



REPUBLIC OF KENYA

High Court at Kerugoya

Environmental & Land Case 26 of 2013

ISAIAH MUTONYI WAMBUGU PLAINTIFF

V

JOSEPH GATOHI MAINA 1ST DEFENDANT

LINUS MURIMI CHOMBA 2ND DEFENDANT

JUDGMENT

The plaintiff filed this suit at the High Court Embu on 29/4/2010 seeking the following relieves against the two defendants jointly and severally in paragraphs 13 of his plaint.

13 (a) A permanent injunction restraining the 2nd defendant from being on, selling, transferring alienating or otherwise parting with possession of title number KIINE/SAGANA/426.

(b) A permanent injunction to restrain the defendants from interfering with his quiet enjoyment of the suit property.

(c) Declaration that the transfer and subsequent registration of the 2nd defendant as a proprietor of the said title number KIINE/SAGANA/426 was fraudulent, null and void.

(d) A declaration that the 2nd defendant holds the suit property in trust for the plaintiff.

(e) An order directing the 2nd defendant to deliver up the said title deed to the Land Registrar Kirinyaga for cancellation.

(f) An order directing the Land Registrar Kirinyaga to cancel the fraudulent title deed issued to the 2nd defendant.

(g) General damages

(h) Costs of this suit.

(i) Interest on (d) and (e) above at Court rates.

According to the records herein, the plaintiff does not know the two defendants and therefore sought and was granted leave to serve them by advertisement in the Nation Newspaper which he did on 6/5/2010 and on 23/8/2010, interlocutory judgment was entered against the defendants and the matter was listed for formal proof before Lady Justice Ong'udi at the High Court in Embu on 19/12/2012.

When the matter came up on 19/12/2012 before Lady Justice Ong'udi, she transferred it to this Court and also allowed the plaintiff to notify the defendants about the hearing date by posting notices at both the Embu and Kerugoya High Court notice boards. Ms Wamucii, counsel for the plaintiff, did confirm when the matter came up for hearing on 27/5/2013 that indeed the notices informing the defendants about the hearing had been put up as directed.

In his evidence in chief, the plaintiff testified that he is the registered owner of the property known as KIINE/SAGANA/426 (the suit property) since 1975 and he produced the Land Certificate (Exhibit 1) adding that the original is with National Bank of Kenya as security for some facility he took. The plaintiff added that sometime in 2010, he went to the suit property and found someone living on it and so he reported the matter to the police and also went to the Lands office in Kerugoya to investigate.

His investigations revealed that the 2nd defendant had been registered as the owner of the land on 24/3/2009 and had obtained a title deed (Exhibit 2). He also found a sale agreement dated 14/2/2008

(Exhibit 3) showing that the 1st defendant had sold the suit property to the 2nd defendant. Both defendants are strangers to him and are not his relatives yet at the same Lands office, the plaintiff found a copy of a grant of letters of administration intestate (Exhibit 4) allegedly issued in the names of the 1st defendant as administrator to the Estate of the plaintiff who is still alive and even produced his Identity Card No. number 4405002 (Exhibit 10) as evidence! Further investigations revealed that the above grant was issued in Embu High Court Succession Cause No. 4 of 2006 but upon checking with the said Court, it was confirmed that infact Succession Course No. 4 of 2006 is in respect of the Estate of one Josphat Nyaga Njathika (see Exhibit 9). The plaintiff further found that following the issuance of the grant in respect of “**his Estate**”, an order was made by the High Court (Exhibit 7) authorizing the Land Registrar Kirinyaga to dispense with the production of the old title deed in respect to the suit property and arising out of that order, the 2nd defendant was registered as the proprietor of the suit property and form R.L.7 (Exhibit 8) was issued and signed by the Land Registrar.

Having un-earthed all the above, the plaintiff moved to court hence this suit.

I have considered the plaintiff’s un-contraverted evidence together with the documentary evidence in support of his claim. The plaintiff produced his Identity Card (Exhibit 10) and obviously he could not be the subject of Embu High Court Succession Cause No. 4 of 2006 purportedly instituted on behalf of “**his Estate**” and therefore all documents flowing therefrom could only have been fraudulent. Indeed the plaintiff’s investigations revealed that the genuine Succession Cause No. 4 of 2006 at Embu High Court was in relation to another person and not the plaintiff herein. Therefore, the order issued by the High Court in Embu on 5/12/2007 directing the Land Registrar Kirinyaga to register the 2nd defendant as the proprietor of the suit land was really null and void and therefore the plaintiff’s claim that the 2nd defendant was fraudulently registered as the proprietor of the suit land has been established. In any case, the plaintiff has produced as evidence the Land Certificate in respect of the suit property showing that he was registered as the owner on 10/11/1975 – see exhibit 1). There is no reason to doubt the authenticity of the plaintiff’s Land Certificate and it follows therefore that the title deed issued to the 2nd defendant in respect to the same suit property can only be a fraudulent document.

Upon considering all the evidence in this case, I find that the plaintiff has proved his case against the defendants and is entitled to a judgment in his favour. However, some of the remedies sought in the plaint are, in my view, not available to the plaintiff. For example, in paragraph (d) of the prayers and which I have reproduced above, the plaintiff seeks a declaration that the 2nd defendant holds the suit property in trust for him. I don’t think this remedy is really necessary because I have already found that the title deed held by the

2nd defendant was fraudulently obtained. The 2nd defendant has no right whatsoever over the suit land and so the issue of him holding the same in trust cannot arise. In **BLACK’S LAW DICTIONARY NINTH EDITION**, a trust is defined as follows:-

“The right, enforceable solely in equity to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary)”.

This Court having found that the 2nd defendant's title deed in respect to the suit land is a fraud, he is a stranger to the property and the issue of any trust cannot arise. It is therefore, in my view, superfluous for this Court to make any declaration regarding trust having found that the 2nd defendant's registration as proprietor of the suit land was fraudulent and therefore null and void that having been his only connection to the suit property.

The other remedy which is not available to the plaintiff is an award of damages. It was clear from plaintiff's testimony that he has always been in possession of the suit property. The person that the plaintiff found on this land was not any of the defendant's herein. Indeed he never met them and it was clear from his evidence that he was able to use the property including charging it to the National Bank as security. Damages usually connote injury and no evidence was laid by the plaintiff to demonstrate what injury he suffered apart from the fraudulent registration of the 2nd defendant as the proprietor of the land but nothing more was done by either of the defendants on the property. The claim for damages is, in my view, not well founded.

Ultimately therefore, judgment is entered for the plaintiff in terms of prayers 13 (a), (b), (c), (e) and (f) of his plaint.

The plaintiff is also entitled to costs of the suit and interest thereof at Court rates. Orders accordingly.

B.N. OLAO

JUDGE

3/6/2013

3/6/2013

Before B.N. OLOA – JUDGE

CC – Muriithi

Miss Wamucii for Plaintiff present

Defendant - absent

Judgment delivered this 3rd day of June 2013 in open Court

Ms Wamucii for plaintiff present

No appearance for defendant

Right of appeal explained.

B.N. OLAO

JUDGE

3/6/2013