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Court:	Environment and Land Court at Nakuru
Case Action:	Judgment
Judge:	Mwangi Njoroge
Citation:	Francis Ngaruiya Ngethe v Josphat Ndora Mungai & 2 others [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Nakuru
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History Docket Number:	-
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

LAND CASE NO. 186 OF 2015

FRANCIS NGARUIYA NGETHE PLAINTIFF

VERSUS

JOSPHAT NDORA MUNGAI 1ST DEFENDANT

LAND REGISTRAR, NAIVASHA..... 2ND DEFENDANT

RAFIKI MICROFINANCE BANK LIMITED.....3RD DEFENDANT

JUDGMENT

1. By a plaint dated **24/6/2015** and filed in court on **30/6/2015** the plaintiff sought the following orders against the defendants:-

a. A permanent mandatory injunction restraining the defendants by themselves, their servants or agents from trespassing, alienating, selling, transferring, disposing of, charging, dealing or in any other way interfering with the parcel of land known as MITI MINGI/MBARUK BLOCK 8/1271 (KIANJOYA ‘D’).

b. An order that the registration of the 1st defendant as the owner of the parcel of land known as MITI MINGI/ MBARUK BLOCK 8/1271 (KIANJOYA ‘D’) is illegal, null and void and the said registration and title deed issued to the 1st defendant be cancelled and further the 2nd defendant do remove all entries made in the register to the detriment of the plaintiff and do reinstate the plaintiff as the sole owner of the said parcel of land.

c. A declaration that the plaintiff is the bonafide and legal owner of the parcel of land known as MITI MINGI/MBARUK BLOCK 8/1271 (KIANJOYA ‘D’).

d. Costs of this suit plus interest.

The Plaintiff’s Case

2. The plaintiff’s case is that while he was the lawful owner in possession of the suit land having purchased it for valuable consideration the 1st defendant in **December 2014** trespassed on the land thereby denying the plaintiff quiet possession thereof. That was not all; the 1st defendant and the 2nd defendant jointly colluded and fraudulently caused the title to the suit land to be registered in the name of the 1st defendant who subsequently charged it fraudulently to the 3rd defendant hence the suit against the three defendants.

The Defendants’ Defences and the Reply to Defence

3. The 1st defendant filed his defence on **15th March 2017** and denied the claim and putting the plaintiff to strict proof of all his averments.

4. The 2nd defendant filed his defence on **1st March 2017** denying the claim and stating that if there was any fraud or

misrepresentation then the 1st defendant was liable for such.

5. The 3rd defendant filed a defence on **2/11/2016** denying the claim and stating that the plaintiff's suit against it discloses no cause of action against it. It further states that the 1st defendant was its customer who applied for a credit facility secured by the suit property and that prior to disbursing the loan the 3rd defendant carried out all due diligence in respect of the suit property and carried out a valuation. A search at the Lands Registry revealed that the land was registered in the 1st defendant's name and it was devoid of any encumbrance. It states that it acted in good faith and is a stranger to the allegations and states that the plaintiff's option is to seek indemnity from the government of Kenya. It seeks that the suit be dismissed with costs.

The Plaintiff's Evidence

6. The suit came up for hearing on **11/5/2018** when the plaintiff gave evidence in his case in the absence of the 1st and 3rd defendants. He stated that he bought the suit land from Kianjoya enterprises limited vide an agreement dated **7/6/1996 (PEXh 1)** for **Ksh 250,000/=**. He was issued with a title deed dated **6/1/2012 (PEXh 2)**; he obtained a certificate of official search on the land (**PEXh 3**) which established that he was the registered owner as well as rates payment receipt (**PEXh 4**). He did not develop the plot; he only fenced it. He was subsequently alerted by a neighbour that some persons were fixing beacons on the plot. When he went to the land he found freshly fixed beacons but the person who had installed them had vanished. Later he met with a land agent, a Mr Kigo, who conceded to him that he had been instructed by the 1st defendant to subdivide the land. However the plaintiff did not know the 1st defendant by then and neither had he authorized him to deal with the land in any manner and he therefore reported the incident to the police. Upon conducting a search on the land again he found that the 1st defendant had been registered as the proprietor thereof and that he had charged it to the 3rd defendant to secure a loan of **Ksh. 2,000,000/=**. He thereafter caused a restriction to be registered against the land. He then made a further statement with the police who arrested the 1st defendant. It was at the police station that the plaintiff saw the 1st defendant for the first time. The plaintiff still had his original title deed.

7. Upon cross-examination by Mr Ngigi he stated that the 1st defendant was charged with subdividing a plot that did not belong to him and that he testified in that case.

