



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 600 OF 2014

(Formerly NYERI HCCC 168 OF 2008)

KIGUOYA KAMUNGE.....PLAINTIFF

-VERSUS-

KAGITHI KAMUNGE.....1ST DEFENDANT

WACHIRA MUTERO.....2ND DEFENDANT

HARRISON MUHORO MWANGI.....3RD DEFENDANT

CORRIGENDA TO THE JUDGMENT DATED 28TH SEPTEMBER 2015

In exercise of the power of the court under **Section 99** of the Civil Procedure Act, (Cap 21 Laws of Kenya), the Judgment of this court delivered on 28th September, 2015 shall be corrected as follows:-

Heading: ELC CASE NO. 600 OF 2014

(Formerly Nyeri HCC **168** of 2008)

NOT

ELC CASE NO. 600 OF 2014

(Formerly Nyeri HCC **166** of 2008)

Save as aforesaid, the Judgment is affirmed and reiterated herein.

Dated and signed at Nyeri this 19th day of April, 2018.

L N WAITHAKA

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ELC NO.600 OF 2014

(Formerly Nyeri HCC NO. 166 OF 2008)

KIGUOYA KAMUNGE PLAINTIFF

-VERSUS-

KAGITHI KAMUNGE 1ST DEFENDANT

LAWRENCE WACHIRA MUTERO..... 2ND DEFENDANT

HARRISON MUHORO MWANGI..... 3RD DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated **4th December, 2008** and amended on **29th November, 2009** the plaintiff seeks judgment against the defendants jointly and severally for:-

a) Declaration that the subdivision of the suit property to wit, Land Parcel No. Aguthi/Gititu 7 into Aguthi/Gititu 690 and Aguthi/Gititu 691 (hereafter referred to as the suit properties) was null and void;

b) Cancellation and rectification of title to land parcels number Aguthi/Gititu/690 and Aguthi/Gititu/691 and the register in respect thereof be rectified to read the Original land Parcel Number Aguthi/Gititu 7;

c) Eviction of the defendants from the suit properties

d) Any other or better relief this court may deem fit to grant.

2. The plaintiff contends that the 1st and the 2nd defendants fraudulently caused the original parcel of land to be sub-divided into Aguthi/Gititu/690 and Aguthi/Gititu/691 and registered the parcels in their names. The plaintiff avers that the original parcel of land was registered in the name of his deceased father, Kamunge Son of Kagithi who passed on in 1980. The plaintiff blames the 1st defendant for having caused the suit property which formed part of the estate of his deceased father to be sub-divided and transferred to them yet they were not the administrators of his deceased father's estate.

3. The plaintiff blames the 2nd defendant for having transferred the parcel registered in his name to wit, Aguthi/Gititu 691 to the 3rd defendant.

4. Upon being served with summons to enter appearance, the 3rd defendant entered appearance as required of him and filed a statement of defence in which he denies having had knowledge that the 1st and 2nd defendants fraudulently caused the suit properties to be registered in their names. He avers that he bought Aguthi/Gititu/691 from the 2nd defendant for valuable consideration and without notice of any defect of the title held by the 2nd defendant. He contends that the plaintiff's suit is defective for want of particulars of fraud levelled against him.

EVIDENCE

The plaintiff's case

5. The plaintiff, **Kiguoya Kamunge** informed the court that the original parcel of land belonged to his father, Kamunge Kagithi, who passed on in 1980. He stated that he does not know how the 1st and 2nd defendants inherited the land; that after he learnt that the suit property had been sub-divided and transferred to the 1st and 2nd defendants he went to the lands office where he was advised to file a suit for revocation of the titles in respect of the sub-divisions, 690 and 691.
6. To enable him file a suit in respect of his father's estate, he filed Nyeri High Court Probate and Administration Cause No. 166 of 2013 in which he was issued with letters of administration in respect of the deceased's estate. In 2008 he brought this suit against the defendants contending that they obtained titles to the suit property fraudulently. Despite having served all the defendants with the suit papers, only the 3rd defendant filed a defence to it. He informed the court that in 1995 when the 1st and 2nd defendants got the suit property sub-divided and registered in their names, none of them was an administrator of the deceased's estate.
7. Contending that the 3rd defendant must have been aware of the fraud by the 1st and 2nd defendant, he urged the court to revoke the titles held by the defendants.
8. Upon being cross-examined, the plaintiff informed the court that the 1st defendant is his elder brother and admitted that his family members live on plot No. 690 held by the 1st defendant. He further admitted that his brother (1st defendant) was a witness in Tetu Land Disputes Tribunal Case where the 2nd defendant's father had sued the 3rd defendant concerning plot No. 691. He admitted that the award of the Tribunal was adopted as an order of court.
9. **P.W.2 John Wambugu Kamunge**, a brother to the plaintiff, told the court that his father had not indicated that he shared the suit property with any other person. For that reason they were surprised to learn that the title to the suit property was in the name of other persons. Consequently they allowed the plaintiff to apply for letters of administration of the estate and claim back the property.
10. Like P.W.1, he maintained that the 3rd defendant's parcel of land was illegally obtained.
11. **P.W.3 Wilson Karii Kamunge**, a brother of the plaintiff, informed the court that he got information that the 3rd defendant had entered their land but he had no idea how the 3rd defendant obtained title to the suit property. He informed the court that the plaintiff and the 2nd defendant resided on the land. He denied having had knowledge that his father and the 2nd defendant's father had agreed to share the suit property. He thought that the 3rd defendant did not use the proper process in obtaining the land.
12. Even though the 1st defendant did not file a defence to the suit, he testified upon being summoned by the court. He denied having participated in the sub-division and transfer of the suit property. He explained that the title deed he holds was brought to him by post by the 2nd defendant; that three years later, he realised that the land was less by 1.7 acres. He also realised that the portion registered in the name of the 2nd defendant had been sold to the 3rd defendant without succession in respect thereof being carried out.
13. He conceded that he was a witness in the Tetu Land Disputes Tribunal case but stated that he had no knowledge that his uncle had any interest in the suit property.
14. He further informed the court that the 3rd defendant has developed the parcel of land he owns and that he has never given testimony against him in a case for forgery.
15. On his part, the 3rd defendant informed the court that he bought the parcel of land he owns from the 2nd defendant; that in 2001, the 2nd defendant's father filed Originating Summons number 2001 of 2001 which was decided in his favour. In that suit, the 2nd defendant's father gave a history of the suit property. He further informed the court that the 1st defendant testified in the tribunal case where no issue of fraud was raised. He contended that the testimony of the 1st defendant before the tribunal is true. He informed the court that the 1st defendant explained how the suit property was divided between the

plaintiff's father and the 2nd's father (plaintiff's) uncle.

16. He explained that he went to the tribunal seeking to have the 2nd defendant's father evicted from the land and that the tribunal found in his favour.

17. He further informed the court that before he bought the parcel of land in dispute, he conducted a search and established that the land belonged to the 2nd defendant; that he only bought the land after satisfying himself that it was in the 2nd defendant's name.

Submissions

18. In his submissions, the plaintiff points out that from the evidence adduced, it is clear that the 1st and 2nd defendants caused to be sub-divided and later on transferred to their names, the suit property before succession into the estate of his deceased father had been done. In view of the foregoing, the plaintiff urges the court to cancel the titles held by the 1st and 3rd defendants to enable the family of the deceased share out the estate of the deceased as directed by the court in Nyeri High Court Succession Cause No.163 of 2005.

19. On behalf of the 3rd defendant, it is submitted that the plaintiff sought to prove fraud against the 3rd defendant yet he only pleaded fraud against the 1st and the 2nd defendants. Citing **Order 2 Rule 6(1)** of the Civil Procedure Rules which prohibits parties to a suit from making an allegation of fact or raising any new ground of claim, inconsistent with a previous pleading of his in the same suit, it is submitted that the plaintiff never amended his plaint to set out the particulars of fraud against the 3rd defendant.

