



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KAJIADO

ELC CASE NO. 506 OF 2017

(formerly Machakos ELC No 363 of 2011)

MARJORIE WAITHERA WAMBUGU.....1st PLAINTIFF

NARGISBAU MOHAMED IQUBAL SHARAFDIN &

MOHAMMED SAMEER MOHAMED IQUBAL SHARAFDIN

Suing as the Administrators of the Estate of the Late

MOHAMED IQUBAL SHARAFDIN.....2nd PLAINTIFF

-VS-

GRACE WAIRIMU GACHIE.....1st DEFENDANT

DAVID NGUGI KIRAGU.....2nd DEFENDANT

TYME ARCADE LIMITED.....3rd DEFENDANT

LAND REGISTRAR KAJIADO NORTH.....4th DEFENDANT

THE HON. ATTORNEY GENERAL.....5th DEFENDANT

JUDGEMENT

By a Plaintiff dated the 30th November 2011, and amended on 7th March 2012, the Plaintiff seeks the following prayers against the Defendants:

a) A declaration that the plaintiffs are the rightful registered owners of all that land known as NGONG/NGONG/6027 and that all subsequent transfers and transactions of whatever nature after 3/11/1983 are nullity and void ab initio.

b) An order be issued to the 4th defendant directing that the register in respect of all that property known as NGONG/NGONG/6027 measuring 2.0 acres be rectified specifically by cancelling all transfers effected to the 1st, 2nd and 3rd defendants in respect of the suit property after the 3rd November 1983 and reinstating the property in the plaintiff's name.

- c) A permanent injunction do issue restraining the defendants by themselves, their servants, and or agents from entering, transferring, alienating, selling or purporting to sale and or transfer and or charge and or in any other way interfering and or meddling with any of the portion of the land known as NGONG/NGONG/6027.
- d) Any other order that this Honourable Court deems fit and just to grant for end of justice to be met.
- e) Costs of the suit be borne by the defendants jointly and severally.

The 3rd defendant filed its amended Defence and counterclaim on 31st May 2012 where it disputed the Plaintiffs' claim. It averred that they were the legal registered owners of the Land Parcel No. no. NGONG/NGONG/6027, which they came into possession of after purchasing the same at a consideration from the 1st defendant. They stated that they exercised due diligence and obtained consent to transfer by the Land Control Board; Paid Stamp Duty and were issued with a title deed to the suit land. The 3rd Defendant sought the following orders in its Counterclaim:-

- a) A declaration that the sale and transfer of the land parcel no. NGONG/NGONG/6027 by David Ngugi Kiragu, the 1st defendant in the counterclaim to Tyme Arcade Limited, the plaintiff in the counterclaim was lawful and that the plaintiff is the legal and registered owner of land parcel no. NGONG/NGONG/6027.
- b) An order directing the 2nd and 3rd defendants in the counterclaim to surrender to the 4th defendant in the counterclaim any title deed and or title documents in their possession in respect of land parcel no. NGONG/NGONG/6027 and the 4th defendant in the counter claim do cancel the title deed in respect of land parcel no. NGONG/NGONG/6027 in the possession of the 2nd and 3rd defendants in the counterclaim.
- c) ALTERNATIVELY, this Honourable Court be pleased to order the 1st 4th and 5th defendants in the counterclaim to jointly and severally refund the plaintiff in the counterclaim all the monies paid to the 1st defendant in the counterclaim.
- d) Damages
- e) Costs and interests.

The 4th and 5th defendant filed a statement of Defence on 17th September 2012 and denied each and every allegation of law and fact raised in the plaint and further averred that if the plaintiff paid the purchase price, then the 4th and 5th defendants were not a party to the said agreement.

Evidence of the Plaintiffs

1st Plaintiff, Marjorie Waithera Wambugu testified that the partner, Mohamed Iqbal Sharafdin, with whom she had bought the land passed away on 18th December 1994. In addition, Petition of Letters of Administration of his Estate were taken out by his wife, Nargisbanu Mohamed Iqbal Sharafdin and son, Mohamed Sameer Mohamed Iqbal Sharafdin. She stated that the 2nd Plaintiff's family failed to include the suit land in their Petition for Grant of Letters of Administration Intestate as the same had been sold to the 1st defendant, Grace Wairimu Gachie and Title Deed issued on 30th May, 1990, long before he death of Mohamed Iqbal Sharafdin, as evidenced by the copy of green card. The Plaintiff based her claim of fraud on the part of the 1st, 2nd and 3rd defendants for allegedly obtaining registration of her property without consent and her knowledge. She however did not attribute any fraud on the part of the 4th and 5th defendant.

