



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 96 OF 2016

EDWARD MWANGI IRUNGUPLAINTIFF

-VERSUS-

THE CHIEF LAND REGISTRAR.....1ST DEFENDANT

NYERI LAND REGISTRAR2ND DEFENDANT

RICHARD JOSEPH MATHENGE GITONGA... 3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

1. By a plaint dated **17th May, 2016** and filed on **19th May 2016**, Edward Mwangi Irungu hereinafter referred to as the plaintiff filed the suit herein seeking the reliefs listed hereunder.

2. The plaintiff's claim is premised on the ground that on or about 9th October 1992, he was allocated an unsurveyed plot NO. F in Nyeri Municipality. He accepted the offer, complied with all the conditions set out in the letter of offer and took possession of the plot which was later surveyed and registered as L.R No.Nyeri Municipality Block 1/1172 hereinafter referred to as the suit property.

3. The plaintiff laments that as he was waiting for a lease to be processed in his favour, he received information that a stranger had invaded the suit property. Upon carrying enquiries, he established that the 3rd defendant was claiming ownership of the suit property. He also established that the 3rd defendant was registered as the owner of the suit property.

4. Arguing that issuance of a lease and registration of a lease in respect of the suit property was effected by fraud perpetuated by the 1st and 2nd defendant, the plaintiff contends that the 3rd defendant did not obtain a good title to the suit property as his title is tainted with illegality. The following are given as the particulars of fraud against the 1st and 2nd defendants:-

- (a) Issuing a lease for the suit property to persons who were not the rightful owners of the suit property;
- (b) Issuing a lease in respect of the suit property without informing the plaintiff who continued pursuing the issuance of a lease in his favour;
- (c) Disregarding the process that the plaintiff had undertaken towards issuance of a lease in his favour;
- (d) Receiving money from the plaintiff for processing of a lease in his favour and failing to issue a lease to the plaintiff or account to him;
- (e) Issuing a lease to persons who had not been issued with a letter of allotment;
- (f) Failing to follow the prescribed process in issuing and registering a lease.

5. The 4th defendant is accused of having failed to advise the 1st and 2nd defendants when he had a duty to do so hence equally liable for the fraudulent deeds of the 1st and 2nd defendants.

6. For the foregoing reasons, the plaintiff seeks the following reliefs:-

- (i) Cancellation of the lease issued in respect of the suit property and all subsequent proprietors including the 3rd defendant;**
- (ii) Cancellation of the certificate of lease issued to the 3rd defendant and the registration of the plaintiff as the bona fide owner of the suit property;**
- (iii) Cost of the suit and interest;**
- (iv) Any further or better relief that the honourable court may deem fit to grant.**

7. Vide their statement of defence dated **21st June, 2016** and filed on the same day, the 1st, 2nd and 4th defendants deny all the allegations leveled against them and put the plaintiff to strict proof of his allegations.

8. The 3rd defendant through his statement of defence filed on 18th July, 2016 denied the plaintiff's contention that he did not acquire a good title to the suit property. Arguing that the process of allotment of the suit property to the plaintiff was never completed and that no lease was issued in favour of the plaintiff; that he was wrongly enjoined in the suit and that he was a purchaser of a valid leasehold title to the suit property for value without notice of any fraud, the 3rd defendant contends that his title cannot be challenged.

9. The 3rd defendant further contends that the plaintiff was not at any time registered as the proprietor of the lease.

10. Terming the plaintiff's claim bad in law, the 3rd defendant denies the contention that his title is tainted with illegality.

11. The defendant further claims that the judicial review proceedings he instituted to wit Nyeri High Court JR. 3 of 2014 closed the plaintiff's claim against him.

12. In reply to the issues raised in the defendants' pleadings, the plaintiff filed replies to defence through which besides reiterating the averments in his plaint, contends that the lease through which the 3rd defendants gained proprietary rights to the suit property was invalid and as such incapable of conferring a good title to the 3rd defendant.

