



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 755 OF 2013

EPHANTUS NJOGU NDAMBIRI.....PLAINTIFF

VERSUS

1. JUSTUS NGARI

2. PATRICK MUGO DANSON.....DEFENDANTS

AND

1. JUSTUS NGARI

2. PATRICK MUGO DANSON.....PLAINTIFFS IN THE COUNTER-CLAIM

VERSUS

1. JAMES BUNDI MUNENE

2. JOSPHAT MURIITHI GACHIRA

3. EPHANTUS NJOGU NDAMBIRI.....DEFENDANTS IN THE COUNTER-CLAIM

JUDGMENT

EPHANTUS NJOGU NDAMBIRI the plaintiff herein moved to this Court on 10th March 2005, while acting in person and filed this suit against **JUSTUS NGARI** and **PATRICK MUGO DANSON** (the 1st and 2nd defendants respectively) and sought the main prayer that the defendants, their servants, agents and property be evicted from his land parcel No. BARAGWE/GUAMA/1891 (the suit land) and all inhibitions, restrictions and cautions lodged thereon be lifted forthwith and that the Officer Commanding Kianyaga Police Station do provide security. He also sought costs and any other relief this Court may deem fit to grant. His claim was premised on pleadings that he was the registered proprietor of the suit land which had been gifted to him by one **JOSPHAT MURIITHI GACHIRI** who had in turn obtained it following a Court order made on 8th September 2004 in **NYERI HIGH COURT CIVIL CASE No. 86 of 2004** involving him and one **JAMES BUNDI MUNENE** the then registered owner of the suit land. However, when the plaintiff went to work on the land, he found both defendants illegally working on it thus necessitating this suit.

The defendants first filed a statement of defence through the firm of **MORRIS NJAGE** Advocate on 6th April 2005 in which they raised a Preliminary Objection to the effect that the ownership of the suit land has been fully canvassed and concluded in **KERUGOYA PRINCIPAL MAGISTRATE COURT LAND DISPUTE CASE No. 74 of 2004** and also **NYERI HIGH COURT CIVIL CASE No. 86 of**

2004 and the defendants own the suit land in the following ratios:

1st defendant - 0.15 HA

2nd defendant - 0.20 HA

They therefore denied that the plaintiff is the owner of the suit land.

On 21st April 2005, the defendants filed an amended defence in which they reiterated the Preliminary point of law. They also filed their own counter-claim against the plaintiff but also enjoined **JAMES BUNDI MUNENE** and **JOSPHAT MURIITHI GACHIRI** (as the 1st and 2nd defendants in the counter claim) and added that at all material times **JAMES BUNDI MUNENE** was the registered proprietor of the suit land measuring 0.40 Ha and by a written agreement of sale dated 10th February 1998, he sold it to the two defendants in the main suit and the suit land was sub-divided into two portions as follows:

1. JUSTUS NJERU NGARI – BARAGWE/GUAMA/2100.

2. PATRICK MUGO DANSON – BARAGWE/GUAMA/2101 and 2102.

That the necessary Land Control Board was obtained but the 1st defendant in the counter claim failed to execute the transfer and so the dispute was referred to the **GICHUGU LAND DISPUTES TRIBUNAL** which made a decision in favour of the plaintiffs in the counter claim and a decree was drawn in **KERUGOYA PRINCIPAL MAGISTRATE LAND DISPUTES CASE No. 74 of 2001** in their favour and the transfers were executed. Therefore the 1st defendant in the counter claim **JAMES BUNDI MASESE** had no title to the suit land which he could transfer to the plaintiff in the main suit (also the 3rd defendant in the counter claim). The plaintiff in the counter claim therefore sought judgment against the defendants in the following terms:

(a) Against the 1st, 2nd and 3rd defendants an order that title to the suit land belongs to the plaintiffs.

