



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELCA NO. 73 OF 2014

(Formerly Nyeri HCCC NO. 60 OF 2014)

JOHN WAWERU GAKURU 1ST APPELLANT

PETER MURAGE KAMANJA 2ND APPELLANT

VERSUS

DAVID MULWA MALAMU RESPONDENT

JUDGMENT

Introduction

1. By a plaint dated **9th October, 2009** and amended on or about **23rd October, 2009** to, *inter alia*, add the 2nd appellant, Peter Murage Kamanja, to the the suit, the respondent, David Mulwa Mulamu, instituted a suit in the lower court to wit, Nanyuki SPMC's Civil Case No. 145 of 2019, seeking judgment against the appellants in this appeal for a permanent injunction restraining the defendants (now appellants) by themselves, their agents, workers or servant or anybody claiming the suit property under them from occupying and/or constructing structures or in anyway whatsoever interfering with his possession and ownership of the parcel of land known as **L.R No. Nanyuki Municipality Block 8/909** (hereinafter referred to as the suit property).
2. On or about **29th October, 2010** the respondent re-amended his plaint to, *inter alia*, seek a further relief against the appellants to wit, a declaration that he is the legal owner of the suit property.
3. It was the respondent's case that on or about 30th July 2009, he purchased the suit property from Samuel Muiruri Kariuki and was immediately put in possession; that he has been in quiet and peaceful possession of the suit property ever since.
4. The respondent contended that on or about 8th October, 2009 the appellants with the authority of the Municipal Council of Nanyuki (the 3rd Defendant in the suit before the lower court) and or its servants trespassed into the suit property and started to fence it without any colour of right.
5. In reply and opposition to the suit, the the 1st and 2nd appellant filed their Statement of defence and counter- claim dated 19th october, 2010 and amended on 19th October, 2010.
6. In their statement of defence the appellants denied and/or feigned ignorance of the allegations levelled against them.

7. In their counter-claim, they alleged that the respondent obtained title to the suit property, which they claim was originally UNS. Commercial Plot No.63 Nanyuki Municipality.

8. Based on their allegation that the respondent unprocedurally, illegally or unlawfully obtained title to the suit property, the appellants prayed that the suit against them be dismissed with costs to them and judgment be entered in respect of their counter-claim for:-

a) A declaration that they are the legal owners of UNS. Commercial Plot No.63 Nanyuki Municipality and for order for rectification of the register for the suit property by cancelling the registration of the respondent as its owner and for them to be registered as the owners of the suit property.

b) A permanent injunction to restrain the respondent by himself, members of his family, his servants, agents, employees or any other person claiming through or under him from interfering with the plot.

c) Costs of the counter-claim.

d) Any other or further relief that the court may deem fit to grant.

9. Upon considering the case presented before him by the parties to the suit, the Trial Magistrate (hereinafter TM) entered judgment in favour of the plaintiff (now respondent) in the following terms:-

“Plaintiff has by registration as owner of L.R Nanyuki/Municipality Block 8/909 been vested with absolute ownership of that land together with all rights and privileges and the court has a duty to protect such rights and privileges.

In the end; I have come to the conclusion that the plaintiff has proved his case on probability and the court hereby grants orders for:-

a) A declaration that plaintiff is the legal owner of all that parcel of land known as L.R Nanyuki/Municipality Block 8/909.

b) An order for a permanent injunction restraining the defendants jointly and severally, their agents, workers or servants or anybody under them from trespassing, occupying and/or constructing structures or in any way whatsoever interfering with possession and ownership of the said parcel of land L.R Nanyuki/Municipality Block 8/909.

c) Costs of the suit.”

10. With regard to the Appellant’s Counter-claim, the TM held:-

“As regards the Counter-Claim ; I find that the same has for the reasons herein above mentioned not been proved and is dismissed in its entirety with costs to the Plaintiff.”

11. Being dissatisfied with the decision of the TM, the appellants filed this appeal challenging the judgment of the lower court on the grounds that the TM:-

1. Failed to make a determination on the basis of the issues agreed upon by parties and adopted by the court as the issues for determination;

2. Failed to make a determination that the respondent had not at any time acquired any recognizable interests and rights over the suit property;

3. Failed to find that the contract between the respondent and Samuel Muiruri Kariuki was null and void;

4. Failed to make a determination that the registration of the Respondent as the proprietor of the suit property was null and void;
5. Erred by finding that the respondent was the legal owner of the suit property;
6. Failed to find that the register under the Registered Land Act for the suit property has never been legally and procedurally opened by the Land Registrar Laikipia;
7. Erred by upholding the sanctity of the respondent's ownership documents when the same had being declared forgeries;
8. Failed to make a determination on the respondent's fraudulent acquisition of the purported ownership documents of the suit;
9. Erred by finding that the respondent had proved his case on a balance of probabilities;
10. Erred by making a finding that they did not have *locus standi* over the suit property despite having proved their beneficial interest therein;
11. Failed to find that they had proved their counter-claim on a balance of probabilities;
12. Erred by making findings on rectification of register when that finding was, in view of the evidence they adduced, irrelevant;
13. Erred by dismissing their counter-claim with costs.

