



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 205 OF 2012

(Formerly Nakuru HCCC NO. 501 OF 1998)

JOHN MUNGAI KARUAPLAINTIFF

VERSUS

MUGUGA FARMERS CO-OP SOCIETY 1ST DEFENDANT

MUGUGA NVESTMENT CO . LTD2ND DEFENDANT

S. K. WAKAHIA3RD DEFENDANT

F. N. MIRINGA.....4TH DEFENDANT

B. N. WANDA.....5TH DEFENDANT

JUDGMENT

(Suit for possession of land; claim that plaintiff bought portions from members of a land buying company; contention that suit properties fall within the portions bought; no such proof tendered; no evidence that titles were issued to other persons fraudulently; in any event suit must fail for failing to enjoin the title holders; claim for adverse possession cannot be considered for failure to sue the title holders; suit dismissed).

INTRODUCTION AND PLEADING

1. This suit was commenced by way of plaint filed on 21 October 1998. The plaintiff sued five persons, but as early as 21 October 2003, counsel for the plaintiff was recorded as stating that the 1st defendant, a co-operative society, has been dissolved, whereas the 5th defendant was deceased. No application for substitution or amendment of plaint followed, but given that concession, the suit must be deemed as a non-starter against the 1st defendant and, at the very least , as abated as against the 5th defendant. The only defendants are therefore the 2nd, 3rd and 4th defendants.

2. The suit as pleaded is that the the 3rd, 4th and 5th defendants were Chairman, Secretary and Treasurer, respectively of the 2nd defendant, Muguga Investments Company Limited. It is averred in the plaint that on or about the 24th October 1979, the plaintiff purchased a Plot Number 26 in Muguga Farmers Co-operative Society Ltd (Muguga FCS), the dissolved 1st defendant, from one Peter Gakaria, a land measuring 0.25 acres and on 8 August 1984, and from Nahashon Mburu Gikonyo, another parcel of land.

The two persons, Peter Gakaria and Nahashon Mburu Gikonyo, are said to have been members of Muguga FCS and that the said parcels were purchased with the knowledge and consent of the 1st defendant. It is pleaded that between 1979 and 1998, the plaintiff carried out massive developments on the two plots and remained in occupation till the time of filing suit. It is averred that on unknown dates between 1995 and the filing of the suit, the 2nd, 3rd, 4th and 5th defendants, purported to deal with the two plots of the plaintiff, said to be portions of the land parcel Nakuru Municipality Block 22/40, and fraudulently caused the same to be sub-divided into portions known as Nakuru Municipality Block 22/511, 512, 514, 516, 517, and 518. The following particulars of fraud are pleaded :-

- (i) Causing the subdivision of the parcels of land knowing that the same belongs to the plaintiff.*
- (ii) Allocating the said parcels of land to other persons other than the plaintiff and knowing that the same belongs to the plaintiff.*
- (iii) Causing persons other than the plaintiff to be registered as owners of the suit land.*
- (iv) Causing title deeds to issue in the names of persons other than the plaintiff.*
- (v) Failing to notify the plaintiff of the intended registration with the knowledge of his interest in the suit land.*
- (vi) Meddling with Nakuru Municipality Block 22/40 knowing the same to be the party (sic) of Muguga FCS.*

In the suit, the plaintiff asked for the following orders :-

- i. A permanent injunction restraining the defendants by themselves, servants and/or agents from entering upon the plaintiff's parcel of land within Nakuru Municipality/ Block 22/40.*
- ii. A declaration that the plaintiff is the bona fide purchaser and owner of the two parcels of land in Nakuru Municipality Block 22/40.*
- iii. Alternatively, a declaration that the plaintiff has title by virtue of adverse possession.*
- iv. A declaration that the title deeds issued relating to the suit land herein in names other than that of the plaintiff are null and void.*
- v. In the alternative, that the plaintiff be compensated at the marked value for the loss occasioned jointly and severally.*
- vi. General damages.*
- vii. Costs*
- viii. Interest.*

(ix) Any other relief that the court may deem fit.

3. An appearance and defence was entered for the 2nd, 3rd and 4th defendants by the law firm of M/s Kimatta & Company Advocates. In the defence, it was inter alia denied that the plaintiff has ever owned the land parcel No. 40 or that the sub-division of that land into the parcels No. 511, 512, 514, 516, 517 and 518 was unlawful or fraudulent.

4. In the course of time, the plaintiff died and was substituted by his wife, one Julia Wacheke Mungai.

5. The defendants and their counsel did not appear at the hearing of the suit and the only evidence on record is that tendered by the plaintiff and his witnesses. The plaintiff called three witnesses in total.