(b) An order that the registration of the 3rd defendant as the owner of the suit land be cancelled and the same be registered in the names of the plaintiffs in ratio:

1st plaintiff - 0.15 HA

2nd plaintiff - 0.25 HA

(c) That the suit by the 3rd defendant against the plaintiffs be dismissed with costs.

(d) Costs of the counter claim.

(e) Such further or other relief.

On 4th May 2005, the plaintiff amended his plaint through the firm of **P.M. MUCHIRA** Advocate and maintained the same orders as sought in the original plaint. He added however that the suit land was originally registered in the names of **JAMES BUNDI MUNENE** the 1st defendant in the counter claim who sold it for Ksh. 400,000 to **JOSPHAT MURIITHI GACHIRI** the 2nd defendant in the counter claim before it was later transferred to the plaintiff on 20th December 2004 for valuable consideration who went to work on it and found the defendants in the main suit (plaintiffs in the counter claim) illegally working on it. The plaintiff averred that there have never been any suit between him and the defendants over the suit land.

And in reply to the defence and counter claim, the plaintiffs averred that **KERUGOYA PRINCIPAL MAGISTRATE'S CIVIL CASE No. 74 of 2001** has no bearing to this suit and the decree in **NYERI**

HIGH COURT CIVIL CASE No. 86 of 2004 was between **JOSPHAT MURIITHI GACHIRI VS JAMES BUNDI MUNENE** and hence res-judicata does not apply. That in any event, the issues determined in **KERUGOYA PRINCIPAL MAGISTRATE'S CIVIL CASE No. 74 of 2001** involved different parties and the decree was in any event null and void ab-intio for want of jurisdiction. Further, that the defendants have brought in two persons in their counter claim without the leave of the Court and their suit is incompetent, bad in law and an abuse of the Court process and should therefore be dismissed and judgment entered for him as prayed in his amended plaint.

The hearing of the suit first commenced before **W. KARANJA J.** (as she then was) on 10th November 2010 when the plaintiff testified and closed his case. The trial was then adjourned for the defence and counter claim and when it was next mentioned before **ONG'UDI J.** on 20th June 2012, the parties agreed to proceed from where the case had reached. However, on 9th September 2013, it was transferred to this Court and when it was placed before me on 3rd December 2013, it was again agreed that it proceeds from where it had reached and after several adjournments, the defendants commenced their defence and counter claim on 3rd November 2016 when the 1st defendant in the main suit and 1st plaintiff in the counter claim **JUSTUS NGARI** testified and asked the Court to adopt his statement as his evidence. The 2nd defendant in the main suit and 2nd plaintiff in the counter claim **PATRICK MUGO DANSON** also asked the Court to adopt his statement as his evidence. Both were then cross-examined and their advocates filed their respective submissions.

I have considered the parties oral and documentary evidence and the submissions by their advocates. While the plaintiff in the main suit claims that the suit land is his property and seeks the eviction of the 1st and 2nd defendants therefrom, the said defendants have filed a counter claim in which they have enjoined **JAMES BUNDI MUNENE** and **JOSPHAT MURIITHI GACHIRI** as 1st and 2nd defendant in the this suit and seek orders that the suit land belongs to them.

The starting point should be to consider whether or not **JAMES BUNDI MUNENE** and **JOSPHAT MURIITHI GACHIRI** the 1st and 2nd defendants in the counter claim have been properly enjoined in these proceedings as defendants. The two were not defendants in the main suit filed by the plaintiff and the record shows that on 25th February 2016 the Deputy Registrar entered ex-parte judgment against them following an application dated 15th February 2016 by the advocate for the defendants in the main suit and plaintiffs in the counter claim. Since the 1st and 2nd defendants in the counter claim were not parties to the main suit, it was mandatory that the provisions of **Order 7 Rule 9 of the Civil Procedure Rules** are complied with. Those provisions provide as follows:

“Where any such person as is mentioned in rule 8 is not a party to the suit, he shall be summoned to appear by being served with a copy of the defence which shall be served in accordance with the rules for regulating service of summons”. Emphasis added