12. For the foregoing reasons, the appellants pray that the judgment delivered on 17th September, 2014 in Nanyuki CMCC No.145 of 2009 be set aside and their Counter-Claim in Nanyuki CMCC No. 145 of 2009 be allowed.

13. This being a first appeal, this court has a duty to evaluate afresh the evidence on record in order to arrive at its own independent conclusion, bearing in mind that it neither saw nor heard the witnesses testify, and make allowance for that. See **Selle & Another vs. Associated Motor Co. Ltd & Others** (1968) E.A. 123.

14. The case presented before the TM was that the respondent, David Mulwa Mulamu bought the suit property from Muiruri Kariuki; that Muiruri Kariuki got the property registered in favour of the respondent; that the suit property and the unsurveyed plot claimed by the appellants is one and the same plot on the ground.

15. After the respondent obtained title to the suit property he realised that some people were fencing it. When he went to the Municipal Council to find out who was fencing it, he learnt that the council had authorised the appellants to fence it. For that reason he went to court to restrain the Appellants from interfering with the suit property.

16. In his testimony before the lower court, the respondent denied the allegations by the appellants that he obtained the suit property fraudulently and that he did not follow the requisite legal procedure in obtaining the title to the suit property. He maintained that he obtained rights to the suit property lawfully.

17. The appellants on the other hand, maintained that the respondent obtained title to the suit property unprocedurally and fraudulently. In this regard, the appellant's relied on the following uncontroverted facts about the title held by the respondent:-

- a) That the title was obtained before land rent clearance certificate in respect thereof had been obtained from the Commissioner of lands;

b) That the copy of transfer form relied on by the respondent was not attested by an advocate or the Land Registrar;

c) That there was no evidence that stamp duty had been paid before registration of the certificate of lease in favour of the respondent.

d) That no rates clearance certificate in respect of the suit property was issued before the property was transferred to the respondent.

e) That the entries in the certificate of lease do not conform to the entries that would ordinarily appear therein.

18. Through the testimony of D.W.1 Silas Kiogora Mburugu, a land officer from the Ministry of Lands Headquarters, the trial court heard that the suit property was the unsurveyed plot claimed by the appellants. The plot was allocated to one, Colonel K. Lebo some time in 1992. The court heard that there was an attempt to transfer the suit property to the appellants, which did not materialise (materialise in the sense that no certificate of lease was ever issued to the appellants).

19. D.W.1 maintained that there was nothing in the court file concerning the suit property to show that the property was at any time issued to Muiruri Kariuki who sold it to the respondent. He acknowledged that the Chief Land Registrar received complaints regarding registration of the suit property in favour of the respondent. He was however, not aware what decision the Chief Land Registrar made concerning the complaint.

20. Concerning the documents relied on by the respondent to prove his entitlement to the suit property, despite having entertained serious doubt about their authenticity, he stated that he had no evidence that the lease was not authentic.

21. D.W.2 Peter Murange Karanja, informed the court that the 2nd appellant and himself bought the suit property from its allottee, John Lebo. The court heard that they paid Kshs.400,000/= to the allottee. Thereafter they went to the Municipal Council whereat the allottee effected an informal transfer of the suit property to them.

22. He explained that the suit property had been irregularly transferred to the respondent in 2009 when the respondent complained that they were fencing his property. Consequently, they complained to the Chief Land Registrar. He admitted that no lease was ever prepared in their name or in the name of John Lebo. He also admitted that they obtained permission to develop the suit property using Lebo's name. This was so despite the said person having passed on.

23. Maintaining that the original allottee of the suit property had informally transferred the suit property to them, he denied the respondent's contention that they had hatched a scheme to obtain the suit property fraudulently.

24. D.W.3 Stephen Mburu Ndiba, admitted having gone to the headquarters to collect the lease in favour of the respondent but contended that he was not involved in the transfer of the property to the respondent. He, in particular, denied having signed the lease held by the respondent. Like D.W.1, he contended that the lease held by the respondent is a forgery.

