



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 87 OF 2014

JAMES KITHAKA KIARAGO.....PLAINTIFF

VERSUS

DUNCAN NEWTON NYAGA NJAGI.....1ST DEFENDANT

SELAVIN CILITY MAGAMBO.....2ND DEFENDANT

THE LAND REGISTRAR EMBU LAND REGISTRY.....3RD DEFENDANT

JUDGEMENT

1. By a plaint dated and filed on 31st August 2012, the Plaintiff sought the following reliefs as against the Defendants;

a) A declaration that the certificates of title issued by the 3rd Defendant to the 1st and 2nd Defendants are invalid and/or are of no legal consequence/effect (worthless), cancellation thereof, and restoration, reversal of the illegal entries in the land register and/or vesting back of the proprietary interests in the land to the Plaintiff and the production of the original title during such vesting/restoration and/or reversal of the illegal entries in the land register be dispensed with, delivery to him of vacant possession thereof, and if need be, by forcible eviction by court bailiff assisted by police at her expense, mesne profits for loss of user, value of the assorted trees cut and general damages for trespass. (sic)

b) Costs of the suit.

2. It was pleaded that at all material times, the Plaintiff was the registered proprietor of all that parcel of land known as *Title No. Ngandori/Kangaru/T.239* (hereinafter called the *suit property*) and was issued with a certificate of title in 1976. The Plaintiff further pleaded that the 1st Defendant had fraudulently and illegally caused the suit property to be registered in his name in consequence of which he sold and transferred the same to the 2nd Defendant.

3. The particulars of fraud, illegality, irregularity and misrepresentation were pleaded in paragraph 10 of the plaint as follows;

a) Colluding to have the land transferred and registered in the 1st and 2nd Defendant's names secretly and behind the Plaintiff's back.

b) Dishonestly acquiring the land.

c) Misleading and/or misrepresenting facts to the Embu Municipality Land Control Board and the Land Registration Office/Land Registry, Embu to register the transfer and issue title deed for the land in favour of the 1st Defendant and now in the 2nd Defendant.

d) Shamelessly, defrauding the Plaintiff of his land.

e) Violating his constitutional right to property (Article 40 of the Constitution of Kenya, 2010).

f) Putting the Plaintiff's bid for his land in a precarious position.

4. The 1st Defendant filed a written statement of defence dated 2nd May 2013 in which he denied the Plaintiff's claim. He denied the alleged fraud, illegality and misrepresentation. The 1st Defendant stated that all statutory formalities were complied with before the suit property was transferred to him by the Plaintiff. The 1st Defendant did not specifically plead that the Plaintiff had given him the suit property as a gift.

5. The 2nd Defendant filed a statement of defence dated 29th April 2013 in which she denied the Plaintiff's claim. She denied the allegations of fraud, illegality and misrepresentation. She further pleaded that she had lawfully bought the suit property from the 1st Defendant vide a sale agreement dated 10th December 2009 hence she was the absolute owner thereof.

6. The 3rd Defendant filed a statement of defence dated 2nd March 2014 which was quite evasive. The 3rd Defendant pleaded that it was a stranger to most of the allegations contained in the plaint. It was stated that at the time the impugned transactions were taking place, there was some restructuring being undertaken to separate the Embu and Mbeere Land Registries. The 3rd Defendant, however, admitted that the Plaintiff made a complaint at the Land Registry regarding the impugned transactions.

7. A perusal of the record reveals that the 2nd Defendant herein had also filed a plaint dated 27th June 2012 against the Plaintiff herein in *Embu CMCC No. 127 of 2012*. She sought the following reliefs against the Plaintiff;

a) A permanent injunction restraining the Defendant, its agents, employees, representatives, and/or anybody claiming through them from threatening to evict, selling, alienating, transferring, sub-letting, parting with possession or in any other way dealing with Land Parcel Ngandori/Kangaru/T.239 and any prohibition and or cautions registered against it by the Defendant be vacated and or removed.

b) Costs of this suit and interest.

c) Any other relief that this honourable court may deem fit and just to grant.