The interlocutory judgment entered by the Deputy Registrar against the 1st and 2nd defendants on 25th February 2016 was upon a request by the advocate of the plaintiffs in the counter claim vide his letter dated 29th July 2009. Attached to that request is an affidavit of service by one **WILFRED NJERU KIGORO** a licenced process server at Embu dated 2nd July 2009 in which he has deponed that on 10th June 2009 having received instructions from **MORRIS NJAGE** advocate, he served the amended defence and counter claim upon **JAMES FUNDI MUNENE** the 1st defendant in the counter claim. There is no evidence that the said **JAMES FUNDI MUNENE** was served with the summons as provided in **Order 7 Rule 9 of the Civil Procedure Rules**. There is also no evidence to show that the 1st defendant in the counter claim **JOSPHAT MURIITHI GACHIRI** was similarly served with summons as required by the same rules. Service of summons on a party is regulated by **Order 5 of the Civil Procedure Rules and Rule 1 (1)** thereof provides that:

“Where a suit has been filed, a summon shall issue to the defendant ordering him to appear within the time specified therein”.

What is annexed to the affidavit of service by **WILFRED NJERU KIGORO** the process server is only the amended statement of defence and counter claim. There is no copy of any summons served upon the

1st, and 2nd defendants in the counter claim as required by the provisions of **Order 7 Rule 9 of the Civil Procedure Rules**. That was a fatal lapse and I would not consider it a mere technicality that can be cured by the provisions of **Article 159 (2) (d) of the Constitution** bearing in mind that the 1st and 2nd defendants to the counter claim were not parties in the original suit and therefore would not have had any knowledge of the same. The service was done in June 2009 and so the applicable provision was **Order VII Rule 8 of the Civil Procedure Rules 2009** which read as follows:

“Where any such person as is mentioned in Rule 7 is not a party to the suit, he shall be summoned to appear by being served with a copy of the defence which shall be served in accordance with the rules for regulating service of summons”

It is clear therefore that **Order 7 Rule 9 of the 2010 Civil Procedure Rules** is similar to **Order VIII Rule 8 of the 2009 Civil Procedure Rules** in so far as the requirements of service of counter claim is concerned. As there was no compliance with the law with regard to service upon the 1st and 2nd defendants in the counter claim and who were not parties to the original claim by the plaintiffs in the main suit, it is obvious that the exparte judgment entered against the 1st and 2nd defendant in the counter claim on 25th February 2016 was irregular and must be set aside ex –debito justitiae which I hereby do. That means that the only parties both to the main suit and the counter claim are the plaintiff **EPHANTUS NJOGU NDAMBIRI** (also 3rd defendant in the counter claim) and the defendants **JUSTUS NGARI** and **PATRICK MUGO DANSON** (also plaintiffs in the counter claim).

According to the Green Card to the suit land, it is clear that it was part of the partition to land parcel No. BARAGWE/GUAMA/302. The suit land was registered in the names of **JAMES BUNDI MUNENE** on 30th May 2000. Cautions were placed thereon by the two defendants herein claiming a purchaser’s interest. However, on 17th November 2004 the suit land was transferred to **JOSPHAT MURIITHI GACHIRI** following orders issued in **NYERI HIGH COURT CIVIL CASE No. 86 of 2004** and a title deed issued in his names on 19th November 2004. Then on 30th December 2004, it was transferred to the plaintiff – **EPHANTUS NJOGU NDAMBIRI** – and a title deed was issued in his names on the same day. There is currently a restriction placed thereon in terms of a letter dated 20th January 2005. Therefore, the plaintiff’s claim that the suit land is registered in his names is not in doubt. Among the documents produced by the plaintiff in support of his claim to the suit land is an agreement dated 24th November 2004 by which he purchased the suit land from **JOSPHAT MURIITHI GACHIRI** (Plaintiff’s Exhibit 2). There is an acknowledgement confirming receipt of Ksh. 200,000 as purchase price by the said **JOSPHAT MURIITHI GACHIRI** (Plaintiff’s Exhibit 3), an application for the Land Control Board’s consent (Plaintiff’s Exhibit 4) and the letter of consent dated 7th December 2004 (Plaintiff’s Exhibit 5). Therefore, as the registered proprietor of the suit land, the plaintiff would, unless the contrary is proved, be entitled to the protection provided by **Section 26 (1) of the Land Registration Act** which 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, 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 ground 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” Emphasis added.

