



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 17 OF 2012

JULIUS NJOGU KIMANIPLAINTIFF

VERSUS

STEPHEN MAINA.....DEFENDANT

JUDGMENT

(Suit by plaintiff seeking cancellation of title of defendant; plaintiff having bought property from a third party who had purchased from original owner; contract between original owner and the third party having been rescinded; original owner thereafter transferring land to defendant; whether on the facts the transfer to defendant was fraudulent; plaintiff having acquired nothing owing to the rescission of contract between original owner and third party who sold to plaintiff; no fraud demonstrated in manner in which defendant acquired title; suit dismissed with costs).

A. INTRODUCTION AND PLEADINGS

1. This suit was commenced by way of plaint filed on 16 October 2012. In the plaint, it is pleaded that on 6 September 1979, the plaintiff purchased 4 acres of land from one Charles Kamau Waiyaki at a cost of Kshs. 35,000/= at Tabuga Farmers Company. He has pleaded that he then fenced the land and constructed a 3 bedroomed semi-permanent house. It is averred that in the year 1991, the plaintiff moved his family to a farm in Silibwet Scheme in Nyahururu and left the house which he had constructed. In the year 2011, the plaintiff came to process his title deed but was surprised to find that the title was issued to the defendant on 7 June 1990. The title is to the land parcel Dundori/Lanet Block 2/30 and it is the contention of the plaintiff that the plaintiff obtained the title by way of fraud.

The following particulars of fraud are pleaded, being :-

- (a) *Causing the Land Registrar to issue a title deed in respect of the land parcel Dundori/Lanet Block 1/230 (Tabuga) while knowing very well the father had sold the land to Charles Kamau Waiyaki.*
- (b) *Purporting to be the owner of the land parcel Dundori/Lanet Block 1/230 (Tabuga) while knowing the same had been sold to Charles Kamau Waiyaki who sold it to the plaintiff.*
- (c) *Illegally taking a title deed from the Land Registrar with the full knowledge that the land parcel Dundori/Lanet Block 1/230 was not his.*

2. In the suit, the plaintiff has asked for the following orders :-

(a) *An order that the defendant by himself, his servants or agents be restrained from entering, tilling, selling or transferring the land parcel Dundori/Lanet Block 1/230 (Tabuga).*

(b) *That the title deed issued to the defendant on 7/6/1990 be cancelled and a fresh title to issue in the name of the plaintiff.*

(c) *Costs of this suit.*

3. The defendant entered appearance and filed defence. He pleaded that the plaintiff has never been on the suit property and that it is him (the defendant) who has been cultivating the same since the year 1983. It is pleaded that in the same year, the defendant's father refunded to Charles Kamau, the purchase price that he had paid and the agreement between the two was rescinded. The defendant has averred that he purchased the suit property from his father for valuable consideration in the year 1983 and that his father transferred to him the share certificate. It is also pleaded that the case is time barred.

B. EVIDENCE OF THE PARTIES

(i) Plaintiff's Evidence

4. The plaintiff testified that the suit property was sold to him by Charles Kamau Waiyaki on 6 September 1979. They had a written agreement which was produced as an exhibit. The plaintiff testified that Charles Kamau Waiyaki held shares in Tabuga Farmers Company and that he transferred to him the said shares which were equivalent to 4 acres of land. He produced copies of the share transfer and a letter dated 24 December 1979 confirming the transfer of shares. He testified that after the purchase, he entered into the land and lived in it and developed a house which is on site up to date. When he went to process his title deed, he found that the defendant had already obtained title to the land.

5. In cross-examination, the plaintiff testified that the shares that he purchased were originally owned by one James Kuria. He stated that James Kuria sold his shares to Charles Kamau Waiyaki who in turn sold the shares to him. The agreement that he had was with Charles Kamau and not James Kuria. There were no titles at the time that he purchased the land and he was at a loss as to how the defendant obtained title.

