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Case Action:	Judgment
Judge:	Lucy Nyambura Gacheru
Citation:	Joseph Igogo Gathirwa v Peter Nduati Mbau & 2 others [2021] eKLR
Advocates:	-
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 263 OF 2018

JOSEPH IGOGO GATHIRWA.....PLAINTIFF

VERSUS

PETER NDUATI MBAU.....1ST DEFENDANT

JANE WANJIKU MAINA.....2ND DEFENDANT

LAND REGISTRAR, KIAMBU.....3RD DEFENDANT

JUDGMENT

By a Plaint dated **30th October 2018**, the Plaintiff herein sought for Judgment against the Defendants jointly and severally for the following orders;

a. A Permanent Injunction restraining the 1st and 2nd Defendants by themselves, their servants or agents from entering into, fencing, building, selling, transferring, dealing or interfering in any manner whatsoever with Land Parcel No. KIAMBAA/RUAKA/2265.

b. A Declaration against the Defendants that the Plaintiff herein is the legal owner of all that piece of land known as KIAMBAA/RUAKA/2265.

c. A Declaration that any purported sale and transfer of KIAMBAA/RUAKA/2265, to the 1st and 2nd Defendants is unlawful and fraudulent.

d. An Order that the title deeds issued to the 1st and 2nd Defendants be revoked and declared null and void and the 3rd Defendant do cancel the entries of the 1st and 2nd Defendants in the Green Card for the Plaintiff to remain as the sole registered proprietor.

e. Damages and costs of the suit.

f. Such other or further relief as this honorable Court shall deem fit and proper to grant.

In his claim, the Plaintiff averred that he purchased, the suit property being Plot L.R. Number **KIAMBAA/RUAKA/2265**, measuring 0.046 Ha which was excised from **KIAMBAA/RUAKA/1804**, on the **24th day of October 2003**, from the owner one **Sarah Wanaga Kariuki**, and he paid full consideration of Kshs. Six Hundred and Fifty Thousand (**650,000/=**). Subsequently, the vendor effected transfer of the said piece of land to the Plaintiff after subdividing **KIAMBAA/RUAKA/1804**, to give rise to **KIAMBAA/RUAKA/2265**, and he was issued with a title deed dated **29th June 2005**.

That the Land Register was on the **6th April 2007** and **15th November 2011**, fraudulently and illegally altered by the **3rd Defendant**, and the suit property transferred and registered in the names of the **1st and 2nd Defendants** herein.

The Plaintiff further contended that he is in possession of the suit property and had commenced development of the same. Further,

that he only came to discover that the same was registered in the name of the 1st and 2nd Defendants around **July 2017**, while he was in the process of procuring a search for the suit property.

The Plaintiff further averred that he had conducted a search on the suit property in **November 2011**, and the suit property was still registered in his names, yet the register now shows that the interest of the 1st Defendant was registered on the **26th June 2007**. He further averred that the registrations were fraudulently, unprocedurally and illegally entered in the **Green Card** and when they realized the Plaintiff's brother, **David Wamwenya George**, made an application to caution the property. The matter was also reported to **Karuri Police Station**, who conducted investigations on how the Defendants acquired title of the property.

The Plaintiff further averred that all attempts to locate the 1st & 2nd Defendants bore no fruits and he even stopped further development of the impugned parcel of land to pursue the outstanding issue to its logical conclusion,

Fraud by the 1st and 2nd Defendants was particularized as; causing the Land Registrar to issue a title deed in respect of Land Parcel **KIAMBAA/RUAKA/2265**, while knowing very well that they were not the legal owners of the said land, illegally obtaining a title deed from the 3rd Defendant, purporting to be owners of the Plaintiff's land parcel No. **KIAMBAA/RUAKA/2265**, acquiring the suit property by fraudulent means, tendering a forged title to the lands office to effect a fraudulent transfer and colluding with imposters to effect a fraudulent transfer.

Fraud by the 3rd Defendant was particularized as; transferring the suit land without conducting requisitions of title and colluding with imposters to effect a fraudulent transfer, transferring the suit land fraudulently, accepting fraudulent and forged documents particularly the title deed to effect a fraudulent change of ownership; ignoring rights of the land owner, conspiring with the 1st and 2nd Defendants to defeat the legal rights of the Plaintiff and purporting to transfer a parcel of land by one who has got no proprietary interest in the suit land.

The 1st and 2nd Defendants neither entered appearance nor filed their Defence, despite being served via **substituted service** pursuant to an order of the Court issued on **7th November 2018**.

The suit was contested by the 3rd Defendant, who filed a Defence dated **12th March 2019**, and denied all the allegations made in the Plaint. The 3rd Defendants averred that if at all the names of the 1st and 2nd Defendant were entered on the register of the suit property, then the same were entered based on the documents presented to the 3rd Defendant's office, who exercised due diligence and the said documents being believed to be true were registered. That the 3rd Defendant thus performed his duties as prescribed by the law and without any unprofessionalism.