The claim by the 1st defendant (1st plaintiff in the counter claim **JUSTUS NGARI**) however, is that the said **JAMES BUNDI MUNENE** had sold him ½ acre out of the suit land for Ksh. 79,700 on 22nd November 1999 and he took possession and remains thereon to-date. The same **JAMES BUNDI MUNENE** also agreed to sell the other ½ acre out of the suit land to the 2nd defendant (2nd plaintiff in the counter claim) **PATRICK MUGO DANSON** for Ksh. 105,000. However, he reneged on both

agreements although they were in writing signed and attested. The dispute was therefore taken to the Gichugu Land Disputes Tribunal which decided in their favour. That award was confirmed by the **KERUGOYA PRINCIPAL MAGISTRATE'S CASE LDT No. 74 of 2001** and both defendants in the main suit (plaintiffs in the counter claim) were to get 0.15 Ha and 0.20 Ha each. There is also evidence that **JOSPHAT MURIITHI GACHIRI**, as plaintiff, had sued **JAMES BUNDI MUNENE**, as defendant, in **NYERI HIGH COURT CIVIL CASE No. 86 of 2004** seeking the transfer of the whole of the suit land to him and removal of all cautions, restrictions and inhibitions lodged against the said land. On 9th September 2004, a consent order was recorded in the following terms:

- 1. "That the defendant do transfer one (1) acre or 0.40 HA of the land parcel No. BARAGWE/GUAMA/1891 to the plaintiff"**
- 2. "That the inhibitions, restrictions and cautions lodged against land parcel No. BARAGWE/GUAMA/1891 be lifted forthwith and that the Court do authorize the Executive officer of this Court to sign all the necessary documents to facilitate the transfer of the said land parcel No. BARAGWE/GUAMA/1891".**