The defendant's evidence

8. The hearing of the 1st defendant's case took place on **4/3/2020**. He stated that he was shown the suit land by brokers in the year **2012** and he became interested in purchasing it. He negotiated the purchase price with the brokers and subsequently signed an agreement on **23/1/2012** at the office of an advocate by the name Maureen Muiruri. He stated that the consideration was **Ksh 6,000,000/=** and that he paid an initial amount of **Ksh 3,000,000/=** upon the execution of the agreement. The balance was to be paid in instalments of **Ksh 400,000/=** which he paid through cash till the full purchase price was cleared according to **DW1** the plot was transferred to him after the relevant consent was issued and a title deed was issued in his name on **21/11/2012**. He later charged it to the 3rd defendant for **ksh 2,000,000/=**. He stated that the original agreement and copy of title were left with the Police. Later he stated that the original title was with the 3rd defendant.

9. While he was being cross-examined by Mr. Njogu the 1st defendant stated that he was **26** in **2012** when he was registered the owner of the land; that he had money to buy the land even then. He conceded that he had been charged in **Nakuru CM Criminal Case No 111 of 2015** which at the time of his giving evidence had not been concluded. He stated that the plaintiff (who was in court during his cross-examination) was not the vendor. He also stated that it was not the plaintiff who gave him his copy of identity card and PIN. He further testified that he had been unable to service the loan with the 3rd defendant who had by then repossessed his motor vehicle.

10. At that juncture and since the 1st defendant's second witness was absent, the 3rd defendant was allowed by court to call its evidence on the understanding that the 1st defendant's second witness would be called after the case of the 3rd defendant was completed. However no other witness was called at the subsequent hearings and the 1st defendant's case was closed on **22/9/2021**.

11. **DW2** testified in support of the 3rd defendant's defence on the same day as **DW1**. She stated that she is the 3rd defendant's debt recovery manager. She further stated that the 1st defendant who was the 3rd defendant's customer borrowed a credit facility with the 3rd defendant in **2014** with the title to the suit land as security. The 3rd defendant wrote an offer letter (**DEXh 2**) to which the 1st defendant accepted. Another letter of offer (**DEXh 3**) was made. A first charge (**DEXh 4**) was then registered over the title using the services of an advocate. Before the charge was registered however a search was done on the property which revealed that the land

was registered in the 1st defendant's name and that it was without any encumbrance. A valuation was also conducted. It found the land had a forced sale value of **Ksh 7,500,000/=** and a market value of **ksh 10,000,000/=**. The original title was deposited with the bank and a copy was produced as **DExh 6**. **DW2** stated that at the time of her giving evidence the 1st defendant was indebted to the 3rd defendant to the sum of **ksh 2,218,061.80** as per the statement of account she produced as **DExh 7**. **DW1** denied collusion between the 3rd defendant, the 1st defendant and the 2nd defendant to defraud the plaintiff.

12. Upon cross-examination however **DW2** was not able to ascertain to the court that the 3rd defendant's agent went to the ground and interviewed the neighbours as to the ownership of the land. She also confirmed that the 3rd defendant also sold one of the 1st defendant's vehicles and partially liquidated the loan. At that juncture the 3rd defendant closed its case.

13. The 2nd defendant never called any evidence and his case was closed on **12/10/2021**.

14. Parties were then ordered to file submissions. The plaintiff filed submissions on **9/11/2021**. I have perused the court file and I have found no submissions filed on behalf of the defendants.

Determination

15. The main issues arising from this suit are as follows:

- a. Was the acquisition of the title to and registration of a charge over the suit land by the 1st defendant fraudulent"**
- b. What orders should issue"**
- c. Who should bear the costs of the suit"**

16. **Section 25** of the **Land Registration Act** states as follows:-

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...”

Section 26 of the same Act goes further to provide that:-

“(1) 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.”**

Section 107 of the **Evidence Act Cap 80** of the laws of Kenya states that:-

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

17. In respect of the first issue, it was established by the plaintiff that he was the rightful owner of the land. He produced sufficient evidence in that regard.

18. The plaintiff having established that he had held title to the land that preceded the purported title held by the 1st defendant, it was incumbent upon the 1st defendant to demonstrate to the court that it was the plaintiff who had sold him the land.

19. In the case of **Gichinga Kabutha v Caroline Nduku [2018] eKLR ELC Appeal No. 16 of 2017** my learned sister Judge Kemei J. held that

“It is, therefore, settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.”

20. The defendant’s defence is on the record. One can only be allowed to prove the statements contained in their defence and the 1st defendant’s defence was a mere denial lacking any substance. What the 1st defendant was therefore left with was to discredit the plaintiff’s evidence.

21. Hon Justice Munyao Sila in **Elijah Makeri Nyangw’ra Vs Stephen Mungai Njuguna & Another (2013) eKLR**, while considering the application of **Section 26(1) (a) and (b) of the Land Registration Act** rendered himself as follows: -

“... the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme...Is the title impeachable by virtue of section 26(1) (b)” First, 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 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 of 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 the titles by subsequent transactions. 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.”

22. The 1st defendant could not and did not insist that it was the plaintiff who sold him the land but said that it was someone else. That someone else could not have had the authority of the plaintiff. The plaintiff established that all along while the 1st defendant was purporting to acquire documents of title to the suit land and to charge the title thereto to the 3rd defendant, the plaintiff still had the original title issued in his name in his custody.

23. It has been established by evidence of both the plaintiff and the 1st defendant that the person alleged by the 1st defendant to have presented to him a copy of identity card and PIN certificate resembling the plaintiff’s was not the plaintiff. It is therefore clear that either the plaintiff was impersonated by some persons or that the 1st defendant by himself forged the documents of title he held. The plaintiff therefore could not have been the one who sold the land to the 1st defendant. The evidence of the plaintiff was not shaken in cross-examination by defence counsel. The 1st defendant was unable to effectively discharge his duty.

24. I find that the 1st defendant has not been able to effectively refute the plaintiff’s claims of fraud against him. I therefore hold that the 1st defendant falsely held himself out as having purchased the suit land from the plaintiff.

25. The foregoing notwithstanding it was still open to the 1st defendant to call evidence to demonstrate that he was an innocent purchaser for value. This never happened. He never called the agents who showed him the land and introduced him to the individual who impersonated the plaintiff. Besides, he never disclosed the agents’ name or names. He produced no exhibits as to the identity of such persons and this court can not be certain that they exist. The advocate who is said to have drawn the sale agreement was also not called to give evidence. This court can not also be certain that execution of the alleged agreement for the purported sale of the land ever occurred at that advocate’s office.

26. In this court's view this court holds that the plaintiff has established his claims of fraud against the 1st defendant.

27. Without the defendant having called the kind of evidence intimated to by this court immediately hereinbefore, only the 1st defendant can be presumed to know the origins of the title that he presented to the 3rd defendant. Neither the plaintiff nor the 1st defendant associated the 2nd defendant with the issuance of the title he purported to be valid. Consequently the plaintiff's allegations of fraud against the 2nd defendant can not stand. It is credible that the 2nd defendant merely registered the documents presented by the 1st defendant in good faith and issued him with a title document in his name.

28. The 3rd defendant also fell to the wiles of the 1st defendant and purported to register a charge over the title purportedly held by the 1st defendant, unaware that it was fake. It can not be blamed for the 1st defendant's fraud. Therefore though the 3rd defendant can not be blamed for fraud what comes out of nullity is a nullity. The charge it holds was not registered on a valid title or with the authority of the plaintiff and it is therefore invalid as against the plaintiff, although it can be independently enforced as an agreement against the 1st defendant for the repayment of the monies; the 3rd defendant appears to have realised this fact and it has demonstrated that it has commenced the process of seizure and sale of the 1st defendant's assets in attempts to recover its money. The entries made against the title remain ineffective against the plaintiff as that title held by the 1st defendant is fake and liable to be cancelled.

29. What orders should issue in view of the foregoing"

30. It has been established that the plaintiff is the legal proprietor of the suit property. To protect the innocent plaintiff's legal and equitable interest in the property, a permanent injunction restraining the 1st and the 3rd defendants from in any way interfering with the suit property is necessary, as is an order of cancellation of all entries vide which the 1st defendant was registered as the proprietor of the suit land and the subsequent entries regarding the 3rd defendant's charge over the suit property.

31. I find that by his nefarious activities the 1st defendant occasioned this suit and he alone ought to bear all the costs of the suit of the plaintiff and of the 2nd and 3rd defendants.

32. Consequently I enter judgment in favour of the plaintiff against the defendants and I issue the following final orders:

a. A declaration is hereby issued that the plaintiff is the legal owner of the parcel of land known as MITI MINGI/MBARUK BLOCK 8/1271 (KIANJOYA 'D');

b. A permanent injunction is hereby issued restraining the 1st and 3rd defendants by themselves, their servants or agents from trespassing, alienating, selling, transferring, disposing of, charging, dealing or in any other way interfering with the parcel of land known as MITI MINGI/MBARUK BLOCK 8/1271 (KIANJOYA 'D');

c. The registration of the 1st defendant as the owner of the parcel of land known as MITI MINGI/ MBARUK BLOCK 8/1271 (KIANJOYA 'D') is illegal, null and void and is hereby cancelled;

d. The title deed issued to the 1st defendant as the purported registered proprietor of the parcel of land known as MITI MINGI/MBARUK BLOCK 8/1271 (KIANJOYA 'D') is hereby cancelled;

e. The 2nd defendant shall within 30 days of this judgment remove all entries made in the register by which the 1st defendant was registered as proprietor of the suit land and he shall reinstate the plaintiff as the sole registered proprietor of the parcel of land known as MITI MINGI/MBARUK BLOCK 8/1271 (KIANJOYA 'D');

f. The 1st defendant alone shall bear the costs of this suit plus interest thereon at court rates until paid in full.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU BY WAY OF TELECONFERENCE ON MICROSOFT TEAMS ON THIS 18TH DAY OF NOVEMBER, 2021

MWANGI NJORGE

JUDGE, ELC NAKURU.



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