



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.152 OF 2013

HELLEN WANJIRU KIRAGU (Suing as the legal representatives of
the estate of the late **JAMES KIRAGU KIGOTHO (deceased)PLAINTIFF**

VERSUS

JAMES NDUNG’U MURIN’GU.....DEFENDANT

JUDGMENT

(Plaintiffs claiming ownership of certain land; the land having been sold to defendant in a public auction; defendant making counterclaim for possession of the land; plaintiffs' claim dismissed for failure to tender evidence; defendant demonstrating that he purchased the land in a public auction; plaintiffs have no right over the property; defendant's suit succeeds).

1. This suit was commenced by way of plaint filed on 8 February 2013. The plaintiffs pleaded that they are the bona fide owners of the land parcel Miti Mingi/ Mbaruk Block 5/36 (Kiungururia) having acquired it in the year 1991 or thereabouts. They pleaded that they have been in continuous occupation of it until sometimes in the year 2011 when the defendant started laying claim to it. They averred that the suit land was all along registered in the name of James Kiragu Kigotho (deceased) who died in the year 1996 and that there has been no succession commenced in respect of his estate. They pleaded that on 19 November 2012, they conducted a search of the property and discovered that the defendant has obtained title and has commenced subdivision of the land. They pleaded that the defendant's title was acquired fraudulently . In the suit, the plaintiffs asked for a declaration that they are the rightful owners of this land; cancellation of the title of the defendant and a permanent injunction to restrain the defendant from the suit land.

2. The defendant filed a defence and counterclaim. He pleaded inter alia that he purchased the suit land in a public auction in September 2007 and the land was thereafter transferred to him. He averred that the plaintiffs have continued to occupy a portion of the land. He pleaded that he subdivided the land and the plaintiffs are now in occupation of one subdivision registered as Miti Mingi/Mbaruk Block 5/4253 (Kiungururia). In the counterclaim, he asked for a mandatory injunction compelling the plaintiffs to vacate this parcel of land; eviction orders and a permanent injunction against the plaintiffs.

3. The matter was scheduled for hearing on 12 October 2016. On that day, Mr. Chege for the plaintiffs sought an adjournment for the reason inter alia that his clients were absent. I declined to adjourn and since Mr. Chege had no witness, I dismissed the plaintiffs' case. I invited the defendant to tender evidence and he inter alia stated that he purchased the property Miti Mingi/Mbaruk Block 5/36 in a public auction held on 7 December 2007. He produced a newspaper cutting showing that the property had been advertised for

sale; a handbill for the sale; the certificate of sale and Memorandum of Sale. He paid a deposit of Kshs. 325,000/= on the day of the auction and later paid the balance of Kshs. 975,000/=. Once he completed payment the title documents and transfer by chargee were released to him. Consent of the Land Control Board was applied for and granted. He paid stamp duty and the property was registered in his name. He thereafter embarked on subdivision of the land into 50 plots. He stated that the plaintiffs occupy one of these plots which is Miti Mingi/ Mbaruk Block 5/4253. He produced the title deed to this parcel of land to demonstrate that it is registered in his name. In cross-examination, he affirmed the above evidence.

4. I invited counsels to file submissions but only Mr. Ndungu Njuguna for the defendant filed his submissions. I declined an adjournment to give more time to Mr. Chege to file his submissions, for I was of the opinion, that there had been more than adequate time to file the same. I have taken note of Mr. Ndungu's submissions in arriving at my decision.

5. It will be observed that the only decision that I need to make is on the counterclaim for I already dismissed the plaintiffs' case. From the evidence tendered, it is clear that the land parcel Miti Mingi/Mbaruk Block 5/36 had been charged to a bank. There must have been default and the bank exercised its statutory power of sale vide which that land was put up for sale in a public auction. The defendant attended the public auction and was declared the highest bidder. The property was thereafter transferred to him and he subdivided it into 50 plots. The plaintiffs still occupy one of these plots being the land parcel Miti Mingi/ Mbaruk Block 5/4253. In his counterclaim, the defendant wants the plaintiffs out of this land.

6. The plaintiffs did not tender any evidence to justify their continued presence on this land parcel No. 4253. I have not seen any fraud in the manner in which the defendant obtained ownership of the suit land. If the plaintiffs are aggrieved by the public auction sale, they can try their luck by suing the bank. But the defendant is an innocent purchaser for value and he must be protected.

7. As the registered owner, the defendant is entitled to all rights over this property including the right to exclusive occupation of it. These rights are provided for in Section 25 of the Land Registration Act, Act No. 3 of 2012, which provides as follows :-

Rights of a proprietor.

25. (1) The rights of a proprietor, whether acquired on first registration or 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) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

8. As owner, the defendant is entitled to enjoy all these rights to the exclusion of the plaintiffs. The plaintiffs have no colour of right whatsoever over the defendant's land and they must give vacant possession to the defendant. I have no reason to deny the defendant the prayers he has asked for in his counterclaim. I allow the counterclaim and now make the following final orders :-

(i) I hereby declare the defendant to be the rightful owner of the land parcel Miti Mingi/Mbaruk Block 5/4253.

(ii) I hereby order the plaintiffs and/or their servants/agents/assigns to vacate the land parcel Miti

Mingi/Mbaruk Block 5/4253 within the next 60 days and in default the defendant may apply for their eviction.

(iii) Upon vacating the land parcel Miti Mingi/Mbaruk Block 5/4253, the plaintiffs are hereby permanently restrained from the said land.

(iv) The defendant shall have the costs of the plaintiffs' suit and of the counterclaim.

9. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 8th day of February 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Mr. Ndung'u Njuguna for the defendant

No appearance on the part of M/s Munene Chege & Co Advocate for the plaintiff

Court Assistant : Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU