



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NYERI
ELC CASE NO. 61 OF 2015
(Formerly HCC NO. 96 OF 2012)

GODFREY N. NYAGA PLAINTIFF

-VERSUS-

MARGARET W. THEURI 1ST DEFENDANT

EUGENE GITONGA KAMAU 2ND DEFENDANT

LANDS REGISTRAR NYERI 3RD DEFENDANT

JUDGMENT

Introduction

1. The suit herein is in respect of the parcel of land known as **Aguthi/Gatitu/1144** situated in Nyeri town (hereinafter referred to as the suit land). The plaintiff who claims to have been the registered proprietor of the suit land, together with the 1st defendant, explains that sometime in September, 2010 he got information that somebody was fencing the suit land. After conducting inquiry on the matter, the plaintiff discovered that a person called Maureen Wachera Macharia was in the process of purchasing the suit land from the 2nd defendant. The inquiry also revealed that it was the 2nd defendant who was selling the property to Macharia, purporting to be the legal owner of the suit land.

2. Upon conducting a search at the lands registry Nyeri, the plaintiff discovered that the suit land had been fraudulently transferred into the name of a person called Dorcas Nduta Macharia who had in turn sold it to another person.

3. Pointing out that the 2nd defendant is in the process of transferring the suit land to other parties, the plaintiff prays for judgment against the defendants jointly and severally for:-

1. An injunction restraining the 2nd defendant from transferring, alienating, using, leasing or in any other way dealing with the suit land.

2. An order of inhibition inhibiting any dealings with the suit land till this suit is heard and determined.

3. A declaration that the transfer of the suit land from the joint names of Godfrey N. Nyaga and Margaret W. Theuri into the name of Margaret W. Theuri alone and the subsequent transfer of the suit land to Dorcas Nduta Macharia and then to Eugene Gitonga Kamau were fraudulent and illegal.

4. An order directing the 3rd Defendant to cancel the subsequent titles issued to any other person other than the first one in the name of Godfrey W. Nyaga and Margaret W. Theuri.

5. Damages for trespass.

6. Costs of the suit.

4. In her statement of defence dated **16th June, 2012** the 1st defendant denies having been involved in the transfer of the suit land into her name alone or into the names of Dorcas Nduta Macharia. The 1st defendant states that if any transfer was done, it must have been done fraudulently by either the 2nd defendant or the said Dorcas Nduta Macharia.

5. The 1st defendant further states that to the best of her knowledge the suit land is still jointly owned by the plaintiff and herself.

6. In his statement of defence dated **4th June, 2012** the 2nd defendant states that he was registered as the proprietor of the suit land after he bought it from Dorcas Nduta Macharia. Explaining that he has been in occupation of the suit land from the time he bought it (8th March 1994), the 2nd defendant explains that on 20th January, 2010 he sold it to Maureen Wachera Macharia.

7. Concerning the alleged fraud in transfer of the suit property to him, he denies having engaged in the alleged fraud and contends that he was a purchaser for value from his predecessor in title.

8. With regard to his attempt to transfer the suit property to a third party, Maureen Wachera Macharia, he states that being the proprietor of the suit land he has every right to transfer the suit land.

9. On behalf of the 3rd defendant, the Office of the Honourable Attorney General filed the statement of defence dated **2nd January, 2013** in which it denied all the allegations contained in the plaint and put the plaintiff to the strict prove of those allegations.

EVIDENCE

The plaintiff's case

10. When the matter came up for hearing, the plaintiff reiterated that the first defendant and he were the initial registered proprietors of the suit land before it was fraudulently transferred to other persons including the 2nd defendant. To prove his entitlement to the suit land, the plaintiff produced the following documents:-

- a) Title deed issued in respect of the suit land, as Pexbt 1;
- b) Copy of the green card in respect of the suit land, as Pexbt 2;
- c) Official search certificate dated 27th April, 2007 as Pexbt 3;
- d) Proceedings and judgment dated 17th February, 2012, as Pexbt 4
- e) A letter from the Director of Criminal Prosecutions dated 30th March, 2012, as Pexbt 5.

11. Concerning the entries in the green card that showed that he transferred the suit land to the 1st defendant, he stated that he did not transfer it to anybody.

12. Concerning his acquisition of the suit land, the plaintiff stated that the first defendant and he bought the suit property in 1978 from a Mr. Hamisi and later got it registered in their joint names. He denied having transferred it as a gift to his co-registered proprietor, as indicated in entry 5 of the green card.

13. The plaintiff further stated that when he contacted the 1st defendant about the transfer, she denied having any knowledge about the transfer or having been involved in the transfer.

14. The plaintiff informed the court that even though he has never lived in the suit land he had been cultivating on it.

15. When he discovered the fraudulent dealings concerning the suit land, the plaintiff complained to the police but no action was taken against the 2nd defendant.