That consent order was issued on 9th September 2004 in a suit in which **JAMES BUNDI MUNENE** was the defendant. Even if the decree in **KERUGOYA PRINCIPAL MAGISTRATE'S CASE No. 74 of 2001** can be challenged for want of jurisdiction as submitted by the plaintiff, the order dated 9th September 2004 was issued by the High Court which has jurisdiction and its import is that from 9th September 2004, **JAMES BUNDI MUNENE** the defendant in **NYERI HIGH COURT CIVIL CASE No. 86 of 2004** had no proprietary interest in the suit land which now belonged to **JOSPHAT MURIITHI GACHIRI** and indeed by an agreement dated 24th November 2004, the said **JOSPHAT MURIITHI GACHIRI** transferred it to the plaintiff herein. However in July 2002, over two (2) years before the transfer of the suit land to the plaintiff herein, the said **JAMES BUNDI MUNENE** agreed to sell ½ acre out of the suit land to the 1st and 2nd defendants in the main suit (the plaintiffs in the counter claim) who have even gone into occupation thereof. He however reneged on the agreements. It is the submission by the advocate for the plaintiff that the sub-division of the suit land into two parcels i.e. BARAGWE/GUAMA/2100 and 2101 was null and void and cannot therefore be given any force of law by this Court. Further, that the various agreements and affidavits produced by the defendants to support their claim to the suit land are void as they relate to land parcel No. BARAGWE/GUAMA/302 and no valid agreement has been produced in respect to the suit land and there is a failure to comply with the provision of **Section 3 (3) of the Law of Contract Act**. The agreements between **JAMES BUNDI MUNENE** and the 1st and 2nd defendants in the main suit (the 1st and 2nd plaintiffs in the counter claim) are indeed with respect to land parcel No. BARAGWE/GUAMA/302 as submitted by **MR. MUCHIRA** advocate for the plaintiff in the main suit (3rd defendant in the counter claim). However, it is instructive to note that those agreements were entered into in the period 1998 and 1999. The suit land was originally part of land parcel No. BARAGWE/GUAMA/302 and arose out of the partitioning of that land. That explains why the first entry in the register with respect to the suit land is dated 30th May 2000. The agreements related to the purchase by the 1st and 2nd defendants (1st and 2nd plaintiffs in the counter claim) of ½ acre each out of land parcel No. BARAGWE/GUAMA/302. The application for the Land Control Board's consent to transfer a portion of the suit land to the 2nd defendant in the main suit and also the letter of consent to sub-divide the suit land into three portions measuring 0.20 HA, 0.15 HA and 0.05 HA may both have been signed by the Executive officer of the Principal Magistrate's Court at Embu and not **JAMES BUNDI MUNENE** as would have been expected. However, in doing so, the Executive officer was acting pursuant to orders issued by a Court of law. Even if it can be argued that those orders arose out of any award filed at the Court by the Gichugu Land Disputes Tribunal which had no jurisdiction over a dispute relating to title to registered land, it was nonetheless a Court order once it was adopted by the Principal Magistrate's Court at Kerugoya on 29th August 2001. The law is that Court orders must be obeyed at all times whether one agrees with them or not. And where one does not agree with a Court order, the remedy is not to ignore it but to move to the Court that issued it to have it discharged or file an appeal. That is why in **HADKINSON VS HADKINSON (1952) 2 ALL E.R 56**, the Judges of the Court of Appeal of England held that:

"It is the plain and unqualified obligation of every person against or in respect of whom an

order was made by a Court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the Court by him not being entertained until he had purged his contempt”.

It is plain to this Court therefore, that for as long as the orders issued by the Principal Magistrate’s Court Kerugoya in the case No. 74 of 2001 remained un-discharged, it was not open to **JAMES BUNDI MUNENE** and **JOSPAT MURIITHI GACHIRI** to record the consent order that they did in **NYERI HIGH COURT CIVIL CASE No. 86 of 2004** transferring the suit land to **JOSPAT MURIITHI GACHIRI**. That order was clearly obtained through concealment of material facts relating to the suit land and which were within the knowledge of **JAMES BUNDI MUNENE**. It was also made in contravention of an earlier order, albeit issued by a subordinate Court, and which had not been discharged. That information was obviously kept away from the Judge (if the order was issued by one) or the Deputy Registrar who signed the order in **NYERI HIGH COURT CIVIL CASE No. 86 of 2004**. Therefore the transfer of the suit land to **JOSPAT MURIITHI GACHIRI** and thereafter to **EPHANTUS NJOGU NDAMBIRI** the plaintiff in the main suit vide the agreement dated 24th November 2004 was unlawful. No valid title to the suit land was acquired by the said **EPHANTUS NJOGU NDAMBIRI**, the plaintiff in the main suit, that can be protected by the provisions of **Section 26 (1) of the Land Registration Act** referred to above. As was held by **ALNASHIR VISRM J.** (as he then was) in **KOINANGE INVESTMENT & DEVELOPMENT LTD, VS NAIROBI CITY COUNCIL & OTHERS 2009 e K.L.R (HIGH COURT NAIROBI CIVIL APPEAL No. 535 of 2006)**, a transfer done in contravention of a Court order is **“unlawful, null and void and is of no effect whatsoever”**. I agree with those sentiments. It must also be remembered that this is both a Court of law and equity and it will not allow a person to benefit from his own wrong doing nor allow unjust enrichment. Equity is about fairness.

