



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 193 OF 2017

MARY WANJIKU.....PLAINTIFF

VS

MURANGA COUNTY GOVERNMENT.....DEFENDANT

JUDGMENT

1. By an amended Complaint filed on the 20/7/17 the Plaintiff filed suit against the Defendant seeking orders that a restriction lodged on LOC 7/GAKOIGO/1388/69 (suit land) be removed and interest of the suit be determined in her favour. She averred that she is the registered owner of the suit land situate at Maragua Township. That the Defendant caused a restriction on the suit land on 13/2/12 allegedly on grounds that she obtained the suit land fraudulently an allegation that she terms baseless and geared towards depriving her the proprietary rights over the suit land.

2. Whilst admitting the restriction on the suit land the Defendant denied the Plaintiff's claim and averred that the restriction was placed to protect the interests of the public as the suit land is earmarked for public use. It denied allocating the land to the Plaintiff. Further it averred that the suit is defective, incompetent and an abuse of the process of the Court. The jurisdiction of the Court is denied on the ground that the Plaintiff should have filed a judicial review to challenge the decision of the National Liaison Committee and the District Liaison Committee. The Court was urged to strike out the Plaintiff's suit on that account.

3. At the hearing the Plaintiff informed that Court that she is duly registered owner of the suit land. she produced a copy of the title registered in her name on the 5/1/93. On the 2/11/1990 she was issued with a letter of allotment for LOC7 /GAKOIGO/1388/1 for a tenure of 99 years with effect from 1/11/1990 at Maragua Market of Kigumo Division. The plot was allocated by the Plot allocation committee under Min No. 4/88 at its meeting held on 22/7/88. On the 30/12/92 a lease for LOC7/GAKOIGO/1388/69 was issued in her name paving way for the registration of the title dated 5/1/1993.

4. That in 2012 she found out that the Defendant has registered a restriction on the suit land on 13/2/12 vide a letter to the Land Registrar dated 7/2/2011 alleging that the title could have been fraudulently acquired. Shocked by this development she wrote a letter on 20/3/12 to the council asking them to remove the restriction. On the 4/4/2012 her lawyers on record Messrs J N Mbuthia & Company wrote another letter to the Town Clerk of Maragua demanding the removal of the restriction within 14 days or legal action would commence against the Defendant thereafter. On the 16/4/2012 vide the Town Clerk, the Defendant responded and advised the Plaintiff to liaise with the National Liaison Committee and appeal the decision of the District Liaison committee. She testified that she did not receive any summons to appear before the committee nor participated in any of their proceedings. She stated that she had no knowledge that the suit land is public utility plot. She stated that the suit land is adjacent to other public utility plots. She stated that though her husband was the Clerk to the County Council of Muranga, the restriction was placed after he left office. She stated that her husband was not involved in any misdeed in respect to the allocation of the suit land to her. The suit land was signed by the then Clerk of Muranga County Council, namely PM Njoroge.

5. Further she stated that the issue between the Salvation Army Church and the council regarding repossession of the original land did not involve her as that happened way back in 1974 and had no knowledge of the same. She further clarified that the allotment letter described the plot as LOC7 /GAKOIGO/1388/1 but the lease and the title bear LOC7 /GAKOIGO/1388/69. She stated that the letter of allotment could have mistakenly referred to the suit as LOC7 /GAKOIGO/1388/1 instead of LOC7 /GAKOIGO/1388/69.

6. The Defendants Advocate on record did not call any witness and relied entirely on its pleadings and the list of documents dated 9/8/12.

7. The parties elected to file written submissions which I have read and considered.

8. As to whether the Court has jurisdiction to hear the matter, the Plaintiff submitted that the issue in the suit relates to the acquisition of the suit land by the Plaintiff which is outside the purview of the mandate of the Liaison Committees. The defence case that the Plaintiff should have filed a Judicial Review is unfounded. That the said committee has no jurisdiction to determine issues relating to the suit land.

9. Has the Defendant proved fraud" It is the case of the Plaintiff that none has been proved as envisaged by section 26 of the Registered Land Act, 2012. She submitted that the Plaintiff acquired the suit land lawfully from the County Council of Murang'a then.

10. The Defendant submitted that the allotment letter and the lease refer to two different land reference numbers; LOC7 /GAKOIGO/1388/1 and LOC7 /GAKOIGO/1388/69 respectively. It is the Defendants case that the Plaintiff was allocated LOC7 /GAKOIGO/1388/1 but given a title for LOC7 /GAKOIGO/1388/69 and on that account lies the fraud as the Defendant does not have documents of allotment in respect of LOC7 /GAKOIGO/1388/69.

11. On jurisdiction the Defendant submitted that the Plaintiff should have filed a Judicial review to have the executive decision to remove the restriction be lifted. He faulted the Plaintiff on this account.

12. The key issues for determination are; whether the Court has jurisdiction to determine this case; whether the Plaintiff is the registered owner of the suit land; whether the suit land was acquired fraudulently; whether the restriction should be removed; who meets the costs of the suit.

13. On the question of jurisdiction, the Defendant has denied the jurisdiction of this Court and faulted the Plaintiff for filing suit by way of a plaint instead of filing a judicial review to challenge the decision to register a restriction of the suit land. It has been pleaded by the Defendant that the restriction was placed under the authority of the District Liaison. According to the evidence on record the restriction was placed pursuant to a letter dated the 7/2/11 signed by one Stephen Kiiru for the Town Clerk Town Council of Maragua. In it he instructed the District Land Registrar in the following terms;

"RE; ADVICE TO RESTRICT COUNCILS LAND PARCEL NO. LOC 7/GAKOIGO/1383 AND LOC 7/GAKOIGO/1388 REGSITERED UNDER MARY WANJIKU AND FRANCIS MWANGI.