The matter proceeded by way of viva voce evidence wherein the Plaintiff gave evidence for himself and called no witness. The Defendants called no witnesses though 3rd Defendant was represented by a State Counsel Ms Nyawira who cross-examined the Plaintiff, but did not call any witness.

PLAINTIFF'S CASE

PW1 **Joseph Igogo Gathirwa**, the Plaintiff herein adopted his witness statement dated **28th October 2018**, as part of his evidence.

He further testified that he is the registered owner of **KIAMBAA/RUAKA/2265**, and that he purchased the same in **2003**, from **Sarah Wanaga Kariuki**. That he paid the entire purchase price before the Land could be transferred to him. That he had occupied the suit property since **2007**, and no one had ever come to claim the same. That he had never sold the suit property to the 1st Defendant and he did not know both the 1st and 2nd Defendants. Further, that he did two official searches prior to filing of the suit. That the search dated **1st November 2011**, indicated that he was the owner of the suit property while the search done in 2017, showed the suit property was registered in another person's name.

That after the search of **2017**, he placed a caution on the suit land and he went on to report the matter to the Police, at Karuri, who handed it over to the DCIO. Further that he did not sell the land to the 1st and 2nd Defendants and that he neither signed any transfer for nor attended the **Land Control Board for Consent**. That he did not share his PIN Certificate with anyone in relation to the suit property and that the 1st and 2nd Defendants obtained title of the suit property in their names illegally.

On cross examination by the 3rd Defendant's Counsel, PW1 stated that he bought the land from **Sarah Wanaga Kariuki**, and that he executed a sale agreement. He further stated that at the time of purchase, he neither attended the **Land Control Board for consent**, nor did he have the consent, nor pay any stamp duty. He also indicated that he did not have the receipt to show that he paid for the search and that he got the Green Card copy in **Kiambu 2007**, and it showed that the land was in the name of **Peter Nduati Mbau**.

On re-examination PW-1 stated that there was no pending claim and/or issue between the vendor of the suit property and himself. Further that there had been no objection filed to oppose the production of the documents he attached to his claim.

After *viva voce* evidence, the Court directed the parties to file their written submissions. The Plaintiff through the **Law Firm of Wanjiku Mwaura & Co Advocates**, filed his written submissions dated **18th December 2020** on **22nd January 2021**, and submitted that from the evidence presented in Court, the Plaintiff had neither sold nor transferred the suit property to the 1st and 2nd Defendants. He further submitted that the 1st and 2nd Defendants had failed to defend the suit, despite being duly served and the 3rd Defendant despite filing a Defence did not call any witnesses or produce any documents to support its claim. It was the Plaintiff's submissions therefore, that the suit was not contested and he urged the Court to grant the prayers sought in the Plaintiff.

The Court has carefully read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law and finds that the issues for determination are;

1. *Who is the bonafide owner of the suit property.*
2. *Whether the Plaintiff is entitled to the orders sought.*
3. *Who should bear the cost of the suit.*

1. Who is the bonafide owner of the suit property"

It is not in doubt that both the Plaintiff and the 1st and 2nd Defendants have laid claim to the suit property (**KIAMBAA/RUAKA/2265**) herein. It is also not in doubt that while the parties both lay claim to the suit property, more specifically being **KIAMBAA/RUAKA/2265**, the 1st and 2nd Defendants did not participate in the proceedings before the Court, despite being duly served with the pleadings. The Court notes that the Plaintiff lays claim on the suit property while the documents placed before the Court including a copy of the Green Card show that suit property is owned by **Jane Wanjiku Maina**, who was issued with a title deed on **15th November, 2012**, after acquiring the property from one **Peter Nduati Mbau**.

When a person's ownership to property is called into question, it is trite that the said proprietor has to show the root of his ownership. *See the case of Hubert L. Martin & 2 Others Vs. Margaret J. Kamar & 5 Others [2016] eKLR*, where the Court held that;

“A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

Further in the case of *Munyu Maina Vs. Hiram Gathiha Maina, Civil Appeal No.239 of 2009, the Court of Appeal* 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.”

The Court has to determine which party has proved the root of its title and that party will definitely be the bona fide owner of the suit property.

It is the Plaintiff's evidence that he bought the suit property from one **Sarah Wanaga Kariuki**, which evidence is supported by a sale agreement dated **24th October 2003**, a Copy of the **title deed** for the impugned property issued to the Plaintiff, a Certificate of official search dated **1st November, 2011**, and a copy of the **Green Card** of the suit property. Further the Plaintiff testified that upon the purchase of the suit property, he did not transfer the same immediately to himself, but only transferred the said property in **2005** after it was segmented from the bigger portion which was **KIAMBAA/RUAKA/1804**.

