



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 99 OF 2013

JULIUS WAIHARO MARIUKOPLAINTIFF

VERSUS

REUBEN KIPKEMOI NGENODEFENDANT

JUDGMENT

(Suit by the plaintiff seeking cancellation of title held by the defendant; plaintiff having been owner of parent title and proceeding to subdivide it; one of the subdivisions now registered in name of defendant; defendant not contesting the suit; Land Registrar testifying that the registration of defendant is not supported by appropriate documentation; judgment entered for the plaintiff; defendant's title must have been acquired illegally and same is cancelled)

[1] This suit was commenced by way of plaint which was filed on 31 January 2012. The defendant was served with summons but did not enter appearance and did not participate in this suit. The pleadings and evidence of the plaintiff are therefore uncontroverted by the defendant.

[2] From the pleadings and evidence tendered, the plaintiff was a member of the Mwariki Farm Company Limited which was a land buying company. He had five shares and in accordance with his shares, he was allotted 11 acres of land. He was issued with a title deed to this portion of 11 acres which was the land parcel number Kiambogo/Kiambogo Block 2/169. He then proceeded to subdivide this land into 80 plots which were registered as land parcel numbers Kiambogo/Kiambogo Block 2/2540 - 2619. The plot in issue in this case is the land parcel Kiambogo/Kiambogo Block 2/2595 which is among the 80 subdivided plots. That land is currently registered in the name of the defendant. It is the contention of the plaintiff that the registration of the defendant as proprietor was procured through fraud.

[3] In his evidence, the plaintiff testified that he never sold nor gave out this land to the defendant. He only came to learn that the defendant has title to this land when he conducted a search of the property on 21 January 2011. On discovering this, he wrote a letter to the District Land Registrar who summoned both plaintiff and defendant to a meeting. The defendant did not however show up. The defendant also followed up with letters to the District Commissioner and the Chief Land Registrar in vain. It is then that he filed this suit. He testified that he does not know how the defendant came to be registered as proprietor and his title should be cancelled.

[4] PW- 2 was Ms. Madeline Vugutsa Bunyoli, the Land Registrar, Nakuru. She testified that from her records, the suit property became registered in the name of the plaintiff after subdivision of the parent title. The defendant came to be registered through a transfer which was registered on 22 March 2006. She stated that there is no document in their records which supports the transaction. She testified that the

defendant was summoned to their offices but has failed to appear.

[5] As I mentioned at the beginning of this judgment, the defendant did not challenge the suit herein. The evidence on record shows that the manner in which the defendant became registered as proprietor of the suit property is not clear. The plaintiff has been categorical that he never transferred the suit land to the defendant. The only conclusion I can reach, is that the defendant became registered as proprietor through fraudulent means.

[6] Ordinarily, title to land is supposed to be protected by law. However, where such title is procured fraudulently, then such title cannot be safeguarded. This is brought forth by the provisions of Section 26 of the Land Registration Act, 2012, which provides as follows :-

26. (1) The certificate 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 the 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 misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

[7] It will be seen from the above, that a title procured by way of fraud or misrepresentation to which the title holder is proved to be a party, or a title acquired illegally, unprocedurally or through a corrupt scheme, is prone to be challenged. In our case, I am of the considered view, from the evidence on record, that the title of the defendant was procured by way of fraud and I am of the further view that the defendant must have been a party to the said fraud. If I am wrong, then the title was acquired illegally or unprocedurally, for the defendant could not have become registered as proprietor of the land without the plaintiff formally transferring the said land to him.

[8] In his plaint, the plaintiff asked for a declaration that he be declared the rightful owner of the suit property; cancellation of the title of the defendant; and a perpetual injunction restraining the defendant from the suit land. I allow all these prayers only that the declaration of ownership will be as against the defendant. I further direct the Land Registrar, Nakuru to proceed to restore the plaintiff as the rightful proprietor of the suit land. The plaintiff shall also have the costs of this suit.

[9] It is so ordered.

Dated, signed and delivered in open court at Nakuru this 22nd day of September 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

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In presence of : -

Ms. Gitau holding brief for Mr. Gatonye for plaintiff

Defendant did not enter appearance: absent

C/Asst. Janet

MUNYAO SILA

JUDGE

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