



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 541 OF 2014

NANCY NYAMBURA KARORI.....PLAINTIFF

VERSUS

JOHN GITHERE KARANJA1ST DEFENDANT

ISAIAH NJAU KAHUKI.....2ND DEFENDANT

JANE WAMBUI KAHUKI.....3RD DEFENDANT

JUDGMENT

Introduction

1. Nancy Nyambura Karori (**the plaintiff**) and Patterson Karori Njoroge (hereinafter referred to as "**Patterson**") are wife and husband. On 2/4/1994, they were registered as proprietors of Land Title Number **Kiambaa/Kihara/2607** (hereinafter referred to as **Parcel No 2607**). Subsequently, in November 2000, Patterson entered into a sale agreement with John Githere Karanja (the **1st defendant**) pursuant to which he agreed to sell to the 1st defendant 1/4 of an acre out of Parcel No. 2607 at Ksh.750,000. The Plaintiff who was a joint proprietor of the suit property was not a party to the sale agreement. Secondly, consent of the land control board was not procured. Consequently, the intended sale flopped.

2. On 10/12/2002, the 1st defendant sued Patterson in Nairobi CMCC 9881 of 2002 claiming a refund of Kshs 734,000 which he had paid to Patterson pursuant to the aborted sale agreement. He contended that Patterson was guilty of misrepresentation and concealment of material facts in that he did not disclose to him that the suit property was jointly owned by him and the plaintiff herein.. He further contended that Patterson had failed to seek consent of the land control board. At the time the 1st defendant initiated the suit, Patterson was serving a jail term on fifteen counts relating to the offence of obtaining money through false pretences. The complainant in the criminal case was the 1st defendant herein, and the money said to have been obtained through false pretences was the Kshs 734,000 paid as purchase price under the aborted sale agreement.

3. The 1st defendant obtained exparte judgment and decree in Milimani CMCC 9881 of 2002 and proceeded to attach and sell the whole of Parcel Number 2607. The Plaintiff's objection to the attachment was dismissed on the ground that although she attached an official search to her objection application, she did not attach a copy of the title to the application. The property was subsequently sold by the 1st defendant as decree-holder and purchased by the same 1st defendant as the highest bidder. The 1st defendant subsequently subdivided the property into four (4) titles:**Kiambaa/Kihara/3607; Kiambaa/Kihara 3608; Kiambaa/Kihara 3609 and Kiambaa/Kihara 3610** and transferred them to the joint names of the 2nd and 3rd defendants.

4. Aggrieved by the actions of the defendants, the plaintiff brought this suit seeking the following orders:

a) A declaration that the Plaintiff is a bonafide owner and/or beneficial owner of land known as LR. No. KIAMBAA/KIHARA/3608, KIAMBAA/KIHARA/3609 and KIAMBAA/KIHARA3610, AND THE Titles in favour of the 2nd and 3rd Defendants are null and void.

b) A declaration that the Title Deeds for L.R. Nos. KIAMBAA/KIHARA/3607, KIAMBAA/KIHARA/3608, KIAMBAA/KIHARA/3608 and KIAMBAA/KIHARA 3610 in favour of the 2nd and 3rd Defendant were acquired illegally, unprocedurally, is rooted in fraud and/or misrepresentation of facts and therefore the 1st and 2nd Defendants have no legitimate proprietary right over the same.

c) A permanent injunction restraining the 1st, 2nd and 3rd Defendants whether by themselves or their servants or agents from dealing, constructing, disposing, trespassing, interfering, charging and/or whatsoever dealing with LR. Nos. KIAMBAA/KIHARA/3607, KIAMBAA/KIHARA/3608, KIAMBAA/KIHARA/3609 and KIAMBAA/KIHARA/3610.

d) A Permanent Injunction restraining the 1st, 2nd and 3rd Defendants whether by themselves or their servants or agents from evicting and/or interesting with the Plaintiff's quite possession over L.R Nos. KIAMBAA/KIHARA/3607, KIAMBAA/KIHARA/3610.

e) An order directing the chief Land Registrar to cancel the Title deeds issued on L.R. NOS. KIAMBAA/KIHARA/3607, KIAMBAA/KIHARA/3608, KIAMBAA/KIHARA/3609 and KIAMBAA/KIHARA/3610 in favour of the 2nd and 3rd Defendants and in their stead, the Plaintiff be registered as the owner.

f) Cost of the suit and interest thereof from the date of filling the suit. Any other relief that the Honourable court may deem just and fit to grant.

