



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELCA NO. 25 OF 2014
(Formerly NYERI HCCA NO. 111 OF 2012)

1. CHRISTOPHER KANYI NDERITU
2. MARY WATARE GITHITHO APPELLANTS

-VERSUS-

MWERUA FARMERS COOPERATIVE SOCIETY.....RESPONDENT

JUDGMENT

Introduction

1. By a plaint dated **18th June, 2012** the respondent herein, Mwerua Farmers Cooperative Society, instituted a suit before the lower court to wit, Nyeri Chief Magistrates Court Civil Case No. 268 of 2012 seeking judgment against the appellants herein for cancellation of all the transfers of L.R No. Aguthi/Gatitu/813 (hereinafter referred to as the suit property) and the registration of title in its name; forceful eviction of the defendants (read appellants), their agents servants and or anyone claiming on their behalf from the suit property; costs of the suit and interest.

2. Simultaneously with the plaint, the respondent had brought a motion of even date seeking an order of temporary injunction to restrain the appellants, their servants, agents and/or any other person acting on their behalf from proceeding with further construction or building on the suit property pending hearing and final determination of the suit.

3. The application, which was brought under **Order 40 Rules 1, 2 and 3** of the Civil Procedure Rules, was premised on the supporting affidavit of the Chairman of the respondent, Joseph Kiragu, and on the grounds that the suit property had been fraudulently transferred from the respondent to among other persons, the appellants.

4. It was deposed that the appellants had embarked on construction of a house on the suit property and that the respondent would be greatly prejudiced if the appellants were not restrained from continuing with the construction before the dispute was heard and determined.

5. In reply, the appellants had, *inter alia*, deposed that the orders sought should not be allowed firstly because the appellants had obtained the suit property for valuable consideration without notice or knowledge of the respondent's interest therein (had bought the suit property from Catherine Wanja Chege who was the registered proprietor thereof). Secondly, the appellants complied with all legal processes

before they bought the suit property. Thirdly the respondent's title is not authentic (is fake) and fourthly, there was nothing fraudulent in the process of transfer of the suit property from the previous registered owner (Catherine Wanja Chege) to the appellants.

6. Wondering why the respondent did not sue the person to whom its title was transferred to, the appellants argued that their title is indefeasible.

7. In support of the respondent's case it was submitted that the court would be called upon to decide on how the property was transferred from the respondent to other proprietors, the appellants included.

8. Arguing that the appellants would not suffer loss which cannot be compensated by award of damages, if the order sought is granted, the respondent submitted that the balance of convenience tilted in favour of maintaining the status quo.

9. On behalf of appellants, reference was made to the various transfers that had been effected in respect of the suit property and the time lapse between the time the suit property was transferred from the respondent and the fact that the respondent had not found it wise to sue the persons to whom the suit property was first transferred to, to wit, Kariuki Ndagu and Catherine Wanja Chege and submitted that the alleged fraudulent transfer of the suit property should not be believed.

10. The application and the suit was said to be time barred because they were brought more than 10 years after the alleged fraudulent transfer occurred.

11. The respondent was also said to have failed to prove fraud in the registration of the suit property in favour of the appellants.

12. Based on the provisions of **Section 143(2)** of the Registered Land Act, Cap 300 (now repealed), it was submitted that in the absence of any evidence of the appellants' involvement in the alleged fraud, the respondent's case was destined to fail.

13. It was further submitted that the respondent had not demonstrated the loss it would suffer, if the order sought was denied.

14. Based on the provisions of **Section 27** of the Registered Land Act and the fact that the appellants are indicated as the current registered proprietors of the suit property and given the fact that the appellant acquired the suit property for valuable consideration from the previous registered owner and after conducting due diligence in respect thereof, it was submitted that the appellants had the right to use, develop and utilise the suit property (the balance of convenience tilted in his favour).

15. Owing to the delay in lodging the suit herein, the respondent is said to be undeserving of an equitable remedy.

16. It was also contended that the trial court lacked jurisdiction to determine the suit preferred before it.

17. Upon considering the case presented before him and the rival arguments of the parties, the trial magistrate entered judgment in favour of the respondent in the following terms:-

“...had the transfer of the suit land from the applicant to Cleopas Kariuki Ndagu been above board and untainted with any fraud, the applicant's land certificate ought to have produced it to the registrar for destruction or the registrar ought to have dispensed with its production as required by the law above quoted and since there is no evidence that the registrar dispensed with its production, I find that the applicant has demonstrated a *prima facie* case with a probability of success.

