



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KISUMU

ELC NO. 417 OF 2015

(FORMERLY CIVIL SUIT NO. 67 OF 2009)

SAMUEL ODHIAMBO OLUDHE.....1ST PLAINTIFF

DAVID ODUOR OLUDHE.....2ND PLAINTIFF

DAVID OWOUR OLUDHE.....3RD PLAINTIFF

VERSUS

JUBILEE JUMBO HARDWARE LIMITED.....1ST DEFENDANT

THE HON. THE ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

By a plaint dated 4th June 2009 the plaintiff herein sued the defendants seeking for the following prayers:

- a) A rectification of the register with regard to property known as Title no. Kisumu/Municipality/Block 4/92;
- b) An order of eviction of the 1st defendant and demolition of any illegal structures in the suit property;
- c) Damages for trespass;
- d) Mesne profits;
- e) Costs of the suit plus interest thereon at court rates.

The plaintiff filed an application contemporaneously with the plaint seeking for a temporary injunction restraining the defendants from interfering with the suit land pending the hearing and determination of the case which was allowed by consent of both parties.

Plaintiff's Case

PW1 adopted his statement dated 5th August 2013 and the list of documents filed in court on 29th November 2010, further lists dated 5/8/13 and 15/6/16 respectively as exhibits before the court. It was his evidence that he was issued with a grant of letters of administration vide Nairobi High Court Succession Cause No.2455 of 1999 and that the property KISUMU BLOCK 4/92 was listed amongst the properties in the estate.

PW 1 further testified that the Plaintiffs are sons and administrators of the estate of the late Jackson Oludhe Aloo who died on 4th May, 1998 and at the time of his death, the deceased was the registered owner of the property known as **KISUMU/MUNICIPALITY/BLOCK 4/92**. PW 1 produced the original Certificate of Lease as exhibit 4.

PW1 testified that he filed the current suit against the defendants because the suit property was fraudulently transferred to BRUNO PETER AMOKO on 21st July 2007 who then sold it to the 1st defendant vide an agreement dated 29th September, 2008. He stated that he had been paying land rent and rates for the suit property and he only discovered the illegal and fraudulent transfer on 3rd January, 2009 when he went to the Kisumu Municipality offices to pay rates that he was informed that the suit property had been transferred.

It was PW1's evidence that upon discovery that the 1st Defendant had been conned by the said Bruno Peter Amoko, the company lodged a criminal complaint with the police and investigations into the illegal and fraudulent transfer were commenced which culminated into BRUNO PETER AMOKO being charged in **Kisumu Criminal Case No. 669 of 2011** with the offence of making a document without authority contrary to Section 357(a) of the Penal Code and obtaining money by false pretence contrary to Section 313 of the Penal Code. He stated that the complainant in the matter was PATEL INDRAVADAL ASHABHI who is the director of the 1st Defendant herein. It was his evidence that Bruno had obtained the title deed long after the plaintiff's father had died.

It was further PW1s evidence that they appeared before the Kisumu District Land Registrar with Mr. Patel the owner of Jubilee Hardware who wanted him to sell to him the suit land but he told him that he had to get permission and authority from the other siblings. He also stated that the Registrar wanted them to agree and formalize the sale but the plaintiff said that he had to consult his siblings.

It was PW1's evidence that the Registrar advised them to move to court for the cancellation of the title as he could not do it without a court order. He also stated that they are the ones in occupation of the suit property. He therefore prayed for judgment as per the plaint and costs of the suit.

Plaintiffs Counsel's submission

Counsel submitted that from the documents filed by the parties and the evidence of the 1st Plaintiff, that the following facts are not disputed:

- a) The plaintiffs' father acquired the suit property in 1975 according to the green card exhibited in the Plaintiffs' further list of documents filed on 8th August, 2013. This was first registration.
- b) The deceased was issued with a Certificate of Lease on 16th May, 1983.
- c) The Plaintiff's father died on 4th May, 1998 and at the time of his death, he had not transferred the property.
- d) There was no evidence of transfer of the suit property from the deceased to Bruno Peter Amoko and if there was then it was fraudulent as it was effected in the year 2007 after the death of the registered owner.

