



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO.203 OF 2012

1. EVANS NGUGI NDICHU.....PLAINTIFF

2. PAUL THUO NDICHU.....PLAINTIFF

VERSUS

1. JOSEPH KABUI KIRAGU.....DEFENDANT

2. THE HON. ATTORNEY GENERAL.....DEFENDANT

3. THE COMMISSIONER OF LANDS.....DEFENDANT

4. KAMITI FARMERS COMPANY LTD.....DEFENDANT

JUDGMENT

The plaintiff brought this suit against the defendants on 18th April, 2012 seeking the following reliefs;

- (i) A declaration that the title held by the 1st defendant in respect of land parcel number NAIROBI BLOCK 117/473(hereinafter referred to as “the suit property” is invalid null and void.
- (ii) A declaration that the plaintiffs and the estate of John Ndichu Ngugi (hereinafter referred to as “the deceased”) are the bona fide owners of the suit property.
- (iii) An order directing the 3rd defendant to cancel the title held by the 1st defendant in respect of the suit property.
- (iv) A permanent injunction restraining the 1st defendant his servants or agents from alienating, dealing, disposing of or interfering in any manner with the suit property.
- (v) Costs of the suit.

The plaintiffs brought this suit on their own behalf and on behalf of the estate of John NdichuNgugi(“the deceased”). In their plaint dated 16thApril, 2012, the plaintiffs averred that at all material times, the deceased was the lawful allottee of the suit property. The suit property was allotted to the deceased by the 4th defendant company by virtue of the shares that the deceased held in the said

company. The plaintiffs averred that the deceased passed away on 20th April, 2010 before he was issued with a title in respect of the suit property. After the death of the deceased as aforesaid, they started following up the title of the suit property. In the process, they discovered that the suit property had been registered in the name of the 1st defendant, who had obtained a certificate of lease in respect thereof on 22nd December, 2008. The plaintiffs averred that the 1st defendant acquired the suit property fraudulently in collusion with the 3rd and 4th defendants. The plaintiffs set out the particulars of fraud on the part of the 1st, 3rd and 4th defendants. The plaintiffs averred that they sent notices to the 2nd and 3rd defendants demanding that the 1st defendant's title be cancelled which notices did not elicit any positive response thereby leaving them with no alternative but to institute this suit.

All the defendants were served with the summons to enter appearance but only the 2nd and 3rd defendants entered appearance of filed a joint statement of defence through the Attorney General. In their defence the 2nd and 3rd defendants denied the plaintiff's claim in its entirety. The 2nd and 3rd defendants averred that whatever action that was taken by the 3rd defendant was taken in good faith and in reliance on the information that was provided by the 4th defendant. The 2nd and 3rd defendants denied all the particulars of fraud pleaded against them in the plaint. The 2nd and 3rd defendants averred that the plaintiff's claim if any lies against the 1st and 4th defendants but not against the 2nd and 3rd defendants.

When the suit came up for hearing on 12th October, 2015, the 2nd and 3rd defendants did not appear. After satisfying myself that the Attorney General who is on record for the 2nd and 3rd defendants was duly served, I allowed the plaintiffs to proceed with the hearing, the 2nd and 3rd defendant's absence notwithstanding. The 2nd plaintiff gave evidence on behalf of the plaintiffs. The plaintiffs also relied on their witness statements that were filed herein pursuant to the provisions of Order 3 rule 2 (c) of the Civil Procedure Rules. In his testimony, the 2nd plaintiff told the court that the 1st plaintiff is his brother and that they are the administrators of the estate of their father, John NdichuNgugi (deceased). He stated that the deceased was issued with a ballot paper No.281 by the 4th defendant that entitled him to a parcel of land. The deceased was subsequently issued with a certificate by the 4th defendant confirming that he had been allocated the suit property. The certificate was issued in the name of the deceased and the two plaintiffs. The 4th defendant also did a letter confirming that the deceased had been allocated four(4) parcels of land one of which was the suit property. He stated that after the death of the deceased they started following up the title for the suit property. In that process they carried out a search on the register of the suit property which revealed that the same was registered in the name of the 1st defendant. He stated that the following this discovery their advocates on record did demand letters before action to which no response was received save for a response from the Attorney General. The 2nd plaintiff denied that the 1st defendant acquired the suit property lawfully. He produced as exhibits among others, a copy of the grant of letters of administration intestate in respect of the estate of the deceased that was issued to them on 11th November, 2011 in Nairobi High Court succession cause No. 1483 of 2011, a copy of the death certificate for the deceased, a copy of the ballot paper that was issued to the deceased by the 4th defendant, a copy of the certificate of ownership dated 11th February, 2011 that was issued to the deceased jointly with the plaintiffs in respect of the suit property, a copy of a letter dated 21st May, 2011 by the 4th defendant confirming that the deceased was allocated four(4) plots among them the suit property, a copy of a certificate of search on the register of the suit property dated 19th April, 2011 and copies of demand letters before action to the defendants. The plaintiffs closed their case with the evidence of the 2nd plaintiff after which the plaintiffs' advocates made closing submissions in writing.