16. **P.W.2 Maureen Wachera Macharia**, informed the court that she was approached by agents to buy the suit land. The agents told her the land belonged to Eugene Gitonga Kamau (the 2nd defendant). She did a search which revealed that the land belonged to the 2nd defendant. As a result, she entered into a sale agreement with the 2nd defendant. After she had entered into the agreement for sale of the suit land with the 2nd defendant, she was informed by the owners of the parcels of land adjacent to the suit land that the 2nd defendant was not the owner of the land. For that reason, she lodged a complaint with the police which resulted in arrest and charging of the 2nd defendant and his wife with the offence of obtaining by false pretences.

17. P.W.2 further informed the court that she was refunded the Kshs. 300,000/- she had paid to the 2nd defendant in respect of the suit land.

The defence case

18. In her testimony, the 1st defendant, **Margaret Wanjugu Theuri**, informed the court that she bought the suit land with the plaintiff and reiterated her contention that she was never involved in the transfer of the suit land to herself and/or any other person. Like the plaintiff, she stated that the suit land, which was jointly registered in her name and in the name of the plaintiff, was transferred without their knowledge.

19. Like the plaintiff, the 1st defendant stated that they bought the suit land in 1978 from an old man whose name she could not remember. Although she could not remember the plot number of the parcel of land they bought, the 1st defendant described the physical location of the suit land as near Namachaki PCEA Church near Skuta area in Nyeri.

20. Concerning the entries in the green card which showed that a person called Margaret Theuri transferred the suit property, she stated that that person is not herself. Explaining that she cultivated the land between 1978 and 1980, the 1st defendant stated that she had left the land in the care of her neighbours and that in 2005, she carried out a search that revealed that they were still the registered proprietors of the suit land.

21. On his part, the 2nd defendant, **Eugene Gitonga Kamau**, informed the court that he bought the suit land from Dorcas Nduta Macharia. Before buying the suit land, he conducted a search which revealed that Dorcas Nduta Macharia was the registered proprietor of the suit land. Thereafter he got registered as the proprietor of the suit land.

22. Pointing out that in 2010 he sold the suit land to P.W.2, he explains that owing to that transaction, he was arrested and charged with a criminal case but after trial was acquitted of the charges against him.

23. Explaining that he got to know the plaintiff during the said criminal case and the 1st defendant during the hearing of this case, he stated that he has no claim against them.

24. In support of his case, the 2nd defendant produced the sale agreement executed between him and Dorcas Nduta Macharia and the search he had carried out before entering into the sale agreement as Dexbt 1 and 2 respectively.

25. Maintaining that the suit land is his, the 2nd defendant stated that he has already transferred it to Joel Karimi Warutere.

26. Concerning the title held by the plaintiff, he conceded that it was issued before his.

27. On whether he obtained the history of the suit property from the person who allegedly sold it to him, he stated he never did so.

28. Concerning sale of the suit land to Joel Warutere during the pendency of this suit, he explained that he did so because his title was recognised in the criminal case filed against him and that there was no order restraining him from utilising the suit land or selling it.

29. The testimony of the 3rd defendant was given by the Nyeri County Land Registrar, **Mr. W. R. Ngaine**. Concerning the entries shown in the green card, Mr. Ngaine stated that they are made by registration clerks and signed by the Land Registrar. In respect of those entries, he stated entry No.1 to 4 are as should be. Concerning entries No.5 to 8, he stated that his office had received a complaint from Criminal Investigations Department (CID) concerning them.

30. Explaining that he cannot verify the authenticity or otherwise of entries No.5 to 8, he explained that the title held by Margaret Theuri and Godfrey Nyagah ought to have been surrendered, yet there was no evidence that it was surrendered. He further stated that entry No. 6 should not have been done without entry of an Identity card number. He produced a certified copy of the green card in respect of the suit land as D.W.3 Exhibit 1.

31. Concerning the transfer of the suit land from the 2nd defendant to Joel, he stated that they received the title deed held by the 2nd defendant and transfer documents but could not effect transfer in favour of Joel because of this case.

The Registrar produced the original title deed issued in favour of the 2nd defendant and held by County Registrar as 2nd defendant's exhibit 1.

32. Upon cross-examination by the plaintiff's counsel, the Land Registrar stated that according to their records, they did not have any transfer from Dorcas to the 2nd defendant and from Margaret to the 2nd defendant, yet such a transfer is a mandatory document for their records. In view of that fact, he stated that those transactions are unsupported.

33. Terming failure to indicate identity card number in entry No. 6 unprocedural, he opined that the entry could have been effected negligently.

34. Given the fact that the original title deed is with the original proprietors of the suit property, he stated there is something wrong with the issuance of the 2nd title deed.

35. Concerning entry number 5 in the green card, he stated that their records have no entry to show that the original title deed was surrendered yet a surrender of the original title was mandatory. He also pointed out that entry Number 5 is missing in their presentation book.