8. The basis of the said suit was that the Plaintiff had registered a caution against the suit property and had also threatened to forcefully evict the 2nd Defendant and to alienate the suit property without lawful justification. The Plaintiff herein filed a defence reiterating the contents of his plaint in the instant suit.

9. The record further shows that the said suit was transferred to the Environment and Land Court and consolidated with the instant suit. The order for consolidation was made on 24th April 2013 by the Hon Justice Boaz Olao.

10. At the trial hereof, the Plaintiff testified on his own behalf as the sole witness and closed his case. His testimony reiterated the contents of his plaint. He adopted his witness statement dated 13th September 2017 as his sworn testimony. The summary of the Plaintiff's case was that he never transferred the suit property to the 1st Defendant as a gift or at all. He did not appear before the Land Control Board (LCB) for consent to transfer. He did not sign any transfer documents hence the 1st Defendant must have obtained registration of the suit property through fraud, illegality and misrepresentation. He, therefore, wanted his land back.

11. The 1st Defendant, on the other hand, adopted his witness statement dated 9th November 2017 as his sworn testimony. The gist of his defence was that he was given the suit property as a gift by the Plaintiff who is his uncle. Later on, he sold the suit property to the 2nd Defendant since he was the registered owner at the material time.

12. The 2nd Defendant testified on her own behalf as the sole witness and closed her case. She adopted her witness statement dated 9th November 2017 as her sworn testimony. Her evidence was rather straightforward and non-controversial. The gist of her defence was simply that she bought the suit property from the 1st Defendant vide a sale agreement dated 10th December 2009. The 1st Defendant was the registered owner at the material time.

13. The 3rd Defendant called a Land Registrar from the Lands Office at Embu. She was called Millicent Wangare Kariuki. Her evidence was that the land register for the suit property was opened in 1970 when the Plaintiff was registered as proprietor. In 2008, the proprietor transferred the suit property to the 1st Defendant as a gift and that in 2009, the 1st Defendant transferred it to the 2nd Defendant by way of sale. During cross-examination by the Plaintiff's counsel, she stated that she did not have copies of the application for Land Control Board consent, the Land Control Board consent or the transfer form in their records at the registry. She, however, insisted that those documents must have been available at the time of transfer of the suit property.

14. The court has noted that the parties did not file an agreed statement of issues. They prepared and filed separate statements. The court shall, therefore, frame the issues for determination in accordance with the provisions of **Order 15 Rule 2 of the Civil Procedure Rules**.

15. The court has considered the pleadings, the evidence of the parties as well as the documents on record. In the opinion of the court, the following arise from determination in this suit;

a) Whether the 1st Defendant obtained registration of the suit property as a gift from the Plaintiff or through fraud, misrepresentation and illegality.

b) Whether the 2nd Defendant obtained a good and valid title to the suit property.

c) Whether the Plaintiff is entitled to the reliefs sought in the plaint.

d) Whether the 2nd Defendant is entitled to the relief sought in her suit which was consolidated with the instant suit.

e) Who shall bear the costs of the suit.

16. The court has considered the evidence on record on the 1st issue. Although the 1st Defendant claimed that he was given the suit property by the Plaintiff as a gift, there was no evidence to support this allegation. He did not produce copies of the documents which would have shed light on this issue such as the application for consent of the Land Control Board, the consent of the Land Control Board and the transfer form. On the contrary, the Plaintiff who was said to be the donor completely denied having given away his land to the 1st Defendant as a gift. He denied having applied for or having obtained consent of the Land Control Board to transfer it to the 1st Defendant as a gift. He denied having signed any transfer form at all. The court observed the demeanor of the Plaintiff at the trial hereof and was satisfied that the Plaintiff was an honest and credible witness.

17. The court has also noted from the proceedings of *Embu CR Case No. 980 of 2010* that when the 1st Defendant was entering into a sale agreement with the 2nd Defendant for the sale of the suit property, he was in the company of his father and brother. Those two were not called as witnesses to shed light on the alleged gift of the suit property to the 1st Defendant. It would be expected that in the ordinary course of things, a father would know when his child has been gifted a parcel of land by his relative.