EVIDENCE

The Plaintiff's case

13. When the case came up for hearing, the plaintiff reiterated the averments contained in his plaint and produced the documents contained in his list of documents filed on 19th May, 2016 as **Pexbt 1-26** and the replying affidavit of Edwin Munoko Wafula in JR No. 7 of 2011 which was marked for identification as PMFI 27. He also relied on his witness statement recorded on 17th May, 2016.

14. Upon being cross examined by counsel for the 1st, 2nd and 4th defendants, he stated that his complaint in the letter dated 26th October, 2010 (Pexbt 15) was about the irregular manner in which his plot had been allocated to another person.

15. He acknowledged that the 1st defendant responded to his complaint vide the letter dated 29th December, 2010 (Pexbt 18) but maintained that there was fraud in issuance of a lease and registration of the suit property in the names of other people as opposed to himself perpetuated by the office of the Land Registrar Nyeri as the documents used to register the suit property emanated from that office.

16. He complained to the Criminal Investigation Department (CID) leading to a criminal case being instituted against the persons who sold the suit property to the 3rd defendant.

17. Upon being cross examined by counsel for the 3rd defendant, he stated that from the green card (read white card), it appears that the 3rd defendant purchased the suit property from other persons.

18. He admitted that before he wrote the letter dated 29th October, 2010 he had not written any other complaint letter. He acknowledged that in that letter, he referred to the registered owner and the persons who sold the suit property to him. He also acknowledged that in that letter and the plaint, he did not impute any fraud on the 3rd defendant.

19. Concerning the Judicial Review proceedings instituted by the 3rd defendant, he acknowledged that he was an interested party in those proceedings and he is aware that the 1st defendant was prohibited from interfering with the 3rd defendant's title.

20. He further acknowledged that other than the letter of allotment (Pexbt 1), there is no other document showing that he was registered as owner of the suit property.

21. He further acknowledged that he does not know how the persons who sold the suit property to the 3rd defendant got registered before

him. He is aware that there are ongoing criminal proceedings concerning the process through which the suit property was transferred to the 3rd defendant. He acknowledged that the 3rd defendant is not facing any charges in those criminal proceedings.

22. In re-examination, the plaintiff stated that at the time he discovered that his plot had been registered in the name of other persons, the registered owner of the suit property was the 3rd defendant.

23. With regard to the judicial review proceedings, he explained that the court was stopping the Land Registrar from expunging the 3rd defendant's documents from the records. He pointed out that the court did not determine the issue of ownership of the suit property.

24. P.W.2, Lydia Mureithi, the in charge of the Environment and Land Court Registry Nyeri Law courts, produced the court file containing the replying affidavit of Edwin Munoka Wafula sworn on 3rd October, 2013 and filed in court on the same date in reply to the 3rd defendant's Judicial Review case No. 7 of 2011. The copy of the said replying affidavit contained in the plaintiff's further list of documents was produced as Pexbt 27.

The Defence case

25. The 3rd defendant relied on his witness statement recorded on 18th July, 2016 and his list of documents filed on 21st May, 2018, which he produced as Dexbt 1-16.

26. He informed the court that he conducted a search (Dexbt 1), signed the agreement in respect of the suit property and paid the full purchase price. He produced the sale agreement, acknowledgement of payment and bank statement containing proof of payment as Pexbt 2, 3 and 4 respectively.

27. On 29th December, 2010 he received a letter from the Chief Land Registrar (Pexbt 13). He replied on 21st January, 2011 (Pexbt 14) but he neither received any response nor got summoned by the office of the Land Registrar.

28. He filed JR 3/2014 (Pexbt 16) where the court ruled that his name be retained in the register. He informed the court that no one has ever come to him claiming the land belongs to him. He believes he has a valid title to the suit property as it was issued to him by the lands office. He has been paying the requisite charges for the suit property, rates and land rent.

29. Upon being cross examined by counsel for the plaintiff, he stated that he bought the suit property from Peter Mureithi Kariuki and Johnstone Mukundi Githinji. He stated that he has not filed any claim against them because he was satisfied with their transaction. He acknowledged that by the time he filed his statement of defence, he had received notice from the plaintiff stating that the land was his.

