



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 146 OF 2017

KAMAU JAMES NJENDUPLAINTIFF

VERSUS

SERAH WANJIRU1st DEFENDANT

REGISTARAR OF TITLES-NYANDARUA2nd DEFENDANT

JUDGEMENT

1. The plaintiff in this matter filed his Complaint on the 4th February 2014 in the Environment and Land Court at Nakuru in which he sought for the following orders against the Defendants.

- i. A permanent injunction restraining the Defendants or any of them by themselves, their servants, employees and/or agents from dispossessing the Plaintiff of the suit property, entering into occupying, evicting the Plaintiffs' agents, employees and/or servants, constructing, fencing, selling, leasing, disposing any interest of and/or undertaking any development or in any other way interfering with the property and/or the Plaintiffs' quiet possession and enjoyment of the suit property known as Nyandarua/Mutonyora/565.
- ii. A declaration that the 1st Defendant's purported title to Nyandarua/Mutonyora/565 is illegal. Null and void and does not confer any proprietary interest upon the 1st Defendant or any other person.
- iii. A declaration that the Plaintiff is the bona fide owner of Nyandarua/Mutonyora/565.
- iv. An order directing the second Defendant to rectify its register and to nullify the 1st Defendant's registration in respect to that entire parcel known as Nyandarua/Mutonyora/565.
- v. An order for vacant possession against the Defendant by themselves their employees, agents, and/or servants.
- vi. Costs of the suit plus interest.

2. Together with the Complaint, the Plaintiff filed an application for interim orders of injunction restraining the Defendant from occupying the suit land or disposing of the Plaintiff or in any other way interfering with the suit property, pending hearing and determination of this suit.

3. It is worth noting that whereas the 2nd Defendant was served appropriately, the 1st Defendant could not be traced wherein the Plaintiff sought for leave of the court to serve her by way of substituted service. Leave was granted on the 2nd April 2014. The pleadings as well as summons to Enter Appearance were served upon the 1st Defendant through the star Newspaper dated the 12th/13th April 2014.

4. On the day the Application was to be heard interparty, none of the defendants had filed any papers to oppose the application, indeed the State Counsel from the office of the Hon Attorney General confirmed that the Application was not opposed. The same having not been opposed by either party, the Plaintiff obtained the said interim orders vide a ruling delivered on the 5th day of March 2015. A hearing date for the main suit was thus fixed for the 5th November 2015 with notice to issue. There were further orders that the 1st Defendant to be served by registered post.

5. Following the above orders, the 2nd Defendant was served with the hearing notice wherein they filed their defence on the 6th May 2015.

6. Subsequently the matter was transferred from the Environment and Land Court at Nakuru to this court. The Plaintiff filed his application on the 3rd October 2017 seeking for judgment to be entered against the 1st Defendant pursuant to Order 10 rule 4 of the Civil Procedure Rules, for neither entering appearance nor filing her statement of defence within the stipulated time.

7. Judgment was entered against the 1st Defendant on the 21st November 2017. By consent, the matter fixed was for hearing for the 15th February 2017 on which day the matter proceeded ex-parte, the date having been taken by consent and the 1st Defendant having failed to attend court.

The Plaintiffs case

8. It was the Plaintiff's case that in the year 1993 he was issued with a letter of offer for the suit land dated the 23rd July 1993, which he produced as Pf Exh 1. That he accepted the offer and was to make payments for discharge of the land from the Settlement Fund Trustees.

9. That on the 1st November 1993, vide receipt No. 669578, Pf Exh 2, he made a payment of Ksh 3,330/= for outright purchase wherein he was issued with a certificate of outright purchase, Pf Exh 3, dated the 8th December 1993 which was then followed with a discharge of charge dated the 4th August 1998, Pf Exh 4.

10. The Plaintiff testified that he was subsequently issued with a transfer of land dated the 15th May 2006, Pf Exh 5 which documents were presented to the Land's office at Nyahururu wherein they were registered and he was issued with his title deed dated the 7th October 2008, Pf Exh 6. The court upon comparing copies of the said title deed with the original copy, accepted the certified copy as an exhibit and returned the original to the Plaintiff for safe keeping.

11. The Plaintiff further testified that he had made other payments including the payment of ksh. 3,000/= for stamp duty on the 15th May 2006 Pf Exh 7, Ksh 250/= vide receipt No 0311198 dated the 15th May 2001 being payment for the certificate, Pf Exh 8.