The Plaintiff's Case

5. The plaintiff's case is that she was a joint proprietor of the suit property. Secondly, she was never a party to the aborted sale of the suit property to the 1st defendant by her husband, Patterson. Thirdly, she was never a party to the judgment and decree in Nairobi CMCC 9881 of 2002 hence the decree should not have been executed against her. Fourthly, she contends that Parcel No. 2607 was not available for attachment to satisfy a decree against Patterson because the property was jointly owned by herself and Patterson.

Defendants' case

6. The defendants filed a joint statement of defence on 12th August 2014 denying the plaintiff's claim. The defendants contended that the suit property was acquired in a court sanctioned public auction in execution of a decree issued in Milimani CMCC No. 9881 of 2002. The 2nd and 3rd defendants pleaded that they lawfully purchased the subdivision parcels from the 1st defendant and were therefore innocent purchasers for value.

Evidence of the Plaintiff

7. During trial, the Plaintiff (PW1) adopted her statement filed in court on 7th May 2014 as her sworn evidence-in-chief. She produced a bundle of 12 documents as Plaintiff Exhibit Numbers 1 to 12. She testified that the suit property was registered jointly in her name and that of her husband, Patterson Karori Njoroge. PW1 stated that she had lived on the suit property since her marriage in 1975 and she still lived on it. Her evidence was that Parcel No. 2607 was subdivided and mutated into Parcel Numbers 3607, 3608, 3609 and 3610 and that she was never involved in the subdivision, did not sign any consent and was not a party to the judgment and decree in Nairobi CMCC 9881 of 2002.

8. PW1 stated that when Nairobi CMCC 9881 of 2002 was heard, her husband was serving a 2 years jail term and in 2001 her children had placed a caution on the suit property. She stated that the 2nd and 3rd defendants lived 300 metres away from Parcel No. 2607 and knew to her. Her evidence was that being her neighbours, the 2nd and 3rd defendants knew that the 1st defendant had fraudulently and irregularly transferred Parcel No. 2607 into his name. She stated that she was an aunt to the 1st defendant while the 2nd and 3rd defendants were running a school in her neighbourhood. She averred that the 1st defendant did not give her any notice of intention to sell Parcel No. 2607 and further that she was not party to the sale agreement between her husband and the 1st defendant.

9. The 1st defendant (DW1) adopted his written statement dated 17th September 2015 as his evidence in chief and produced a bundle of 15 documents as Defence Exhibit Numbers 1 to 15 respectively. DW1 testified that he was not aware that Parcel No. 2607 was registered in joint names when he entered into a sale agreement with Patterson. He testified that he knew Patterson and that the plaintiff was his aunt. He stated that after obtaining judgment, Patterson did not satisfy the decree and his then advocate instructed an auctioneer to execute the decree. He added that the auctioneer (Expeditious General Merchants) did not inform him Parcel No. 2607 was jointly owned. He testified that he was the highest bidder in the auction conducted in 2004. He contended that at the time of bidding, the plaintiff's objection to the attachment had been dismissed.

10. DW1 stated that Parcel No. 2607 was sold at Kshs 2,000,000/- and the balance of the money was released to Patterson. He further testified that the plaintiff and her husband were on the suit property when the land was surveyed. His evidence was that they had been evicted from Parcel No. 2607 in 2005 but returned and that he tried to evict them again in 2014.

11. During cross-examination, DW1 testified that the sale agreement he signed with Patterson contained the title number of Parcel No. 2607 which could have made an official search possible. He stated that the plaintiff was not captured in the sale agreement as a co-owner. He added that he did not carry out an official search and was not aware that Parcel No. 2607 was jointly owned. DW1 stated that he became aware of the joint ownership when Patterson was unable to transfer the portion he had purchased soon after signing the agreement in November 2000. He then approached the plaintiff whom he said was hostile and declined to discuss the sale. Consequently, he instituted Milimani CMCC 9881 of 2002.

12. DW1 further confirmed that at the time of filing Milimani CMCC 9881 of 2002, he was aware that Parcel Number 2607 was registered in the joint names of the plaintiff and her husband. He also testified that the plaintiff objected to the attachment on the grounds that she was a co-owner of Parcel No. 2607. He reiterated that the suit in the magistrate court proceeded when Patterson was serving a jail term. He stated that the notification for sale contained the plaintiff's interests as a joint owner and it also identified an encumbrance by Watiri Karori and Jenifer Watiri.

