



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC NO. 1818 OF 2002

SIMON KAMANU..... PLAINTIFF

VERSUS

1. JANETTA WANJIKU MWANGI

2.JAMES MWANGI NJEHIA.....DEFENDANTS

CONSOLIDATED WITH

ELC NO.1536 OF 2013

1.JANETTA WANJIKU MWANGI

2.JAMES MWANGI NJEHIA.....PLANITIFFS

VERSUS

1.SIMON KAMANU

2.COMMISSIONER OF LANDS

3.REGISTRAR OF TITLES

4.ATTORNEY GENERAL.....DEFENDANTS

RULING

ELCC No. 1818 of 2002, Simon Kamanu vs. James Mwangi Njehia and Jannetta Wanjiku Mwangi and ELC No. 1536 of 2013, Jannetta Wanjiku Mwangi and James Mwangi Njehiavs. Simon Kamanu and 3 others concern the same subject matter. The parties to the two suits are the same save for Commissioner of Lands, Registrar of titles and the Attorney General who are nominal parties. Simon Kamanu (hereinafter be referred to only as “the Plaintiff”) brought ELC No. 1818 of 2002 against James Mwangi Njehia and Jannetta Wanjiku Mwangi (hereinafter referred to only as “the Defendants”) on 16th December 2002 seeking among others a declaration that the transfer of all that parcel of land known as LR No. 8226/14 (hereinafter “the suit property”) by one Mary Murugi John (hereinafter referred to only

as “Mary”) to the Defendants was illegal, null and void and incapable of transferring any title in the suit property to the Defendants, an order cancelling the Defendants title to the suit property and the re-transfer of the same to the Plaintiff and an injunction restraining the Defendants from interfering with the Plaintiff’s possession of the suit property. In his plaint dated 16th December 2002, the Plaintiff averred that he was at all material times the registered proprietor of the suit property and that on or about 29th June 1994, Mary used a forged instrument of transfer and caused the suit property to be transferred to her name. The Plaintiff averred that on 20th December 1994, Mary purported to transfer the suit property to the Defendants. The Plaintiff averred that the purported transfer of the suit property to the name of Mary and subsequently to the Defendants was carried out fraudulently and as such the Defendants do not hold valid title over the suit property. Together with the plaint, the Plaintiff filed an application for a temporary injunction which was heard and dismissed by Kuloba J. on 10th March 2003.

The Defendants filed a statement of defence and counter-claim against the Plaintiff on 25th February 2003. The Defendants denied that the Plaintiff was at all material times the registered owner of the suit property and contended that they had purchased the suit property from Mary who was the registered owner thereof in the year 1996 at a consideration of Kshs.4,000,000/=. The Defendants denied that their title to the suit property is tainted with fraud and that the Plaintiff is entitled to the reliefs sought in the Plaint. In their counter-claim, the Defendants claimed from the Plaintiff a sum of Kshs.300,000/= which they claimed to have spent in re-surveying and re-installing the beacons which the Plaintiff had unlawfully removed on 19th February 2002 when he trespassed on the suit property. The Defendants also sought exemplary damages for trespass and malicious damage and an injunction to restrain the Plaintiff from laying a claim to the suit property.

The Plaintiff did not take any action in ELC No. 1818 of 2002 for a period of over 5 years between the year 2007 and the year 2012 and on 25th January 2012, the suit was dismissed for want of prosecution. While that suit was pending, the suit property was transferred from the name of the Defendants to the Plaintiff on 20th March 2012 pursuant to a purported court order that was issued on 14th March, 2011 in Nairobi HCCC No. 1481 of 2004, Simon Kamanu vs. James Mwangi Njehia and Jannetta Wanjiku Mwangi. The Plaintiff thereafter claimed that his certificate of title to the suit property was lost was issued with a provisional certificate of title on 12th March 2013.

When the Defendants learnt of this development, they filed an application by way of Notice of Motion dated 22nd July, 2013 in ELC No. 1818 of 2002 in which they sought injunction to restrain the Plaintiff from among others, selling or transferring the suit property. The Defendants application was heard by Mutungi J. *ex parte* on 22nd July, 2013 who granted the injunction sought in the interim period pending the hearing of the application *inter partes*. When the Defendants application came up before Nyamweya J. on 20th September, 2013, the Judge observed that since the suit had been dismissed for want of prosecution on 25th January, 2012 as stated above, the Defendants application had no substratum. The judge vacated the orders that had been given earlier by Mutungi J. and stood over the matter generally.

