



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 147 OF 2015

PERIS WANJA CINI.....1ST PLAINTIFF

ESTHER WANJIRU WANJAU.....2ND PLAINTIFF

VERSUS

PAUL MURIITHI NJAU.....1ST DEFENDANT

ELIUD WARUI.....2ND DEFENDANT

JOHN MBOGO NYAGA.....3RD DEFENDANT

ROSE WANJIKU MBOGO.....4TH DEFENDANT

PATRICK MURAGE KANYI.....5TH DEFENDANT

JUDGMENT

The 1st plaintiff (**PERIS WANJA CINI**) is the mother to the 2nd plaintiff (**ESTHER WANJIRU WANJAU**) and together with 1st plaintiff's other daughter **MUTHONI NYOIKE NJOROGE** are the registered proprietors of land parcel No. MWERUA/KAGIO/3424. The 1st defendant is a son to the 2nd plaintiff and according to the plaint filed here on 17th November 2015, the 1st defendant sometime in 2011 fraudulently and without colour of right un-lawfully had the said land registered in his names after which he sub-divided it into four (4) parcels being MWERUA/KAGIO/5456 to 5459 which he sold to the 2nd to 5th defendants respectively.

Upon learning of this fraud, the plaintiffs reported to the Police and the 1st defendant was arraigned in Wanguru Court and charged in **Criminal Case No. 584 of 2013** and convicted to serve two (2) years imprisonment.

The plaintiffs therefore filed this suit seeking the following prayers:-

- a. ***Cancellation of Titles to land parcel No. MWERUA/KAGIO/5456, 5457, 5458 and 5459 and reconsolidation back into the original title No. MWERUA/KAGIO/3424 in the joint names of PERIS WANJA CINI, MUTHONI NYOIKE NJOROGE and ESTHER WANJIRU WANJA.***
- b. ***Costs of this suit plus interest at Court rates.***
- c. ***Any other further alternative or better relief as this Honourable Court may deem fit or just to grant.***

The 1st defendant entered appearance but did not file any defence to the suit. The 2nd to 5th defendants

neither entered appearance nor filed any defence.

On 29th January 2016, interlocutory judgment was entered against all the defendants and the matter fixed for formal proof on 21st April 2016 when the defendants were all served with hearing notices but did not attend Court.

The two plaintiffs testified with the 1st plaintiff who is quite elderly adopting her statement filed in Court together with their plaint.

Their evidence is that they and **MUTHONI NYOIKE NJOROGE** have all along been the registered proprietors of land parcel No. MWERUA/KAGIO/3424 the original title of which was shown to the Court during the trial. However, the 1st defendant who is a grandson to the 1st plaintiff and a son to 2nd plaintiff fraudulently reported that the title deed to the said land was lost and managed to obtain another title which he then transferred into his names although a caution had been placed on the land. He then sub-divided the land into portions No. MWERUA/KAGIO/5456, 5457, 5458 and 5459 which he then transferred to the 2nd to 5th defendants. They reported to the Police and the 1st defendant was charged in Wanguru Court Criminal Case No. 584 of 2013, convicted and sentenced to two (2) years imprisonment.

The plaintiffs produced the following as exhibits.

1. *Copy of Title deed to L.R No. MWERUA/KAGIO/3424 (They had the original in Court)*
2. *Green Card to L.R No. MWERUA/KAGIO/3424.*
3. *Proceedings in Criminal Case No. 584 of 2013 at Wanguru Court.*
4. to 7. *Certificates and Search in respect to L.R No. MWERUA/KAGIO/5456 to 5459.*

As the defendants did not file any defence, the plaintiff's evidence is un-challenged. It is clear from that evidence that while the plaintiffs retain the original title deed to land parcel No. L.R MWERUA/KAGIO/3424, the 1st defendant fraudulently had another title deed to the same land issued in his names after which he sub-divided it into four (4) portions which he then sold to the 2nd to 5th defendants.