13. DW1 could not tell if the plaintiff was served with the notification of sale. He testified that he did not involve the plaintiff in the subdivision of Plot No. 2607 which was already in his name. He added that at the time of selling the suit properties, the plaintiff and her husband were in possession and the 2nd and 3rd defendants were aware of this fact. The evidence of DW1 was that all the eviction orders were directed at Patterson Njoroge and not the plaintiff.

14. In re-examination, DW1 stated that he was unable to conduct an official search because Paterson did not have a title. He stated that there were 4 portions of the suit property with beacons but with no fence marking the four portions. He also testified that there was a house on the suit property where the plaintiff lived with her husband. It was the evidence of DW1 that he did not disclose the plaintiff's claim to the 2nd and 3rd defendants at the time of subdivision since he had a title in his name. Lastly, he testified that the 2nd and 3rd defendants viewed the suit properties while the plaintiff and her family were living on the suit property.

15. The 2nd defendant (DW2) adopted his written statement dated 17th September 2015 as his sworn evidence in chief and relied on documents produced by DW1. He stated that by the time they bought the property, people were living on the property. He said they bought the first two plots in October 2004 and subsequently bought the other two plots in April 2006. He added that at the time of purchase, he knew Patterson who was living on the suit properties with his family but did not have any conversation with them. He said he discussed the issue of people living on the suit property with the 1st defendant who showed him the eviction order. He said he conducted an official search prior to purchasing the property.

16. During cross-examination, DW2 informed the court that he knew the history of the property they were purchasing as the 1st defendant had availed to him the proceedings and court documents in Milimani CMCC No. 9881 of 2002 together with the notification of sale by auction. He stated that he never obtained an eviction order against the plaintiff. DW1's evidence was that he requested Patterson to move out because he did not want to appear to be insensitive.

Submissions

17. The plaintiff filed submissions dated 11th November 2017 in which she identified three issues for determination namely: (i) the legality of transfer of Parcel No. 2607 and the subsequent subdivisions; (ii) the legitimacy of ownership of the subdivisions from Parcel No. 2607 by the 2nd and 3rd defendants viz a viz the doctrine of innocent purchaser for value; and (iii) the appropriate reliefs available.

18. While observing that Parcel No. 2607 was registered in the joint names of the plaintiff and her husband, counsel relied on Section 102 of the Registered Land Act (repealed) for the submission that any disposition could only have been made by all the joint proprietors.

19. It was the plaintiff's submission that parties involved in the transfer were cognizant of her rights as a co-owner. She stated that this fact was evidenced by the notification of sale by public auction which named her as an owner and the objection proceedings she lodged in CMCC No. 9881 of 2002. Counsel submitted that despite knowledge of her registered interest in the property, the 1st defendant proceeded to dispose Parcel No. 2607 without regard to her. Reliance was placed on Section 30(f) of the Registered Land Act (repealed) and the provisions of Order XXI of the Civil Procedure Rules (Repealed by Order 22) and it was argued that the suit property was not available for auction. Counsel submitted that the subdivision was intended to create third party rights to conceal the irregularities.

20. The plaintiff relied on the case of **Mugo Muiru Investment v EWB & 2 others (2017)eKLR** where it was stated that a married spouses unregistered proprietary interest in the matrimonial home was in common law an overriding interest superseding any registered instrument conveying title in the matrimonial interest. Reference was also made to **Halsburys Laws of England 4th Edition Vol 39** which states that a joint tenant may not part with the title deed of the property without the consent of the other. Counsel submitted that the defendants' act of dispossessing the plaintiff was null and void. Counsel further relied on the case of **Macfoy v United Africa Co. Ltd (1961)3All ER**.

21. In further submissions, the plaintiff argued that the doctrine of innocent purchaser is not absolute and cannot protect a purchaser who had notice of the irregularities. The case of **Kaniki Karisa Kaniki v Commercial Bank Ltd & 3 others (2016) eKLR** and **Williams Glyn's Bank v Boland(1979) 2ALL ER** were relied on for the submission that a purchaser who had knowledge of a wife's interest takes the land subject to the wife's interest. The court was also referred to Section 26 of the Land Registration Act, Section 143 of the Registered Land Act (repealed), the case of **Elijah Makeri Nyangwara v Stephen Njuguna & another (2013) eKLR**, **Munyu Maina v Hiram Gathiha Maina (2013)eKLR** and **Maingi Mutisya Nzioka v Mbuki Kisavi (2014) eKLR** in which the Court of Appeal stated that a party who obtains property fraudulently holds the property in trust for the party injured by the fraud.