Due to this turn of events, the Defendants decided to file a fresh suit against the Plaintiff. This is how ELC No. 1536 of 2013, Janetta Wanjiku Mwangi and James Mwangi Njehiavs. Simon Kamanu and 3 others came about. In ELCC No. 1536 of 2013, the Defendants averred that the Plaintiff caused the suit property to be fraudulently transferred to his name from the Defendants name using illegal court orders that were purportedly issued in Nairobi HCCC No. 1481 of 2004. The Defendants sought among others, a permanent injunction to restrain the Plaintiff from selling and/or in any other manner dealing with the suit property and the cancellation of the entries in the title of the suit property pursuant to which the Plaintiff was registered as the owner of the suit property and issued with a provisional title. Together with the plaint the Defendants filed an application for a temporary injunction to restrain the Plaintiff from among others selling or transferring the suit property pending the hearing and determination of ELCC No. 1536 of 2013. The application was heard *ex parte* by Gacheru J. on 19th December 2013 who granted the injunction sought on an interim basis pending the hearing of the application *inter partes*. The plaintiff was served with the summons to enter appearance and the Defendants’ application for injunction.

The Plaintiff filed his statement of defence in ELCC No. 1536 of 2013 on 3rd March 2014 wherein he denied the Defendants' claim in its entirety. The Plaintiff also filed a replying affidavit and supplementary affidavit on 25th February 2014 and 24th April 2014 respectively in response to the Defendants' application for injunction. At paragraph 9 of the replying affidavit aforesaid, the Plaintiff attributed the purported court order that was said to have been issued in Nairobi, HCCC No. 1481 of 2004 to his previous advocate, Kaniaru M. Kamau Advocate who he claimed to have made him believe that the said order was issued in ELC No. 1818 of 2002. The Plaintiff claimed further that he was surprised that ELC No. 1818 of 2002 had in fact been dismissed for want of prosecution in the year 2012. He stated that he was not to blame for the purported court order. In his supplementary affidavit sworn on 24th April 2014, the Plaintiff stated in paragraphs 4 that his said previous advocate Moses Kaniaru Kamau had fraudulently obtained the purported court order pursuant to which the suit property was transferred to the Plaintiff on 20th March 2012. In the said affidavit the Plaintiff stated that the said advocate had been arrested and charged with the offence of making a document without authority and uttering a false document in relation to the said court order. The Plaintiff annexed a copy of the charge sheet to his affidavit. The Plaintiff denied any involvement in the acquisition of the purported court order and stated that only his said previous advocate can tell the court where and how he obtained the purported order.

What I now have before me are two applications. The 1st application is by the Plaintiff and the same has been filed in ELCC No. 1818 of 2002. The application seeks the setting aside of the order of dismissal of the said suit that was made by Nyamweya J. on 25th January 2012. The second application is by the Defendants and the same is made in ELCC No. 1536 of 2013. This application seeks judgment against the plaintiff on admission. The Plaintiff's application was brought on the grounds that ELCC No. 1818 of 2002 was dismissed due to the failure by the Plaintiff's then advocates, Gachiri Kariuki and Kiai Advocates to set down the same for hearing and that the Plaintiff who has an arguable case with a probability of success against the Defendants has always been ready and willing to proceed with the suit. The Plaintiff contended that if the order of dismissal is not set aside and the suit reinstated for hearing inter partes he would have been condemned unheard and he would suffer great loss and prejudice.

On their part, the Defendants, sought judgment against the Plaintiff in ELCC No. 1536 of 2013 on the ground that the Plaintiff had admitted in his affidavit in response to the Defendants' application for injunction that the order pursuant to which he was registered as the owner of the suit property was obtained fraudulently. The Defendants contended that in the face of the said admission, the Plaintiff cannot have any defence to the Defendant's claim.

The two applications were argued by way of written submissions. I will consider the Plaintiff's application in ELCC No. 1818 of 2002 first because it was first in time. As I have stated earlier in this ruling, the Plaintiff has sought the setting aside of the order that was made on 25th January 2012 by Nyamweya J. dismissing ELC No. 1818 of 2002 for want of prosecution. As I have already mentioned, the Plaintiff has contended that he was let down by his previous advocates. I have considered the application and the 2nd Defendant's affidavit in opposition thereto. ELC No. 1818 of 2002 was dismissed by the court on its own motion under Order 17 Rule, 2(1) and (4) of the Civil Procedure Rules. Order 17 rule 2(1) of the CPR provides that;

“2(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, it may dismiss the suit.”

This rule requires that before a suit is dismissed the parties have to be served with notice to appear before court and show cause why the suit should not be dismissed. Upon perusal of the court file, I have noted that the parties herein were not served with a notice to appear in court on 25th January 2012 to show cause why ELC No. 1818 of 2002 should not be dismissed. A perusal of the notice to show cause dated 17th January 2012 that was issued by the court for service upon the parties in ELC No. 1818 of 2002 shows that the same was addressed to “Mburu Mbugua Advocates, Uganda House, 4th Floor Nairobi” and J. A Guserwa & Company Advocates, Agip House, 3rd Floor, Nairobi. The said notice was not served upon

any of these advocates. All copies of the said notice were returned to court unserved with comments that Mburu Mbugua Advocate was deceased and the firm of Guserwa & Company Advocates had ceased to practice on 3rd Floor, Agip House. It is not surprising therefore that neither the Plaintiff nor the Defendants' advocates appeared in court on 25th January 2012 when the matter came up for notice to show cause. I have also noted that as at the time when the court was making attempts to serve a notice to show cause upon the firm of Mburu Mbugua Advocates on behalf of the Plaintiff, the said firm of advocates was not on record for the Plaintiff. The Plaintiff had changed advocates on 9th July 2009 and appointed Gachiri Kariuki and Kiai Advocates to act on his behalf in ELC No. 1818 of 2002 in place of Mburu Mbugua and Company Advocates.