12. That after he had received the title deed, he took possession of the suit land by placing a caretaker thereon since he worked in Mombasa. In the year 2013 however, he received a phone call from his caretaker informing him that a lady had gone on the suit land accompanied with some people wherein she had claimed ownership of the land and that she intended to sell the same to the people accompanying her.

13. When the Plaintiff received the said information he went to the Lands office and conducted a search thereon on the 29th November 2013 only to discover from the search certificate Pf Exh 9, that the suit land had been registered in the name of the 1st Defendant on the 14th March 2012.

14. It was the Plaintiff' evidence that he did not know the 1st Defendant herein that he had neither sold nor transferred the suit land to anybody and was still in possession of the original title. That the transfer of title to the 1st Defendant was therefore illegal.

15. That vide a letter dated the 29th January 2014, Pf Exh 10, he raised his concern with the Chief Registrar which had elucidated no response.

16. The plaintiff prayed for orders to issue as prayed in his plaint and closed his case.

17. Counsel for the Plaintiff then filed his submissions on the 6th March 2018 wherein he reiterated the evidence adduced in court. There was however further submission that for a parcel of land to have been lawfully and legally transferred, the registered proprietors ought to have surrendered the original title deed, signed the transfer witnessed by and advocate as well as to have executed all relevant documents that pertain transfer of land in the present case, none of these documents were ever executed by the Plaintiff.

18. Counsel further submitted that both the transferor and transferee did not appear before the Land Control Board for consent to transfer more so because the suit land is an agricultural land governed by the provisions of the Land Control Act.

19. That the Plaintiff's evidence was uncontroverted and unchallenged and that the same proved particulars of fraud and illegality on the part of the Defendants resulting into the illegal transfer of the Plaintiff's land to the 1st Defendant. That since the Plaintiff confirmed that he was in possession of the suit land, they prayed for orders sought in their plaint save for prayer (e) which was a prayer for eviction and which did not arise in the present circumstance.

Determination.

20. I have carefully considered the Plaintiff's claim against defendants, the evidence, submissions as well as the law applicable thereto. I find the matter arising for determination thereto as being

- i. Whether the present suit as against the Defendants is sustainable in the law.
- ii. Whether the Plaintiff is the bona fide owner of Nyandarua/Mutonyora/565.
- iii. Whether 2nd Defendant should be ordered to rectify its register in regard to parcel known as Nyandarua/Mutonyora/565

21. It is evident that the 1st Defendant herein was served with summons to 1st appearance wherein she neither entered appearance nor filed any defence. Wherein the Plaintiff applied for interlocutory judgment to be entered against her which was duly entered. That whereas the 2nd Defendant entered their appearance and filed their defence denying the Plaintiff's claim in its entirety. They were given time to file their statements and/or documents but failed to do so. They also failed to attend court to defend the case. The Plaintiff's suit is therefore

undefended. However, even though the suit was not defended, the Plaintiff still had the duty to formally prove his case on a balance of probability as required by law.

22. The suit was commenced by way of plaint filed on the 4th February 2014. The Plaintiff's claim is that he was allocated plot No 565 in Mutonyoro Settlement scheme which later became Nyandarua/Mutonyora/565 by virtue of the deed issued to him on the 7th October 2007 upon registration.

23. That he had taken possession of the land by putting a caretaker on the same. Later he was informed that the 1st Defendant had claimed ownership of the said land wherein he had conducted a search at the lands registry only to discover that the suit land had been registered in the 1st Defendant's name.

24. It was the Plaintiff's case that the 1st Defendant's title was obtained fraudulently in collusion with the 2nd Defendant. The plaintiff thus prayed for cancellation of the 1st Defendant's title.

25. In essence therefore I find that there could have been double allotment of the suit land and the blame would therefore lay squarely on the Settlement Fund Trustee. In the case of *M'Ikiara M'Rinkanya & Another –v- Gilbert Kabeere M'Mbijiwe, (1982-1988) 1KAR 196*, the court held that where there was a double allocation of land, the first allotment would prevail. That therefore there was no power to allot the same property again. (See also *Kariuki –v- Kariuki (1982-88) KAR 26/79 and Otieno and Matsanga, (2003) KLR 210*. In this case however since the case was not defended by the 1st Defendant, the court would not be in a position to know whether there was double allocation or whether this was a case of competing titles.

