



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 27 OF 2019

NELIUS MUTHONI THEGETHA.....PLAINTIFF

VERS US

JULIUS NDUNGU MWANGI.....1ST DEFENDANT

THE DISTRICT LAND REGISTRAR,

MURANGA.....2ND DEFENDANT

JUDGEMENT

1. Vide a Plaint filed on the 26/7/2019 and amended on the 7/2/2020 the Plaintiff filed suit against the Defendants seeking the following orders:

a. An Order of declaration that the transfer of the suit land parcel number LOC.8/KAGAA/1393 to the 1st Defendant was fraudulent and that the said land belong to the Plaintiff and the Land Registrar, Murang'a be directed to revoke and cancel the said registration and title issued to the 1st Defendant.

b. That the title to the land parcel LOC.8/KAGAA/1431 be cancelled and the land parcel numbers LOC.8/KAGAA/1392 and LOC.8/KAGAA/1393 be reinstated to their original status or alternatively; a portion of zero decimal zero eight zero nine (0.0809) Hectares be excised from the land parcel numbers LOC.8/KAGAA/1431 and be transferred to the Plaintiff.

c. An order do issue empowering and authorizing the Court Deputy Registrar, Murang'a to sign all documents and forms on behalf of the Plaintiff to facilitate the transfer process of the said land parcel mentioned in (b) above and the District Land Registrar, Murang'a be allowed and authorized to dispense with the production of the old title retained by the 1st Defendant and also to transfer the said land to the Plaintiff accordingly.

d. Costs of the suit and interest thereof;

e. Any other or better relief this Honourable Court deem fit to grant.

2. The Plaintiff avers that she was the registered owner of LOC8/KAGAA/996 measuring 1.53 acres. She subdivided the said land in to parcels Nos LOC.8/KAGAA /1392 and 1393 measuring 1.3 and 0.23 acres respectively. That she sold LOC.8/KAGAA /1392 to Joseph Macharia Kagwi on the 1/12/2015 vide an agreement of sale and retained LOC.8/KAGAA /1393 in her name.

3. It is her case that in 2017 the 1st Defendant fraudulently transferred parcel LOC.8/KAGAA /1393 to his name without his consent and knowledge using forged documents. Further that he procured the consolidation of parcels Nos LOC.8/KAGAA /1392 and 1393 into parcel LOC.8/KAGAA /1431 and transferred through fraud to himself.

4. The particulars of fraud on the part of the 1st and 2nd Defendant are set out on para of the Plaintiff.

5. The 1st Defendant denied the claim and stated that parcel LOC.8/KAGAA /1393 was sold to him by Antony Mwai Mukunga. That he acquired parcel LOC.8/KAGAA /1392 from Joseph Macharia Kagwi. That upon acquisition of the two portions he consolidated them to create LOC.8/KAGAA /1431 now registered in his name.

6. By way of a counterclaim, the 1st Defendant sought the following orders;

a. That there be a declaration/confirmation that there is no land known as LOC.8/KAGAA/1393.

b. The Plaintiffs, relatives, agents servants, purchasers, agents and employees or anyone acting on their behalf be evicted from the parcel of land known to the parties as LOC.8/KAGAA/1431.

c. A permanent injunction be issued against Plaintiff, relatives, agents, servants, purchasers and employees from trespassing, subdividing, disposing, living on, erecting on buildings whatsoever, transacting any business and or interfere in any manner whatsoever with the parcel of land known to the parties as LOC.8/KAGAA/1431.

d. Cost of this suit.

e. Interest thereon.

f. Any/or further relief this Honourable Court might deem fit and just to grant thereon.

7. The 2nd Defendant denied the Plaintiffs claim and states that the registration of the transfer was done in compliance with the statutory provisions of the law. Further the suit offends the statutory provisions of section 13A of the Government Proceedings Act since no notice was issued.

8. PW1 – the Plaintiff testified that she owned parcel LOC8/KAGAA /996 which she subdivided into two portions and sold parcel LOC.8/KAGAA /1392 to Joseph Macharia Kagwi. She produced the agreement of sale dated the 1/12/2015 and retained the second portion. That in 2017 upon carrying out a search she discovered that the 1st Defendant caused himself to be registered as owner of parcel LOC.8/KAGAA /1393 on the 10/3/17 without her knowledge and or consent. Thereafter the 1st Defendant consolidated the parcels of land to create LOC.8/KAGAA /1431 through fraud and forgery.

9. Alarmed with the happenings she stated that she reported the matter to the Chief and the local administration where the 1st Defendant was summoned but refused to surrender the title to the Plaintiff.

10. Further she stated that she received the purchase price from Kagwi but did not sign any transfer documents. Neither did she attend or apply for the Land Board consent.