6. The plaintiff intended to call Charles Kamau Waiyaki as his witness but he died before testifying. He had however recorded a statement which the parties agreed to have admitted in evidence. The statement is quite brief. In it, Charles Kamau Waiyaki affirmed that he did sell the suit property to the plaintiff at a consideration of Kshs. 35,000/= in the year 1979.

With the above evidence the plaintiff closed his case.

(ii) Evidence of the Defence

7. The defendant is son to James Kuria, the original owner of the land. He did not deny that his father had an agreement with Charles Kamau Waiyaki (Waiyaki) for the sale of the land, drawn on 23 November 1978, but he stated that Waiyaki did not pay the balance of the purchase price although he did take possession of the land. The defendant's father asked the defendant for money to refund and the defendant did give his father money to refund Waiyaki. The refund was paid through Advocate Juma Nyabinda. For this money, the defendant's father transferred the shares of the suit property to the defendant and they wrote an agreement dated 23 March 1983. He paid the requisite fees and got title to land. It was his position that after refund of the purchase price, the agreement between his father (James Kuria) and Waiyaki was extinguished. He testified that after he took over the land in the year 1983, he leased it out and Waiyaki did not raise any issue. He however did recall Waiyaki having complained to the Chief of the area that he has not been refunded all his money, but his position, was that all money had been refunded. Apart from the purchase price, the defendant testified that Waiyaki was given a sum of Kshs. 440/= as compensation for the maize store that he had developed on the land. He testified that he eventually got title to the land on 7 June 1990.

8. In cross-examination, the defendant testified that the agreement between his father (Kuria) and Waiyaki was drawn by Advocate Mindo. The rescission was however written by Advocate Juma Nyabinda. He stated that Waiyaki was refunded the purchase price on 23 March 1983. He denied, that by that time, his father had already transferred his shares to Waiyaki. He stated that Waiyaki had asked his father to make himself available on 16 February 1983 to receive the balance of the purchase price, but Waiyaki did not show up as appointed and the balance was never tendered. He testified that the refund was made on 21 March 1983 at Juma Nyabinda's office but he could not explain why the Advocate deemed it fit to receipt the money if it was paid immediately to Waiyaki. He stated that it was Waiyaki who had put up a structure on the land in the year 1983 and not the plaintiff. He stated that he leased out the land, but used it himself in the years 1996-1998. He was aware that the Chief had called his father on a complaint made by Waiyaki that he had not been refunded his money. He felt that the Chief was disturbing them and he reported him to the District Officer (DO). By that time, the defendant was working for the District Commissioner (DC). In re-examination, he stated that his father died in the year 2008 and that Waiyaki never filed any suit against him.

9. DW-2 was Edwin Gichuru Githui. He served as Chief of the area between the years 1981 and 1995. He testified that in the year 1983, Waiyaki complained to him regarding the suit property, and he wrote to Kuria to attend at the Chief's office to try and resolve the matter. He referred them to a panel of elders. He was not aware of what the panel of elders decided as the parties never got back to him. He was otherwise not aware whether the purchase price had been paid in full.

With the above evidence, the defendant closed his case.

C. SUBMISSIONS OF COUNSEL

10. In her written submissions, Ms. Njoroge for the plaintiff reviewed the evidence and submitted that the plaintiff had confirmed that he had purchased the property from Waiyaki. She pointed at what she deemed to be discrepancies in the evidence of the defendant on the amount owed. She further doubted the authenticity of the receipts for refund, reasoning that if the money was paid on the table, there was no need for such receipts. She also doubted the authenticity of an agreement for sale with DW-1. She did not think much of the evidence of DW-2 as to her, DW-2 did not have any idea about the dispute. She submitted that by the time the defendant was receiving the title to the suit property, he never informed the Land Registrar that there was a dispute between his father, Waiyaki, and the plaintiff, over the same land. She further submitted that the defendant never informed the Land Registrar that the plaintiff was in use and occupation of the premises. She submitted that there was no proof that the defendant had leased out the premises to third parties as the lessees were never called to give evidence. She relied on Section 26 of the Land Registration Act, which inter alia gives provision for cancellation of title if obtained by misrepresentation or fraud. She asked that the court finds for the plaintiff.

