



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELC CASE NO. 98 OF 2009

GRACE WANJIRU CHEGE.....PLAINTIFF

VERSUS

JAMES NJUGUNA MWAURA.....1ST DEFENDANT

JOHN NDUNGU MWAURA.....2ND DEFENDANT

JUDGMENT

BACKGROUND

The history of this case is that plaintiff Grace Wanjiru Chege claims she owned parcel of land No. Dagoretti/Kinoo/708 but that the land was fraudulently sold when she was in United States of America. Defendants on the other hand claim that they lawfully purchased the suit property from plaintiff.

Plaintiff's claim is for:

- a) A declaration that the transfer made on the 12th February, 2009 with respect to Land Parcel Number Dagoretti/Kinoo/708 was fraudulent and is null and void.
- b) A declaration that the Plaintiff is the rightful owner of all that Land Parcel Number Dagoretti/Kinoo/708.
- c) A permanent injunction restraining the Defendants from entering, erecting any structures and dealing in any manner whatsoever with Land Parcel Number Dagoretti/Kinoo/708.
- d) An order for rectification of the register in respect of Land Parcel Number Dagoretti/Kinoo/708 by way of cancellation of the registration made on the 12th February 2009 of the Defendants as proprietors of Land Parcel known as Dagoretti/Kinoo/708.
- e) Any other relief the Court may deem fit and costs of the suit.

Defendants on the other hand pray that they be declared as bonafide purchasers of the suit property.

The matter was set down for hearing on 23/3/2017. The defendants were absent but the case proceeded after the court confirmed that service had been effected.

PLANTIFF'S CASE

Plaintiff adopted her statement filed in court on 31/5/2013 as her evidence in chief. She states that she is the registered owner of plot No. Dagoretti/Kinoo/708. She avers that she resides and works in New York City in United States of America. On 26/2/2009 she was in Kenya. She found building materials on her plot. She proceeded to conduct a search at Land Registry, which revealed that her land had been transferred to defendants fraudulently. She also discovered that her I.D card and her original title to the land had been stolen from her residence in Kinoo. She reported the matter to the Land Register Kiambu and also to the police.

She avers that her daughter Sarah Wangui was charged in connection with the alleged illegal transaction, but was acquitted on account of the fact that the child has no mental capacity to transact. Plaintiff also avers that defendants owned other properties in the vicinity and so they knew very well that the suit property belonged to plaintiff.

Plaintiff is emphatic that she never sold her plot, never received any money or consideration for sale and never went to any Land Control Board.

She states that when her property was transferred, on 12/2/2009 she was in United States America as is evident in her pass port.

In support of her claim, plaintiff produced as exhibits the documents in her list of 31/5/13 and a supplementary list of 22/3/17.

PW2, a police officer did testify and confirmed that indeed plaintiff had reported the case of fraudulent transfer of the property.

DETERMINATION

There is only one issue for determination; **whether the registration of the suit land in favour of defendants was a fraudulent transaction.** If this is in the affirmative, then the land belongs to plaintiff. If not the land belongs to defendants.

The transfer of the land to the defendant was occasioned by a land sale agreement, subsequent consent at Land Control Board and eventual registration of the land in favour of defendants.

Firstly, I find that the plaintiff has stated that she was not in the country when the sale occurred on 12/2/2009. She was in the United States America. Plaintiff did show the Court her United States America passport which had a stamp of 26/2/2009 as date of entry into the country (Kenya). I have no reason to doubt this record.

Secondly it is quite apparent that the documents used to transfer the land from plaintiff to defendants were not genuine documents. The National I.D card used to represent plaintiff is exhibit 14 bearing the name of Wanjiru Chege from Trans-Nzoia born in 1958. However plaintiff's I.D card is the one marked Ex 13. She was born in 1936 and hails from Meru Central. When plaintiff was testifying, the court observed that indeed she is an old lady who was certainly not born in the 1950s. She said that her first born child was actually born in 1958.

The other document used to effect transfer is the KRA PIN. The false one used is the one produced as exhibit 15. Again this document depicts the plaintiff as someone born in 1958 in Trans-Nzoia. I have already established that these are false particulars of the plaintiff. The plaintiff was on the other hand able to avail the Computer Generated PIN showing her PIN No. produced as exhibit 20.

The other document used is the transfer forms produced as Exhibit 5. The signature thereof is indicated as G. Wanjiru. Plaintiff has stated that this not her signature. I have no reason to doubt that.

