



**Muriithi v Ngari & another (Environment & Land Case
135 of 2014) [2016] KEELC 1311 (KLR) (12 July 2016) (Judgment)**

Stephen Maina Muriithi v Wangu Ngari & another [2016] eKLR

Neutral citation: [2016] KEELC 1311 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 135 OF 2014**

L WAITHAKA, J

JULY 12, 2016

BETWEEN

STEPHEN MAINA MURIITHI PLAINTIFF

AND

WANGU NGARI 1ST DEFENDANT

WANJIRA NGARI 2ND DEFENDANT

JUDGMENT

1. The plaintiff, Stephen Maina Muriithi, who together with John Ngari Muriuki (deceased) are the registered proprietors of the parcel of land known as Konyu/Baricho/2715 (hereinafter referred to as the suit property) brought the current suit seeking judgment against the defendants, Wangu Ngari and Wanjira Ngari (the beneficial owners of his co-owner's share of the suit property) for:-
 1. A perpetual injunction to restrain the defendants by themselves, their agents and/or servants from in any way interfering with his share of the suit property measuring 0.6 hectares;
 2. General damages for trespass; and
 3. Costs of the suit and interest.
2. The plaintiff's case against the defendants is that sometime in the year 2014, the defendants encroached into his share of the suit property and committed some acts of waste thereon (cut down the trees thereon). The plaintiff is apprehensive that unless restrained, the defendants will continue their unlawful actions.



3. Upon being served with summons to enter appearance and the suit papers, the defendants filed the statement of defence and counter-claim dated 19th August, 2014 in which they, inter alia, contend that the plaintiff was fraudulently registered as a co-owner of the suit property.
4. Vide their counter-claim, the defendants reiterate their contention that registration of the plaintiff as co-owner of the suit property was fraudulently effected. In that regard, the defendants' contend that the plaintiff relied on illegal documents to secure the registration and that the plaintiff lied to the Registrar that he was the rightful owner of a portion of the suit property measuring 0.6 hectares. For those reasons, the defendants prays for cancellation of the registration effected in favour of the plaintiff, damages for fraud, costs of the suit and interest and any other or better relief that the court may deem better to grant.
5. In his defence to counter-claim, the plaintiff denied the allegations of fraud levelled against him and put the defendants to strict proof of those claims. The plaintiff also contends that the defendants have no capacity to plead the counter-claim.

Evidence

The plaintiff's case

6. When the matter came up for hearing, the plaintiff informed the court that he got registered as a proprietor of the suit property together with the defendant's father in 2001. He explained that his registration was on account of the help he accorded the defendants' father during succession of his father's estate. The plaintiff informed the court that because of the help he accorded the defendants' father in the succession proceedings, the defendants' father agreed to sell to him 1 ½ acre from the suit property. The plaintiff further informed the court that after he bought the parcel of land, he fenced it off and began developing it-planted trees thereon.
7. He further informed the court that before he died, the defendants' father had been charged for cutting down his trees. He explains that the defendants have also been cutting down his trees. He produced photographs in respect of the destructions done to his trees by the defendants as Pexbt-2.
8. To prove his interest in the suit property, the plaintiff produced a certificate of official search showing that he co- owns the suit property with the defendants' father.
9. Concerning how he got registered as co-owner of the suit property, the plaintiff told the court that it is the defendants' father who presented transfer documents to the Land Registrar. He admitted that the land was initially registered in the name of the defendant's grandfather but maintained that he is the one who paid for the succession case. He stated that the defendants' father had sold to him the parcel he owns at Kshs. 360,000/=. However, he produced no documents capable of proving that he bought the suit property from the defendants' father or paid for the succession case of the property from defendants' grandfather to the defendants' father.
10. On the whereabouts of the defendants, when the property was being registered in their names, he explained that the 2nd defendant was not present because she was married.

The Defence Case

11. D.W.1, Ann Wangui Ngari, informed the court that the plaintiff is not their relative. She told the court that she got to know the plaintiff when he caused their father to be arrested and charged for cutting down trees in the suit property.



12. Despite her testimony to the effect that she only got to know the plaintiff when he caused her father to be arrested and charged for cutting his own trees on the suit property, D.W.1 informed the court that the plaintiff, who has never lived in the suit property, used to come and pick tea therefrom.
13. D.W.1 told the court that the suit property originally belonged to their grandfather and that it was subdivided between her father and uncle in equal shares. After titles were issued to them, her father's title disappeared. Later, they learnt that her father's portion was registered in the name of their father and the plaintiff as owners in common.
14. Arguing that neither their father nor any of their family members signed the consent to transfer the land in favour of the plaintiff, D.W.1 stated that there are two green cards in respect of the suit property. However, she neither called the Land Registrar to vouch for that assertion nor proved any documentary proof of that fact.
15. Upon being cross-examined by counsel for the plaintiff, D.W.1 stated that she was born on the suit property and that she has all along resided there. She maintained that her father did not sign the consent for transfer of the suit property in favour of the plaintiff despite being forced by police and members of provincial administration (D.O) to do so. She also acknowledged that before her father died, he was aware that the title to the suit property was in his name and the name of the plaintiff.
16. Concerning the destruction effected on the plaintiff's portion of the suit property, she admitted that she is the one who caused it and explained that she did so because the land belongs to her father.