30. He informed the court that he does not have letters of allotment. The sellers gave him an original title deed. He was not given any lease in respect of the suit property.

31. In explaining about the Judicial review matter, he stated that the letter dated 29th December, 2010 directed that his title be cancelled. He filed JR No. 4 of 2014 and succeeded in stopping the process of cancellation of his title. He acknowledged that the issue of ownership of the suit property was not determined in the judicial review proceedings.

32. He stated that no criminal charges have been preferred against him but he is aware that the sellers were charged in a criminal case. He was a prosecution witness in that case. He does not know what the verdict in that case was.

33. Upon being cross-examined by counsel for the 1st, 2nd and 4th defendants, he stated that he got to know about the land through land brokers and did not know the sellers before the transaction or where the sellers come from.

34. In re-examination, he stated that in conducting his due diligence, he knew that all he had to do was to conduct an official search. The search he conducted did not show any encumbrance or inhibition.

35. He informed the court that he used the title to secure a loan advanced to him by a bank. The title to the suit property is still charged in favour of the bank which advanced him the loan.

36. The 1st, 2nd and the 4th defendants closed their case without calling any witness.

SUBMISSIONS

37. At close of hearing, parties to the suit filed submissions which I have read and considered. I find the sole issue for the court's determination to be whether the plaintiff has made up a case for being granted the orders sought or any of them.

38. With regard to that question, reference is made to the document produced as Pexbt 27 in which the 1st defendant states that the lease registered by the 2nd defendant did not originate from its offices. In other words was a forgery and on account of that fact, submitted that the 3rd defendant did not acquire a good title to the suit property. In support of that contention, reference is made to the case of **Arthi Highway Developers Ltd v. West End Butcheries Limited & 6 others (2015)e KLR** where the Court of Appeal *inter alia* stated:-

“66. We have found already, on evaluation of the recorded evidence, that fraud was committed both at the registry of companies as well as the Lands office. The consequence is that West End did not divest its registered interest in the disputed land which was not an equitable one. It was the proprietor of the legal interest in the disputed land and did not part with it, as alleged or at all. The trial court held, following previous court decisions, that an innocent holder of legal Title to land cannot be dispossessed of that interest by a fraudster, and that *Section 23* protects “Title issued to a purchaser upon the transfer or transmission by the proprietor thereof”. Those decisions are the Alberta Mae Gacie case (*supra*) and the Iqbal Singh Rai case (*supra*) which emanated from the High Court. With respect, we are persuaded by the reasoning in those cases as it accords with the law.

Furthermore, the protection accorded by law in the event of fraud, is to a “**bona fide purchaser without notice**” and even then, only against equitable interests. We have seen the definition of “bona fide purchaser” from Black’s Law Dictionary and from the Katende case (*supra*). The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner. Snell’s Principles of Equity (*supra*) illustrate the issue, thus:-

“An important qualification to the basic rule is the doctrine of the purchaser without notice, which demonstrates a fundamental distinction between legal estates and equitable interests.

1. The doctrine. A legal right is enforceable against any person who takes the property; whether he has notice of it or not, except where the right is overreached or is void against him for want of registration. If A sells to C land over which B has a legal right of way, C takes the land subject to B’s right, although he was ignorant of the right. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser’s conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails.”

68. It is also stated therein that “the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests”. So that, even if the issue of *bona fide* purchaser arose in this matter which, in our finding, it did not, we are not satisfied that the evidence tendered by Arthi supports a credible finding that it was a bona fide purchaser of the disputed land.

69. It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.

70. The upshot is that the decision of the trial court was right in principle and correct in law and we uphold it. We also uphold the various orders issued by that court.”

39. On behalf of the 1st, 2nd and 3rd defendant, it submitted that the plaintiff did not prove the pleaded fraud against the 1st and 2nd defendants. Based on the evidence adduced by the plaintiff to the effect that after the plaintiff complained about the unlawful dealings with the suit property, the 1st defendant carried investigations and recommended cancellation of the title held by the 3rd defendant, it is submitted that the plaintiff has not proved that the 1st and the 2nd defendants committed any fraud in the registration of the suit property in the name of other persons.

