



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 47 OF 2017

GABRIEL MACHARIA NJOROGE.....PLAINTIFF/APPLICANT

VS

THE LAND REGISTRAR MURANG'A

LANDS OFFICE.....1ST DEFENDANT/RESPONDENT

TITUS NYINGI NGAHU.....2ND DEFENDANT/RESPONDENT

RULING

1. The background of this case is that the Plaintiff filed suit against the Defendants seeking the following prayers;

- a) Cancellation of any fraudulent entries in the register of land parcel LOC.9/KIRURI/459 and the land to revert back to its original owner before the commissions of fraud namely to read Angelo Kanyuanjohi Macharia to enable Plaintiff file a Succession Cause.
- b) Interests and costs and damages of this suit.
- c) Any other relief this Honourable Court may deem fit to grant.

2. The 1st Defendant opposed the Plaintiff's claim and filed a statement of defence in which it denied the allegations of fraud and sought to put the Plaintiff to strict proof.

3. The 2nd Defendant on his part opposed the Plaintiff's claim and briefly stated in his amended statement of defence filed on 3/11/06 that he purchased the suit land from one Geoffrey Gachungu for a sum of Kshs. 2.4m and developed his matrimonial home thereon. That he is a bonafide purchaser for value without notice.

4. In compliance with Order II of the Civil Procedure Rules the 1st Defendant filed a list and bundle of documents on 19/10/17 listed as follows;

- a) Copy of Green Card – Loc.9/Kiruri/1261.
- b) Copy of Form of Registration of the Court order.
- c) Copy of Application for change of name.
- d) Copy of Caution – Kiruri /459.
- e) Copy of Application for Consent to the Land Board.
- f) Copy of searches and receipts.
- g) Copy of Title Deed – Loc.9/Kiruri/1262
- h) Copy of Area map.

i) Copy of Mutation Form.

5. The Plaintiff in response filed an application by way of Notice of Motion dated 15/12/2017 seeking the following orders;

a) The 1st Defendant list and bundle of documents filed on 19/10/2017 be expunged from Court record.

b) Alternatively, the said documents be declared irrelevant to these proceedings.

c) Costs of this application be in the cause.

6. The application is based on the grounds as stated below

a) The documents introduced to Court on 19/10/2017 have raised a new cause of action which was not present in the suit altering the whole suit.

b) The documents introduced on 19/10/2017 relate to a purchaser which will necessitate an amendment to the pleadings.

c) The documents introduced on 19/10/2017 contradict in totality the documents previously on record rendering the hearing cumbersome and almost impotent.

d) The documents introduced on 19/10/2017 are at a glance fraudulent.

e) The documents introduced on 19/10/2017 are only meant to derail due process and defeat justice.

f) If the said documents are not expunged from the Court record it shall cause the Applicant irreparable loss and the said document shall alter trial.

7. It is supported by the Supporting Affidavit of the Plaintiff/Applicant where he raised concerns as follows;

a) A green card attached thereto is a document the Land Registrar had previously stated by correspondence that it was missing and it has now suddenly been discovered.

b) The said attached green card is obviously hurriedly written, irregular and most probably fabricated as there is no way entry No 10 and 11 being title issued to Lydia Njoki Maguta on 10/10/2015 could have processed entry No 12 and 13 being title issued to Tirus Nyingi Ngahu on 17/12/2014 earlier than entry No 10 and 11.

c) The said entries must have been fabricated to cover up the cause of action and defeat suit.

d) The said entries No 10 would effectively mean the title has changed hands thus altering the cause of this suit information the 1st Defendant had every opportunity to provide at the time of amending defence, response to application dated 30/7/2015 and the defence at the time of preparing the bundle of documents at the stage of pre-trial but the 1st Defendant chose not to do so because the documents were probably not there and may have been fabricated.

e) The said green card does not capture the fact that the land had been charged with Barclays Bank of Kenya Limited as alleged by the Plaintiff and thereafter with Parliamentary Service Commission for 17,600,000/= as alleged by the Defendant.

8. Further he faulted the documents annexed to the list of the 1st Defendants bundle such as the green card and letter of consent approving transfers. He argued that allowing the documents will prejudice his case. According to him the documents still indicate that the land has never been discharged by Barclays Bank of Kenya Limited.

9. The application has been opposed by the 1st Defendant through the sworn Replying Affidavit filed on 20/3/2018 by one Nancy N. Njenga, the Land Registrar Murang'a. She argued that the 1st Defendant was sued and is within his right to respond to the Plaintiffs claims; the trial is yet to commence and therefore no prejudice will be occasioned to the Plaintiff during the discovery stage, as in this case; that the Plaintiff is yet to prove his case; this is an adversarial system and the 1st Defendant has just submitted its documents to the parties in the suit as is the practice in Kenya.

10. The 2nd Defendant opposed the application and filed a Replying Affidavit deponed by the 2nd Defendant where he stated that the application is unmerited and should be dismissed. That the Plaintiffs claim is based on allegations of fraud which he must proof within the required standard. The allegations of fraud must be tested against documentary proof or such evidence that the parties will produce in Court at the hearing. Stopping the 1st Defendant from producing the documents as listed in their list of bundles amounts to prematurely scuttling evidence before the trial begins. This he argued is an antithesis of a fair trial. That if the documents are expunged the foundation/stratum of the case will be removed. The right to be heard uncondemned is a cardinal rule of natural justice enshrined in the constitution and that expunging the documents will adversely impact on establishing his case which is that of a bonafide purchaser without notice.

11. I have read and considered the written submissions filed by the parties and I find no useful need to reproduce them.

12. The Plaintiffs claim is that allowing the production of documents will prejudice his case. His case is based on fraud against the Defendants. He has not explained how these documents will stand to prejudice him in prosecuting his case. I have perused the documents presented by the 1st Defendant which seek to explain the historical transactions on the suit lands. The Plaintiff will have a right of reply and to challenge the documents at the trial. I am in agreement that the 1st Defendant cannot be muzzled in the manner in which it wishes to present its defence. The Plaintiff appears to be challenging the documents on grounds that they are fraudulent, incorrect and fabricated. The Plaintiff will have the opportunity to do so at the hearing.

13. Further I see no reason why the Plaintiff cannot seek leave to amend his pleadings if indeed there is reason to. The law on amendment of pleadings is clear and is liberally applied.

14. On the issue as to whether the documents raise a new cause of action, the Plaintiff has not explained the new cause of action for the Court to apply its mind on it and for determination. This ground is declined. Neither was irreparable loss explained.

15. This application is for declining. It is dismissed with costs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF OCTOBER, 2018.

J .G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Plaintiff – Absent

Defendants 1 – Absent

2 – Onyancha HB for Mulani for the 2nd Defendant

Irene and Njeri, Court Assistants