22. The defendants filed joint submissions dated 15th January 2018 in which they submitted that the plaintiff had not adduced any evidence to link the 2nd and 3rd defendant to the alleged fraud. They cited the case of **Okere v Kiiyukia (2007) 1EA 304** and **Katende v Haridas & Co. limited (2008)2EA** for the submission that fraud must be specifically pleaded and proved on a standard higher than a balance of probabilities but lower than beyond reasonable doubt. The 1st defendant argued that he relied on the lower court's finding that the plaintiff had not proved any interest in the land and that the plaintiff did not pursue the matter further after her objections was dismissed.

23. Counsel submitted that the 2nd and the 3rd defendant had no notice of the plaintiff's interest and had no reason to doubt a court sanctioned process and were therefore *bonafide* purchasers as defined in **Katende v Haridas & Company Ltd**. They cited Section 26 of the Land Registration Act and submitted that the plaintiff had failed to establish fraud, misrepresentation, illegality or corrupt scheme and they urged the court to uphold titles registered in their favour.

24. Counsel placed reliance on the cases of Charles **Karathe Kiarie and others v Administrators of John Wallace Mathare (deceased) and 5 others, Eunice Grace Njambi Kamau and David Peterson Kiengo & 2 others v Kariuki Thuo (2012) eKLR** for the submission that the defendants' titles were indefeasible and could only be defeated by proof of fraud or misrepresentation to which the defendants were parties. Lastly, it was submitted that the plaintiff slept on her rights and therefore acquiesced to the transactions leading to transfer of the properties in their favour and the case of **Serah Njoroge Mwobi Vs John Kimani Njoroge (2013) eKLR** was relied upon.

Determination

25. I have considered the parties' pleadings, evidence, submissions and cited authorities. I have also considered the prevailing statutory framework at the time the cause of action accrued. Three issues fall for determination in this suit. The first issue is whether this suit is *res judicata*. The second issue relates to the legality and validity of the sale of Parcel Number Kiambaa/Kihara/2607 in execution of the decree

procured by the 1st defendant against Patterson Karori Njoroge. The third issue is whether the 2nd and 3rd defendants were innocent purchasers for value without any knowledge of the plaintiff's interest in the suit property.

26. The first issue is whether the suit herein is *res judicata*. The cause of action in the present suit is predicated upon the sale of Land Title Number Kiambaa/Kihara/2607 by the 1st defendant in execution of a decree directed against one of the joint owners of the suit property, Patterson Karori Njoroge. The plaintiff's case is that the sale and transfer were unlawful because she was not a judgment debtor in the suit giving rise to the decree. I have carefully examined the evidence presented by the parties. There is no evidence that the issue as to whether the sale and transfer of the suit property was lawful or not was heard and determined by any court of competent jurisdiction. The Magistrate Court did not hear and determine the question of validity of the sale and transfer of the suit property by the 1st defendant. Consequently, it is my finding that the defence of *res judicata* has no basis in the present suit.

27. The second issue relates to the legality and validity of the sale of the suit property in execution of a decree against Patterson Karori Njoroge. It is not contested that at all material times, Parcel Number Kiambaa/Kihara/2607 was jointly registered in the names of Patterson Karori Njoroge and Nancy Nyambura Karori (the plaintiff). It is also not in contest that the judgment and decree which the 1st defendant purported to execute by selling the jointly owned property was directed against only one of the joint proprietors, Patterson Karori Njoroge. The 1st defendant's attention was properly drawn to the fact that the plaintiff was a joint owner of the suit property but the 1st defendant ignored the legal implications of the joint ownership and proceeded to sell the property to himself as decree-holder cum purchaser. He thereafter proceeded to subdivide the suit property and sold it to neighbours to the plaintiff.

28. My understanding of the law relating to execution of a monetary decree and transfer of land pursuant to a monetary decree is, firstly, that the decree is directed against a specified judgment debtor, requiring the judgment debtor to satisfy the decree. Execution of the decree is restricted to the judgment debtor. Unless a court order is procured permitting severance of the joint interest of the joint owners, the decree holder cannot sell a jointly owned land. To purport to attach and sell land which is jointly owned by the judgment debtor together with another person who is herself not a judgment debtor in the suit was, in my view, illegal. It is clear from paragraph 6 of the 1st defendant's plaint in Nairobi CMCC 9881 of 2002 that he knew that the suit property was jointly owned by Patterson and the plaintiff herein. It is for this reason that he sued for a refund of Kshs 734,000 which he had paid to Patterson as purchase price as opposed to an order of specific performance. To subsequently turn against the same property and purport to sell and purchase it with total disregard to the Plaintiff's recognized interest as a joint registered proprietor was, without doubt, unlawful.