25. D.W.4 a documents examiner, informed the court that upon comparing the signatures allegedly made by D.W.3 and the Commissioner of Lands on the Certificate of lease issued to the respondent, he formed the opinion that the document was forged.

26. The respondent also availed another document examiner, P.W.2, who stated that upon examining the signatures in the impugned lease and known signature of D.W.3 and that of the Commissioner of Lands, he formed the opinion that the lease was signed by the said officers. It however emerged that his testimony was unreliable because he confirmed examining only copies of documents presented to him

and not the originals documents.

27. The foregoing was the evidence on the basis of which the impugned decision of the trial court was premised.

28. The appeal herein was disposed of by way of written submissions.

Submissions

29. In the submissions filed on behalf of the appellants, it was pointed out that during pre-trial, parties had framed the issues they wanted the trial court to consider and contended that the TM steered away from those issues and framed her own issues hence denying the parties an opportunity to submit on those issues.

30. In his submissions, the respondent does not agree with the appellants' contention that the TM failed to consider the issues framed for determination. According to him (respondent) the TM addressed all the issues framed for her determination. The appellants are said to have failed to show which issues the TM failed to address. Besides, he contends that the court is not bound by the issues framed by the parties; it is only obligated to consider the evidence on record and the law. It is contended that any assertion to the contrary would negate the principles espoused in **Article 159** of the Kenyan Constitution.

31. With regard to these issues, I agree with the respondent that the court was not bound to determine the suit on the issues framed by the parties. This is especially so if the issues framed by the parties are not in tandem with the pleadings filed by the parties. It is trite law that parties are bound by their pleadings. In that regard, the issues for the court's determination flow from the pleadings. In the circumstances of this case, the parties had framed the following issues for the court's determination:-

- a) Whether plot No. unsurveyed commercial plot No.63Nanyuki Municipality and plot No.Nanyuki/block 8/909 are on the same ground?
- b) Who between the plaintiff and the defendant is entitled to ownership of the suit property?
- c) whether the register should be rectified and the plaintiff's registration as proprietor of the suit property cancelled?
- d) Who is entitled to an order of permanent injunction?
- e) Whether the third defendant lawfully authorized the 2nd defendant to fence the suit property?
- f) Who should bear the costs of the suit.

32. Although the TM did not sequentially address all the questions framed by the parties, it is clear from her judgment that she addressed all the issues framed by the parties and ultimately determined that it's the plaintiff (now respondent) who proved his case on a balance of probabilities.

33. On whether the TM erred by finding in favour of the respondent merely because he had a Certificate of Lease, reference is made to the case of **Daudi Kiptugen v. Commissioner of Lands & 4 others EL No.787 of 2011, e KLR** and the many issues that the respondent was unable to address concerning his registration as the proprietor of the suit property and submitted that the TM failed to judiciously scrutinize the process that led to the issuance of the certificate of lease.

34. In the case of **Daudi Kiptugen** (*supra*) it was held:-

“In order to determine the question whether the lease held by the plaintiff is valid, it

must be demonstrated that it was properly acquired. It is not enough that one waves a lease or a certificate of Lease and assert that he has good title by the mere possession of lease or certificate of lease. Where there is contention that a lease or certificate of lease held by an individual was improperly acquired, then the holder thereof must demonstrate, through evidence, that the lease or certificate of lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through proper process, then all one would need to do is to manufacture a lease or certificate of title, at the backyard or corner of a dingy street, and by virtue thereof, claim to be rightful proprietor of the land indicated therein. It is therefore necessary for the court to determine how the plaintiff ended up having a lease and certificate of lease in his name, and further determine if the Government did intend to issue the plaintiff with a lease over the suit land.”

I totally agree, with the sentiments expressed in the aforesaid case of Daudi Kiptugen, *supra*.

35. In the circumstances of this case, it is not in dispute or controverted that various procedures and processes involved in issuance of title were not complied with before the title was issued, for instance, the transfer was effected before the requisite clearance certificates were obtained, there is no evidence that stamp duty in respect of the transfer was paid and there is serious doubt as to the authenticity of the documents used to effect the transfer in favour of the respondents. The documents of transfer, that the lease and the certificate of lease also raise serious doubts as to their authenticity. The land officers who allegedly authored them disowned the document. Expert opinion tendered in court in respect thereof by D.W.4 was to the effect that the documents were not authentic.

36. On the contention by the respondent that the Government has been receiving rent on the impugned lease and the failure by the appellants’ to call the author of the impugned lease, I am of the view that those contentions cannot be used to validate a process that *prima facie* was conducted without following the requisite law and/or procedure. In this regard see **Section 19** as read with **Section 5** of the Stamp Duty Act Cap 480.