There is no doubt from what I have set out above that the order that was made on 25th January 2012 dismissing ELC No. 1818 of 2012 was irregular in that the same was made without notice having been served upon the parties to show cause why the suit should not be dismissed. Having come to the conclusion that the said order was irregular, I have no discretion in the matter. The Plaintiff is entitled to have the said order set aside *ex debito justitiae*.

The disposal of the Plaintiff's application paves the way for consideration of the Defendants application in ELC No. 1536 of 2013 in which the Defendants have sought judgment against the Plaintiff on admission. The Defendants application was brought under Order 13 rule 2 of the Civil Procedure Rules which provides as follows:-

“2. A party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to without waiting for the determination of any other question between the parties, and the court may upon such application make such order, or give such judgment, as the court may think just.”

From what I have set out herein earlier, the Plaintiff has admitted in the two affidavits that he filed in opposition to the Defendants' application for injunction that the purported court order which was alleged to have been issued in Nairobi HCCC No. 1481 of 2004 and on the strength of which the Plaintiff was registered as the owner of the suit property on 20th March 2012 and subsequently issued with a provisional certificate on 12th March 2013 was a forgery. I am in agreement with the Defendants that on the face of this admission, the Plaintiff cannot have any defence to the Defendants' claim in ELC No. 1536 of 2013. In ELC No. 1536 of 2013 the Defendants are seeking the cancellation of the registration of the Plaintiff as the owner of the suit property and the provisional title that was issued to him pursuant to the said purported court order. The purported court order was disowned by the Deputy Registrars of the High Court Civil Division and the Environment and Land Court in their letters to the Defendants' advocates dated 13th July 2013 and 16th August 2013 respectively. The two letters are annexed to the 2nd Defendant's affidavit which was sworn on 18th December 2013 in support of the Defendant's injunction application.

I am in agreement with the submissions by the Plaintiff that for judgment on admission to be entered, the admission must be unequivocal. See, the decision of Madan JA. in the case of **Choitram vs. Nazari (1984) KLR 327** where he stated that:

“Admissions have to be plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt....”

I am satisfied that the admissions made by the Plaintiff in the two affidavits that he filed in reply to the Defendants' application for injunction on the legality of the purported court order that was purportedly issued in Nairobi HCCC No. 1481 of 2004 were unequivocal. In paragraph 5 of the supplementary affidavit the Plaintiff stated that;

“THAT it is clear from the above my then advocate had fraudulently obtained the said order in court Civil Number 1481 of 2004 without my knowledge.”

In paragraph 6 he added that;

“THAT I was not involved in any way whatsoever in obtaining that court order.”

The foregoing to me is a clear admission that the subject order was obtained fraudulently by the Plaintiff’s former advocate. There is no dispute that it is the said order that enabled the Plaintiff to be registered as the owner of the suit property on 20th March 2012. A title acquired through a fraudulent court order obtained by the holder’s agent cannot stand. I cannot see any defence which the Plaintiff can have to the Defendants’ claim herein.

In the final analysis and for the foregoing reasons, I find merit in the Defendants’ application dated 7th May 2014. In conclusion, I hereby make the following orders in the two applications before me.

1. The Notice of Motion dated 6th May 2014 in ELC No. 1818 of 2002 is allowed in terms of prayers 2 and 3 thereof.

2. The Notice of Motion dated 7th May 2014 in ELCC No. 1536 of 2013 is allowed on the following terms:

(i) The statement of defence by the 1st Defendant, Simon Kamanu dated 28th February 2014 is struck out.

(ii) Interlocutory judgment is entered for the Plaintiffs Jannetta Wanjiku Mwangi and James Mwangi Njehia against the 1st Defendant, Simon Kamanu.

(iii) The Plaintiffs, Janetta Wanjiku Mwangi and James Mwangi Njehia shall set down the suit for formal proof as against the 1st Defendant, Simon Kamanu.

(iv) The award of costs shall await the formal proof.

Delivered and Dated at Nairobi this 2nd day of August, 2016

S. OKONG’O

JUDGE

In the presence of

Mr. Wilson h/b for Kamene for the Plaintiff

Mr. Kariu for the Defendant

John Court Assistant