



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 702 OF 2017

(Formerly Nairobi ELC No. 686 of 2015)

MOSES PARANTAI

PERIS WANJIKU MUKURU (Suing as the legal representative

of the estate of **SOSPETER MUKURU MBEERE DECEASED**).....**PLAINTIFFS**

VERSUS

JANET WAIRIMU MURITU.....**1ST DEFENDANT**

JOSEPH OTIENO ONYANGO.....**2ND DEFENDANT**

STEPHEN NJOROGI MACHARIA.....**3RD DEFENDANT**

THE DISTRICT LAND REGISTRAR,

KAJIADO NORTH DISTRICT.....**4TH DEFENDANT**

JUDGEMENT

By a Plaint dated the 16th July, 2015, the Plaintiffs seek for the following orders:

- a) A declaration that the Plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of the parcel of land known as Kajiado/ Olchoro – Onyore/ 3665 situated in Kajiado and that the alleged occupation and possession of the plot by the 3rd Defendant is illegal, unlawful, null and void.
- b) An order of permanent injunction restraining the 3rd Defendant either by himself, his employees, servants and/or agents from continuing to occupy, trespassing on, purporting to sell, subdividing, erecting structures and/or in any other manner interfering with the Plaintiffs' quiet enjoyment and possession of land known as Kajiado/ Olchoro – Onyore/ 3665 situated in Kajiado within the Republic of Kenya.
- c) An order of eviction against the 3rd Defendant from the land known as Kajiado/ Olchoro – Onyore/ 3665 situated in Kajiado.
- d) An order directing the Officer Commanding Station (OCS) Kiserian Police Station to provide security and ensure compliance with the orders herein.
- e) An order compelling the 3rd Defendant to surrender the title known as Kajiado/ Olchoro – Onyore/ 3665 to the 4th Defendant for cancellation and correction of entries in the register to reflect that the legal representatives of the estate of the deceased are the sole owners of the property and to have title registered as such.
- f) An order to issue compelling the 4th Defendant to cancel the title issued to the 4th Defendant to cancel the title issued to the 3rd Defendant and register it in the names of legal representatives of the estate of the deceased.

- g) General damages for loss of user.
- h) General damages for trespass.
- i) Damages for loss of income and mesne profits.
- j) Costs of this suit and interest thereon.
- k) Any other relief this Honourable Court shall deem just and fit to grant.

The 3rd Defendant filed his Defence where he denied allegations levelled against him in the Complaint and averred that land parcel number Kajiado/ Olchoro – Onyore/ 3665, hereinafter referred to as the ‘suit land’, was registered in the name of the deceased until 19th August, 2010. He contends that transfer of land parcel number Kajiado/ Olchoro – Onyore/ 3665, in favour of the 1st Defendant was effected on 19th August, 2010 and not 8th October, 2010 as alleged. He denied the particulars of fraud, illegality as well as breach of statutory duty. He states that insofar as he took possession of land parcel number Kajiado/ Olchoro – Onyore/ 3665, he denies trespassing thereon including the particulars of trespass contained in the Complaint and aver that his possession was lawful as he was entitled to do so, after the proprietary interest was lawfully transferred to him. He further denies the particulars of loss and damage.

The rest of the Defendants did not file their defence and the matter proceeded to full hearing.

Evidence of the Plaintiffs

The Plaintiff called two witnesses. PW1 Moses Parantai Ole Shukrani testified that the deceased who was his father in law was the proprietor of the suit land. He passed away on 7th June, 2011. He stated that the 1st Defendant was fraudulently registered as proprietor of the suit land and got title on 8th October, 2010 and that the 2nd Defendant was registered as owner of the said land on 13th June, 2011. He explained that on 10th October, 2014, the 3rd Defendant got registered as the proprietor of the suit land and from the Green Card, he got the transfer from the 2nd Defendant. During cross examination, he confirmed that the suit land was registered in the name of 1st Defendant on 19th August, 2010 when the deceased was still alive and he had not raised any complaint before he died. He clarified that there was no criminal case regarding the suit parcel. He claimed the 1st Defendant was the caretaker of the deceased residential building. In reexamination he clarified that the complaint over the lost title of the suit land was made by one Grace who was the deceased 1st wife.