11. Mr. Kipkoech Ng'etich for the defendant, was of the view that three issues need to be determined. That is :-

- (a) Whether the defendant is the legal and lawful owner of the suit land.
- (b) Whether the plaintiff has any cause of action whatsoever against the defendant.
- (c) Whether the suit is time barred and which ought to be struck out.

12. He reviewed the evidence and submitted that the plaintiff has no cause of action against the defendant, as the two never had any agreement, and submitted that the plaintiff ought to pursue his claim against the person who sold him the land (Waiyaki). It was also submitted that the plaintiff never raised issue with the defendant's father (Kuria), who died in the year 2008, and only waited until he died so as to raise a claim. He submitted that the plaintiff had enough time since the year 1983, when the matter went before the Chief, if he thought the issue had not been settled. He further submitted that Waiyaki had no land to sell to the plaintiff as his agreement with the defendant's father had been rescinded.

13. On the law, he relied on Article 40 of the Constitution which protects the right to property; Sections 27, 28 and 31 of the Registered Land Act (repealed) which also generally provided for the protection of title save for overriding interests; and Sections 25 and 26 of the Land Registration Act, which also generally provide for protection of title. He also relied on Section 39 of the Land Act, which allows for rescission of a sale of land contract, and counsel submitted, that James Kiarie had a right to rescind the contract with Waiyaki, which counsel argued that he did. Counsel also relied on Section 23 of the Registration of Titles Act (repealed) which also offered protection to title. He also relied on various authorities which in my view are authorities that buttress the general protection to title offered by statutory law. He relied on the cases of *Dr. Joseph Ng'ok v Justice Moijo ole Keiwua & Others*, Nairobi Civil Application No. NAI 60 of 1997 (unreported); *Cross Current Indigenous Network Ltd vs Commissioner of Lands & Another (2005) eKLR*; and *Republic vs Registrar of Titles & Another ex-parte Kalidas Kanji Ltd (2015) eKLR*; *Charles Karathe Kiarie & 2 Others vs Administrators of the Estate of John Wallace Mathare (deceased) & 5 Others (2013) eKLR* and *Wreck Motor Enterprises vs The Commissioner of Lands & 3 Others (2005) eKLR*. He submitted that the plaintiff's title can only be challenged on grounds of fraud or misrepresentation for which none had been shown. He submitted that no illegality over the defendant's title has been shown and neither has it been proved that the defendant acquired title unprocedurally or through a corrupt scheme.

14. On limitation, counsel submitted that Section 7 of the Limitation of Actions Act, CAP 22, provides for a limitation period of 12 years. He also relied on the case of *Esther Gachambi Mwangi v Samwel Mwangi Mbiriri (2013) eKLR*. He submitted that the defendant obtained title in the year 1990 and that this case was filed about 21 years later.

15. He finally submitted that the principle of *nemo dat non quod habet* applies since Waiyaki had no title to pass to the plaintiff.

D. DECISION

16. It is with the above pleadings, evidence and submissions, that I need to decide this matter. After evaluating the evidence, I find that some facts are not in dispute. The original parcel of land was owned by James Kuria (Kuria), who is the defendant's (Maina) father. Kuria had an agreement with one Charles Kamau Waiyaki (Waiyaki) on 23 November 1978 for the sale of the suit property at a consideration of Kshs. 35,000/=. A few months down the line, on 6 September 1979 to be precise, Waiyaki resold the land that he had bought to the plaintiff (Kimani) at the same consideration, that is Kshs. 35,000/=. There is also an agreement between Kuria and his son Maina, dated 23 March 1983, vide which Kuria sold to Maina the same land at the same consideration of Kshs. 35,000/=. On 7 June 1990, Maina, the defendant, obtained title to the suit property. This suit was filed on 16 October 2012, over 22 years since Maina obtained title to the suit land.