The plaintiffs were of course not privy to all this so they do not know how the 1st defendant managed to do so. However, the fact that the plaintiffs still retain the original title deed in respect of L.R No. MWERUA/KAGIO/3424 is clear evidence that the four (4) sub-divisions being L.R No. MWERUA/KAGIO/5456 to 5459 that were carved out of it and sold to the 2nd to 5th defendants could only have been procured through fraud.

To understand how this happened, I have perused the proceedings and judgment in **WANGURU PRINCIPAL MAGISTRATE'S COURT CRIMINAL CASE NO. 584 of 2013 - REPUBLIC VS PAUL MURIITHI NJAU** who, I am informed by the plaintiffs in this case, is the 1st defendant herein. What is clear from the evidence in the criminal case as adduced by **CATHERINE NJAGI** the Land Registrar Kirinyaga (PW4) and **P.C MICHAEL KIMARU** of C.I.D Kirinyaga (PW5), the 1st defendant obtained a Police Abstract to the effect that the title deed to land parcel No. MWERUA/KAGIO/3424 was lost and that report was published in the Kenya Gazette as required after which a new title deed was issued and the land transferred to the 1st defendant before being sub-divided and sold to the 2nd to 5th defendants. Upon hearing the criminal case, the trial magistrate found the 1st defendant guilty of procuring execution of a document by false pretences contrary to **Section 355 of the Penal Code** and sentenced him to serve two (2) years imprisonment. There is no evidence that any appeal was preferred against that conviction or sentence.

The plaintiffs' evidence taken together with the 1st defendant's conviction in Wanguru Principal Magistrate's Court Criminal Case No. 584 of 2013 are sufficient proof that the 1st defendant obtained registration of the title No. L.R MWERUA/KAGIO/3424 fraudulently and in collusion with the other defendants. The fact that neither of the defendants filed defences to this claim can only be interpreted to mean that they have no answer to the allegation levelled against them. The law allows this Court to cancel

any certificate of title obtained through fraudulent means.

Section 26(1) of the Land Registration Act provides as follows:-

“The certificates 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 all 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 mis-representation to which the person is proved to be a party; or***
- b. ***where the certificate of the title has been acquired illegally, un-procedurally, or through a corrupt scheme”***

Therefore, while the law recognizes a certificate of title as conclusive evidence of proprietorship and that the person named therein is the absolute indefeasible owner, the law also empowers the Court to cancel the same if it was acquired ***“illegally, un-procedurally or through a corrupt scheme”***

The 1st defendant having been convicted for the offence of procuring a document by false pretenses, that conviction which was not over-turned, is conclusive evidence that he obtained registration of the title sought to be impugned herein through fraudulent means. **Section 47A of the Evidence Act** is instructive. It states:-

“A final judgment of a competent Court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged”

Further, only the defendants in this case could tell this Court how they procured the registration of title No. L.R MWERUA/KAGIO/5456 to 5459 into the names of the 2nd to 5th defendants. **Section 112 of the Evidence Act** places that burden on them on saying:-

“In Civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

Only the defendants could explain how they obtained a new title deed in respect of parcel No. L.R MWERUA/KAGIO/3424 and thereafter had it sub-divided into L.R No. MWERUA/KAGIO/5456 to 5459 while the original title was in the custody of the plaintiffs. By failing to defend this claim, they demonstrated that they could not discharge that burden.

In the circumstances, I find that the plaintiffs have satisfactorily proved their case against the defendants as required in law.

Judgment is accordingly entered for the plaintiffs against the defendants in the following terms:-

1. ***Cancellation of Titles to land parcel No. MWERUA/KAGIO/5456, 5457, 5458 and 5459 and re-consolidation back into the original title No. MWERUA/KAGIO/3424 in the joint names of PERIS WANJA CINI, MUTHONI NYOIKE NJOROGE and ESTHER WANJIRU WANJAU.***
2. ***No order as to costs.***

B.N. OLAO

JUDGE

22ND APRIL, 2016

Judgment dated, signed and delivered in open Court this 22nd day of April, 2016.

Mr. Macharia for Mr. Miano for Plaintiffs present

Defendants absent

Right of appeal explained.

B.N. OLAO

JUDGE

22ND APRIL, 2016