PW2 Peris Wanjiru Mukuru who is the daughter as well as the administrator of the estate of the deceased stated that her father owned the suit land and wanted Court to revert ownership of the said land to the name of the deceased. During cross examination, she confirmed that the 1st Defendant was indicated as the owner of the suit land on 19th August, 2010 as per the Green Card, when her father was still alive. She further confirmed that the 1st Defendant was working for her father and handed over some title deeds to her mother but she could not recall if her mother asked for a specific one. In reexamination, she contended that as per a search conducted on 16th January, 2012, it indicated that her father was the owner of the suit land. The Plaintiffs thereafter closed their case.

Evidence of the Defendants

The Defendants called two witnesses in opposition to the Plaintiffs’ case.

DW1 claimed before he purchased the suit land, it belonged to the 2nd Defendant. He confirmed having executed a Sale Agreement and paid the 1st and 2nd Defendants, Kshs. 7 million as purchase price. This was because the 2nd Defendant had not finalized paying the 1st Defendant the purchase price. He explained that he was given completion documents, which he took to the Ngong Lands Office for registration and issuance of a title deed to his name. He confirms being issued with a title deed and at that time, he was not aware of any dispute over the suit land, took possession of the same and started cultivating it. He denied getting his title deed fraudulently and insists he undertook due diligence before purchasing the suit land. He contends that he has never been charged in court for obtaining by false pretence. During cross examination, he clarified that he paid 1st Defendant Kshs. 3. 8 million and the 2nd Defendant, Kshs. 2.45 million respectively. He stated that, he was informed by the 1st and 2nd Defendants that there was property the 1st Defendant was purchasing from one George Munyoro, of which he was made to pay Kshs. 750,000/= to him, out of the purchase price of Kshs. 4.6 million that he paid the 1st Defendant. He however did not provide evidence in court to that effect. He highlighted the various entries in the Green Card and stated that entry No. 6, dated 19th August, 2010 and indicated that the suit land was registered in the 1st Defendant’s name; while entry No. 8 dated the 13th June, 2011 shows the suit land was registered in 2nd Defendant’s name. He reiterated that the title deed was issued to him on 10th November, 2014. In reexamination, he reiterated that the 1st and 2nd Defendants have not denied that he paid for the suit land. Further, that he presented copies of the ID Card, Consent, transfer form duly signed, to the Lands office in Ngong before he was issued with his title deed and he does not know who makes entries in the Green Card. He further explained that the 1st Defendant told him, she was holding the title deed as she had not been paid the full purchase price by the 2nd Defendant.

DW2 Janet Wairimu Muritu who is also the 1st Defendant herein confirmed the suit land was initially owned by the deceased, who gave her the title deed. She averred that the deceased Joseph Mukuru was her husband and he is the one who gave her the suit land. She stated that she was staying with him in Nairobi west and after his demise, she gave three title deeds to his first wife. Further, that she did not give the title deed to the suit land to the first wife as it was already registered in her name. She stated that she sold the suit land to the 2nd Defendant because the first wife’s children were harassing her. She further confirmed that it is the 2nd Defendant who sold the suit land to the 3rd Defendant. In cross examination, she confirmed that she commenced staying together with the deceased in the year 2000 as husband and wife and they have one child. She denied being his employee. She reiterated that the deceased gave her the suit land but she did not have any

documents including transfer documents to prove this. She further confirmed selling the suit land to the 2nd Defendant and transferred the land to him after he partly paid the purchase price of Kshs. 4.6 million. Further, that she knew the 3rd Defendant, after she had sold land to the 2nd Defendant. In reexamination, she clarified that the deceased only gave her the title deed to the suit land and one document but did not give her the documents of transfer. She reiterated that she sold the land to the 2nd Defendant and was also given money from the 3rd Defendant when doing the transaction with the 2nd Defendant.