36. He stated that according to Pexbt 3, the plaintiff and the 1st defendant were the registered proprietors of the suit property, yet that is not the position in the green card. Commenting on that situation, he stated that the entries in the register were either back-dated or the search issued in respect thereof was issued with the omission of the subsequent entries.

37. Mr. Ngaine informed the court that entries No.1 to 4 have supporting documents. The said entries

are also in the presentation book. He pointed out that there was variance between the Identity card produced by 1st defendant and that purported to be hers in the transfer in favour of Dorcas. (1st defendant's I.D according to I.D Produced in court is 1425634. The I.D used to transfer the suit land to Dorcas is 1424366/65).

38. Terming the title issued to 2nd defendant genuine on face value, he admitted that sometimes their office issues two title deeds, an occurrence he explained to be irregular.

39. At the conclusion of the case, advocates for the plaintiff and the 1st defendant filed written submissions, which I have read and considered.

40. From the pleadings, evidence and the submissions filed in respect thereof, I find the sole issue for determination to be whether the plaintiff has made up a case for being granted the orders sought.

Analysis and determination

41. It is not in dispute that the suit land was originally registered in the names of the plaintiff and the 1st defendant before it was purportedly transferred to the 1st defendant alone as a gift.

42. Both the plaintiff and the 1st defendant denied having been parties to the purported transfer of the suit property to Margaret W. Theuri as a gift. The evidence on record shows that the Identity card used in effecting the transfer of the suit property to the said Margaret W. Theuri is different from the one held by the 1st defendant to whom the suit land was allegedly transferred to, as a gift, by the plaintiff.

43. According to the testimony of the Land Registrar, the transfer of the suit land to Margaret W. Theuri and subsequently to Dorcas Nduta Macharia and the 2nd defendant was irregular on the following grounds:-

- a) Titles held by the transferrors were not surrendered as is normally the norm;
- b) Entries in respect thereof are not supported by the necessary documents like transfer forms;
- c) Entries were not entered in the presentation book
- d) Some entries, like entry number 6 in the green card, were entered without indication of the Identity card number of the transferee.

The Law applicable

44. Under **Section 143** of the Registered Land Act, Cap 300 Laws of Kenya (now repealed) which by dint of the provisions of **Section 107** of the Land Registration Act, 2012 applies to the suit land, this court has power to order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

45. There being evidence that the plaintiff and the 1st defendant were the first to be registered as the proprietors of the suit property and there being no evidence that registration in favour of the 2nd defendant and his predecessors in entitlement, namely Dorcas and Monica, was lawful or bonafide, I find the plaintiff's claim to have been proved on a balance of probabilities.

46. Concerning the title held by the 2nd defendant, I can do no better than adopt the judgment of **J.M Mutungi J.**, in the case of **Esther Ndegi Njiru & Another v. Leonard Gatei (2014)e KLR** thus:-

“In the present case the plaintiffs cannot shield themselves with the title that they hold though without any doubt they were bona fide and innocent purchasers from the 2nd Defendant. The act of

the 2nd Defendant of processing the title to his name using fake or forged documents were patently illegal and the 2nd Defendant must have known they were. The processing of the title in his name and thereafter selling the parcel of land to the unsuspecting plaintiffs was illegal and unprocedural. The 2nd Defendant must have known what he was doing. He was simply a conman otherwise he would have appeared to defend and/or clear his name. While it is clear the title held by the plaintiffs cannot be impugned under section 26(1) a) of the Act as they were not party to any fraud or misrepresentation the title is nonetheless impeachable under section 26(1) (b) as the title transferred to them by the 2nd defendant was obtained illegally and unprocedurally.

Whereas the law respects and upholds sanctity of title the law also provides for situations when title shall not be absolute and indefeasible. The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40(6) of the Constitution removes protection of title to property that is found to have been unlawfully acquired. This provision of the constitution coupled with the provision of section 26(1) (a) and (b) of the Land Registration Act in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as “grabbed public lands” it is essential to endeavour to ascertain the history and/or root of the title.”

47. Since there is evidence that the requisite legal procedures and processes of registration of title were not followed in registration of the title held by the 2nd defendant and there being no evidence that the original proprietors of the suit land namely the plaintiff and the 1st defendant were parties to the impugned transfer, I find and hold that the title held by the 2nd defendant does not enjoy legal protection. Consequently, I find the plaintiff’s suit to have merit and allow it in terms of prayers 1, 3 and 4 with costs, against the 2nd and 3rd defendants.

Dated, signed and delivered at Nyeri this 18th day of November, 2015.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Ng'ang'a for the plaintiff

Mr. Kingana h/b for Mr. Muhoho for the 2nd defendant

Mr. Karingithu h/b for the 1st defendant

Mr. Makori for the 3rd defendant

Court assistant - Lydia