



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 166 OF 2014

(FORMERLY EMBU HCCC NO. 115 OF 2008)

ANNAH MUTHONI IRERI.....PLAINTIFF

VERSUS

WILLIAM NJERU MBOGO.....DEFENDANT

JUDGEMENT

1. By a plaint dated and filed on 12th August 2008, the Plaintiff sought the following reliefs from the Defendant;

a) A declaration that the purported registration of the Defendant William Njeru Mbogo as the proprietor of land parcel number Ngandori/Kirigi/684 on 8th August 2002, vide entry number 4 in the register for the said land and the subsequent title deed issued on the said 8th August 2002, are (sic) fraudulent, illegal, null and void.

b) A declaration that the Plaintiff is the lawful proprietor of land parcel number Ngandori/Kirigi/684 and that the Embu District Land Registrar do rectify the register for land parcel number Ngandori/Kirigi/684 by canceling and/or deleting the names of the Defendant William Njeru Mbogo from the proprietorship section and reinstating and/or restoring the names of the Plaintiff Annah Muthoni Ireri as the proprietor of the said land.

c) Costs of the suit (sic).

2. It was pleaded in the plaint that prior to 8th August 2002, the Plaintiff was the registered proprietor of *Title No. Ngandori/Kirigi/684* (hereinafter known as the 'suit property'). It was further pleaded that sometime in the year 2002, the Defendant fraudulently obtained registration of the suit property by tricking the Plaintiff into thumb printing some documents which she was informed were for different purpose.

3. The Plaintiff further averred that the Defendant was a preacher or pastor of the Full Gospel Church of Kenya Missionaries and that she was a member of the Defendant's congregation at the material time. As a result of the said relationship, she stated that she wholly trusted the Defendant believing that he was a man of good intentions.

4. The particulars of fraud and misrepresentation alleged on the part of the Defendant were particularized in paragraph 12 of the plaint as follows;

- i. *Causing land parcel number Ngandori/Kirigi/684 to be registered in his names without following the proper and lawful procedures.*
- ii. *Causing the said land to be registered in the Defendant's name without any and/or any valid consent from the Land Control Board.*
- iii. *Causing the said land to be registered in the Defendant's name without any and/or any valid transfer form having been executed by the Plaintiff.*
- iv. *Causing and/or tricking the Plaintiff to thumb print documents for transfer of the said land.*
- v. *Causing, tricking and/or misleading the Plaintiff to thumb print transfer documents by alleging that they were documents confirming that the Plaintiff had allowed the Defendant to live and/or construct a house/structure on the Plaintiff's land parcel number Ngandori/Kirigi/684.*
- vi. *Taking advantage of the Plaintiff's illiteracy to deprive her of her land.*
- vii. *Using falsehoods, misrepresentation and deceit to cause land parcel number Ngandori/Kirigi/684 to be registered in the Defendant's names.*
- viii. *Presenting forged and/or invalid documents to the Land Registrar for purposes of the Defendant being registered as the proprietor of land parcel number Ngandori/Kirigi/684.*
- ix. *Obtaining an invalid, improper and/or unlawful title to land parcel number Ngandori/Kirigi/684 by use of fraud, deceit and misrepresentation.*

5. The Defendant entered an appearance on 25th August 2008 and filed a defence on 27th August 2008 denying the Plaintiff's claim in its entirety. The Defendant pleaded three defences to the action. First, that the Plaintiff had freely and willingly transferred the suit property for a consideration. Second, that the Plaintiff's suit was statute barred. Third, that the suit was *res judicata* on account of previous proceedings between the parties vide Embu Land Disputes Tribunal Case No. 116 of 2007 and High Court Misc Civil application JR No. 22 of 2008.

6. In a reply to defence filed on 29th August 2008, the Plaintiff denied that she freely and willingly transferred the suit property to the Defendant. She denied that her suit was statute barred or *res judicata*.

7. Although both parties filed their respective witness statements, the Defendant did not turn up for trial when the suit was set down for hearing on 15th June 2017. The court, therefore, allowed the Plaintiff to proceed *ex-parte* upon being satisfied that the Defendant's advocate had been duly served with a hearing notice. The affidavit of service filed in court indicated that the Defendant's advocate received the hearing notice on 26th April 2017.

8. At the hearing hereof, the Plaintiff called two witnesses and closed her case. She was the first to testify as PW 1. She testified that she used to attend the same church with the Defendant who was a preacher at the Full Gospel Churches of Kenya at Mutunduri. It was her case that her late husband was previously registered as the owner of the suit property and that she became the owner upon his death after undertaking succession proceedings.

9. It was her evidence that sometime in 2002, the Defendant requested her to allow him to erect a temporary building on the suit property for residential purposes, which request she accepted. Later on in 2002, the Defendant informed her that the church required a document from her proving that she had allowed him to reside on the suit property and that it was free of charge. She was informed that the document had to be prepared and thumb printed at the District Officer's Office. The Plaintiff also acceded to the Defendant's said request and thumb printed some documents.

10. The Plaintiff stated that she later on discovered to her surprise that the documents were in fact transfer forms which were then used to transfer the suit property to the Defendant's name in 2002. She stated that she was illiterate and that the forms she thumb printed were not read over to her hence she did not know their contents. It was her case that she had no intention of transferring the suit property to the Defendant at all. It was also her case that she had no reason to transfer the suit property to the Defendant since she was not selling it. She, therefore, wanted to recover the suit property from the Defendant.

