



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 350 OF 2014

YASMIN ANWAR KHAN YUSUF.....PLAINTIFF

VERSUS

SAMUEL GATUGI MAINA.....1ST DEFENDANT

VIRGINIA WANGUI NJOROGE.....2ND DEFENDANT

MINI BAKERIES (NAIROBI) LIMITED.....3RD DEFENDANT

JUDGEMENT.

1. The Plaintiff filed an amended Plaint dated 22nd October 2020 in which she sought the following reliefs against the Defendants: -

i. 1st and 2nd Defendant's subdivision of LR No. Ngong /Ngong/ 15418 into two parcels i.e LR No.Ngong/ Ngong/ 57743 and 57744 and transfer of the new parcels to the 3rd Defendant be annulled.

ii. A permanent injunction to restrain the Defendants jointly and severally from entering or in any manner interfering with the Plaintiff's proprietorship and or possession of LR No.Ngong/ Ngong/15418.

iii. The removal and or demolition of all structures constructed on the suit premises by the 3rd Defendant.

iv. Costs of this suit.

2. The 3rd Defendant filed a defence and counter claim in which it sought the following reliefs:-

a) An order for cancellation of the Plaintiff's title to land parcel number LR No Ngong/Ngong/15418 which is invalid since the land parcel number LR No Ngong/Ngong/15418 is no-longer in existence having been sub divided into land parcel numbers LR No Ngong/ Ngong/57743 and Ngong/ Ngong/57744.

b) A declaration that the land parcel numbers Ngong/ Ngong/57743 and Ngong/ Ngong/ 57744 are validly owned by the 3rd Defendant who acquired a bonafide title to the same for valuable consideration.

3. The subject matter of this suit relates to LR No Ngong/Ngong/15418 which was subsequently subdivided giving rise to LR No Ngong/Ngong/ 57743 and Ngong/ Ngong/57744 (suit property).

Plaintiff's case.

4. It is the Plaintiff's case that she purchased LR No.Ngong/Ngong/15418 from Enid Nyanja in 1994. She processed and obtained title to the suit property on 17th March 1994. The Plaintiff who is now based in the United Kingdom used to visit the suit property regularly. When she relocated to the United Kingdom, she asked David Kagiri Muhia to keep watch over the suit property.

5. In 2014, the Plaintiff wanted to dispose of the suit property. She went to the Land Registry in Ngong where she was informed that the suit property no longer existed as it had been subdivided by the 1st and 2nd Defendants who in turn transferred the subdivided portions to the 3rd Defendant. The Plaintiff was asked to make payment to facilitate gazettelement of the lost register which is commonly referred to as the green card. It is upon this discovery that she filed the present suit.

First and second Defendant's case.

6. It is the 1st and 2nd Defendant's case that they purchased the suit property from Charles Kamau Kimani on 8th January 1998. They constructed a semi-permanent structure and the 2nd Defendant started cultivating the suit property. They later subdivided the suit property and obtained title Nos. Ngong/ Ngong/ 57743 and Ngong/ Ngong/ 57744. In 2012 they sold the two plots to the 3rd Defendant.

Third Defendant's case.

7. It is the 3rd Defendant's case that it purchased the suit property from the 1st and 2nd Defendants who had subdivided it into Ngong/ Ngong/57743 and Ngong/Ngong/57744. The 3rd Defendant paid Kshs.5,500,000/= for each of the two plots . The 3rd Defendant moved to the suit property and started developing it until this suit was filed. The 3rd Defendant contends that it purchased the suit property after undertaking due diligence and confirming that the 1st and 2nd Defendants were the registered owners.

8. The 3rd Defendant argues that it is an innocent purchaser for value without notice of any defect in the title and that in any case, the Plaintiff's suit is statute barred.

Analysis.