B. EVIDENCE OF THE PLAINTIFF

6. PW-1 was Stephen Chege Mungai, son of John Mungai, the original plaintiff. He stated that he is familiar with the matter. According to him, the issue in the matter is over the parcels No. 14 and 26 in

Muguga Farm. He testified that Peter Gikaria was allocated the land plot No. 14 and Nahashon Mburu, the plot No. 26. He testified that the two persons had separate agreements with his father for the sale of these two plots, dated 24 October 1979 and 8 August 1984. He stated that upon purchase, his father erected a sawmill and timber yard. He testified that in 1989, the 2nd defendant company tampered with the land and subdivided it. He stated that this was because some members had missed some plots. He testified that the proposed subdivisions were rejected by the Commissioner of Lands for various reasons, including that some plots were irregular and had a poor road network. He stated that the subdivision proceeded in a manner that led to relocation of the plots for Nahashon Mburu and Peter Gikaria, meaning that the plaintiff had to relocate to the new site. The plaintiff however declined the plots since this is not where he had settled. He testified that the land they had settled was sub-divided to produce the land parcels Nakuru Municipality Block 22/512, 514, 516, 517 and 518. He produced the Green Cards to these parcels of land. He testified that they are still on the land that they had settled and have never moved out. He produced various correspondences to support his case.

7. PW-2 was Julia Wacheke Mungai wife of John Mungai Karua, the original plaintiff. She is the legal representative of John Mungai Karua and she produced a Grant of Letters of Administration.

8. PW-3 was Anne Nyokabi Kirubi, employed in the survey department of the Nakuru County Government. She testified that she visited the site in dispute and found developments on the land. She testified that the ground whereupon the land parcel Nakuru Municipality Block 22/40 is situated is developed with various structures and a godown. She stated that the original Block 22/40 has now been subdivided. The structures she found on the ground have been encroached by the parcels No. 511, 514, 518 and 512 and the former is now further sub-divided into the parcels No. 3388 and 3389.

9. With the above evidence, the plaintiff closed her case.

C. SUBMISSIONS OF COUNSEL

10. Only counsel for the plaintiff filed submissions.

11. In his submissions, Mr. Kagucia for the plaintiff submitted inter alia, that the survey demarcating the plaintiff's claimed land could only have been fraudulent since the Commissioner of Lands had declined the proposed sub-division. He submitted that the Certificates of Title issued were obtained illegally and are caught up by Section 26 of the Land Registration Act, 2012. He submitted that titles have now been issued to other persons and not the plaintiff. He asked that the titles to the land parcels Nakuru Municipality Block 22/551, 512, 514, 516, 517 and 518 be cancelled. In the alternative, he asked that the plaintiff be compensated by the market value of the said properties and the developments therein. He further submitted that the plaintiff has an overriding interest pursuant to Sections 30 of the former Registered Land Act (CAP 300) (repealed), and the current Section 28 of the Land Registration Act. He submitted that the plaintiffs are in adverse possession of the suit property and that all conditions for establishing a case of adverse possession have been met. He relied on the cases of *Virginia Wanjiku Mwangi vs David Mwangi Jotham Kamau (2013) eKLR*; *Maweu vs Kiu Ranching Company Ltd (1985) eKLR* and *Willie Kiritu Kigotho vs Freshia Wambui Muiruri & Another, HCCC No. 266 of 2004* (unreported).

D. DECISION

12. It will be observed that the case of the plaintiff is that he is entitled to be registered as proprietor of the two portions that he purchased from Nahashon and Peter Gikaria.

13. The plaintiff's pleading and evidence describe the land purchased from Nahashon and Peter, as plots number 26 and 14. It is not clear to me whether these are land parcel numbers for registered land, or whether they are mere descriptions of plots on the ground, solely meant for purposes of distinguishing and identifying them. The first thing the plaintiff needs to prove is that the said plots number 26 and 14 comprise the latter Nakuru Municipality Block 22/40 and later Nakuru Municipality Block 22/ 511, 512, 514, 516, 517 and 518.

14. I have no evidence before me which informs me that the land described as plot number 26 and 14 were within the land parcel Nakuru Municipality Block 22/40. The plaintiff needed to come with a record showing that these plots are the same as Nakuru Municipality Block 22/40, or at the very least were within this registered parcel. PW-3 testified that the structures she saw on the ground are within sub-divisions of the parcel Nakuru Municipality Block 22/40. But no connection was shown between the plots described as Plots 26 and 14, and the land parcel Nakuru Municipality Block 22/40.