The fact that the defendants are constructing on the suit land has not been disputed. In the sale agreement dated 27/3/09 which is among the list of documents filed, there is a default

clause which entitles the respondents to damages and a refund of all reasonable costs incurred. On the other hand, if construction is allowed to go on then the applicant might suffer irreparable loss which would not adequately be compensated by an award of damages and lastly the balance of convenience tilts in favour of granting the injunction.

The issue as to whether the suit is statute barred will be canvassed at the full prosecution of the suit so is the issue as to whether the land certificate is fake.

It should also be noted that the 2nd defendant did not oppose the application. Although in the replying affidavit it was deposed that the 2nd defendant authorized the 1st defendant to swear the replying affidavit on her behalf the said authority was not signed by the 2nd defendant and filed in this case as required under order 1 rule 13 of the Civil Procedure Rules.

Lastly the sale agreement filed together with the defence is between Christopher Kanyi Nderitu and Catherine Wanja Chege and one wonders how Mary Watere Githotho (2nd defendant) became registered as a co-owner of the suit land with the 1st defendant.

And although the defendants have filed a sale agreement which shows that the defendants bought the land at Kshs. 1.5 million, the green card does not indicate the consideration for the transfer from Catherine Wanja Chege to the defendants.

Again the consideration reflected in the letter of consent is Kshs. 800,000/= which again raises the issue as to whether indeed the sale and transfer of the land was above board and whether the consent was obtained through fraud.

In view of the foregoing, I find that the application has merit and grant the prayers as sought..."

18. Aggrieved by the above decision, the appellants appealed to this court on eight (8) grounds which are summarised as follows:-

1. The learned trial magistrate erred by entertaining the suit and the application when it lacked jurisdiction to entertain the claim presented before it;
2. The learned trial magistrate erred by failing to find that the respondent had not made up a case for being granted the orders sought.
3. The trial magistrate erred by granting a temporary injunction when it was not one of the prayers sought in the plaint.

19. For the foregoing reasons, the appellants pray that the appeal be allowed and the ruling of the lower court, dated 12th October, 2012, be set aside.

Submissions for the appellants

20. Counsel for the appellant, **Mr. Muthui**, submitted that under **Section 159** of the Registered Land Act, (RLA) (repealed), the lower court had no jurisdiction to cancel title and pointed out that under **Section 80** of the Registration of Titles Act, the lower court has no jurisdiction to cancel title.

21. He reiterated the appellants' contention that no *prima facie* case was established to warrant the injunction. In this regard he submitted that no evidence of fraud was adduced yet under **Section 82** of the RLA, fraud must be proved. He maintained that there was no evidence that appellants had knowledge of the alleged fraud.

22. He further submitted that the respondent's claim was time barred and that the respondent did not

demonstrate what loss if any they would suffer if the order was denied.

23. He further submitted that owing to delay in bringing the suit and the application, the respondent did not deserve an equitable remedy.

24. He took issue with the respondent's failure to sue the appellants' predecessors in title and to prosecute the suit within the time provided under **Order 40 Rule 1** of the Civil Procedure Rules.

Respondent's submission

25. On behalf of the respondent, it is pointed out that the suit was filed when the Registered Land Act was in force and submitted that **Section 159** of the Act allowed lower courts to deal with title to land where the value of the land was under Kshs. 500,000/= (25 000 pounds) and contended that it has not been demonstrated that the suit property exceeded 25, 000 pounds.

26. Based on **Section 5** of the Magistrates Court's Act which gives magistrate's courts civil jurisdiction of upto 7 million, it submitted that the lower court had jurisdiction to handle the subject matter before it.

27. According to the respondent, **Section 30** of Environment and Land Court Act (ELCA) did not repeal the provisions of the Magistrates Courts Act. He pointed out that the new Magistrate Courts Act, gives Magistrate courts jurisdiction to hear such disputes.

28. He further pointed out that the trial magistrate gave reasons for holding that the respondent had made a case for being granted the orders sought (the order was issued to preserve the suit property).

29. With regard to the contention that the respondent had not proved knowledge on the part of the appellants, it is submitted that the question of knowledge can only be proved during trial.

30. On time bar, he submitted that time started running from the time the fraud was discovered that is within three (3) years of issuance of the appellants' title.

31. Concerning the alleged fraud it is contended that the police had been notified but before investigations could ensue, the appellants began developments on the suit property rendering the suit hereto necessary.