11. With respect to parcel LOC.8/KAGAA /1392 she stated that she did not gift it to Antony Mwai nor sell it to the 1st Defendant. That she did not consent to the consolidation of her two plots. That she left the parcel LOC.8/KAGAA /1392 in the care of Mwai and did not authorize him to sell the land to anybody least of all the 1st Defendant. That she learnt that her land had been sold to the 1st Defendant through the wife of Mwai who is her nephew.

12. The 1st Defendant took the stand and adopted his witness statement dated the 9/12/19 and stated that he purchased parcel LOC.8/KAGAA /1392 from Joseph Kagwi. That he carried out a search which revealed that the suit land was registered in the name of the Plaintiff. That he also bought parcel LOC.8/KAGAA /1393 from Anthony Mwai which he was given by the Plaintiff as he is

her kinsman. That he was assured by the said Anthony and he would procure the signatures of the Plaintiff because the title was not in his name. Upon acquiring the two plots he consolidated them to LOC.8/KAGAA /1431 and had it registered in his name. That at the time of handing over of vacant possession the wife of Anthony complained to the local administration that they were being evicted from the land. Upon hearing the dispute the local administration directed Anthony to vacate the land within 6 months.

13. Further he stated that it is Anthony who processed the transfers including procuring the Land Control Board consent. He admitted that he did not attend the Land Control Board meeting and neither did the Plaintiff. He paid Anthony some money and he coordinated everything as he was busy with his businesses. That he does not know how the transfers were registered. All he did was to pay the purchase price to Mwai, he testified.

14. The 2nd Defendant did not attend the hearing of the suit despite the hearing date having been fixed in the presence of its counsel, Ms Chilaka.

15. I have read and considered the written submissions on record.

16. The issue for determination is whether the Plaintiff has proven fraud on the part of the Defendants; whether the consolidation and transfers of the titles should be revoked; who meets the cost of the Suit.

17. The rights to property the world over is protected and safeguarded by the highest laws in the land. In Kenya property rights are elevated to the bill of rights. Under Article 40 the Constitution offers property rights protection from arbitrary deprivation and restriction from the enjoyment of the same without cause. Under Article 40(6) of the Constitution the said protections are not available to property that has been found to have been unlawfully acquired.

18. In line with the guarantees aforesaid section 24 and 25 of the Land Registration Act stipulates the registration of a person as a proprietor of land vest in that person the absolute ownership together with rights and privileges thereto and the rights of a proprietor shall not be defeated except as provided for by the Act. The rights can only be limited by the conditions restrictions encumbrances permitted by the Act.

19. Section 26 in particular mandates all Courts to take a certificate of title issued to a proprietor by the Land Registrar as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to easements restrictions and conditions endorsed on the title. The section provides two instances in which a title may be impugned; on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

20. Black's Law Dictionary, 9th Edition defines fraud as;

"Fraud consists of some deceitful practice or willful 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. As applied to contracts, it 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".

21. In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the Court held that; -

"It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427**:

"Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (**Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308**).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (**see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221**). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (**Davy V Garrett (1878) 7 ch.D. 473 at 489**). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

see **Insurance Company of East Africa vs. The Attorney General & 3 Others HCCC No 135/1998** it was held that whether there was fraud is, however, a matter of evidence.

22. In the case of **Koinange & 13 others v Koinange [1968] KLR 23** the Court of Appeal held that allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings, that is on the balance of probabilities.

23. The Plaintiff pleaded acts of fraud on the part of the Defendants and it is the duty of the Court to determine if she has proved them to the required standard which is slightly higher than the balance of probabilities.

24. It is not disputed that the Plaintiff was the registered proprietor of parcel LOC 8/KAGAA/996 measuring 0.62 ha. The Plaintiff acquired the land through succession in 2006. On the 10/2/2015 the title was closed on subdivision into two parcels; LOC.8/KAGAA /1392 and 1393.

25. The Plaintiffs case is that she sold a portion of the main title (parcel LOC.8/KAGAA/1393) to Joseph Macharia Kagwi on the 1/12/15 vide an agreement of sale produced in Court. She received the purchase price and what remained was to obtain the Land Control Board and transfer the land to him. It was a term of the agreement under para 4 that upon completion the vendor shall deliver completion documents to the purchaser (Kagwi) being the duly executed transfer of the property, copy of PIN certificate, ID card, two colored photographs and the original title.

26. It is her position that she did not execute any transfer in favour of the said Kagwi nor attend the Land Control Board. She also stated that she did not provide any documents to the said Kagwi. The 1st Defendant has admitted that the search he carried out showed that the Plaintiff was the owner of the land and yet he went ahead to purchase land from Kagwi who had no title to the suit land. It is trite and settled law that a person cannot convey that which he holds not.

27. I have perused the agreement between the Plaintiff and Kagwi and observe that the purchase price was Kshs 850,000/-. The same land appreciated twice in 21 days to the sum of Kshs 1.6 million, the price that the Defendant purchased the land from Kagwi.