The Court is thus satisfied that the Plaintiff has been able to show the root of his title.

The 1st and 2nd Defendants neither entered appearance nor filed their Defence and hence the Court was not privy to how they acquired title over the impugned property. Having stated the above, the Court finds that the 1st and 2nd Defendants have failed and/or neglected to provide information on how they acquired title over the suit property.

Further, the Court notes that the 3rd Defendant only filed a Defence and did not produce any witnesses and /or documents in support of the same. The Court further notes that the 3rd Defendant is the custodian of all land records and their testimony would have been of immense importance in assisting the Court to determine the authenticity or lack thereof of the documents placed before it.

However, the Court has no reason to doubt the evidence of PW1, and for the above reasons, the Court finds and holds that the 1st and 2nd Defendants have failed to prove the root of their title.

For the above reasons, the Court finds and holds that the Plaintiff is the bonafide owner of the suit property.

2. Whether the Plaintiff is entitled to the orders sought

The Plaintiff had sought several Orders amongst them a declaration that he is the lawful owner of the suit property, and that the conversion was fraudulent. He also sought for an order of cancellation of the title held by the 1st & 2nd Defendants and finally permanent injunction.

The Court has already held that the 1st and 2nd Defendants have failed to prove the root of their title and therefore none of them is the lawful owner of the suit property. The Court has further found that the Plaintiff was able to prove the root of his title and therefore he is the lawful and bonafide owner of the suit property and thus, he is entitled to a **Declaration that he is the Lawful owner** and legal of the suit property.

It is trite that whoever alleges must prove and he who seeks the Court to rely upon any piece of evidence must bring forth the said evidence. It is thus clear that the 1st and 2nd Defendants failed and /or neglected to prove how they acquired title over the suit property. The only conclusion that this Court can arrive at is that the said transfer was fraudulent.

The Plaintiff has also sought for the revocation of the 1st and 2nd Defendants title and the cancellation of their entries in the Green Card. In the case of *Elijah Makeri Nyangwara –Vs- Stephen Mungai Njuguna & Another [2013]* the Court held that;

“The evidence in this case puts no one in doubt that the title to the 1st Defendant was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (b) have been met and that the title of the 1st defendant is liable to be cancelled. I therefore proceed to cancel the title of the 1st defendant and his registration as proprietor of the suit land. The Plaintiff should be registered as owner of the suit land. It is regretful that the 1st defendant was snared by the scheme perpetuated by the 2nd defendant. I sympathise with him, but I must ensure that the real title holder is protected and that he is registered as the proper owner of the suit land.”

Further in the case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR*, the Court 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 titleholder. 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 titleholder 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.”*”

The title held by the 1st Defendant and subsequently held by the 2nd Defendant was procured unprocedurally as there are no records as to how and when the transfer was done from the Plaintiff. The root of the Plaintiff’s title dates back to the year 2005. Even if the two were competing interest, which they are not, the Plaintiff’s title would still be superior to the one being held by the 1st and 2nd Defendants. Therefore, the Court finds and holds that as per the powers granted to it under **Section 80** of the **Land Registration Act** which are the Replica of **Section 143** of the **Registered Land Act Cap 300 (Repealed)**; this Court is vested with the necessary power to cancel title to land that was procured unprocedurally. Hence the said prayer is merited.

The Plaintiff has also sought for a permanent injunction. The Court having held and found that the Plaintiff is the lawful owner; and the Court having cancelled the 1st and 2nd Defendants title, it is thus not in doubt that the Plaintiff is holding absolute and indefeasible rights and interests over the suit property and he is thus entitled to a **Permanent Injunction Order**, so that he can enjoy peaceful and quiet occupation and possession of the suit property.

3. Who should bear the costs of this suit

Section 27 of the Civil Procedure Act, grants the Court discretion to grant costs. However, it is trite that costs usually follow the events unless special circumstances present themselves. In the instant case, the Court finds no special circumstances and therefore the Plaintiff being the successful party is entitled to the costs of the suit.

Having carefully read and considered the Pleadings by the parties, the evidence adduced, the written submissions and the relevant provisions of law, the Court finds and holds that the Plaintiff has proved his claim against the Defendants herein on the required standard of balance of probabilities. Consequently, the Court enters judgment for the Plaintiff against the Defendants jointly and severally as prayed in the Plaintiff dated **29th October 2018**, in terms of prayers No. (a), (b), (c) & (d) with the costs to the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 18TH DAY OF NOVEMBER, 2021.

L. GACHERU

JUDGE

In the presence of;

Kuiyaki..... Court Assistant

Present in person.....for the Plaintiff

N/A..... for the 1st Defendant

N/A.....for the 2nd Defendant

N/A.....for the 3rd Defendant

L. GACHERU

JUDGE



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