40. Based on the decision in the case of **R.G Patel vs. Lalji Makani** cited in the case of **Gladys Wanjiru Ngacha vs. Theresa Chepsaat & 4 Others (2013)e KLR** where the Court of Appeal held that allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require a proof beyond reasonable doubt, something more than a mere balance of probabilities is required and that it is not enough for the appellant to have pleaded fraud. The appellant ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court; it is reiterated that the plaintiff has not proved the pleaded fraud against the 1st and the 2nd defendant either to the required standard of law or at all.

41. On whether the 3rd defendant acquired a good title to the suit property, because of the evidence adduced in this case to the effect that the lease used to register the suit property did not originate from the 1st defendant, it is submitted that the 3rd defendant did not acquire a good title to the suit property.

42. In his submissions, the 3rd defendant points out that the plaintiff relies on a letter of allotment in his favour which did not culminate in issuance of a lease in his favour. Pointing out that a lease in respect of the suit property was issued to persons who were not sued, the 3rd defendant points out that those persons were registered by the 2nd defendant as the proprietors of the suit property. Being the registered proprietors of the suit property those persons offered to sale the suit property to the 3rd defendant which offer the 3rd defendant accepted and on the basis of the due diligence he conducted in respect of the suit property, which showed that the sellers were indeed the registered proprietors of the suit property, the 3rd defendant purchased the suit property for valuable consideration.

43. Arguing that he did what he was required to do before purchasing the suit property, which is to search the register of the suit property, the 3rd defendant points out that the search revealed that the sellers were the registered proprietors of the suit property and that their title was not encumbered.

44. The 3rd defendant explained that the suit property was transferred to him after he obtained the requisite consent and met the legal requirements for the transfer.

45. He points out that no fraud was urged against him or his predecessors' in entitlement to the suit property but against the 1st and 2nd defendants.

46. He contends that the pleaded fraud against the 1st and 2nd defendants was not proved to the required standard. No evidence of wrongdoing was adduced against the third defendant, who is said to have given cogent evidence in support of his claim that he is the holder of a lawful certificate of lease.

47. It is contended that apart from the register showing the plaintiff and his successors in entitlement to the suit property as the registered proprietor of the suit property, there is no other register showing the plaintiff as the registered proprietor of the suit property.

48. It is pointed out that the issues raised in the letter from the 1st defendant dated 29th December, 2010 were addressed through the 3rd defendant's letter dated 21st January, 2011 and the JR proceedings instituted by the 3rd defendant.

49. Maintaining that he is an innocent purchaser for value without notice of the 3rd defendant's interest, if any in the suit property, the 3rd defendant submits that the plaintiff claim, if any, lies elsewhere, not getting the suit property which already lawfully vests in him.

Analysis and determination

50. Have carefully considered the evidence adduced in this case which shows that the 3rd defendant is the registered proprietor of the suit property having being so registered on 31st March 2010, by dint of the provisions of **Section 107** of the Land Registration Act, 2012, the law applicable to the title held by the 3rd defendant is the Registered Land Act, Cap 300 Laws of Kenya (now repealed). In this regard see the said provision of the law which provides as follows:-

“107. (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

(2) Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act...”

51. The relevant section of Cap 300 concerning the issues raised in this suit are **Sections 27, 28, 31, 32, 33, 34, 143 and 144** which provides as follows:-

“27. Subject to this Act –

(a)

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register;

and (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register.

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

31. Every proprietor acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge subsisting at the time of acquisition.

32. (1) The Registrar shall, if requested by a proprietor of land or a lease where no title deed or certificate of lease has been issued, issue to him a title deed or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease:

Provided that - (i) only one title deed or certificate shall be issued in respect of each parcel of land or lease; (ii) no title deed or certificate of lease shall be issued unless the lease is for a certain period exceeding twenty-five years.