28. The finding of the Court is that the Plaintiff did not obtain a good title from the Kagwi who sold land that was still in the name of the Plaintiff. The purported seller being Joseph Kagwi had no mandate to sell the land to the 1st Defendant. Due to the exigencies of life, many at times a seller will give a power of attorney to an agent to transact in land on their behalf. In this case no evidence of a power of attorney has been given to support any agency between the Plaintiff and the said Kagwi.

29. The same scheme was rehashed with respect to parcel LOC.8/KAGAA /1392. The Plaintiff states that this land was retained by herself and left it in the care of Anthony Mwai, his nephew as she lived in Embu. That she did not sell the land to the 1st Defendant nor gave a power of attorney to Mwai to sell it on her behalf. That there was no bequest either to Mwai. That she did not sign the transfer and Land Control Board consent. She testified that the signature on the document is a forgery. This evidence was not controverted. The Court heard and observed the demeanor of the Plaintiff who is in her senior years and she came out as a truthful witness.

30. The 1st Defendant admitted that he neither negotiated the purchase of the land with the Plaintiff nor met with her nor attended Land Control Board to procure the Land Control Board consent. Infact he stated in evidence that he paid Mwai who carried out all the transactions until he gave him a title comprising of the consolidated title of LOC.8/KAGAA /1431. That he did not know how the land was consolidated and registered in his name as he was busy with his businesses.

31. Where a person's title is under attack, he must of necessity give an account on how he acquired the same. **In the case of Munyu Maina –Vs- Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, where the Appeal Court held that: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

32. In this case the Defendant stated that he gave Mwai money to fix the transaction as he was busy with his businesses. The Defendant did not offer an explanation in defence to his title. He instead tangled a title before the Court purporting to be the owner. The acts of the 1st Defendant were astonishingly careless as to constitute fraud as he purported to acquire an interest in title from an imposter.

33. It is the finding of the Court that the Plaintiff did not participate in the transaction and the whole scheme was championed by Mwai and the 1st Defendant.

34. In the case of *Chemey Investments Ltd -Vs- Attorney General & 2 Others, CA No. 349 of 2012*, the Court of Appeal held that sanctity of title to land registered under the repealed Act was guaranteed and could not be defeated except on the specific grounds set out therein. Where, however, title to property was obtained fraudulently or illegally in violation of the provisions of the Act, (except a first registration) the same was not sacrosanct, did not enjoy any protection, and the Court had power to order rectification of the register.

35. The 1st Defendant cannot be allowed to benefit from his fraudulent acquisition of title. When confronted by a similar case the Court in *Alice Chemutai Too -VS- Nickson Kipkurui Korir & 2 others [2015] Eklr* held that;

“...I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

36. Having held that the whole transaction reeked of fraud, the Court cannot close its eyes in the face of illegalities. **In the case of Mistry Amar Singh -Vs- Serwano Wofunira Kulobya [1963] EA 408**, it was held that whenever an act of illegality is brought to the attention of the Court, then the Court will not allow anybody to benefit from such an illegality, which proposition was also reiterated in the case of **Standard Chartered Bank of Kenya Ltd -Vs- Intercom Services Ltd & 4 Others [2004] eKLR**.

37. The power to revoke and /or rectify title under Section 80 and Section 26 of the Land Registration Act is meant to achieve justice for the true owners of title. The conclusion is that this is a title for revocation on account of fraud and attendant illegalities.

38. In the end I enter judgment in favour of the Plaintiff as follows;

a. The 1st Defendant’s counterclaim fails. It is dismissed.

b. It is hereby declared that the transfer of the suit land parcel number LOC.8/KAGAA/1393 and 1392 to the 1st Defendant was fraudulent.

c. The consolidation of parcels LOC.8/KAGAA /1392 and 1393 were illegal and unlawful and are hereby cancelled.

d. That the title to the land parcel LOC.8/KAGAA/1431 in the name of the 1st Defendant be cancelled and the land parcel numbers LOC.8/KAGAA/1392 and LOC.8/KAGAA/1393 be reinstated to their original status in the name of the Plaintiff (as per entry No 6 in the title).

e. An order do issue empowering and authorizing the Hon Deputy Registrar of this Court to sign all documents and forms in place of the 1st Defendant and the Land Registrar is authorized to dispense with the production of the old title retained by the 1st Defendant for purposes of effecting orders a-d above

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

39. **It is so ordered.**

DATED, SIGNED AND DELIVERED ONLINE AT MURANGA THIS 10TH DAY OF DECEMBER 2020

J G KEMEI

JUDGE

Delivered online in the presence of:

Kinuthia for the Plaintiff

Mrs. Kerio for the 1st Defendant

2nd Defendant: AG is absent.

Njeri and Kuyiki, Court Assistants



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