Counsel cited Court of Appeal case of **Evanson Wambugu Gachugi –Vs- Simon Wainaina Gatwiki & 2 Others [2014] eKLR** where the court had the following to say regarding forged transfer instrument:

*“On this issue of the validity of the transfer documents, we cannot fault the learned Judge for the conclusions that he made regarding the legality of the instruments of transfer that dispossessed the estate of the deceased of the suit land. On the other issue of whether the Judge could have ordered the transfer to the name of the 1st respondent. The Judge having found collusion on the part of the appellant and the Land Registrar in the manner in which the transfer was effected, under **Section 143 (1) of the Repealed Registered Land Act**, the court is empowered to order the rectification of the Register by directing a registration to be cancelled if it was obtained by fraud or mistake. There is also no dispute that the 1st respondent is the administrator of the estate of the deceased and we find no fault in the order that directed title be registered in his name in that capacity as the administrator of the estate.”*

Counsel also submitted that the Plaintiffs are still in possession of the suit property and have the Original title document. The Court of Appeal in the case of **Evanson Wambugu Gachugi Supra** held as follows:

“Moreover the original title of the suit property was with the 1st respondent. It was never surrendered to the Lands Office in support of the transfer as the original must be surrendered for cancellation before a new title is issued. In the event that the original transfer was unavailable, it was incumbent upon the Land Registrar to publicise its loss in the Kenya Gazette which was not done in this case.”

Counsel submitted that the 1st Defendant lodged a criminal complaint against Bruno Peter Amoko of which particulars of the offence are quite clear that: *on the 21st day of February, 2007, at an unknown place within the Republic of Kenya jointly with others not before the court, with intent to defraud, without lawful authority or excuse made a certain certificate of lease Title No. Kisumu/Municipality/Block 4/92 purporting it to be genuine and valid deed issued by Kisumu Land Registrar.* Counsel submitted that said Bruno Peter Amoko absconded after being released on bond and the charges were later withdrawn.

Mr Njomo therefore submitted that the transfer of the property was tainted by an illegality as Bruno Peter Amoko did not have a clean title capable of being transferred to the 1st Defendant. The fact that he managed to obtain a Certificate of Lease through fraudulent and corrupt means did not in itself confer a clean title capable of being transferred to the 1st Defendant.

He submitted that the issue of transfer of property by connen has been subject of litigation and courts have held that the mere possession of a title does not imply that the same cannot be challenged. Counsel cited the case of **Republic –vs- Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563** which was cited with approval in **Kenya National Highway Authority – vs – Shalien Masood Mughal & 5 Others [2017] eKLR by Kiage JA in the following terms:-Maraga, J (as he then was 63 expressed himself as follows:-**

“Court should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the

principle of the indefeasibility of title deed...

Counsel also submitted that the mere fact of holding a title does not in itself limit the power of this court as was held by Justice Onyancha in **Alberta Mae Gacci – vs – Attorney General & 4 Others (2006) eKLR** where he stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the way when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come...”

Mr. Njoma submitted that the Plaintiffs are innocent proprietors who are entitled to the protection of their right to property under Article 40 of the Constitution of Kenya, 2010 and that the 1st Defendant’s right to the suit property cannot be upheld pursuant to Article 40(6) of the Constitution of Kenya which stipulates that the rights to property do not extend to any property that has been found to have been unlawfully acquired and to uphold such titles, the Court would be encouraging an illegality.

Section 26 of the Land Registration Act is categorical that a certificate of title is prima facie evidence that the person named therein is the proprietor of the land but the same can be challenged where the Certificate of title has been acquired fraudulently, unprocedurally or through corrupt practice.