Submissions

17. Despite having being accorded an opportunity to file their submissions, at the time of writing this judgment, the only submissions in the court file were those of the defendants.
18. In those submissions, reference is made to the evidence adduced by the plaintiff to the effect that he co-owns the suit property with the defendants' deceased father and submitted that the plaintiff did not adduce any evidence capable of justifying his registration as a co-owner of the property. For instance, it is said that the plaintiff failed to provide any agreement or relevant document to prove that he bought the land or even to show when he bought the land.
19. The plaintiff is faulted for having failed to call the Land Registrar or the District Officer or any of the members of the defendants' family to vouch for his allegation that he was given a consent to transfer by the defendants' father.
20. Based on the testimony of the defendant to the effect that she was not privy to any sale transaction between the plaintiff and her father; that her father did not execute any transfer document in favour of the plaintiff and that none of her siblings was involved in the transfer of the suit property, it is submitted that the defendants have demonstrated that the registration of the suit property in the name of the plaintiff was effected by fraud.
21. Arguing that the registration of the plaintiff was fraudulent and in contravention of Section 6 of the *Land Control Act*, Cap 302 Laws of Kenya, the defendants urge the court to invoke Section 80(1) of the *Land Registration Act*, No.3 of 2012 in granting the prayers sought in the counter-claim.

Analysis and determination

22. From the pleadings and the submissions filed in this suit, the issues for determination are:-
 - 1). Whether the plaintiff obtained title to the suit property by fraud?



- 2). If the answer to (1) is negative, whether the plaintiff has made up a case for being granted the orders sought?
- 3). What orders should the court make?

Whether the plaintiff obtained title to suit property by fraud?

23. As pointed out herein above, the registration of the plaintiff as a co-owner of the suit property is said to have been effected by fraud. The reasons for holding that opinion is that the plaintiff did not produce any evidence capable of showing that he bought the land and/or he obtained the consent of the defendant's father or family members to transfer. The absence of proof of the circumstances that led to registration of the plaintiff as a co-owner of the suit property is proof that the title held by the plaintiff was obtained fraudulently.
24. Whereas it is true that the plaintiff did not produce any documents capable of proving that he bought the suit property from the defendant's father, the evidence on record shows that the plaintiff's registration as a co-owner of the suit property was known to the defendants and their father long before their father died. D.W.1 acknowledges that the plaintiff had taken her deceased father to members of the provincial administration in a bid to force him to sign transfer documents in his favour. There is evidence that the plaintiff was in possession and use of the property even during the lifetime of the defendant's father. The evidence on record shows that the plaintiff had asserted his right to the suit property even during the lifetime of his co-owner of the land.
25. Whilst there is evidence of the plaintiff asserting his rights to the suit property, there is no evidence of any attempts made by the defendants herein to show that the plaintiff's registration and use of the suit property was wrongful or illegal. The only evidence available in favour of the defendant's claim to the suit property is their interference with the plaintiff's possession of the suit property by cutting trees thereon. In my view, the conduct by the defendants and their predecessor in title/claim cannot be taken as a lawful mechanism of challenging the title held by the plaintiff. No wonder, the plaintiff was able to have the defendant's father arrested and charged in respect thereof.
26. Whilst the defendant claims that the registration of the plaintiff, was effected by fraud, I note that she produced no evidence capable of proving that registration of the plaintiff was effected by fraud. I say that because, being the one who wants the court to give judgment in her favour based on the alleged fraud, it behoved the defendant to lead evidence capable of proving fraud against the plaintiff. In my view it is not enough to allege that her father did not sign transfer documents in favour of the plaintiff or that there was forgery by the plaintiff. Section 107 imposes an obligation on the defendants to prove those assertions.
27. The law also imposes an obligation on the defendant to prove the alleged fraud to the required standard, which is beyond proof on a balance of probabilities although not beyond reasonable doubt.
28. Upon review of the totality of the evidence adduced in this case, which evidence includes, the observations of this court in its judicial capacity (as contemplated under Section 3 of the *Evidence Act*, Cap 80 Laws of Kenya), I find and hold that the defendant's have not proved that the registration of the plaintiff as a co-owner of the suit property was effected by fraud. The conduct of the parties to this suit before institution of this suit militates against that finding. In my view, if the registration of the plaintiff was effected by fraud, the defendants and their predecessor in claim would have at least taken legal steps to protect their interest in the suit property. The fact that they decided to use unlawful mechanisms to protest the plaintiff's use and occupation of the suit property shows that they have no



legally protectable interests against the plaintiff. No wonder, D.W.1 was unable to lead any evidence capable of showing that the registration of the plaintiff was effected by fraud.

29. Having returned a negative verdict to the first issue herein and there being evidence that the plaintiff is the registered proprietor of a portion of the suit property and there being evidence that the defendants are interfering with the plaintiffs rights over the suit property, I find and hold that he has made up a case for being granted the orders sought. Consequently, I allow the claim in terms of prayers 1 and 3.
30. As for prayer 2, damages for trespass to land, there is evidence of malicious destruction of the plaintiff's property by D.W.1. In fact D.W.1 admitted having destroyed trees from the plaintiff's land on the ground that they belong to her father. I find the conduct by D.W.1 to be a recipe for chaos. What her belief concerning the suit property is, it is unacceptable for members of public to sort disputes by taking law into their hands. To deter the defendants from resorting to self help in sorting disputes and trespass to land being actionable per se, I award the plaintiff Kshs. 50,000/= as damages for trespass to land.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF JULY, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr.Kingori for the plaintiff

Ms Wambui h/b for Mr. Andrew Kariuki for the defendant

Court assistant - Lydia