Both the Plaintiffs and the 3rd Defendant filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the Plaint, 3rd Defendant's Defense, Exhibits including testimonies from the respective witnesses and upon reading submissions from the Plaintiffs as well as the 3rd Defendant, the following are the issues for determination:

- Whether the acquisition of the suit land by the 1st Defendant from the deceased was legal.
- Whether the 1st Defendant fraudulently transferred the suit land to the 2nd Defendant.
- Whether the 3rd Defendant was a bona fide purchaser for value.
- Whether the Plaintiffs are entitled to the reliefs sought
- Who should bear the costs of the suit.

As to whether the acquisition of the suit land by the 1st Defendant from the deceased was legal. PW1 contended the 1st Defendant was fraudulently registered as proprietor of the suit land on 19th August, 2010 while the 2nd Defendant was registered as owner of the said land on 13th June, 2011. He further stated that the 3rd Defendant was registered as the proprietor of the suit land on 10th October, 2014. He however confirmed that the deceased passed away on 7th June, 2011. From the Green Card, it is clear the registration of the 1st Defendant as proprietor of the suit land was done when the deceased was alive. DW2 contended that she was the wife to the deceased who transferred the suit land to her, when he was alive and denied committing any fraud. PW1 and PW2 never informed court as to whether there were any criminal proceedings commenced against the 1st Defendant in regards to the suit land and the burden of proof was upon them to prove so. I find that since the suit land was transferred to the 1st Defendant during the deceased lifetime and further since there are no criminal proceedings against the 1st Defendant as relates to the suit property, there is no demonstration of fraud against her. Since she already had a title, she was protected by section 25 and 28 of the Land Registration Act that provides as follows:

‘25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever

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.’

It is against the foregoing that I find that the Certificate of Title which the 1st Defendant held over the suit land, was conclusive proof of ownership as she has not been prosecuted of having acquired the same illegally, unprocedurally or through a corrupt scheme. Further, after transfer of the suit land to her, the deceased remained alive for about ten(10) months but never complained of any form of fraud.

As to whether the 1st Defendant fraudulently transferred the suit land to the 2nd Defendant.

The Plaintiffs contended that the 1st Defendant fraudulently transferred the suit land to the 2nd Defendant who later sold the same to the 3rd Defendant. 1st Defendant as DW2 confirmed in court that she sold the suit land to the 2nd Defendant, and transferred the same to him once he paid part of the purchase price. This evidence was corroborated by the 3rd Defendant as DW1, who averred that at the time of the purchase of the suit land from the 2nd Defendant, he was informed that the 2nd Defendant still owed some money to the 1st Defendant and that is why he paid part of the purchase price to the 1st Defendant. As per my findings above, I note the 1st Defendant already had a good title and she was legally capacitated to transfer the suit land to the 2nd Defendant. In the case of ***Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000)*** Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not

allowable to leave fraud to be inferred from the facts.”

From the particulars of fraud at paragraph 20 of the Plaint, the Plaintiffs pleaded that the 1st and 4th Defendant fraudulently colluded to transfer suit land to the 1st Defendant. Further, that the 4th Defendant altered the Green Card to indicate the suit land was transferred from the deceased to the 1st Defendant on 8th October, 2010 while as at 16th January, 2012, the suit land was still registered in the name of the deceased. As per the Certificate of Official Search dated the 16th October, 2012, produced by the Plaintiffs, it indicated the deceased was still the proprietor of the suit land by then. But as per another Certificate of Official Search dated the 24th June, 2013, it indicates that as at 13th June, 2011, the 2nd Defendant was proprietor of the suit land. However, as per the excerpt from the Green Card produced by both the Plaintiffs as well as 3rd Defendant it indicates that the deceased transferred the suit land to the 1st Defendant on 19th August, 2010 and a title deed issued to that effect. Further, it shows on 13th June, 2011, the suit land was transferred to the 2nd Defendant and on 10th November, 2014, the same was transferred to the 3rd Defendant. I note that the two Certificates of Official searches produced in Court, contains contradictory information on the ownership of the suit land. However, I note that the Green Card, which is a Land Register by virtue of section 7 of the Land Registration Act, contains all the records of all the transactions that have taken place in respect of a particular parcel of land which I hold is the position in the current case. The standard of proof for the claim of fraud and conspiracy, is much heavier on the plaintiff. Hence, I find that the records in the Green Card supersede what is contained in the Certificate of Official Searches.