32. On failure to enjoin the previous registered owners of the suit property, it is submitted that there was no need to enjoin them at that stage. Moreover, it is contended that the non joinder is not fatal to the suit/application.

33. Concerning the delay in determination of the suit, the respondent blames it on the appellant.

34. In a rejoinder, Mr. Muthui, maintained that the lower court had no jurisdiction to hear and determine the dispute preferred before him.

35. Concerning the practice directions given by the Chief Justice under **Section 30** of ELCA, he submitted that the Chief Justice has no mandate to amend statutes in contravention of the constitution. He pointed out that there is an order on the Magistrates Act, 2015 which is still pending.

36. He maintained that the suit is time barred and that no fraud has been proved.

37. Concerning failure to prosecute the main suit within the time stipulated in the Civil Procedure Rules, he submitted that the stay was not on the main suit.

Analysis and determination

38. From a review of the case urged before the lower case, the grounds of appeal and the submissions by counsel in respect of the appeal, the Issues for determination are:

(a) Whether the trial court had jurisdiction to hear and determine the dispute preferred before it?

(b) Whether suit/application was time barred?

(c) Whether the order for temporary injunction could issue in the absence of such a prayer in the plaint?

(d) Whether the respondent had made a case for being granted the orders sought or any one of them?

(e) What orders should the court make?

39. On whether a temporary injunction could issue in the absence of a prayer for injunction in the main suit, case law suggests that it cannot. The reason for that, is that, seeking for a temporary injunction in an interlocutory application in the absence of such a prayer in the plaint amounts to deviating from the pleadings something not allowed by the rules. In this regard, see the case of **James Archimedes Gichana v. Pyrethrum Board of Kenya - Nakuru HCCC NO. 237 of 2007** where it was observed:-

“Both rules 1(a) and 1(b) of Order 40 have been judicially considered to require clear indication or prayer in the suit seeking such an injunction. Where an applicant for injunction fails to demonstrate that he first sought an order of temporary injunction in his suit his application is said not to sound in either rule 1(a) and 1(b) of the said order 40 and will be deemed to be incompetent...The reason for this is clear. It is found in Order 2 rule 6 of the Civil Procedure Rules 2010. That no party may in any pleadings make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit...6(1) without first amending his pleadings. 6(2) No party can depart from his pleadings whether in evidence or in an interlocutory application, to do so the party must first amend his/its pleadings.”

40. The rationale for requiring a permanent injunction in the plaint before a temporary injunction can issue ,was given in the case of **Mary Ngaru v. Family Bank Ltd & 2 others (2014) eKLR** thus;

“A temporary injunction is issued with the aim of preserving the property pending the hearing and determination of the suit. If the applicant succeeds in his quest to permanently prohibit the sale or alienation of the property the court would issue a perpetual injunction restraining the sale, alienation and/ or interference with the property. Without such a prayer, nothing would prevent the sale of the property immediately after the suit is heard and determined effectively rendering the subsistence of a temporary injunction during trial nugatory.”

41. Being of the view that the above cases capture the correct legal position on this matter and there being evidence that the respondent’s had not sought a permanent injunction in their plaint, I find and hold that the prayer for temporary injunction amounted to a departure from the respondent’s pleadings. As such, it ought not to have been considered.

42. The question as to whether the trial court had jurisdiction to hear and determine the dispute preferred before it, my view of the issue is that the court’s jurisdiction to hear disputes touching on land registered under the Registered Land Act, Cap 300 Laws of Kenya was limited to Kshs. 500,000/=. The evidence presented before the lower court to wit the value of the suit property according to the consent for transfer and the sale agreement executed in respect of the suit property suggest that the value of the suit property was way beyond jurisdiction of the lower court.

43. Concerning the argument that the jurisdiction of lower courts in civil matters was up to Kshs. 7 million, it’s my considered view that the said jurisdiction could not apply to land matters because the relevant legislation had limited it to Kshs. 500,000/=.

44. The upshot of the foregoing is that trial court did not, at the material time, have jurisdiction to hear and determine the dispute preferred before it.

45. As anything done without jurisdiction is a nullity, I find its determination in respect of the dispute preferred before it to have been a nullity and I set it aside.

46. The upshot of the foregoing is that the appeal herein has merit and is allowed as prayed.

Dated, signed and delivered at Nyeri this 2nd day of March, 2017.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Kihara h/b for Muthui Kimatni for the appellant

N/A for the respondent

Court clerk - Esther