20. On whether fraud was proved against the defendants, it is submitted that the proceedings of the Tetu Land Disputes Tribunal clearly indicates how transmission was effected from Kamunge S/O Kagithi to the 1st and 2nd defendants. It is pointed out that as at 2000 when the 3rd defendant bought Plot No. 691, new titles in respect of the suit property had been issued. Further, that the 3rd defendant bought his parcel of land from the 2nd defendant for valuable consideration and without any notice of any defect in the title.

21. For the foregoing reasons, it is submitted that the plaintiff failed to prove fraud to the required standard and at all. On the nature of evidence required to prove fraud, reference is made to the cases of **Nyagate Nguto alias Watson Mogere Mogoko vs. Maxwell Okemwa Mogere & National Bank of Kenya Ltd (2011) e KLR; Mwai Karinga vs. Waruguru Kibe; Nyeri HCCC NO.156 of 1997(unreported)** and reiterated that the plaintiff failed to prove fraud to the required standard and at all.

22. It is further submitted that by dint of the provisions of **Section 4(2)** of the Limitation of Actions Act, Cap 22 Laws of Kenya, the plaintiff's claim is time barred. In this regard, it is submitted that the plaintiff discovered the alleged fraud in 2002 and brought the instant suit in 2008, outside the time stipulated in **Section 4(2)** of Cap 22.

23. It is also submitted that the plaintiff's claim is *res judicata* Nyeri CMCCC Land Award Case No.63 of 2001. It is pointed out that the plaintiff did not appeal against the award of the Tetu Land Disputes Tribunal which led to the judgment and decree obtained in Nyeri CMCCC NO. 63 OF 2001. Maintaining that the issues raised in the current suit are the same as the issues raised in Nyeri CMCCC NO.63 OF 2001 and Nyeri HCCC NO.177 OF 2007 (O.S), it is submitted that the current suit is *res judicata* those suits.

Analysis and determination

24. Whereas the plaintiff alleges collusion among the defendants in sub-division and transfer of the suit property to themselves, no evidence capable of proving fraud as against the defendants and in particular, the 3rd defendant was adduced. The evidence on record shows that the 3rd defendant bought the portion of the suit property he holds from the 2nd defendant at a time when the 2nd defendant was the registered proprietor thereof. No evidence was led to show that the 3rd defendant knew or ought to have known of

the defects, if any, in the title held by the 2nd defendant.

25. It is also noteworthy that the plaintiff did not plead any fraud as against the 3rd defendant. That being the case, the plaintiff is by law, estopped from proving fraud against the 3rd defendant, when the same was not pleaded. In this regard see **Order 2 Rule 6(1)** of the Civil Procedure Rules and the case of **Kinyanjui Kamau v. George Kamau Njoroge (2015) e KLR** where the Court of Appeal observed:-

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo (2008) 1 KLR (G&F) 742 wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil

cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

26. In the circumstances this case, the burden to prove fraud against the defendants, jointly and severally, lay with the plaintiff. Before he could be allowed to prove fraud against the defendants, the law required the plaintiff to have not only pleaded but given the particulars of fraud alleged against the defendants. In this case, the plaintiff merely made allegations of fraud against the defendants, and in particular the 3rd defendant.

27. Having reviewed the pleadings filed in this suit and the evidence adduced in respect thereof, I find and hold that they fall short of the standard required to establish a case based on fraud against the defendants.

28. Having found the evidence adduced in this case to be insufficient to form the basis of granting the orders sought, I consequently dismiss the suit with costs to the 3rd defendant.

Dated, signed and delivered at Nyeri this 28th day of September, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kiguoya Kamuge for the plaintiff

Mr. Muthui h/b for Mr. Mwaura for the defendants

Court assistant - Lydia