11. The Plaintiff's second witness was Stephen Njeru Francis Ndwiga who testified as PW 2. He stated that he knew the Plaintiff in this suit since she was married to his late uncle. He also knew the Defendant as a preacher of the Full Gospel Churches of Kenya. He confirmed that the suit property initially belonged to his uncle but was later transferred to the Plaintiff upon the demise of the former. He further testified that he came to know that the Defendant had caused the suit property to be registered in his name when the Plaintiff was being evicted.

12. It was the evidence of PW 2 that the Plaintiff had no intention of selling or transferring the suit property to a third party since she could have involved other family members. He further stated that the matter was reported to the locational Chief who advised the Plaintiff to file a case at the Land Disputes Tribunal for recovery of her land.

13. The parties herein do not appear to have agreed on a common statement of issues for determination. The record, however, indicates that the Plaintiff filed her version of issues dated 6th January 2016 listing 15 issues for determination. The Plaintiff's counsel framed only 8 issues in his written submissions. The court is of the view that in the absence of an agreed statement, the court should frame the issues arising from the pleadings or at least verify if issues filed properly capture the real issues in controversy in the suit.

14. In my view, the issues in controversy in this suit may be summarized as follows:

- a) Whether the transfer of the suit property and its registration in the Defendant's name was procured by fraud and/or misrepresentation.
- b) Whether the Plaintiff willingly and freely transferred the suit property to the Defendant for consideration.
- c) Whether the Plaintiff's suit is statute barred.
- d) Whether the Plaintiff's suit is *res judicata* by virtue of previous proceedings between the parties.
- e) Whether the Plaintiff is entitled to the reliefs sought.
- f) Who shall bear the costs of the suit.

15. The 1st issue is whether the Defendant obtained his registration as proprietor of the suit property through fraud or misrepresentation. The Plaintiff's evidence at the trial hereof was that she was tricked by the Defendant into thumb printing some documents believing them to be for a different purpose other than transfer of the suit property. The Defendant was said to have taken advantage of her illiteracy and the preacher-disciple relationship of trust to fraudulently acquire the suit property.

16. The court finds the evidence of the Plaintiff on fraud and misrepresentation unchallenged and accepts it as such. The court has examined the green card for the suit property and noted that prior to the Defendant's registration on 8th August 2002, the Plaintiff was the registered proprietor. She was first registered as proprietor on 10th April 1995. The evidence of PW 2 on this issue was not useful since he only became aware of the transfer when the Plaintiff was being evicted. He was not privy to the earlier dealings between the Plaintiff and the Defendant. The court finds that the particulars of fraud and misrepresentation listed as (iv) (v) (vi) and (vii) in paragraph 12 of the plaint as proved. The 1st issue is

therefore answered in the Plaintiff's favour.

17. The 2nd issue was raised by the Defendant in his defence. The Defendant did not attend the trial to support his defence that the Plaintiff transferred the suit property to him freely and willingly for valuable consideration as pleaded in paragraph 4 of the defence. On the other hand, the Plaintiff denied that she ever sold or even intended to transfer the suit property to the Defendant. In the premises, there is no material evidence on record upon which the court may conclude that the Plaintiff transferred the suit property to the Defendant for a consideration. This issue is consequently answered in the negative.

18. The 3rd issue was also raised by the Defendant in his defence. It was not pleaded with particularity though. It was not clear whether the contention was that the Plaintiff's suit was statute barred under the ***Limitation of Actions Act (Cap. 22)*** or any other law. Since the Defendant failed to testify at the hearing hereof, there is no material evidence on record on the basis of which the court may conclude that the Plaintiff's suit is statute barred. The material on record indicates that the suit property moved from the Plaintiff's name into the Defendant's on 8th August 2002 and that the instant suit was filed on 12th August 2008, that is, about 6 years down the line. The 3rd issue is therefore answered in the negative as well.

19. The 4th issue is whether this suit is barred under the doctrine of *res judicata*. The court has examined the material on record relating to previous proceedings between the same parties. The award of Embu Land Disputes Tribunal (hereinafter the 'Tribunal') in LDT case No. 116 of 2007 simply awarded the suit property to the Plaintiff. The judicial review court in Embu High Court Misc Civil Application JR No. 22 of 2008 simply quashed the award of the said Tribunal on account of lack of jurisdiction to deal with registered land. The Judicial Review Court did not determine the substantive land dispute. It simply quashed the award of the Tribunal with the consequence that both parties reverted to the earlier position before the matter was handled by the Tribunal. In those circumstances, the doctrine of *res judicata* would not apply. The 4th issue is consequently answered in the negative.

20. The 5th issue is on the reliefs. Given the holdings on the first 4 issues, it is clear that the Plaintiff has demonstrated that she was induced into giving away her land through fraudulent means. The Defendant has failed to demonstrate his pleaded defences. In the premises, the Plaintiff would be entitled to the reliefs sought in the plaint.

21. The last issue is on costs. Although costs are always at the discretion of the court, the general rule is that costs follow the event. A successful party is thus entitled to costs of the action unless, for good reason, the court orders otherwise. The Plaintiff is, therefore, entitled to costs as the successful party.

22. The upshot of the foregoing is that the court finds that the Plaintiff has proved her case against the Defendant to the required standard hence judgement is hereby entered in her favour as prayed for in the plaint. The Defendant shall bear the costs of the suit.

23. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **19th** day of **OCTOBER, 2017**

In the presence of Mr Njoroge holding brief for Mr Okwaro for the Plaintiff and in the absence of the firm of Eddie Njiru & Co Advocates for the Defendant.

Court clerk Njue.

Y.M. ANGIMA

JUDGE

10.10.17