26. In the case of **Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others[2016] eKLR**, Munyao J held as follows;

'A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.'

27. The evidence tabled by the Plaintiff through supporting documents, was that he was issued with a letter of offer for the suit land dated the 23rd July 1993. That after making the necessary payments, he was issued with a transfer of land dated the 15th May 2006, which documents were presented to the Land's office at Nyahururu wherein they were registered and he was issued with his title deed dated the 7th October 2008. From the Plaintiff's annexures, it is evident that the root of his title can be traced.

28. Further evidence was that when the 1st Defendant appeared on the suit land claiming ownership of the same, the Plaintiff had conducted a search at the lands registry on the 29th November 2013 only to discover from the search certificate that the suit land had been registered in the name of the 1st Defendant on the 14th March 2012. No evidence was tendered by either of the defendants as to how the issuance of the second title came to be. Secondly the suit land, being an agricultural land governed by the provisions of the Land Control Act, there was no evidence that parties had appeared before the Land Control Board for consent to transfer the same as is required under Section 6 and 7 of the Land Control Act, Cap 302 Laws of Kenya. The Plaintiff herein was still in possession of the original title.

29. Needless to say that whereas the plaintiff herein obtained his certificates of title on 7th October 2008, the 1st Defendant was registered as proprietor of the suit properties on 14th March 2012. It is trite law that when there are two competing titles, the first in time will prevail. This position was emphasized in the case of **Wreck Motors Enterprises vs. The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997**, where the court held that:

'Where there are two competing titles the one registered earlier is the one that takes priority'

30. The same position was held in the case of **Gitwany Investment Ltd vs. Tajmal Ltd & 3 Others (2006) eKLR** where the Court held that:-

'...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail'

31. I find that the Plaintiff's title was the first in time and as equity teaches in its maxim that; **"when two equities are equal, the first in time prevails"**, then the Plaintiff's title deed was the first in time and should prevail there having been no evidence called by the Defendants to challenge the same. No evidence was called to confirm how the 2nd title deed came into being and whether the title deed held by the 1st Defendant was genuine or not.

32. Ordinarily, no land should be registered more than once and having two separate title deeds held by separate persons. Therefore in this case, there must be one title deed which is genuine and one which was issued either unlawfully or through mistake and thus double allocation.

33. Balancing the two competing titles, it is my view that the Plaintiff holds good title to the suit property. The title of the 1st Defendant in my view, and in the absence of evidence to rebut the same, could only have been obtained either by the fraud, or by the mistake of the Land Registry, or both.

34. I note that these properties were registered under the repealed Registered Land Act which is now governed by The Land Act, 2012 and The Land Registration Act, 2012. Indeed the law is very clear on the position of a holder of a title deed in respect of land. **Section 26(1)** of the **Land Registration Act** provides as follows:

“the Certificate of Title issued by the Registrar upon registration, 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 the 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

b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

35. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

36. The 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, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.

37. The Court of Appeal in the case of **Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR**, held as follows:

‘We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.’

38. Section 80 (1) of the Land Registration Act provides that:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

39. From the above provisions it is clear that the court has powers to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

40. That said and done I hold that the Plaintiff has proved his case on a balance of probabilities and is entitled to the prayers sought in the plaint. Consequently, I hereby enter judgment for the plaintiff against the Defendants in the following terms:

i. A permanent injunction is herein issued restraining the Defendants or any of them by themselves, their servants, employees and/or agents from dispossessing the Plaintiff of the suit property, entering into occupying, evicting the Plaintiffs’ agents, employees and/or servants, constructing, fencing, selling, leasing, disposing any interest of and/or undertaking any development or in any other way interfering with the property and/or the Plaintiffs’ quiet possession and enjoyment of the suit property known as Nyandarua/Mutonyora/565.

ii. A declaration that the 1st Defendant’s purported title to Nyandarua/Mutonyora/565 is illegal. Null and void and does not confer any proprietary interest upon the 1st Defendant or any other person.

iii. A declaration that the Plaintiff is the bona fide owner of Nyandarua/Mutonyora/565.

iv. An order directing the second Defendant to rectify its register and to nullify the 1st Defendant’s registration in respect to that entire parcel known as Nyandarua/Mutonyora/565.

v. Costs of the suit plus interest at a lower rate since the same was undefended.

Dated and delivered at Nyahuru this 16th day of October 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE