



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 121 OF 2013**

**PAULINE MUTHONI NJOROGHE.....PLAINTIFF**

**VERSUS**

**JAMES NJOROGHE KAMOCHHE.....1<sup>ST</sup> DEFENDANT**

**DAVID CHEGE KIMEMIA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

*(Suit by plaintiff seeking orders of cancellation of a title sold by her husband to the 2nd defendant; apparent from the evidence that the plaintiff's husband sold the suit property despite there being a court order of injunction stopping him from any dealings; sale of property in violation of a court order cannot be allowed to stand; sale set aside; title of the 2nd defendant cancelled; property to revert to previous proprietorship before the sale)*

1. This suit was commenced through a plaint filed on 12 July 2011. In her suit, the plaintiff averred that the 1st defendant is her husband, and she pleaded that during the subsistence of their marriage, the 1st defendant purchased the land parcel Bahati/Engorusha Block 1/184 which she avers became registered in the name of the 1st defendant, to hold in trust for the plaintiff and their five children. It is pleaded that the plaintiff and 1st defendant built a home on the suit land and moved into it in the month of June 1992. It is averred that in July 2009, the 1st defendant demolished the matrimonial home in an attempt to sell the suit land to the 2nd defendant, which prompted the plaintiff to write to the 2nd defendant warning him not to purchase the suit land. She has pleaded that she registered a caution in the Lands office but the Land Registrar removed it, which caused her to file the suit Nakuru CMCC No. 1140 of 2009. She has averred that an injunction was granted by the said court and served upon the 1st defendant but he still proceeded to sell the suit land to the 2nd defendant, who then obtained title to it. It is the position of the plaintiff that this transfer to the 2nd defendant was fraudulent inter alia because there was a court order and that the 2nd defendant purchased it while knowing that there was a family dispute. In the suit, the plaintiff has sought orders to have the title of the 2nd defendant cancelled; rectification of the register to have the land registered jointly in the name of the plaintiff and 1st defendant; general damages for demolition and eviction; and costs and interest.

2. The defendants entered appearance and filed a joint statement of defence. The 1st defendant averred that he purchased the suit land with his own money without any contribution from the plaintiff. He also pleaded that they were living in Wanyororo Farm where the matrimonial home was set. It was pleaded by the 1st defendant that what was developed on the suit land were only temporary structures and nobody was living there and that he demolished the same after selling the land to the 2nd defendant. It is pleaded that the caution lodged by the plaintiff was dismissed by the Land Registrar for want of sufficient reasons, and that the order of injunction was served after the property had already been sold to the 2nd defendant. They have denied that the land was transferred through fraud and that this suit has been overtaken by events.

3. In the course of time, the 1st defendant died, and his case abated, leaving only the 2nd defendant in the suit.

4. In her evidence, the plaintiff testified that she married the 1st defendant in the year 1988 and that they had 5 children. She testified that she was aware that her late husband wished to sell the suit property to the 2nd defendant and she registered a restriction on 4 August 2008. The Land Registrar later summoned the parties for a hearing and decided to lift the restriction. She then filed the suit before the Magistrate's Court and an injunction was granted in her favour. She stated that in the meantime the defendant destroyed the house on the suit land, a toilet, store and other structures which she had built for her sons. She stated that she was never called to the Land Control Board and she was not privy to the sale agreement between her husband and the 2nd defendant. She also stated that the sale was done despite the court order of injunction. She asserted that when the structures on the suit land were destroyed, the 2nd defendant was present.

5. PW-2 was one Paddy Ndirangu Njoroge. He is a son of the plaintiff. He testified that in the year 2009 they were resident on the suit land and that the whole family lived here. He could recall 25 February 2010, when some people came to the land and destroyed their house after which they moved to another area. He stated that the 2nd defendant was present during the demolition and he was pointed out as the purchaser of the property. He and his brother were arrested but released the following day.

6. With the above evidence, the plaintiff closed her case.

7. In his evidence, the 2nd defendant testified inter alia that the deceased 1st defendant offered to sell to him the suit land. He went and saw it and they drew a sale agreement on 12 June 2008. The agreement was signed by the seller and three of his daughters. He stated that the 1st defendant was living on this land with his daughters and that he represented to him that he had separated with the plaintiff. He stated that he wanted to sell this land so that he can have money to relocate to a cheaper parcel of land and also maintain himself. He testified that the 1st defendant purchased another parcel of land and built on it. He denied having sent police to demolish the structures on the suit land and stated that in their agreement, it was agreed that it is the 1st defendant who would demolish the structures, and give possession within 90 days which he acknowledged was done. It happened that the title deed got lost and it had to be gazetted, which was done, after which the land was transferred to him. He denied being aware of the court order dated 28 September 2009 and pointed out that he was not a party to that suit. He got title on 2 December 2009. He testified that he did not meet the plaintiff when they wrote the sale agreement and had never seen her. He was aware of the matter before the Land Registrar as he attended the dispute, although at that time he was already in possession. Cross-examined, he conceded that he lives about 500 meters from the suit land and knew the 1st defendant before he purchased the land as they were living in the same neighbourhood. He agreed that the property was fenced and had some structures where the 1st defendant used to live with one of his daughters called Lorna. He stated that he never found PW-2 or his brother on the suit land and was not aware that Lorna is married and not living on the suit land. He averred that at the time of purchase, he asked the seller to bring his wife, but he informed him that she cannot come as she is living with another man. He stated that the 1st defendant was to vacate the land by 11 September 2008 and remove the structures on the land which was done. He testified that the 1st defendant never informed him of the existence of an order restraining the sale of the land. After taking possession, he built a fence and a temporary structure which are present on site. He testified that they did attend the Land Control Board and that they got the consent on 12 November 2009. The same was however not produced as an exhibit.

8. DW-2 was one Edward Njurai Muthee. He is the Assistant Chief of Rurii Sub-location in Nakuru where the suit land is situated. He testified that in the year 2008, he was in insurance business and not a Chief, and he came to know the deceased first defendant. He became aware of the sale of the suit land to the 2nd defendant through his friends. He stated that the 1st defendant then lived with his daughter, one Lorna, and that after he sold the suit land he moved to another property where he later died. The house is now occupied by a tenant.

9. With the above evidence, the 2nd defendant closed his case and I invited counsel to file written submissions which they duly did. I have considered these in arriving at my decision.

10. In a nutshell, the case of the plaintiff is that her late husband had no mandate to sell the suit land and that in any event, the land was sold when there was a court order in existence, and that the 2nd defendant knew that there was a family dispute about it. I feel prudent to first set out the chronology of the events that are material to this case. I do observe that the 1st defendant became registered as proprietor of the suit land on 26 June 2000, which clearly is after the marriage to the plaintiff, which was in the year 1988. It is apparent therefore, that the suit property was acquired during the subsistence of the marriage between the plaintiff and the deceased 1st defendant. I do note that the sale agreement between the deceased 1st defendant and the 2nd defendant was entered into 12 June 2008. The plaintiff must have gotten wind of this for she did register a restriction on 4 August 2008. On 17 July 2009, the Land Registrar did write to the plaintiff, informing her of intention to remove the restriction. The issue of the lifting of the restriction was heard before the Land Registrar and I do observe from the proceedings that took place, that the 2nd defendant was present and in fact gave evidence that he has already purchased the suit land. Having heard the matter, the District Land Registrar was of opinion that the restriction should be removed. The ruling is dated 23 September 2009. The plaintiff was clearly aggrieved by this turn of events and she filed the Civil Suit No. 1140 of 2009 before the Chief Magistrate's Court. An order of injunction was issued barring the plaintiff's husband from selling, transferring, evicting or demolishing the plaintiff's house or interfering with her quiet possession. It does appear that despite the order of injunction, the 1st defendant still procured a transfer to the 2nd defendant on 2 December 2009.