Counsel for the plaintiff in the main suit has also submitted that the various agreements between **JAMES BUNDI MUNENE** and the two defendants in the main suit do not comply with the provisions of **Section 3 (3) of the Contract Act** and also that they refer to land parcel No. BARAGWE/GUAMA/302. I have already held above that the suit land only came into existence in 2000 upon the partition of land parcel No. BARAGWE/GUAMA/302 and therefore it was not proper for **JAMES BUNDI MUNENE** to transfer the whole of the suit land to **JOSPAT MURIITHI GACHIRI** on 17th November 2004 without taking into consideration that he had already bound himself to transfer ½ acre to each of the defendants in the main suit. That is what a Court of equity will not countenance. On the submission that the agreements between **JAMES BUNDI MUNENE** and the two defendants in the main suit did not comply with the provisions of **Section 3 (3) of the Law of Contract Act**, I have looked at the said agreements and it is true that indeed the agreement between **JAMES BUNDI MUNENE** and **JUSTUS NJERU NGARI** the 1st defendant in the main suit dated 4th April 1998 is only signed by the two parties and no witness. On the other hand, the agreement between **JAMES BUNDI MUNENE** and the 2nd defendant **PATRICK MUGO DANSON** dated 13th November 1998 is signed by the two parties and one witness. However, these agreements were executed in 1998. **Section 3 (3) of the Law of Contract Act** came into effect on 1st June 2003. Prior to that, **Section 3 (3) of the Law of Contract Act** read as follows:

“No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it

provided that such a suit shall not be prevented by reason only of the absence of writing where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –

(1) Has a part performance of the contract taken possession of the property or any part thereof; or

(2) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract”

Clearly therefore the agreement entered into between **JAMES BUNDI MUNENE** and the two defendants in the main suit cannot be defeated by the provisions of the **Law of Contract Act** as to attestation for the reason that in 1998, a disposition in land only required the signature of the person to be charged or by some person authorized to sign it. Indeed even the acknowledgments signed by the parties herein would be sufficient “**memorandum or note**” required by the law. Finally, even if the agreements were invalid, which they were not, it is not contested that the two defendants in the main suit are in occupation of the suit land and that is why the plaintiff in the main suit wants to evict them. It would be unjust for the plaintiff to evict the two defendants in the main suit given those circumstances. The plaintiff’s claim for the orders evicting the two defendants from the suit land must therefore fail.

The two defendants in the main suit seek orders in their counter claim that the suit land belongs to them and that the registration of the 3rd defendant (plaintiff in the main suit) as the owner of the suit land be cancelled and the same be registered in the names of the two plaintiffs in the counter claim in the ratio 0.15 HA for 1st plaintiff and 0.25 HA for 2nd plaintiff. That claim is well merited because, as I have already found above, the transfer of the suit land to the plaintiff in the main suit (3rd defendant in the counter claim) was done un-procedurally and was therefore unlawful, null and void and no title therefore passed to him with respect to the suit land. The said plaintiff in the main suit (3rd defendant in the counter claim) does not therefore have a title that can be protected by the provisions of **Section 26 (1) of the Land Registration Act.**

Ultimately therefore and upon considering the evidence by all the parties herein, this Court makes the following orders:

1. The plaintiff’s claim against the defendants is dismissed with costs.

2. The defendants counter claim is allowed in the following terms:

(a) An order that the land parcel No. BARAGWE/GUAMA/1891 belongs to the defendants (plaintiffs in the counter claim).

(b) An order that the registration of the 3rd defendant (plaintiff in the main suit) as the owner of the land parcel No. BARAGWE/GUAMA/1891 be cancelled and the same be registered in the names of the two defendants (plaintiffs in the counter claim).

(c) The defendants in the main suit (plaintiffs in the counter claim) are also entitled to costs of their counter claim.

B.N. OLAO

JUDGE

19TH MAY, 2017

Judgment dated, delivered and signed in open Court this 19th day of May, 2017

Mr. Muchira for Plaintiff present

Mr. Njage for the Defendants present

Right of appeal explained.

B.N. OLAO

JUDGE

19TH MAY, 2017