17. The case of the plaintiff is that he properly purchased the suit property from Waiyaki, who in turn had bought it from Kuria. It is further his case that the property at that time was only held in form of shares at Tabuga Farmers Co-operative Society (Tabuga FCS) and that Waiyaki transferred to him the said shares. It is therefore his position that the title of the defendant was obtained fraudulently and should be cancelled. Maina has countered this by saying that Waiyaki had no land to sell, as his agreement with his Kuria, had been rescinded and the money paid refunded. He paid for the refund and in consideration, his father transferred the property to him. It is also his view that this case is caught up by limitation of time. In my view the following issues will determine the matter herein being: -

i. Was the agreement between Kuria and Waiyaki rescinded ?

ii. Had Kuria transferred his shares to Waiyaki ?

iii. Could Waiyaki have had capacity to sell to the plaintiff ?

iv. Did Maina properly obtain title?

v. *Is the plaintiff's case time barred?*

(i) *Was the agreement between Kuria and Waiyaki rescinded?*

18. It is not denied that Kuria had an agreement with Waiyaki to sell the suit property. The agreement was drawn on 23 November 1978. It is however the contention of the defendant that this agreement was rescinded, because Waiyaki failed to pay the balance of the purchase price within the agreed period, and that Waiyaki was refunded the money that he had paid.

19. I have seen the letter dated 11 October 1982 (Defence exhibit No. 2) from Advocate Juma Nyabinda written to Waiyaki, advising him that he has not paid a balance of Kshs. 10,600/=. Waiyaki was advised to pay the money within 15 days of the letter. There is another letter from Juma Nyabinda, dated 28 October 1982 (Defence exhibit No. 3) written to Waiyaki, advising Waiyaki that the agreement has been rescinded. I have also seen the endorsement on the agreement of 23 November 1978 (Defence exhibit No.1) , that the agreement has been rescinded. D-exhibit No.1 is a photocopy but there are two types of endorsement. One is copied but the other is written in original pen and stamped 21/3/1983. Although Ms. Njoroge was of the strong view that the endorsements are not authentic, I hold a contrary view. I do not see any problem with the two endorsements, that which is in copy, and the original. The copied endorsement seems to be photocopied together with the original, and it is probable that the other endorsement was written later, on the photocopied document, and endorsed with the signature of Mr. Nyabinda together with his official stamp. I have no proof of any forgery of this document and I have no reason to doubt it.

20. Ms. Njoroge also raised issue with the receipts (Defence exhibits 5a and 5b) on the reasoning that if the refund was made on the table, there was no need for writing receipts. That may be true, but it is probable that Mr. Nyabinda, wanted some documentation done, and that is what led to the money being formally receipted. The receipts are dated 21 March 1983, and are for Kshs. 24,400/= as refund of deposit received, and Kshs. 400/= being compensation to Waiyaki for the developments that he had made on the property. I frankly see no problem with the receipting of the money, and to me the receipts look genuine. More importantly, no evidence has been led that these receipts are forgeries, and I am unable to doubt their authenticity.

21. There was of course the dispute between Kuria and Waiyaki , as evidenced by the Chief's letters of 1983 and 1984, but as the Chief testified, no follow up was made on this dispute and it appears to me as if the parties deemed the issue as resolved. This conclusion is buttressed by the fact that Waiyaki never seems to have made a follow up complaint, nor file any suit, against Kuria. Their conduct can only bring one to the conclusion that they had completely settled their differences and there was nothing to sue for.

22. Based on the oral and documentary evidence before me, I do find that the agreement of 23 November 1978, between Kuria and Waiyaki, was rescinded on 21 March 1983 and that the two parties resolved their differences.

(ii) *Had Kuria transferred his shares to Waiyaki ?*

23. The other issue is whether Kuria had transferred his shares in Tabuga FCS by the time the agreement was being rescinded. This is important because Waiyaki already had another agreement with the plaintiff, entered into on 6 September 1979, before the rescission of the first agreement. If there was a transfer of shares, then it could be argued that the plaintiff was an innocent purchaser for value without notice, and the shares could properly have been transferred to him.