It is my finding that the documents used to transfer the suit land to the defendants were forged document and hence the transaction was fraudulent.

The third aspect to consider is the speed with which the transaction was carried out. Land is an emotive subject in Kenya. Any one transacting in land trends carefully and cautiously. Due diligence is conducted over some period of time, more so if the land is prime like in the present case. The official paper work and the beaurocracy surrounding land transactions run over quite a lengthy time frame.

In the present matter, a copy of agreement annexed to defendant's Replying Affidavit of 29/3/2009 shows that the said agreement was carried out on 11/2/2009. The transfer forms were signed on same date of 11/2/2009 (before the consent from Land Control Board was obtained). The following day on 12/2/2009, the consent from Land Control Board was obtained. Still on this day of 12/2/2009, Registration of Defendants as proprietors of the suit land was effected. The title was issued 10 months later on 13/12/2009. It is however not plausible in Kenya that you enter into a land sale agreement on the same day that you sign transfer forms and the following day, you obtain registration at land office, unless the entire transaction is tainted with fraud. That was certainly what happened in the present case. The consent from Land Control Board itself was obtained after the transfer which makes the entire transaction invalid.

Fourthly, the circumstances surrounding the case at the initial stage indicate that something was amiss.). Plaintiff has demonstrated that she made efforts to bring the fraud issue to the attention of the relevant authorities. PW2 has testified that plaintiff reported the matter to CID on her arrival in the country. Nevertheless, it is PW1's daughter who was charged despite the fact that she is mentally handicapped (see exhibit 19). There is a letter of 3/3/2009, exhibit 17 showing that plaintiff instructed a lawyer to report the fraud issue to Kiambu District Land Registrar. Another letter is that of 8/3/09 (exhibit 18) written by the police from Kabete police station to the kikuyu land board informing the latter that the matter was under investigation. The reasonable cause of action to have been undertaken by the lands office officials is to take preservation measures by registering a restriction on the land. They didn't and rightly so because it is the same lands office where registration of plaintiff's land had been illegally and irregularly effected on 12/2/2009.

Fifthly, I find that there is something peculiar about the proceedings herein. The original file apparently disappeared. The file was reconstructed on 29/3/16. However, in the reconstructed file, the plaint is missing. Defence and counter claim are not.

The statement of defence apparently filed on 29/5/2009 doesn't seem to have the ending. However, a complete counterclaim dated 20/5/2009 has been put in the file where defendants herein are the plaintiff's. This document is however not filed and I disregard it altogether.

Then on 5/4/2016 defence counsel informed the court that 1st defendant was deceased. No further information was given. The court gave a date for 27/6/2016 for further directions. Come 27/6/2016 and defence counsel were absent.

However, on 27/3/2017 just 14 days after the trial had started, defence counsel filed an application to cease acting. It is the view of this court that the application was filed to defeat the course of justice in view of proceedings of 5/4/16.

I do find that defendants came to be registered as the owners of the suit land through fraudulent schemes. Such a title can be impeached pursuant to provisions of section 26 (1) of the Land Registration Act. See **ELC CASE NO. 61 OF 2015 (Formerly HCC NO. 96 OF 2012) GODFREY N. NYAGA -VERSUS MARGARET W. THEURI EUGENE GITONGA KAMAU and LANDS REGISTRAR NYERI.**

Conclusion; I find that Plaintiff has proved her case on a balance of probability. I proceed to give the following orders;

1. It is hereby declared that the transfer made on 12/2/2009 in respect of parcel no. Dagoretti/Kinoo/708 was a fraudulent transaction and the same is null and void.

2. It is hereby declared that plaintiff is the rightful owner of the land parcel no. Dagoretti/Kinoo/708

3. A permanent injunction is hereby issued restraining the defendants from entering, erecting any structures and dealing in the land no. Dagoretti/Kinoo/708.

4. An order is hereby issued to the Land registrar to rectify the register in respect of parcel no. Dagoretti/Kinoo/708 by cancelling the registration made on 12/2/2009 of defendants as the proprietors of the land parcel no. Dagoretti/Kinoo/708 and instead to register GRACE WANJIRU CHEGE as the proprietor of the aforementioned parcel of land.

5. The defendants are hereby condemned to pay costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2017

HON. L.N. MBUGUA

ELC JUDGE

IN THE PRESENCE OF:-

Ongeri H/B for Maina for Plaintiff