In another case of **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR**, the Court of Appeal held as follows: **‘In this case, fraud cannot be imputed on the part of the respondent by the mere fact that the record in relation to the subject property was missing at the Lands Registry. To succeed in the claim for fraud, the appellant needed to not only plead and particularise it, but also lay a basis by way of evidence, upon which the court would make a finding. In the present appeal, there is no such evidence, and the courts below rightly came to the conclusion that the appellant had not made out a case for the grant of the orders he sought’**

In relying on the above cited judicial authorities and the facts as presented, I find that insofar as the Plaintiffs’ had pleaded and particularized the acts of fraud as against the 1st and 4th Defendants, they have failed to lay the basis in their evidence since from the Green Card, it is clear the 1st Defendant was registered as proprietor of the suit land before the deceased demise and hence had a valid title which she passed to the 2nd Defendant who had paid her part of the purchase price. I further find that, there was no proof of fraud as against the 2nd Defendant either.

As to whether the 3rd Defendant was a bona fide purchaser for value. I note that the 3rd Defendant produced a Sale Agreement dated 7th November, 2014 including a Transfer dated 10th November, 2014, as exhibits, which he had executed together with the 2nd Defendant. I note the Transfer form was duly registered on 10th November, 2014 by the Land Registrar. From the Sale Agreement I note the purchase price was kshs. 7 million which no one disputed that the 3rd Defendant paid. Further, DW2 confirmed that the 2nd Defendant had sold land to the 3rd Defendant. I note the 3rd Defendant was issued with a title deed in 2014. It was DW3’s evidence that at the time of purchase of the suit land, he undertook due diligence and the records at the Land Registry confirmed that the 2nd Defendant was the proprietor of the suit land. Further, since the 3rd Defendant upon receiving the completion documents namely original Title, Land Control Board Consent, Colored Passport Size Photographs, Pin Certificate and Transfer Form duly signed, applied for transfer in the Land Registry, with the same being successful, I find that the 3rd Defendant was indeed a bona fide purchaser for value.

As to whether the Plaintiffs are entitled to the reliefs sought, since I have already made a finding above that the 1st Defendant held a valid title which she transferred to the 2nd Defendant, who in turn sold the suit land to the 3rd Defendant, there is no anomaly the Defendants committed with respect to the suit land. PW1 and PW2 in their testimonies did not prove the allegations of fraud pleaded in the Plaint and the documents presented especially the Green Card, all point to the fact that the deceased ceased to be owner of the suit land when he transferred his proprietary interest to the 1st Defendant, whose title he never challenged during the ten (10) months, he was alive. I note from PW1 and DW2’s evidence, it is the 1st Defendant who gave some title deeds to the deceased first wife and withheld the one of the suit land as she was the owner. That in essence means that the 1st Defendant had nothing to hide. It is against the foregoing, that I find that the Plaintiffs’ have not proved their case on a balance of probability and are not entitled to the orders sought.

As to who should bear the costs of the suit, I note it is only the 3rd Defendant who filed his Defense and is hence entitled to his costs.

It is against the foregoing that I find that the Plaintiffs’ have failed to prove their case on a balance of probability and proceed to dismiss it. Costs are only awarded to the 3rd Defendant.

Dated signed and delivered in open court at Kajiado this 26th day of September, 2018.

CHRISTINE OCHIENG

JUDGE