(2) A title deed or certificate of lease shall be only prima facie evidence of the matters shown therein, and the land or lease shall be subject to all entries in the register. (3) When there is more than one proprietor, the proprietors shall agree among themselves as to who shall receive the title deed or the certificate, and failing agreement the title deed or the certificate shall be filed in the registry. (4) The date of issue of a title deed or certificate of lease shall be noted in the register.

33. If a title deed or certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the title deed or the certificate shows all subsisting entries in the register, a note of the registration shall be made on the title deed or the certificate. (2) If the disposition is a transfer, the certificate if produced shall be destroyed, and in that case a new certificate may be issued to the new proprietor. (3) If the disposition is a charge, the certificate shall be delivered to the chargee.

34. On the registration of any disposition of a lease or charge the duplicate and the triplicate of the lease or charge shall be produced to the Registrar, who shall note particulars of the disposition on the filed lease or charge and on the duplicate and triplicate thereof unless the Registrar is satisfied that they cannot be produced.

“143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that a registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default...”

52. Whilst the evidence adduced in this case, to wit the letter from the 1st defendant produced as Pexbt 18 and the replying affidavit of Edwin Munoko Wafula produced as Pexbt 27 suggest that the registration of lease in favour of the 3rd defendant’s predecessors in entitlement to the suit property was tainted by fraud in that the documents used to effect the registration of the lease were forged, this court is unable to apportion blame concerning the alleged fraud on the reasons that no evidence capable of ascertaining the actors in the pleaded fraud was adduced. It is noteworthy that the documents relied on to register the lease in favour of the 3rd defendant’s predecessors in entitlement to the suit property were not availed to this court to consider. This court was not informed of the outcome of the criminal case preferred against the 3rd defendant’s predecessors in entitlement to the suit property. Furthermore, this court cannot conclude that the pleaded fraud was perpetuated by the 3rd defendant’s predecessor in entitlement to the impugned lease on the ground that they were not made parties to this suit.

53. If this court were to determine that the fraud in the registration of the suit property in favour of the 3rd defendant’s predecessors in entitlement was committed by the 3rd defendant’s predecessors in entitlement to the suit property, that would amount to condemning them unheard, something the law abhors. In this regard see the case of Pashito Holdings Limited & Another vs Paul Ndungu & 2 OTHERS[1197]eKLR where the Court of Appeal stated that:

“... The respondents could not have established *prima facie* case with a probability of success which is an essential legal requirement in order

to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)

"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him".

There is an unpronounceable Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right".

The learned Judge quite erroneously in our view said:

“However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings”.

With respect, he should have seen that it was not up to the appellants to fill up the gaping holes in the respondents' case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief".

54. Be that as it may, for the plaintiff to be entitled to an order of rectification of the title held by the 3rd defendant, it behooved him to prove that the 3rd defendant, who is in control of the suit property having acquired it for valuable consideration, had knowledge of the pleaded fraud or illegality in consequence of which the rectification is sought or caused such fraud or illegality or substantially contributed to it by his act, neglect or default, something he failed to do. In that regard see **Section 143** of Cap 300 cited herein above.

55. There being no evidence capable of showing that the 3rd defendant was a party to the pleaded fraud or knew about the fraud in the registration of the suit property in favour of his predecessors in entitlement and there being evidence that the 3rd defendant was an innocent purchaser of the suit property without notice of the plaintiff's interest in the suit property, I agree with the 3rd defendant's submissions that the title held by the 3rd defendant enjoys legal protection. Besides, there are other parties, like Equity Bank, who have interest in the suit property and who were not made parties to this suit. Their interest in the suit property cannot be lawfully interfered with without giving them an opportunity to be heard. In that regard, see the decision in the case of Pashito Holdings Limited *supra*.

56. I think I have said enough to demonstrate that the plaintiff has not made up a case for being granted the orders sought. Consequently, I dismiss his case with costs to the defendants.

Orders accordingly.

Dated, Signed and Delivered in open court at Nyeri this 17th day of December, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Gichuki h/b for Lucy Mwai for the plaintiff

N/A for the defendants

Court assistant - Esther