Evidence of the 3rd Defendant

DW1 Christopher Githinji Rwengo, testified that he was a director of the 3rd defendant company and that he had authority to plead and act on its behalf. He testified that prior to entering into the sale agreement for the suit property with the 2nd defendant, he carried out all due diligence and paid Ksh. 26,000,000/- after which the suit land was transferred to them. It was his testimony that he was an innocent purchaser and got a good title.

Evidence of the 4th and 5th Defendants

DW2 who was the Senior Land Registrar provided a history of the suit land and confirmed that on 11th March 1994 an entry was made to transfer suit land from the 1st Defendant to the 2nd Defendant which was not supported by any documentation that included transfer forms; consent and original title surrendered for cancellation. He explained that if the Plaintiffs had sold the suit land to the 1st defendant, they should have surrendered the title to them but this was not the same. He testified that on 10th October, 2011 there was a transfer to the 3rd Defendant which was supported by all the original documents to transfer, Land Control Board Consent, stamp duty and surrendered original title. It was his testimony that there were no supporting documents for the transfer between Plaintiffs to the 1st Defendant. He referred to the entries in the Green Card and contended that there should be documents to confirm the said transfer and if there are entries without supporting documents, then fraud can be inferred.

In cross-examination, he confirmed that on 3rd November, 1983 the Plaintiffs were registered as owners of suit land. He insisted if there was a transfer, then both Plaintiffs were to execute a transfer form as well as appear before the Land Control Board. He further confirmed that the original title deed surrendered by David Ngugi Kiragu was in their records. He further explained that the features of Title Deed printed by Government Printers at the back indicates the year the title deed was printed which the original title deed by David Kiragu lacked. It was his testimony that it was not possible to transfer land without payment of stamp duty.

The Plaintiff, 3rd, 4th and 5th Defendants filed their respective submissions that I have considered.

Analysis and Determination

Upon considering the pleadings filed herein, the testimonies of the witnesses as well as submissions, the following are the issues for determination:

- Who is the legitimate proprietor of the suit land;
- Is the Plaintiff entitled to the prayers sought in the Plaintiff;
- Are the Defendants entitled to the orders sought in the counterclaim; and
- Who should bear the costs of the suit"

On the issue as to who is the Legal Proprietor of the suit land, from the evidence presented in court, the Plaintiffs were initially registered as proprietors of the suit land but they discovered the 3rd Defendant later acquired a title over it. It was PW1's testimony that they jointly owned the land with the 2nd Plaintiff and she only realized the land had been acquired by a third party when she was approached by a stranger while at the said land, who claimed ownership, yet she still had the title deed with her. It was the 3rd Defendant's testimony that they acquired the suit land from the 2nd Defendant that had obtained the same from the 1st Defendant. DW1 in his testimony contended that they undertook due diligence before purchasing the suit land. However, in the testimony of DW2 who was the Land Registrar that has custody of all the records in respect of the suit land, he provided the history of the suit land and stated that on 4th October 1983 the suit land was in the name of Melonyie Ole Nakeel Soloji. Further, on 3rd November 1983 it was transferred to Mohamed Iqbal Sharadfin and Marjorie Waithira Wambugu (the Plaintiffs herein), and a land certificate issued to them on the same date. It was his testimony that the accompanying documents, i.e. (LCB Consent, Transfer Documents, Land Certificate and the Booking Form for the LCB sitting) were effectively filed therewith. He stated that there were no documents to support the transfer of the suit land from the Plaintiff to the 1st Defendant and the 1st Defendant to the 2nd Defendant respectively. He even proceeded to dispute the title deed surrendered by the 2nd Defendant who transferred the suit land to the 3rd Defendant and intimated that the features of Title Deed printed by Government Printers at the back indicates the year the title deed was printed, which the original title deed held by 2nd Defendant lacked. He confirmed that the documents in respect of transfer to the 3rd Defendant were available in the office. The 3rd Defendant in his testimony contended that he has a good title as he is a purchaser for value.

Section 26(1) of the Land Registration Act, which provides that:

'The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. '

Based on the legal provisions I have cited above, what needs to be deciphered is whether the 3rd Defendant was part of the fraud to acquire the title to the suit land. From the evidence presented, there is no conclusive proof that the 3rd Defendant participated in the fraud to obtain his title. However, DW2 stated that since the two Plaintiffs had owned the suit property together, for a transfer to be effected, they had to jointly appear at the Land Control Board as well as execute Transfer form, which was not the case herein. Since there were no documents to prove transfer from the Plaintiffs to the 1st Defendant and 1st Defendant to the 2nd Defendant, except for the title deeds, there is no proof as to how the Transfers were effected. The 3rd Defendant who held title to the suit land could not prove the purchase price and stamp duty paid.