Counsel submitted that having failed to tender any evidence before the Court on the circumstances under which the 1st Defendant obtained the title, the same must be deemed to be indeed through fraudulent means. He also cited the case of **Sai Office Supplies Limited –vs- Rosemary Alivista Luseno & Another [2014] eKLR**, where Nyamweya J. held as follows:

“I find that since the Plaintiff’s evidence of its ownership of the suit property is not contested by the Defendants, it is therefore entitled to the declaration sought of ownership and any consequential orders arising from such ownership. The shortcomings on the part of the 2nd Defendant clients in the due performance of their duties and responsibilities cannot be allowed to be an excuse or bar to any party desirous of asserting their rights through the due process of law, and indeed such dereliction of duty once proved must be appropriately reprimanded.”

Mr. Njomo submitted that the 1st defendant did not discharge its burden under Section 112 of the Evidence Act which stipulates that **“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”** It was Counsel’s further submission that either the 1st Defendant knew about the fraud or it was negligent for failure to conduct due diligence before embarking on the transaction and that the 1st defendant did take out a Third Party Notice dated 8th June, 2010 and filed herein on 11th February, 2014 seeking indemnity from BRUNO PETER.

Counsel submitted that the 1st Defendant’s actions have prevented the plaintiff from undertaking development on the property pending the hearing and determination of this suit. He cited Halsburys *Laws of England* has defined *mesne profits* as an action by a land owner against another who is trespassing on the owner’s lands and who had deprived the owner of income that otherwise may have been obtained from the use of the land. It was his submission that the 1st Defendant’s interference with the plaintiff’s property amounts to trespass and denial of the plaintiffs from enjoying the property due to the illegal and fraudulent actions therefore entitled to mesne profits.

Counsel submitted that when the 1st Defendant invaded the suit property, it interfered and removed construction materials worth Kshs.6, 000,000.00 that had been purchased by the Plaintiffs’ father and demolished a fence that had been put up by the Plaintiffs’ father at a cost of Kshs.500,000.00 which they should be compensated for the loss. In conclusion Counsel urged the court to find that the plaintiffs have proved their case against the defendants as prayed in the plaint with costs.

Defendant’s submissions

Counsel for the defendant filed written submissions and stated that the issues for determination are as to whether the 1st Defendant is a bona fide purchaser without notice and whether the Plaintiffs are entitled to the reliefs sought.

On the first issue Counsel submitted that the no evidence was provided by the Plaintiffs to prove that the 1st Defendant participated in or facilitated the acquisition of the suit land through fraud. That the plaintiff needed to show that the property in issue was part of the deceased estate.

Counsel submitted that the 1st Defendant discharged its obligation when it properly investigated the title and cannot be faulted on other eventualities it could not reasonably ascertain, thus it protected by the absolute and unqualified defence in Section 26 of the Land Registration Act.

On the issues whether the plaintiffs are entitled to the reliefs sought, Counsel submitted that the claim for damages and mesne profits were not proved. He cited the case of In the case of **KENYA HOTEL PROPERTIES LTD –VS- WILLESDEN INVESTMENT LTD (2009) eKLR** where the Court of Appeal stated that in a claim for mesne profits, there has to be evidence that the Plaintiff is the owner of the property upon which the claim is based. Counsel therefore urged the court to dismiss the plaintiffs; suit with costs.

Analysis and determination

This case proceeded whereby the plaintiff gave evidence and produced several documents in support of their case. It should be noted that the 1st and 2nd defendants did not tender any evidence. The 1st defendant only filed submissions to the case.

The issues for determination are as to whether the suit property was illegally or fraudulently transferred to the 1st defendant and whether the plaintiff is entitled to the reliefs of general damages for trespass, mesne profits, and rectification of the register and eviction of the 1st defendant from the suit land.

From the evidence on record and the documents produced by the plaintiff, it is evident that the suit land belonged to the deceased father of the plaintiffs having produced an original title deed in the name of the deceased father. It is also not in dispute that the plaintiffs are the administrators of the estate of Jackson Oludhe Aloo having produced the letters of administration. It is further not in dispute that the deceased never transferred that suit land while he was alive.