29. Secondly, the decree in Nairobi CMCC 9881 of 2002 did not in any way challenge the plaintiff's joint title to the suit property. The plaintiff was not a judgment debtor in the decree. It therefore follows that the Land Registrar had absolutely no legal basis for altering the register of a jointly held parcel of land. He did not have any valid decree upon which he was entitled to deregister the plaintiff as a joint proprietor of the suit property. Alteration of the land register by the registrar was therefore illegal.

30. The defendants have taken the position that the auction of the suit property was sanctioned by the court and that the plaintiff's objection was dismissed. I do not agree with them. The 1st defendant held a monetary decree against Patterson. He was obligated by law to execute the decree against Patterson. He had no right to execute it against the plaintiff. The Chief Magistrate Court did not decree that the judgment be executed against the plaintiff. The plaintiff's objection was a protestation to the 1st defendant to the effect that he was engaged in illegalities. The 1st defendant ignored that protestation and proceeded to actualize his illegal actions. In my view, a proper cause of action accrued upon the illegal sale and purchase of the suit property by the 1st defendant.

31. The Court's finding on the legality and validity of the sale of the suit property as an execution measure is that the same was illegal and invalid and cannot be said to have been a proper execution of the decree in Nairobi CMCC 9881 of 2002.

32. The third issue is whether the 2nd and 3rd defendants were innocent purchasers for value protected under the statute. The 2nd defendant testified that by the time he bought the suit property people were living on it. He further testified that he knew Mr Patterson was living on the suit property with his family but did not talk to them about the intended purchase. He further stated that he knew the history of the suit property and that the 1st defendant showed him court documents relating to Nairobi CMCC 9881 of 2002. On her part, the plaintiff testified that the 2nd and 3rd defendants lived 300 meters away from the suit property and knew the 1st defendant had illegally transferred the suit property to himself. She further testified that the 2nd and 3rd defendants ran a school in the same neighbourhood. Further, she stated that her family lived on the suit property and her children had caused cautions to be registered against the title.

33. From the foregoing evidence, it is apparent that the 2nd and 3rd defendants had prior knowledge of the history of the suit property and were aware of the plaintiff interest in the suit property. They were also aware that the plaintiff lived on the suit property. They had the opportunity to establish the validity of the 1st defendant's auction of the joint title to himself in execution of the decree directed against only one joint owner. They elected to be part of a scheme to perpetuate illegalities. It is therefore the Court's finding that they are not innocent purchasers for value. Their current titles are therefore impeachable.

34. The totality of the above findings is that the plaintiff has proved her case on a balance of probabilities. I accordingly issue the following orders in tandem with the prayers made in the plaint.

a) It is hereby declared that the plaintiff, Nancy Nyambura Karori, is a bonafide co-proprietor of Land Title Number Kiambaa/Kihara/2607 and the subdivision of the said Title into Kiambaa/Kihara/3607, Kiambaa/Kihara/3608, Kiambaa/Kihara/3609 and Kiambaa/Kihara/3610 together with the titles issued in favour of the 2nd and 3rd defendants are null and void.

b) It is hereby declared that Title Nos Kiambaa/Kihara/3607, Kiambaa/Kihara/3608, Kiambaa/ Kihara/3609; and Kiambaa/Kiahara/3610 issued in favour of the 2nd and 3rd defendants were acquired illegally and unprocedurally.

c) A permanent injunction is hereby issued restraining the defendants together with their agents/servants against interfering with the plaintiff's quiet possession of the suit property.

d) An order is hereby issued directing the Land Registrar to cancel the mutation of Parcel Number Kiambaa/Kihara/2607 into Kiambaa/Kihara/3607; Kiambaa/Kihara/3608; Kiambaa/Kihara/3609 and Kiambaa/3610 together with the resultant registers and titles.

e) The Plaintiff shall have costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17th DAY OF SEPTEMBER 2018.

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B M EBOSO

JUDGE

In the presence of:-

Mr. Maingi Advocate for the Plaintiff

Ms Kangethe Advocate for the Defendant

June Nafula Court clerk