The 3rd Defendant submitted that he was a bona fide purchaser for value without notice and had absolute unqualified and answerable defence against the claim of any prior equitable owner. It relied on the cases of **NAIROBI ELC NO. 169 OF 2008 LAWRENCE P MUKIRI ATTORNEY OF RANCIS MUROI MWAURA -VS- THE ATTORNEY GENERAL, JAMES NDIRANGU, JOSEPH NDIRITU MUGI, ANNAH WANGARI NDIRITU AND LYDIA MUTHONI NDIRITU** to buttress its arguments.

The 4th and 5th Defendants insisted the 3rd Defendant colluded with the 1st and 2nd Defendants who fraudulently transferred suit land to it. They submitted that the title to the suit land is a product of a process and not the end in itself and one must demonstrate that indeed he did obtain the said title procedurally devoid of any defect. They relied on the case of **MUNYU MAINA -VS- HIRAM GATHIHA MAINA Nyeri CA No. 239 of 2009** to support this argument. They reiterated that the alleged sale and transfer to the 3rd defendant was fraudulent.

In the case of **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR Justice Sila Munyao** held that:

' It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of **Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows :-**

"...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. "I stand by the above words and I am unable to put it better than I did in the said dictum.'

Further, Section 80 (2) of the Land Registration Act provides that **'The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.'**

Further in the case of **Agnes Naipanoi Pasha Vs Stephen K. Wangombe & 2 others High Court Civil Suit No. 123 of 2011**, Justice Msagha observed that.....' **The court cannot countenance a situation whereby a party obtains a property through a criminal act, transfer the same to a third party and hold that the third party has a valid title.'**

In another case of **Arthi Highway Developers Vs West End Butchery Limited & 6 others (2015) eKLR**, the Court in deciding on the issue of transfer of land by a Vendor possessing a fraudulent title held as follows:.....' **It is our finding that as between West End and Arthi, no Valid title passed and the one exhibited by Arthi before the trial Court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof...;**

In relying on the facts above, the legal provisions and authorities cited, in so far as there is no evidence to prove the 3rd Defendant participated in the alleged fraud to be registered as proprietor of the suit land, I find that his title is not protected by section 26(1) of the Land Registration Act as 1st Defendant and 2nd Defendant did not have a good title to pass to it. I hold that the root of the 1st and 3rd Defendant's title was founded on fraud and the 3rd Defendant has failed to establish a clean root of its title. Further based on the records at the Lands Office, there is no evidence of how the land was acquired by the 1st Defendant and the 2nd Defendant respectively. I hold that the doctrine of bona fide purchaser for value without notice is not open to the 3rd Defendant as he has failed to demonstrate how he carried out the necessary due diligence before purchasing the suit property.

In the circumstances, I find that the Plaintiffs' are the legitimate holder of the title to the suit land.

As to whether the Plaintiffs are entitled to prayers sought in the Plaint, based on my finding above, I note that the Plaintiffs are the legitimate owners of the suit land, hence are entitled to the prayers for a permanent injunction as against the Defendants over the suit land.

As to whether the 3rd Defendant is entitled to the prayers sought in the counterclaim, it was his testimony that he paid Kshs. 26 million to the 2nd Defendant which was not controverted. I find that since he legally purchased the suit land from the 2nd Defendant, it would be just and equitable if the 1st and 2nd Defendants refunded it the purchase price and compensated it for the damages incurred as a result of the transaction herein. I hold that he is entitled to a refund of Ksh. 26, 000,000/- from the 1st and 2nd Defendants respectively as they did not have a good title to pass to it.

I find that the 3rd Defendant does not have a remedy against the Plaintiffs in the main suit as I have held that their land was fraudulently transferred to the 1st Defendant who in turn transferred to the 2nd Defendant.

It is against the foregoing that I find that the Plaintiffs have established their case on a balance of probability and proceed to make the following orders:

- a) A declaration be and is hereby issued that the plaintiffs are the rightful registered owners of all that land known as NGONG/NGONG/6027 and that all subsequent transfers and transactions of whatever nature after 3rd November, 1983 are nullity and void ab initio;
- b) The 4th defendant be and is hereby directed to rectify the register in respect of all that property known as NGONG/NGONG/6027 measuring 2.0 acres by cancelling all transfers effected to the 1st, 2nd and 3rd defendants in respect of the suit property after the 3rd November 1983 and reinstating the property in the plaintiffs' names;
- c) A permanent injunction be and is hereby issued restraining the defendants by themselves, their servants, and or agents from entering, transferring, alienating, selling or purporting to sale and or transfer and or charge and or in any other way interfering and or meddling with any of the portion of the land known as NGONG/NGONG/6027; and
- d) Costs of the suit be borne by the 1st and 2nd Defendants jointly and severally.

Dated signed and delivered in open court at Kajiado this 13th day of December, 2018

CHRISTINE OCHIENG

JUDGE



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