9. I have carefully gone through the evidence adduced by the Plaintiff as well as the evidence of the Defendants. I have also considered the submissions filed by the parties herein. The issues which emerge for determination are firstly, whether the Plaintiff's suit is statute barred. Secondly, was the Plaintiff the registered owner of Ngong/ Ngong/15418. Thirdly was the subdivision of Ngong/ Ngong/ 15418 done fraudulently. Fourthly is the 3rd Plaintiff a bona fide purchaser of the suit property. Lastly, which order should be made on costs.

10. The 3rd Defendant contends that the Plaintiff's suit is statute barred because it was filed after lapse of twelve years within which a suit for recovery of land ought to be filed. The 3rd Defendant's argument is based on the fact that the 1st and 2nd Defendants who sold the suit property to it acquired it in 1998 and therefore this suit is statute barred.

11. It is important to note that this suit was filed against the Defendants based on fraud. In matters where fraud is alleged, time does not start running for purposes of limitation until the fraud is discovered. In the instant case, the Plaintiff discovered that the suit property had been fraudulently registered in the name of the 1st and 2nd Defendants in 2014 when she wanted to dispose of the suit property. She had gone to Ngong land registry where she was informed that the suit property no longer existed as the same had been sub-divided. It is therefore clear that this suit which was filed on 21st March 2014 is not statute barred. In the case of **Margaret Wairimu Magugu Vs Karura Investment Limited & 4 Others, (2019) e KLR**, the Court of Appeal while dealing with Section 26 of the Limitation of Actions Act stated as follows: -

“There is no doubt that under that provision, where the action is based on fraud, the period of limitation prescribed does not begin to run until the Plaintiff discovers the fraud. See for instance **Kenya Ports Authority Vs Timberland (K) ltd (2017) e KLR**”.

12. On the second there is evidence that the Plaintiff purchased the suit property from Enid Nyambura Nyanja on 16th March 1994. The Plaintiff produced a sale agreement to that effect. The Plaintiff also called Enid Nyambura Nyanja who confirmed that she sold the suit property to the Plaintiff and that she does not know either Charles Kamau Kimani or the 1st and 2nd Defendants and that she never sold the suit property to any of the three persons.

13. The Plaintiff obtained the requisite consent for transfer of the suit property which was finally registered in her name on 17th March 1994. The suit property arose from subdivision of LR No.Ngong/ Ngong/3619 which was held by Enid Nyambura Nyanja. PW3 Joel Muimi Mwinzi a Senior Land Registrar produced a copy of mutation form and transfer of the suit property to the Plaintiff. The transfer was registered in favour of the Plaintiff on 17th March 1994 and title issued. It is therefore clear that the Plaintiff is the registered owner of the suit property.

14. On the third issue, the evidence of PW3 a Senior Land Registrar is that according to their records, there is no title in respect of Charles Kamau Kimani. There are also no records of any transfer of Land from the Plaintiff to the 1st and 2nd Defendants. What was on record is subdivision of the suit property which resulted to LR No.Ngong/ Ngong/57743 and LR No.Ngong/ Ngong/57743. The Senior Land Registrar stated that the subdivisions were done fraudulently. He produced a letter dated 17th February 2014 in which the 1st and 2nd Defendant were notified that they had fraudulently transferred the suit property to themselves and subsequently sold the subdivided portions to the 3rd Defendant. The 1st and 2nd Defendants were summoned to the Lands Office.

15. The 1st and 2nd Defendants claimed that they purchased the suit property from Charles Kamau Kimani through a sale agreement dated 8th January 1998. The said Charles Kamau Kimani allegedly had title which was purportedly issued on 27th August 1996. This alleged title does not exist in the records held by Ngong land Registry. During the hearing, the 1st Defendant testified that he was dealing with a male Asian during the transaction and that he was surprised that the Plaintiff is a female. This evidence contradicts his assertion that he purchased the suit property from Charles Kamau Kimani. If indeed he purchased the suit property from Charles Kamau Kimani, then there is no way he would have dealt with a male Asian as he claims.