15. Even assuming that the plots 26 and 14 fell within the land parcel Nakuru Municipality Block 22/40 that in itself does not mean that the registration of the land parcel Nakuru Municipality Block 22/40 was fraudulent. The Green Card to the land parcel Nakuru Municipality Block 22/40 shows that title was issued to Muguga Investments Co. Ltd, the 2nd defendant, of which Nahashon and Peter were said to be members. That parcel was sub-divided to produce several plots, among them being the plots Nakuru Municipality Block 22/ 511, 512, 514, 516, 517 and 518, which are in issue in this case. It has not been shown to me that the sub-divisions were done fraudulently. Reliance was placed on the letter of the Commissioner of Lands dated 22 November 1989 to demonstrate that the sub-divisions were irregular. I have looked at the said letter. It does state that the proposed sub-divisions have been rejected for various reasons including the reasons that the plot sizes are irregular and there is no good road network. 16. The plaintiff never tabled what the proposed sub-division that was rejected was, and he never showed that the sub-division of the parcel Nakuru Municipality Block 22/40, followed a proposed plan that had been rejected.

17. Without concrete evidence of fraud, I cannot say that the sub-division of the land parcel Nakuru Municipality Block 22/40 was fraudulent.

18. But assuming that there was some evidence of fraud, this case would still fail for non-joinder of necessary parties. The plaintiff never sued the owners of the land parcels numbers Nakuru Municipality Block 22/ 511, 512, 514, 516 , 517 and 518, yet he wants their titles cancelled. In the middle of the proceedings, I did ask counsel whether he wished to proceed with the suit as drawn. Counsel responded that he is comfortable proceeding with the suit as drawn. This court cannot proceed to cancel titles to land, where the proprietors have not been sued. There was clear unwillingness to sue the persons who hold titles and I cannot allow the plaintiff to steal a march on them. But more importantly, I have no evidence that these persons acquired their titles fraudulently, so that even if they were parties, there is no evidence tendered to demonstrate that their titles were fraudulently acquired and need to be cancelled.

19. The plaintiff's case is hinged on the portions that were to be given to Nahashon and Peter. Evidence was led that there was a change in the positions on the ground that Nahashon and Peter were allotted. PW-1 when giving evidence, stated that the portions of Nahashon and Peter are identifiable, but that they do not fall where the plaintiff has settled. It is for this reason that they rejected them. But the plaintiff cannot claim what has not been issued to Nahashon and Peter. Without evidence that the relocation of Nahashon and Peter was successfully resisted, and reversed, the plaintiffs have no choice but to claim whatever portion was allotted to Nahashon and Peter, whether or not it falls within the parcels of land that they claim or elsewhere. They cannot claim the portions of other members, other than the portions of Nahashon and Peter.

20. There was reliance placed on some minutes of a meeting held on 13 July 2008, and it was said that they affirm the plaintiff's case. I have looked at the minutes. Inter alia, it is mentioned that all titles are to be revoked and that the directors have agreed to go back to the old mapping. But clearly, unless with the consent of all proprietors or with an appropriate court order, the meeting could not resolve to cancel and redistribute land that is already registered in the name of other persons. I will not therefore give much weight to the said minutes.

21. The upshot of the above is that the plaintiff has failed to prove that the sub-division of the land parcel Nakuru Municipality Block 22/40 was fraudulent. It follows that I cannot proceed to cancel the titles of the proprietors of the sub-divided portions mentioned in this suit. The plaintiff is not therefore entitled to any declaration in his favour or any order of permanent injunction against the defendants. Neither can I award him any damages or any value of the land in which they currently possess. The plaintiff needs to

follow his share from Nahashon and Peter, and if he does not get it, he can sue the sellers for what is rightfully his, subject of course to any applicable laws.

22. There is the alternative prayer for adverse possession. It is not necessary for me to go to the merits or otherwise of this claim. It must fail for the simple reason that the plaintiff never sued the proprietors of the land that he seeks to claim by way of adverse possession. I mentioned earlier that the title holders of the land parcels Nakuru Municipality Block 22/ 511, 512, 514, 516, 517 and 518 are not parties to this suit. There is no way I can entertain the claim for adverse possession, for such claim, must be directed at the registered proprietors of the land parcels in issue.

23. The upshot of the above is that I find no merit in the plaintiff's suit. It is hereby dismissed. I however make no orders as to costs as the defendants barely participated in these proceedings.

24. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 15th Day of July 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of: -

Katithi holding brief for M/s Kagucia & Co Advocate for plaintiff.

N/A for M/s Kimatta & Co Advocate for 2nd, 3rd and 4th defendants

Janet: Court Assistant

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

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