



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAKURU

NAKURU ELC NO. 218 OF 2013

(FORMERLY NAKURU HCCC NO. 251 OF 2005)

PETER KAMAU MWANGI (Suing as the Administrator

of the Estate of the late MWANGI KAMAU).....PLAINTIFF

VERSUS

ESTHER CHELAGAT NYANGWESO.....DEFENDANT

JUDGMENT

(Suit by plaintiff seeking cancellation of the title of the defendant; plaintiff being administrator of the estate of a deceased person and the deceased having been holder of title to the suit land prior to his death; defendant obtaining title to the suit land after the death of the former proprietor; plaintiff contending that the defendant fraudulently procured title; no sufficient evidence tabled by defendant on how she could have properly obtained title; held that defendant fraudulently procured the title to the suit land; title of the defendant cancelled; defendant ordered to give vacant possession and permanently restrained from the suit land; further orders on rectification of the title issued)

1. This suit was commenced through a plaint which was filed on 12 October 2005. The plaintiff has brought this action on behalf of the estate of the late Mwangi Kamau (the deceased) and it is his contention that the land parcel Olenguruone/Amalo/132 (the suit land) belongs to the estate of the deceased as title was issued to the deceased on 6 February 1978 after the land was allotted to the deceased by the Kenyan Government through the Settlement Fund Trustees (SFT). The plaintiff has averred that in the year 1992, tribal clashes erupted in Olenguruone and the suit land was left unattended and he has insinuated that it is during this time that the defendant took possession of the land. It is further his contention that the defendant fraudulently got registered as the proprietor of the suit land on 20 July 2000 after which criminal charges were presented against her through the case Nakuru Criminal Case No. 2086 of 2002. The plaintiff has averred that the deceased never sold the suit land to the defendant and that the defendant thus acted fraudulently, inter alia, by causing transfer documents to be signed in her favour. In this suit, the plaintiff seeks orders for a declaration that the suit land belongs to the estate of the deceased, an order of cancellation of the title of the defendant and for ownership to revert to the name of the deceased, and injunction to restrain the defendant from utilising the suit land or dealing with it.

2. The defendant filed defence which she later amended. She has denied that the suit land was ever allocated to the deceased by the SFT and denied that a title deed was issued to the deceased. She contended that she purchased the suit land vide a sale agreement. She pleaded that she is a stranger to Nakuru Criminal Case 2086/02 but pleaded that she is only aware of Criminal Case No. 1949/03 which case file she stated has mysteriously disappeared. She denied all particulars of fraud and pleaded that the plaintiff ought to have enjoined the Commissioner of Lands to his suit.

3. In his evidence, the plaintiff testified inter alia that he is son of the deceased and that the deceased died in the year 1999. He produced a Certificate of Death which showed that the deceased died on 2 August 1999. He stated that the suit land was owned by the deceased and he produced as an exhibit an original title deed in the name of the deceased. He testified that in the year 1992,

there were tribal clashes and they were chased away from the suit land and that the defendant is now in occupation of the land. He stated that in the year 2002, he went to the Lands' office and found that title has changed to the defendant. He made a report and the defendant was arrested and charged with a criminal offence but that the case has never been finalized as the file got lost. He asserted that his late father never sold the suit land and was already dead when the defendant got title.

4. PW-2 was Hellen Kharemwa, the Land Registrar, Nakuru District. She testified that she was not able to trace the records for the suit land and could not trace the land register on the same. She thus could not vouch for copies of official searches put to her, one of which showed that the deceased was proprietor of the land and the other showing the defendant as proprietor from 20 July 2000. She however stated that to transfer land, one would need to have a Land Control Board consent, the transfer document and the original title deed. If an owner was deceased, they would only register a transfer by transmission. She did state that it was possible to transfer the land of a deceased person if he had already signed the transfer instruments before his death.

With the above evidence, the plaintiff closed his case.

5. DW-1 was Alex Kipngetchi Rono, the officer in charge of the Nakuru Criminal Registry at the Nakuru Law Courts. He testified that the defendant was charged in Criminal Case No. 1949 of 2003, with the offences of Conspiracy to Commit a Felony and Forgery. There was also a third count of forgery and a fourth count of Forcible Detainer, all being offences under the Penal Code. He however could not trace the file and he could also not trace the register for the year 2003. He thus could not tell the results of the proceedings. He further testified that the defendant was charged in Criminal Case No. 2086 of 2002 with the same offences. He had the register for the year but the same does not indicate the outcome of the proceedings.

6. The defendant testified as DW-2. She stated inter alia that she owns the suit land and that she has lived on it for more than 20 years. She testified that she purchased the suit land from one John Kibilo Sang. She produced an official search to show that she has title to the suit land. She testified that when she took possession of the land there was a house which had been built by Mr. Sang and she lived in it before constructing her own house. She testified that she took possession in the year 1997 and it is after this that the land was sold to her. She was challenged in cross-examination to avail documents showing that Mr. Sang owned the land but she did not produce any. She was also challenged to avail the Land Control Board consent and the transfer instrument but she did not have the same. She stated that all these documents were taken by the police when she was arrested and she did not make copies.