I have considered the plaintiffs' claim against the defendants together with the evidence that was tendered in proof thereof. From the evidence on record, I am satisfied that the plaintiffs have proved their case against the defendants on a balance of probability. The plaintiffs have established that they are the administrators of the estate of the deceased and that the deceased was allotted the suit property

by the 4th defendant in which he was a member. The deceased was therefore entitled to be registered as the owner of the suit property. The 1st and 4th defendants did not defend the suit. It is therefore not clear as to the circumstances under which the 1st defendant got registered as the owner of the suit property. The 2nd and 3rd defendants who are the custodians of the land registration records filed a statement of defence but did not tender any evidence. The 2nd and 3rd defendant's claim that the 3rd defendant acted in good faith in registering the suit property in the name of the 1st defendant following directions from the 4th defendant is without evidence in proof thereof a mere allegation. In the face of clear evidence that the suit property had been allocated to the deceased by the 4th defendant and in the absence of any evidence as to how the 1st defendant came to be registered as the owner of the said property, the only conclusion this court can make is that the 1st defendant's acquisition of the suit property was unlawful and fraudulent as contended by the plaintiffs. Since there is no information as to how the 1st defendant acquired the suit property, I am unable to say from the evidence on record that the 2nd, 3rd and 4th defendants were involved in the fraud. There is no evidence before me that they colluded with the 1st defendant and aided or assisted him in acquiring the suit property. Section 80(1) of the Land Registration Act, 2012 gives this court power to rectify the register of land by directing that any registration be cancelled or amended if it is satisfied that the same was obtained, made by fraud or mistake. The plaintiffs have established that the 1st defendant was registered as the proprietor of the suit property by fraud. I am satisfied that the plaintiffs have proved their claim against the 1st defendant.

Due to the foregoing, I hereby enter judgment for the plaintiff against the 1st defendant for;

- (a) a declaration that the title held by the 1st defendant in respect of Land Parcel Number Nairobi Block 117/473 is invalid, null and void.
- (b) a declaration that the estate of John NdichuNgugi, deceased is the bona fide owner of Land Parcel Number Nairobi Block 117/473.
- (c) An order for the rectification of the register of Land Parcel Number Nairobi Block 117/473 by the cancellation of registration of the 1st defendant as the owner thereof together with the certificate of lease that was issued to the 1st defendant and the registration of the property in the name of the 4th defendant.
- (d) An order directing the 4th defendant to transfer the suit property to the plaintiffs in their capacity as the administrators of the estate of John NdichuNgugi. In this regard, the plaintiffs shall meet all charges and fees associated with the said transfer.
- (e) A copy of this judgment shall be served upon the 1st defendant by the plaintiffs through registered post to his last known postal address namely, P.O.BOX 24484, Nairobi within seven(7) days from the date hereof and affidavit of service shall be filed in court. No action shall be taken in execution of the judgment herein until after the expiry of 60 days from the date of service of a copy of the judgment herein upon the 1st defendant as aforesaid.
- (f) The costs of the suit to be paid by the 1st defendant only.

Delivered, Dated and Signed at Nairobi this 29th day of January, 2016.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Uvyu for the plaintiff

N/A for the 1st defendant

N/A for the 2nd and 3rd defendants

N/A for the 4th defendant

Kajuju Court Assistant

S. OKONG'O,

JUDGE.