The evidence on record also establishes that the land was purportedly transferred to one Bruno Peter Amoko after the deceased had passed on. The 1st defendant in a bid to sanitize his title after the fact caused the arrest and charging of the said Bruno with a criminal case whereby the charges were as follows, *on the 21st day of February, 2007, at an unknown place within the Republic of Kenya jointly with others not before the court, with intent to defraud, without lawful authority or excuse made a certain certificate of lease Title No. Kisumu/Municipality/Block 4/92 purporting it to be genuine and valid deed issued by Kisumu Land Registrar*. This alone points to the fact that the transaction was suspect and that the said Bruno did not have any property to pass to the 1st defendant.

PW1 also testified that they were summoned by the Land Registrar Kisumu with a Mr. Patel a director of the 1st defendant and asked to regularize the transaction but the plaintiff told him that he could only do so after consultation with the siblings. This is further an indication that the 1st defendant already knew that he had been conned by a person who did not have a good title to pass to him hence the attempt to regularize.

Counsel for the defendant submitted that the 1st defendant was a bona fide innocent purchaser but he neither gave evidence nor proved the ingredients of a bona fide purchaser. This is a case of a fraudulent transaction going bad.

In the case of **ELIJAH MAKERI NYANGW –VS-STEPHEN MUNGAI NJUGUNA & ANOTHER [2013] eKLR, Munyoya J held as follows:**

“The evidence in this case puts no one in doubt that the title to the 1st defendant was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (b) have been met and that the title of the 1st defendant is liable to be cancelled. I therefore proceed to cancel the title of the 1st defendant and his registration as proprietor of the suit land. The plaintiff should be registered as owner of the suit land. It is regretful that the 1st defendant was snared by the scheme perpetrated by the 2nd defendant. I sympathise with him but I must ensure that the real title holder is protected and that he is registered as the proper owner of the suit land.”

Section 26 of the Land Registration Act has breathed a sigh of relief to innocent proprietors whose properties have been fraudulently transferred in unscrupulous individual’s names. The court cannot allow such injustice to hold root. The proprietors are protected under the law. In the case of **Chemei Investments Limited –vs- The Attorney General & Others Nairobi Petition No. 94 of 2005** which was cited by Kiage JA as follows:

“The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be sidestepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumar Shah & 2 Others – vs – City Council of Nairobi & Another (supra) where the court stated as follows, “ we hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principal has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.

The court cannot turn a blind eye to sanitize irregularity and fraudulently acquired properties all in the name of indefeasibility of title. In the case of **Arthi Highway Developers Limited – Vs – West End Butchery Limited and Others Civil Appeal No. 246 of 2013** 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.”

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

On the issue of mense profits I find that the plaintiff has not proved this limb as it is a special damage which must be specifically pleaded and proved. There was no evidence on this. This limb fails.

On the issue as to whether the plaintiffs are entitled to general damages against the defendant, it is trite law that trespass to land is actionable per se (without proof of any damage). In the case of **Park Towers Ltd v. John Mithamo Njika & 7 others (2014) eKLR** where **J.M Mutungi J.**, stated:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ...”

I find that the plaintiff has proved his case against the defendants and enter judgement the following terms

- a) A rectification of the register with regard to property known as Title no. Kisumu/Municipality/Block 4/92;
- b) An order of eviction of the 1st defendant and demolition of any illegal structures in the suit property within 30 days
- c) Damages for trespass kshs 500,000/
- d) Costs of the suit.

DATED and DELIVERED at KISUMU this 5TH DAY OF DECEMBER, 2018.

M. A. ODENY

JUDGE

JUDGMENT READ, and SIGNED in open court in the presence of;

Mr. Njomo for Plaintiffs and Mr. Abande holding brief for Mr. Maganga for 1st defendant and Mr. Mutai for 2nd defendant.

M. A. ODENY

JUDGE