The above parcels of land belong to the council. On parcel No LOC7 /GAKOIGO/1383 stands a closed market while on LOC7 /GAKOIGO/1388 stands houses meant for council operations.

The council has been contesting the registration of the parcels to the above persons. There is sufficient evidence to the effect that the titles could have been acquired fraudulently.

Subsequently we are seeking restrictions on both parcels as provided for in section 137(2)(b) and (c) of Cap 300 Laws of Kenya, until the matter is determined."

The above letter emanated from the Town Council of Maragua. The claim that the Plaintiff should have sought judicial review to challenge the decision of the Liaison Committee has no foundation. The issue before this Court relates to the removal of restriction registered on the Plaintiff's title on account of an alleged fraudulent acquisition of the suit land at the behest of the Defendant. To

surmise it is a dispute on ownership on land. Going by Article 162 (b) of the constitution, Section 13 of the Environment and Land Act, Section 150 of the Land Act, and section 101 of the Land Registration Act, this Court has jurisdiction to determine this matter. Even if Judicial review where to be filed, the jurisdiction of the Court cannot be ousted because it is a judicial review and not a plaint.

14. As to whether the Plaintiff is the registered owner of the suit land, the Plaintiff has placed documentary evidence in form of letters of allotment, lease and title showing that she is indeed the registered owner of the suit land. It is the Defendants case that the suit land was acquired fraudulently by the Plaintiff. Section 26 of the Land Registration Act provides that a certificate of title shall be taken as a prima facie evidence that the person named as the owner of the land subject to any easements encumbrances as endorsed on the title. It further provides that the said title can be challenged on grounds of fraud misrepresentation to which the party is a party to or where the title is acquired illegally procedurally or through a corrupt scheme.

15. The Defendant has alleged fraud on the title of the Plaintiff on grounds that the Defendant does not have any documents in its records to show that the title was acquired lawfully. I have perused the documentary evidence (vide letter dated 21/4/2005 by the Town Clerk Maragua to its chairman on status of LOC7/GAKOIGO/1388) of the Defendant in support of its defence and it would appear that the suit land was repossessed by the Defendant vide min No 72/1974 from the Salvation Army church, who had been allocated two plots. The church was allocated an alternative Plot No Nginda /Block1/652/1 in 1966. In para 4 of the said letter the Town Clerk states that the said council also allocated interalia Plot No 69 in 1988. This report agrees with the letter of allotment dated the 2/11/1990 which allocated the suit land to the Plaintiff vide its minutes No 4/88 at a meeting held on 22/7/88. It is noted that the letter of allotment referred to LOC7/GAKOIGO/1388/1 while the lease and the Title refer to LOC7/GAKOIGO/1388/69. The Defendant has termed this a fraud and insists that the Plaintiff was allocated LOC7/GAKOIGO/1388/1 and not LOC7/GAKOIGO/1388/69. The Plaintiff has explained that the letter of allotment may have had an error but insists that the plot allocated to her was LOC7/GAKOIGO/1388/69 for which she holds a valid title. I do not find the variance of numbers to be sufficient ground to oust the title of the Plaintiff. The letter to the District Land Registrar dated 7/2/2011 gave the reason for restriction as that the titles could have been fraudulently acquired. That notwithstanding the Defendant has not laid any evidence to prove fraud.

16. The **Black's Law Dictionary 10th Edition** defines fraud thus: -

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another’. (Emphasis is mine).

17. Fraud is a serious charge and must be proved. I hold and find that the Defendant has not proved the same. Issue No 2 is answered in the affirmative while issue no 3 is answered in the negative.

18. The Defendant has stated that its action was actuated by its desire to protect public land. Article 40 Article 40(6) expressly excludes the protection of the proprietary rights to properties which have been found to have been unlawfully acquired, the use of the phrase “found to have been unlawfully acquired”, necessarily means that for that protection to be lost there must be a finding that the property in question was “unlawfully acquired”. In other words, the pleader of fraud must prove the fraud to the standard required. In this case it was not.

19. The Land Registration Act Cap 300 made provisions under section 136 on the circumstances that permitted the Land Registrar to effect the registration of a restriction as follows;

“ (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge. (2) A restriction may be expressed to endure - (a) for a particular period; or (b) until the occurrence of a particular event; or (c) until the making of a further order, and may prohibit or restrict all dealings or only such dealings as do not comply with specified conditions, and the restriction shall be registered in the appropriate register. (3) The

Registrar shall make a restriction in any case where it appears to him that the power of the proprietor to deal with the land, lease or charge is restricted.

Under the said Act the Registrar shall give notice in writing of a restriction to the proprietor affected thereby. The manner in which this restriction was made is doubtful whether the procedure was followed. The Court holds that the restriction has no basis at all and finds no justifiable reason for its continuous existence.

20. The conclusion is that upon analyzing the evidence and the law, the Plaintiff's case succeeds and the Court makes orders as follows;

a. The Land Registrar Muranga is hereby ordered to remove forthwith the restriction registered on 13/2/12 against LOC7/GAKOIGO/1388/69.

b. The Plaintiff shall have the costs of the suit.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 15TH DAY OF NOVEMBER 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Mbuthia for the Plaintiff

Defendant – Absent

Irene and Njeri, Court Assistants



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