16. The introduction of documents allegedly in the name of Charles Kamau Kimani was an attempt to cover up the fraud. The 1st Defendant did not adduce any evidence of payment of purchase price or even transfer from the alleged Charles Kamau Kimani to himself and the 2nd Defendant. It is therefore clear that the subdivisions were fraudulently done.

17. On the fourth issue, the 3rd Defendant claims that it is an innocent purchaser for value without notice of any defect in the titles which were transferred to it. The 3rd Defendant contends that its advocates carried out due diligence before it purchased the suit property. Black's law Dictionary 10th Edition defines a bona fide purchaser as follows: -

“bona fide purchaser – someone who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims. Generally, a bona fide purchaser for value is not affected by the transferor’s fraud against a third party and has a superior right to the transferred property as against the transferor’s creditor to the extent of the consideration that the purchaser has paid”.

18. The 3rd Defendant called DW 2 Philip Muoka who handled the transaction between it and the 1st and 2nd Defendants. This witness testified that as part of his due diligence, he visited the Ngong Land Registry where he was given the file in respect of the suit property. He stated that he took a picture of the green card which showed that suit property belonged to the 1st and 2nd Defendants. He produced this picture which does not indicate when it was taken. PW3 Joel Muimi Mwinzi , a Senior Land Registrar disowned this green card. He testified that the green card went missing from the file and that the Plaintiff had been asked to pay for the reconstruction of the records.

19. The Plaintiff produced a copy of a receipt for kshs.6000/= dated 26th February 2014. The loss of the register was published in the Daily Nation of 5th March 2014 and the Standard of 5th March 2014. In the witness statement by Philip Muoka, he states that when he perused the green card, the record showed that Enid Nyambura transferred the suit property to Asmin Anwar Khan. He further stated that Asmin Anwar Khan transferred the suit property to Charles Gatugi Kimani who in turn transferred the same to the 1st and 2nd Defendants. This averment which appears in paragraph 20 (e) of his statement does not support the green card which he allegedly photographed as the purported person who transferred the suit property to the 1st and 2nd Defendants is Charles Kamau Kimani and not Charles Gatugi Kimani.

20. The 3rd Defendant has spent considerable energy in trying to doubt whether the suit property belongs to the Plaintiff whose name does not match the one appearing in the green card which was produced by the 3rd Defendant. This green card has been disowned by the Land Registrar. It is therefore clear that the 3rd Defendant knew or had reason to believe that the properties it was buying were fraudulently acquired. The 3rd Defendant cannot therefore claim to be an innocent purchaser. All the documents pertaining to the suit property bear the Plaintiff's name. The title is in the Plaintiff's name. It is the 3rd Defendant which is trying to introduce the name Asmin Anwar Khan for its own purpose of trying to show that the Plaintiff is not the registered owner of the suit

property.

Disposition.

21. From the analysis hereinabove, it is clear that the Plaintiff has proved her case on a balance of probabilities. On the other hand, the 3rd Defendant has failed to prove its case. The 3rd Defendant's counter claim is dismissed with costs to the Plaintiff. Judgement is entered in favour of the Plaintiff as follows: -

1) The subdivision of LR Ngong/Ngong/15418 by the 1st and 2nd Defendants which resulted in LR No Ngong/Ngong/57743 and Ngong/Ngong/57744 which were subsequently transferred to the 3rd Defendant are hereby annulled.

2) A permanent injunction is hereby issued restraining the Defendants jointly and severally from entering or in any manner interfering with the Plaintiff's proprietorship and possession of Lr No. Ngong/ Ngong/15418 .

3) An order directing demolition and removal of all structures which were put up by the 3rd Defendant on LR No. Ngong/ Ngong/15418.

4) Costs of this suit.

Dated, Signed and Delivered at **Nairobi** on this **4th** day of **March 2021**.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

Mr Mbigi for Plaintiff

Mr Akatch for Mr Kuria for 3rd Defendant

Court Assistant: Hilda

E.O.OBAGA

JUDGE



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