



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1544 OF 2014

MBUGUA NJUGUNA..... PLAINTIFF

=VERSUS=

PATRICK KIMANI MBUGUA.....DEFENDANT

J U D G E M E N T

1. On 23/4/1959, the plaintiff, Mbugua Njuguna, was registered as proprietor of Land Title Number: Limuru/Bibirion/T.539 under the Native Land Tenure Rules, 1956 (hereinafter referred to as “**the suit property**”). He was issued with a certificate of ownership under Rule 15 of the Native Land Tenure Rules of 1956. He still holds the certificate to date. On 6/12/1974, an entry was made in the proprietorship section of the land register of the suit property, transferring the suit property to the defendant herein, Patrick Kimani Mbugua. The plaintiff contends that he does not know the defendant and he has never transferred the suit property to him. The plaintiff further contends that he discovered the illegal transfer of the suit property in 2011. It is this discovery that prompted the filing of the present suit.

2. Through a plaint dated 11/12/2014 the plaintiff makes two principal prayers: 1) an order cancelling Entry No. 2 and removing the name of the defendant from the proprietorship section of the suit property register and; 2) a declaration that the plaintiff is the legal owner of the suit property and that Entry No. 2 is fraudulent and should be cancelled. The plaintiff’s case is that he became legal owner of the suit property in 1959 and he has lived on it since then. His two wives live on the suit property. He contends that transfer of the suit property into the name of the defendant in 1974 was fraudulent because he has never executed a transfer instrument in favour of the defendant.

3. On 10/12/2015, the court granted the plaintiff leave to effect service of summons to enter appearance through a notice in the Daily Nation Newspaper. On 5/2/2016 a notice was published in the Daily Nation Newspaper inviting the defendant to enter appearance. An affidavit of service was filed on 10/3/2016 confirming that indeed summons had been served. The plaintiff neither entered appearance nor filed defence.

4. At the hearing, this court was of the view that taking into account the prayers sought in the plaint, there was no legal framework for interlocutory judgment entered by the Deputy Registrar on 18/3/2016. The court proceeded to vacate the interlocutory judgment and hearing proceeded on the basis that there was no interlocutory judgement on record.

5. In his testimony to the court, the plaintiff stated that he holds identity card number 0323372. He has been the legitimate owner of the suit property since 1959 when land demarcation was done in Limuru Area of Kiambu County. He built his residential home on the suit property and he has lived there for the last 58 years. In August 2011, he visited Kiambu Lands Registry to obtain the title deed to the suit property. It is at this point that he learnt that the suit property was transferred into the name of the

defendant on 6/12/74. He carried out inquiries with a view to establishing who the defendant was and how he got to be registered as proprietor of the suit property. He did not manage to trace the defendant. He came to the conclusion that the material entry in the land register was fraudulent because he had never transferred the suit property to the defendant. He further testified that no one has ever come out to lay claim to the suit property. He added that copies of transfer documents used to effect the transfer were not available in the lands registry at Kiambu.

6. **PW2- Elizabeth Mweru**, testified that she got married to the plaintiff in 1966 and they have lived on the suit property throughout the period of their union. She also testified that her co-wife, Elizabeth Karugi, also lives on the suit property. She stated that she is not aware of any transfer effected by her husband in 1974.

7. The plaintiff's case and evidence are unchallenged. The certified copy of the land register produced as an exhibit confirms that the plaintiff was registered as proprietor of the suit property in 1959. The certificate dated 19/1/59 confirms that in 1959 the plaintiff was issued with a land ownership certificate for the suit property under the Native Land Tenure Rules of 1956. The plaintiff has been in possession of the suit property since 1959. He lives on the suit property with his two wives. He is now about 90 years old. No one has laid claim to the suit property.

8. Upon enactment of the Registered Land Act, it became the substantive and land registration legal framework applicable to the suit property. Sections 38(1), 108(1) and 109(1) of the now repealed Registered Land Act contained the following legal framework on disposition of interest in land.

“38(1) No. land, lease, or charge shall be capable of being disposed of except in accordance with this Act and every attempt to dispose of the land, lease or charge otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or effect any estate, right or interest in the land, lease or charge”

“108 (1) every disposition of land, a lease or a charge shall be effected by an instrument in the prescribed form or in such other form as the registrar may in any particular case approve and every person shall use a printed form issued by the registrar unless the registrar otherwise permits”

“109 (1) every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the instrument”.

9. The above legal framework has been replicated with modifications in Sections 42, 43, 44 and 45 of the Land Registration Act 2012. The legal ramifications of the framework in the repealed Registered Land Act was that a transfer executed by a person other than the registered proprietor was ineffectual, did not create or effect a valid interest in favour of the transferee and did not extinguish, transfer or vary the interest of the registered proprietor. In a nutshell, a transfer executed by a person other than the registered proprietor was a nullity and remains a nullity. I would, in addition, echo the Court of Appeal pronouncement in **Arthi Highway Developers Limited Vs West End Butchery Limited & 6 Others (2015) eKLR** to the effect that a title obtained fraudulently is an irredeemable fake. It does not confer any legal interest capable of protection under Section 26(1) of the Land Registration Act 2012.

10. Informed by the uncontroverted evidence on record, the above legal framework and the prevailing jurisprudence, I am satisfied that the plaintiff has proved his case against the defendant on a balance of probabilities. In light of that, I hereby enter Judgment in favour of the plaintiff and against the defendant in the following terms:

(a) A declaratory order is hereby made to the effect that the plaintiff, Mbugua Njuguna, is the legal owner of Land Title Number: Limuru/Bibirioni/T.539.

(b) An order is hereby issued cancelling Entry No. 2 and removing the name of Patrick

Kimani Mbugua from the Land Register of Land Title Number: Limuru/Bibirioni/T.539.

(c) The Land Registrar is hereby ordered to cancel any title instrument issued to Patrick Kimani Mbugua and to note the cancellation on the Land Register of Land Title Number: Limuru/Bibirioni/T.539.

(d) The plaintiff shall have costs of this suit.

Dated, signed and delivered at Nairobi on this 4th day of August 2017.

B M EBOSO

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court clerk