37. On whether the evidence adduced in court sufficed to prove fraud or the alleged irregularity in processing and issuance of certificate of title in favour of the respondent, in view of what I have stated herein above, I must agree with the appellants’ submission that the title was fraudulently or irregularly obtained.

38. In the case of **Sisters of Norte Dame De Namur registered Trustees v. Attorney General & Another Kisumu Petition No.151 of 2012, e KLR** it was stated:-

“Macfoy’s case was offered to show that an action done without backing of due process is void ab initio and does not require a court to declare it so. Circumstances may arise however where a court order may be necessary to declare such action as void.”

39. Having found the procedure used in conferring rights to the respondent wanting, I am unable to agree with the respondent’s submissions that the cases cited in support of the appellants’ case are distinguishable. I am also unable to agree with the respondent that his certificate of title is by dint of the provisions of **Section 143(1)** of the Registered Land Act, Cap 300 Laws of Kenya (repealed) indefeasible even where it has been found to have been obtained by fraud or through a process tainted with illegality. Such a determination would clearly be inconsistent with **Article 40(6)** and **Article 67(1)(e)** of the Constitution of Kenya, 2010 which do not extend protection of right to any property that has been found to have been unlawfully acquired.

40. In the circumstances of this case, despite there being evidence that the respondent obtained the suit property for valuable consideration, there is evidence that the alleged seller did not have a good title to pass to the respondent. There is also evidence that the alleged seller did not follow the right legal processes in passing his alleged rights in the suit property to the respondent. As was rightly observed in the case of **Sisters of Norte Dame De Namur registered Trustees v. Attorney General & Another**

(supra):-

“The principle of innocent purchaser for value without notice of irregularity is subject to the qualification that creation of title itself is not in flagrant breach of statute law. Where it is shown to be such, it is a nullity ab-initio).”

41. In the instant case, it is not in dispute that the certificate of lease held by the respondent was obtained before the requisite clearances in respect thereof had been obtained. There is also no evidence that the requisite stamp duty in respect thereof was paid.

42. I need say no more to demonstrate that the learned TM was not justified in declaring the respondent the legal owner of the suit property.

43. On whether the appellants proved their case so as to be entitled to the orders sought, I wish to point out that according to the testimony of D.W.1 the record held by the Government concerning the suit property still shows that the bona fide owner thereof is Colonel John Lebo (now deceased). Although there were attempts to transfer the suit property to the appellants’ those attempts did not materialise.

44. Since the said original owner of the suit property died without completing the intended process of transfer to the appellants, it is not possible to verify the allegations made by the appellants’ concerning how they gained rights over the suit property. I also doubt whether the property can lawfully be transferred to the appellants’ without involvement of the Administrators of the estate of the said John Lebo. The actions of the appellants of asserting their claim to the suit property using the name of the deceased, in my view, tantamount to intermeddling with the estate of a deceased person. In this regard see **Section 45** of the Law of Succession Act, Cap 160 Laws of Kenya, as read with **Section 80** thereof which provides as follows:-

“45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

45. According to the testimony of D.W.1, the records held by the Government still have the name of the the deceased as the allottee of the suit property. Although D.W.1 seemed to suggest that if a certificate of lease is to be issued in respect of the suit property, it will issue in favour of the appellants, that can only be done with involvement of the administrator or trustee of the estate of the said deceased person. Any action to the contrary, would constitute intermeddling with the estate of the deceased and invite the consequences contemplated under **Section 45(2)** of the Law of Succession Act.

46. Under **Section 82** of Cap 160, only an administrator of a deceased person’s estate has locus to, *inter alia*, to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate. The appellants not being such administrators, lacked locus standi to sue or defend a claim concerning the suit property. In this regard the TM was right in holding that the appellants’ lacked locus standi to sue in relation to the suit property.

47. In view of the foregoing, I find and hold that neither the respondent nor the appellants’ proved their claim to the suit property to the required standard of proof.

48. The suit herein being in respect of grant of disposition of public land, I direct that the question

concerning the disposition of the suit property be referred to the National Land Commission for further review of the grant by the Deputy Registrar of this Court. The National Land Commission shall upon review of the grant, make a report to this court for further orders. In the mean time status quo pertaining the suit property to be maintained.

49. Cost of the appeal to abide the further orders to be issued upon receipt of the report of the National Land Commission.

Dated, signed and delivered at Nyeri this 30th day of June, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kimunga h/b for Mr. Mwangi for the respondent

David Mulwa Malamu – respondent

N/A for the appellants counsel

John Waweru Gakuru – 1st applicant

Peter Murage Kamanja – 2nd applicant