11. The 2nd defendant has argued that he was not a party to the suit Nakuru CMCC No. 1140 of 2009, and was not aware of the order of injunction. To me that is immaterial. The person who transferred the land to the 2nd defendant was aware of the order of injunction and ought not to have transferred the land given that order. In essence, what the 1st defendant did, was to proceed as if no court has issued any order of injunction, which cannot be permissible. The transfer, having been effected despite of the order of injunction is an illegal transfer which must be nullified. Anything done, in violation of a court order must be regarded as an illegality and cannot be allowed to stand. To order otherwise would be to subjugate court orders and compromise the administration of justice.

12. I have in fact taken the trouble of perusing the proceedings in CMCC No. 1140 of 2009. I have seen that the court held that the 1st defendant was aware of the order of injunction when he transferred the land to the 2nd defendant, and indeed jailed the 1st defendant for a period of 6 months for contempt of court.

13. I have taken note of the submissions of counsel for the plaintiff where she has argued that the 1st defendant ought not to have sold the suit land without the consent of the plaintiff. That is well and good, but I do not see the necessity of going into those arguments. To me, it is enough that the suit land was transferred to the 2nd defendant in violation of a court order of injunction. I have already stated that it is immaterial to me that the 2nd defendant was not a party to that case. If I am to allow the transfer to remain, despite the clear order stopping the same, I will be compromising the administration of justice, and giving leeway to unscrupulous persons to act in violation of court orders.

14. It is mainly for this reason that I am unable to allow the title of the 2nd defendant to remain in force. Since it was a title acquired in violation of a court order the same cannot be said to have been properly acquired and it is subject to nullification. The transfer to the 2nd defendant is a nullity and the title must revert to the position that it was, before the transfer was effected. In other words, parties must be brought back to the position that they were in, as if the transfer to the 2nd defendant never happened since it is a nullity in law. Given the foregoing, I do nullify the transfer of the suit land to the 2nd defendant, and do order that the title do revert to the position that it was before the transfer to the 2nd defendant. It is apparent that title will revert to the name of the deceased 1st defendant and therefore the suit land is going to be subject to administration, following the law of the land, as elaborated in the Law of Succession Act, Cap 160, Laws of Kenya. I am in the circumstances unable to grant the order sought by the plaintiff, that the plaintiff and 1st defendant be jointly registered as proprietors of the suit land.

15. One may ask, what now happens to the 2nd defendant who had paid money to the 1st defendant who is now deceased? I trust that the 2nd

defendant will be appropriately advised, and I would not wish to decide for him what options to take. However, without deciding the issue, since it is not before me, I believe he may have a claim for what he has paid against the estate of the deceased 1st defendant. I would not wish to say more on that issue and would leave it at that.

16. There were orders of damages sought against the 2nd defendant owing to the demolition of the structures on the suit land. My own assessment of the evidence is that it is probable that it is the deceased 1st defendant who undertook the exercise as he had a duty to give possession to the 1st defendant and remove the structures on the suit land. On this aspect of the claim, I opt to give the 2nd defendant benefit of doubt, and would not wish to impose upon him the plaintiff's claim for damages.

17. On costs, it is my view that the problem was caused by the deceased 1st defendant who despite being aware of the court order of injunction, still transferred the land to the 2nd defendant. I would have ordered that he shoulders the costs of this case, but since the case against him has abated, I make no orders as to costs.

18. I now make the following final orders :-

**(i) That it is hereby declared that the title of the 2nd defendant to the land parcel Bahati/Engorusha/184 was acquired in violation of a court order, and was therefore illegally procured, and the same is hereby cancelled.**

**(ii) That it is hereby ordered that the register of the land parcel Bahati/Engorusha/184 do revert to the position that it was before the transfer of the suit land to the 2nd defendant, and be subjected to administration following the Law of Succession Act, Cap 160, Laws of Kenya.**

**(iii) That there will be no orders as to costs.**

19. Judgment accordingly.

**Dated, signed and delivered in open court at Nakuru this 17<sup>TH</sup> day of May 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of: -**

Ms. Muthoni Gathecha holding brief for Ms. Nancy Njoroge for the plaintiff.

No appearance on the part of M/s Maragia Ogaro & Company for the defendants.

Court Assistant: Nelima Janepher.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**