18. The final reason why the court is convinced that the 1st Defendant was not gifted the suit property is the following. The Land Registrar was unable to produce the instruments which were used in the transfer of the suit property to the 1st Defendant. The Registrar would ordinarily keep such documents in a parcel file. It was the evidence of DW 3 that she was unable to trace the documents from the Land Control Board or the transfer form at the registry. There was no indication from DW 3 whether the original land certificate issued to the Plaintiff was surrendered to the registry before the transfer to the 1st Defendant was registered. And, if not, there was no indication if the formalities for gazetment of lost title documents was followed.

19. In view of the foregoing, the inevitable conclusion the court would make is that the 1st Defendant must have acquired the suit property through some fraudulent and illegal means. The transfer form must have been a complete forgery. The court is, therefore, satisfied that the 1st Defendant's acquisition of the suit property was fraudulent and unlawful.

20. The 2nd issue is whether the 2nd Defendant obtained a good and valid title to the suit property. The court has already held that the 1st Defendant acquired the suit property through illegal means. He acquired the suit property through criminal conduct and forgery of documents. The Plaintiff did not apply for consent of the Land Control Board to convey the suit property to him. The Plaintiff did not, likewise, sign any transfer form in favour of the 1st Defendant. Whatever documents the 1st Defendant presented for registration purporting to have been signed by the Plaintiff must have been complete forgeries.

21. In those circumstances, the 1st Defendant did not obtain a good and valid title hence he could not convey any legitimate interest upon the 2nd Defendant through his criminal activities. The provisions of section 26 (1) of the Land Registration Act, 2012 provide as follows;

“2 (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.

22. It is thus clear that whereas **section 26 (1) (a)** requires the proprietor to have been privy to fraud, paragraph (b) does not require a proprietor to have been party to any illegality, irregularity or corrupt scheme before a court can cancel or nullify such certificate of title. See **Eldoret ELC case No. 609 B of 2012 Elijah Makeri Nyang'wara Vs Stephen Mungai Njuguna & Another [2013] eKLR**. The court is also aware that under the provisions of Article 40 (b) of the Constitution of Kenya 2010 any property which is found to have been unlawfully acquired is not accorded constitutional protection. The court, therefore, finds and holds that the 2nd Defendant did not obtain a good a valid title to the suit property. The 2nd Defendant shall not, however, be left without a remedy since she may seek compensation or damages from the 1st Defendant.

23. The 3rd issue is whether the Plaintiff is entitled to the reliefs sought in the plaint. The court has noted that the Plaintiff pleaded a combination of several distinct reliefs in the plaint. The reliefs included;

- a) A declaration that the certificates of title issued to the 1st and 2nd Defendants were invalid.
- b) An order for cancellation of the said certificates of title.
- c) An order for reversal of the illegal entries in the register and restoration of the Plaintiff as proprietor.
- d) That production of the certificate of title issued to the 2nd Defendant be dispensed with.
- e) An order for the 2nd Defendant to give vacant possession of the suit property in default of which forcible eviction be undertaken.
- f) *Mesne* profits for loss of user.
- d) Compensation for loss of assorted trees.

h) General damages for trespass.

24. The court is of the opinion that save as hereinafter specified, the Plaintiff is entitled to the reliefs sought in the plaint. The Plaintiff is entitled to such remedies for having proved his case against the Defendants to the required standard. The court is, however, not satisfied that the claim for *mesne* profits and compensation for the alleged loss of trees were proved. No cogent evidence was led to demonstrate how much money the Plaintiff may have reasonably made from the use of the suit property. No report or other material was placed before the court to demonstrate how many trees were lost and the value of such trees. The court is, therefore, unable to allow those two claims.

25. The court has carefully considered the Plaintiff's claim for general damages for trespass to land. The court is aware that trespass to land is a tort which is actionable *per se*. There is material evidence on record to demonstrate that the 1st Defendant was liable in trespass with respect to his illegal and criminal dealings with the suit property.