24. I have no evidence before me that Kuria transferred his shares to Waiyaki or that Waiyaki transferred the same shares to the plaintiff. The plaintiff produced what he deemed to be a share transfer between Waiyaki and himself. However, nothing was produced to demonstrate any transfer of shares between Kuria, the original owner, and Waiyaki. There was no share transfer document produced, and neither was the register of Tabuga FCS produced to prove such transfer. Without the same, it follows that Waiyaki could not transfer anything to the plaintiff, for Kuria had not transferred the shares to him. Kuria still held

the shares, and unless and until, the said shares were transferred to Waiyaki, for which I have no evidence, Waiyaki could not purport to transfer anything to the plaintiff. In any event, the share transfer produced is not witnessed (at the plaintiff's signature) and neither does it show that it was received and endorsed by Tabuga FCS.

25. On the evidence, I therefore find and hold that Kuria had not transferred his shares in Tabuga FCS to Waiyaki, and Waiyaki could not, and did not transfer any shares in Tabuga FCS to the plaintiff.

iii. Did Maina properly obtain title ?

26. It was claimed by the plaintiff that the defendant (Maina) fraudulently acquired title to the suit property. On my part, I have not seen any evidence of fraud. There was a sale agreement entered into between Maina and Kuria, after Kuria had rescinded the earlier agreement with Waiyaki. This cannot be said to be fraudulent. I have already held that there is no proof of any shares in Tabuga FCS having been transferred to Waiyaki or to the plaintiff. The agreement between Kuria and Waiyaki having been rescinded, I cannot fault the defendant for entering into a subsequent agreement with Kuria, and later obtaining title to the suit property.

27. In brief, I have no evidence that the title of the defendant was obtained by fraud. In my view the title of the defendant was properly obtained.

(iv) Can the defendant's title be cancelled and title issued to the plaintiff ?

28. I have already held above that I have no proof that the title of the defendant was fraudulently obtained. That being the case, I cannot proceed to cancel the same. Section 26 of the Land Registration Act, protects such title. The said Section is drawn as follows :-

Certificate of title to be held as conclusive evidence of proprietorship.

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.

29. It will be seen from the above that title can only be challenged on the grounds of fraud or misrepresentation for which the title holder is proved to be a party; or where such title is shown to have been acquired illegally, unprocedurally, or through a corrupt scheme. I have not been given any evidence that the defendant obtained title through fraud or misrepresentation. Neither do I have any evidence that the defendant's title was acquired illegally, unprocedurally or through a corrupt scheme. In essence, I have no grounds to cancel the defendant's title and I have no reason to order the plaintiff to become the registered owner thereof. The plaintiff's prayer that the title of the defendant be cancelled is therefore disallowed.

(v) Is the plaintiff's case time barred ?

30. The case of the plaintiff has been filed 22 years after the defendant obtained title. Section 7 of the Limitation of Actions Act does provide for a limitation period of 12 years for a claim over land. The said

section is drawn as follows :-

S. 7 Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

31. It will be seen from the above that claims over land are to be filed within a period of 12 years. No explanation has been given why the plaintiff opted to file his case this late, and more importantly, it has not been shown that the plaintiff ought to be exempted from the limitation period of 12 years. The plaintiff stated that he went to check on the title in the year 2011 and that is when he discovered that the defendant has obtained title to the land. No explanation was given as to why the plaintiff left the matter that late. Clearly, his case, if ever he had one, has been caught up by the limitation period.

Conclusion

32. From the above discourse, it will be seen that I find no merit to the claim of the plaintiff. I see no problem with the title of the defendant. The plaintiff's case is hereby dismissed with costs.

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 10th day of June 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of: -

Mr Magata holding brief for Ms Nancy Njoroge for plaintiff.

Mr Konosi holding brief for Mr B N Kipkoech for the defendant.

CA: Janet.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

