vide which he claimed to be entitled to the land parcels Naivasha/Maraigushu Block 7/308 and Naivasha/Maraigushu Block 7/688 which land parcels are registered in the name of the defendant. The plaintiff averred that the defendant procured registration as proprietor of the suit properties through fraud. The defendant entered appearance and filed a defence and counterclaim. She asserted that she is the rightful owner of the suit properties having purchased the land from the original allottee, one Paul Kariuki. She denied that she procured her proprietorship by way of fraud. In the counterclaim, she sought orders that she be declared the rightful owner of the suit properties; a permanent injunction against the plaintiff; costs of the suit and interest.

2. On 7 April 2014 when the case was slated for hearing, neither the plaintiff nor his counsel appeared in court, and the plaintiff's case was dismissed for non-attendance. The defendant proceeded to testify on her counterclaim and she inter alia produced the titles to the suit properties as her exhibits. She testified that she has lived on the suit land for 40 years. No other witness was called by the defendant and the defendant closed her case.

3. Later, an application dated 20 June 2014 was filed by the plaintiff, seeking orders to reinstate his case. The application was allowed by consent on 6 October 2015 subject to payment of throw away costs of Kshs. 20,000/=. It is not too clear to me whether these costs were ever paid. Be that as it may, the plaintiff took no step to prosecute his case and it was dismissed on 24 April 2018 for want of prosecution. I listed the case for hearing of the counterclaim, and on 22 May 2018, Ms. Kaholo, learned counsel for the respondent relied on the earlier evidence produced.

4. From the evidence on record, I have no reason to doubt the proprietorship of the defendant as the lawful and rightful proprietor of the suit properties. The plaintiff brought absolutely no evidence to prove that the titles of the defendant are not good titles and should be cancelled. That being the case, I am guided by Section 26 of the Land Registration Act, Act No. 3 of 2012, which provides that a Certificate of Title is prima facie evidence of ownership. The said provision of the law is drawn as follows :-

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.

5. It was upon the plaintiff to provide evidence that the Certificate of Title of the defendant was procured by fraud or misrepresentation, or that the same was acquired illegally, unprocedurally or through a corrupt scheme. The plaintiff availed nothing to impugn the title of the defendant. That being the case, I have no reason not to allow the counterclaim of the defendant, and I hereby allow it. The defendant will also have the costs of the main suit and of the counterclaim.

6. I now make the following final orders :-

(i) That as between the plaintiff and the defendant, it is hereby declared that it is the defendant who is the rightful proprietor of the land parcels Naivasha/Maraigushu Block 7/ 308 and Naivasha/Maraigushu Block 7/689.

(ii) That a permanent injunction is hereby issued against the plaintiff, Josphat Githundi, stopping him from entering, being upon, dealing, utilizing, or in any other way interfering with the defendant's quiet possession of the land parcels Naivasha/Maraigushu Block 7/308 and Naivasha/Maraigushu Block 7/689.

(iii) That the defendant shall have the costs of the main suit and of the counterclaim and interest on the same at court rates.

7. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 9th day of July 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Kaholo instructed by M/s Getanda Rabera & Associates Advocates, for the defendant.

No appearance on the part of M/s George N. Kimani & Company Advocate for the plaintiff.

Court Assistant : Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU