



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KISUMU

ELC NO. 127 OF 2016

TIMOTHY ODUOR MULAHA

PAMELA AWINO OLUOCH (Suing as the Legal

Representatives of the Estate of the late

GILBERT MULAHA MARAMBA (Deceased).....PLAINTIFFS

VERSUS

SCOT HUMFIELD AWINDA.....DEFENDANT

JUDGMENT

By a plaint dated 6th June 2016 the plaintiffs herein sued the defendant seeking for the following orders:-

- a) A declaration that all parcel of land known as Kisumu/Konya/3541 is an asset to the estate of the late Gilbert Mulaha Maramba.
- b) Revocation of the registration of ownership over all that parcel of land known as Kisumu/Konya/3541 in favour of the Defendant.
- c) Cancellation of the Title Deed over the suit land and rectification of the register in favour of the estate of the late Gilbert Mulaha Maramba and the Plaintiffs.
- d) Costs of the suit.
- e) Interests on (d) above at court rates.
- f) Any other remedy or relief this Honourable Court deems fit and just to grant.

The plaintiffs filed suit contemporaneously with a notice of Motion under certificate of urgency seeking for orders of injunction against the defendant from interfering with the suit land pending the hearing and determination of the application and the main suit. The court granted the orders as prayed restraining the defendant from interfering in any way with the suit land until the suit is heard and determined.

The defendant was served with summons to enter appearance together with the plaint but failed to file a memorandum of appearance or defence. The matter therefore proceeded by way of formal proof.

Plaintiff's Case

It was the plaintiff's case that the suit land Kisumu/Konya/3541 was registered in the name of his late brother, Stephen Ochieng' Mulaha and was issued with a Title Deed on 21st July, 1993 by the District Land Registry.

It was further the plaintiff's evidence that the father of Stephen Ochieng' Mulaha, Gilbert Mulaha Maramba became his legal representative vide Kisumu High Court Succession Cause No. 141 of 2005 and that the certificate of confirmation of grant issued to Gilbert Mulaha Maramba listed the suit property as one of the assets belonging to his late son, Stephen Ochieng' Mulaha.

The plaintiff stated that on 11th October, 2012, Gilbert Mulaha Maramba passed away and his two surviving children, Timothy Oduor Mulaha and Pamela Awino Oluoch became the legal representatives to his estate.

It was the plaintiff's testimony that he conducted an official search on 29th October, 2015 over one of his late father's properties, namely land parcel No. Kisumu/Konya/3541 and realized that a Title deed had been issued in respect of the land to Scott Humfield Awinda the defendant herein on 15th February, 2011, a person unknown to the plaintiffs and/or any other person in their family.

The plaintiffs' also stated that their late father neither sold nor transferred the suit property to any person before his demise. The plaintiff produced a copy of letters of administration, a confirmation of grant, copy of title deed, official search, copy of application for lodging of a caution and a copy of official search after lodging the caution on the suit land as exhibits before the court to prove his case. He therefore urged the court to enter judgment as prayed in the plaint plus costs of the suit.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff filed written submissions on behalf of the plaintiff and stated that the issue for determination by the court is who the rightful or legal owner of the suit property is. Counsel cited the provisions of section 26 of the Land registration Act which provides as follows:

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 grounds 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.

Mr Rodi Counsel for the plaintiff relied on the case of **Arthi Highway Developers Limited – Vs – West End Butchery Limited and Others** Civil Appeal No. 246 of 2013 where the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The Court specifically referred to the law as stated in the case of **Dr. Joseph Arap Ngok – Vs – Justice Moiwo Ole Keiwua & 5 Others, Nai. Civil Appeal No. 60 of 1997** where the court categorically declared that:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the Land Registration Act) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the titleholder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

It was Counsel's submission that it is evident that Stephen Ochieng' Mulaha (deceased) has been the registered proprietor of the suit property since 21st July, 1993 to date and that it is not known how the defendant managed to transfer and register the suit property in his name without the knowledge of the plaintiffs. Further that Gilbert Mulaha Maramba (deceased) neither sold nor transferred the suit property to any third party when he was confirmed as the administrator to the estate of Stephen Ochieng' Mulaha who died interstate. He therefore submitted that the defendant fraudulently transferred the suit land in his name without the knowledge or consent of the administrators of the estate as enumerated in the particulars of fraud in the plaintiff's pleadings.

Mr. Rodi also cited the case of **R. G PATEL –VS- LALJI MAKANJI 1957 E. A 314**, where the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

Counsel further submitted that the Defendant had a duty under Section 29 of the Registration of Land Act that states that every proprietor at the time of acquiring land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land lease or charge and subsisting at the time of acquisition. The Defendant had a duty to know who the registered owner of the land is. It was Counsel's contention that the defendant having been registered as owner on 15th February, 2011 without reference to the Plaintiffs and/or the legal representative, amounts to concealment or deceit as neither the plaintiff nor their family members ever sold the suit land to the defendant and there does not exist any type of relationship between the plaintiffs and defendants.

It was therefore Counsel's submission that for the defendant to have acquired the suit property, he did so fraudulently, that is to say forging the transfer, application for consent of the Land Control Board and registering himself as owner. He relied on the case of **Kibiro Wagoro Mukumu – vs – Francis Nduati Macharia & Another [2018] eKLR**, where the Honourable Judge J.G Kemei ordered the cancellation of title over the suit land that was registered in the name of the 1st defendant in favour of the plaintiff after establishing that the defendant acquired title over the suit land fraudulently and failed to appear in court to defend his title.

Mr. Rodi further submitted that the defendant's title having been acquired illegally, unprocedurally and through fraud as highlighted above should therefore be cancelled as the plaintiffs have an interest over the suit land which forms part of the estate of Gilbert Mulaha Maramba (deceased) who was the legal representation of Stephen Ochieng Mulaha (deceased) the rightful proprietor of the suit property.

It was Counsel's submission that the court is empowered under Section 80 (1) of the Land Registration Act, 2012 to 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. He therefore urged the court to allow the plaintiff's prayers as enumerated in the plaint with costs.

Analysis and determination

This matter proceeded by way of formal proof because the defendant was served with summons to enter appearance but the neither filed a memorandum of appearance nor defence within the stipulated period. The issues for determination are who the rightful owner of the suit land is and whether the defendant fraudulently and unprocedurally registered the suit land in his name. The other issue is as to whether the plaintiff has proved his case on a balance of probabilities.

The plaintiff gave evidence and produced exhibits in support of his case which was uncontroverted. It is unfortunate that the defendant was served but did not come to court to give his side of the story on how he got registered as an owner of the suit land. The plaintiff further gave particulars of fraud in his pleadings and led evidence to prove that they neither sold nor transferred the suit land to anyone including the defendant who was neither known to him nor his family members.

It is trite law that particulars of fraud must be specifically pleaded and specifically proved by the person who alleges it. It is not enough to wake up during the hearing of a claim and allege fraud if you have not pleaded such particulars. The plaintiff therefore conformed to this threshold.

Even though Section 26 of the Land Registration Act provides that 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, it also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally.

The court is further empowered under Section 80 (1) of the Land Registration Act, 2012 to 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.

In the case of **Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR** Justice Sila Munyao held that:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”

I am in agreement with Munyao J that section 26 is meant to protect the real title holders from unscrupulous persons whose intention is to benefit where they have not sown. The real title holder having led evidence that they neither sold nor transferred the suit land to the defendant, is prima facie evidence that the defendant got the suit land unprocedurally.

Unscrupulous persons on the prowl looking for unsuspecting titleholders should not be allowed to sanitize such actions therefore making them the norm. The amendment of the land laws which introduced section 26 of the Land Registration Act was a welcome move to protect the rightful titleholders who would previously lose their land due to the concept of indefeasibility of title.

To my mind and having considered the evidence on record, the submissions by Counsel for the plaintiff together with the judicial authorities cited, I find that the plaintiffs have proved their case on a balance of probabilities as required by law and enter judgment in their favour as prayed in the plaint and make the following orders:

- a) It is hereby declared that all parcel of land known as Kisumu/Konya/3541 is an asset to the estate of the late Gilbert Mulaha Maramba.
- b) That the registration of ownership over all that parcel of land known as Kisumu/Konya/3541 in favour of the Defendant is hereby revoked and cancelled.
- c) That the Land Registrar Kisumu do rectify the register in favour of the estate of the late Gilbert Mulaha Maramba and the Plaintiffs.
- d) That the defendant to pay costs of this suit to the plaintiff.

DATED and DELIVERED at KISUMU this 29TH DAY OF NOVEMBER, 2018.

M. A. ODENY

JUDGE

JUDGEMENT READ and SIGNED in open court in the presence of;

Mr. Rodi for the plaintiff and in the absence of defendant.

M. A. ODENY

JUDGE