26. **Black's Law Dictionary (9th Edition)** defines trespass as;

a) **An unlawful act committed against the person or property of another.**

b) **A legal action for injuries resulting from an unlawful act of this kind.**

Black's Law Dictionary (supra) also makes reference to **R.F.V. Henston, Salmond on the Law of Torts (17th edition)**, and quotes the following passage;

“The term trespass has been used by lawyers and laymen in three senses of varying degrees of generality. (1) In its widest and original signification it includes any wrongful act – any infringement or transgression of the rule of right. The use is common in the Authorised Version of the Bible, and was presumably familiar when the version was first published. But it never obtained recognition in the technical language of the law, and is now archaic even in popular speech. (2) In a second and narrower signification – It's true legal sense – the term means any legal wrong for which the appropriate remedy was a writ of trespass – viz any direct and forcible injury to person, land, or chattels. (3) The third and narrowest meaning of the term is that in which, in accordance with popular speech, it is limited to one particular kind of trespass in the second sense – viz the tort of trespass to land (*trespass quare clausum fregit*). (Emphasis added).

27. The court is satisfied that the 1st Defendant's illegal and wrongful interference with the suit property constituted actionable trespass. The Plaintiff would be entitled to general damages for trespass to land. In the case of **Ochako Obincha Vs Zachary Oyoti Nyamongo [2018] eKLR** Mutungi J awarded the Plaintiff Kshs 100,000/- as nominal damages for trespass to land whereas in the case of **Duncan Nderitu Ndegwa Vs KPLC Ltd & Another [2015] eKLR** Nyamweya J awarded Kshs 100,000/- as general damages for trespass. Accordingly, the court awards the Plaintiff a sum of Kshs 100,000/- against the 1st Defendant only as damages for trespass to land.

28. The 4th question is whether the 2nd Defendant is entitled to the reliefs sought in her suit for removal of the caution against the suit property. In view of the court's findings and holdings hereinbefore, it would logically follow that the 2nd Defendant is not entitled to any relief as against the Plaintiff. The court has found that the Plaintiff was deprived of his ownership of the suit property through the illegal, fraudulent and criminal activities of the 1st Defendant. The Plaintiff is the legitimate owner of the suit property hence the 2nd Defendant is not entitled to the reliefs sought.

29. Before concluding this judgement, I would like to address two objections to production of documents which the 1st Defendant's advocate raised at the trial hereof. The court overruled both objections and reserved the reasons for the decision. The first objection was on production of an affidavit of loss of documents by the Plaintiff on the basis that it was served late and that the documents lost and O.B number had not been disclosed in the affidavit. A perusal of the said affidavit, however, reveals that those particulars were captured in the affidavit. In any event, any insufficiency in the contents of an affidavit would only affect its probative value and not its admissibility.

30. The second objection related to production of secondary evidence by the Plaintiff upon loss of the primary documents. The court did not find merit in such objection because the originals had been produced during the earlier hearing of the suit before the High Court. Those exhibits were only released to the Plaintiff on 13th July 2017 after directions to the effect that the suit shall be heard *de novo*. The 1st Defendant still had a chance to verify if the secondary documents were true copies of the originals produced earlier since the court had already agreed to adjourn the suit to another date for defence hearing.

31. The 5th and final issue relates to costs of the two consolidated suits. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. There is no good reason why the successful Plaintiff should not be awarded costs of the action. The Plaintiff shall, therefore, be accorded costs of the consolidated suits to be borne by the 1st Defendant who engineered the mischief which precipitated the proceedings. The 1st Defendant will also bear the costs of the 2nd Defendant.

32. The upshot of the foregoing is that the court finds merit in the Plaintiff's suit and the same shall accordingly be allowed. The claim by the 2nd Defendant for removal of the caution in original *Embu CMCC No. 127 of 2012* shall be dismissed. Accordingly, the court makes the following orders;

a) Judgement is hereby entered for the Plaintiff against the 1st and 2nd Defendants as prayed in the reliefs in paragraph (a) of the plaint save as qualified hereunder.

- b) The claim for *mesne* profits and compensation for the loss of trees is hereby declined.
- c) The Plaintiff is hereby awarded general damages of Kshs 100,000/- for trespass to land.
- d) The 2nd Defendant's suit for removal of the caution over the suit property is hereby dismissed.
- e) The 1st Defendant shall bear the costs of the Plaintiff as well as the 2nd Defendant's costs.

33. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 11th day of OCTOBER, 2018.

In the presence of the Plaintiff in person and in the absence of the Defendants and their advocates.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

11.10.18