With the above evidence, the defendant closed her case.

7. I invited counsel to file written submissions which they both did and I have taken note of these.

8. I have assessed both the evidence of the plaintiff and the defendant. I take note that it is the plaintiff's contention that the suit land was owned by the deceased and that title was fraudulently transferred to the defendant. I do observe that the plaintiff actually produced the original title deed in the name of the deceased. The same shows that it was issued on 6 February 1996. I further observe that the defendant's title was issued to her on 20 July 2000. At this time, the original proprietor was dead as the Certificate of Death shows that he died on 2 August 1999. I further observe that the defendant claims to have purchased the suit land from one John Kibilo Sang. However, I do not have a single document which shows that the suit land was ever owned by John Kibilo Sang at any one point in time. I therefore do not see how the defendant can claim to own the suit land through purchase, if she purchased land from a person who had no title to give. Moreover, the defendant never availed any copy of the transfer instrument, proof of payment of any transfer fees or stamp duty, or any copy of the Land Control Board consent. The defendant of course claimed that these documents existed but were taken away by the police. Even if I am to believe that the documents were taken away, the defendant had the option of calling Mr. John Kibilo Sang to buttress her position that it was him who sold the land to her. She could also obtain minutes of the Land Control Board to show that she indeed had applied for and obtained the consent to transfer. None of these were presented and I am thus not persuaded that the defendant obtained title in her name in the proper manner. I am convinced on a balance of probabilities that all along the deceased had title to the suit land which title has never been transferred to anybody else. Indeed, nothing was presented to me to show any transfer of the suit land from the deceased to anybody else. Given the above, it is my persuasion that the title of the defendant was acquired fraudulently.

9. I observe that the defendant got title in the year 2000 and this suit was filed in the year 2005. The title was obtained under the Registered Land Act (RLA) Cap 300 (repealed) and it thus the provisions of that statute which are operative. The said Section 143 of the RLA provides as follows :-

143. (1) Subject to subsection (2), the court may 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.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such 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 his act, neglect or default.

10. It will be seen from the above that the court has power to order the cancellation of an entry in the land register if it is satisfied that the same was made through fraud or mistake. In the case at hand, I have no doubt in my mind that the registration of the defendant as proprietor of the suit land was made through fraud and I am further persuaded there is no way that the defendant could have become registered as proprietor without her being an active party to the fraud. Her title is thus subject to cancellation under Section 143 of the RLA and I do proceed to cancel the same. The land should revert back to the name of the deceased as proprietor and the same may be distributed to his beneficiaries in the normal way following the law of succession.

11. There was an attempt to claim that the defendant has been in possession for a period of 20 years but all that does not count. This is not a suit for adverse possession and in any event, the plaintiff filed this suit in the year 2005, just about 5 years since the defendant obtained title. It follows that the defendant had not been in possession for 12 years before this suit was filed. Given my judgment above, the defendant has no right to continue possessing the said land and must give vacant possession of it to the plaintiff, who is the administrator of the estate of the deceased. I order the defendant to give vacant possession forthwith and no later than 30 days from the date of this judgment. The defendant is also permanently restrained from entering, being upon, or in any other way utilising or dealing with the suit land.

12. I have not forgotten that in the course of the proceedings it was revealed that the land records could not be traced in the land registry. It behoves the District Land Registrar to reconstruct the records thereof and the same should reflect the name of the deceased as proprietor of the suit land.

13. On costs, the plaintiff has succeeded and will have the costs of this suit.

14. For the avoidance of doubt, I make the following final orders :-

a) That it is hereby declared that the title of the defendant , Esther Chelangat Nyangweso, to the land parcel Olenguruone/Amalo/132 was fraudulently and/or illegally procured.

b) That the title of the defendant Esther Chelangat Nyangweso, to the land parcel Olenguruone/Amalo/132 is hereby cancelled.

c) That it is hereby declared that the rightful name that should be noted as proprietor of the land parcel Olenguruone/Amalo/132 is Mwangi Kamau (deceased).

d) That the District Land Registrar, Nakuru, is hereby ordered to effect the cancellation of the defendant as proprietor of the land parcel Olenguruone/Amalo/132 and register the name of Mwangi Kamau (deceased) as proprietor.

e) That the District Land Registrar, Nakuru, is hereby directed to reconstruct the land records of the land parcel Olenguruone/Amalo/132 and the records to reflect the name of Mwangi Kamau (deceased) as proprietor.

f) That the defendant is hereby ordered to give vacant possession to the plaintiff forthwith and no later than 30 days from the date of this judgment.

g) That the defendant is hereby permanently restrained from entering, being upon, utilising or in any way dealing with the land parcel Olenguruone/Amalo/132.

h) That the plaintiff shall have the costs of this suit as against the defendant.

15. Judgment accordingly.

Dated, signed and delivered in open court at NAKURU this 22ND DAY OF JANUARY 2020.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In the presence of:-

Mr. Mukira holding brief for Mrs. Ndeda for the plaintiff.

Mr. Bundotich holding brief for Mr. Olaly Cheche for the defendant.

Court Assistant – Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

22/1/2020



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