



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Rink v Kabue & 2 others (Civil Suit 471 of 2010)
[2023] KEELC 16656 (KLR) (29 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16656 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 471 OF 2010
M SILA, J
MARCH 29, 2023

BETWEEN

JOCHEN MICHAEL RINK PLAINTIFF

AND

MILKA WANGUI KABUE 1ST DEFENDANT

**YUANITA AOR OPIYO (BEING LEGAL REPRESENTATIVE OF JOSEPH
NDONGA LANYO (DECEASED)) 2ND DEFENDANT**

**THE ATTORNEY GENERAL (SUED ON BEHALF OF REGISTRAR OF TITLES,
MOMBASA) 3RD DEFENDANT**

JUDGMENT

A. Introduction and Pleadings

1. This suit was commenced through a plaint which was filed on 28 September 2010. In the plaint, the plaintiff pleaded to be a German national who came to Kenya sometimes in the year 2001, and in the course of his stay in the country, he purchased two parcels of land located in Mtwapa, Kilifi District, being Subdivision No. 3084 (Original No. 1596/3) registered as CR No. 36441 and Subdivision No. 3086 (Original No. 1569/5) registered as CR No. 36443 (hereinafter referred to as ‘the suit properties’). He avers that he met the 1st defendant at Mtwapa and they became friends. Differences however arose in their friendship and he alleges that the 1st defendant vowed to have him deported from Kenya at all costs. He claims that in November 2006, he was maliciously arrested on a fabricated complaint and charged with the offence of assault in the Magistrate’s Court in Kilifi. He was found guilty and fined and was subsequently deported on 24 April 2017. He has pleaded that during his absence from Kenya, the 1st defendant forged a purported general Power of Attorney dated 15 January 2009 which was fraudulently registered on 16 November 2009 as CR/PA 14697, purporting that the plaintiff has donated a power of attorney to the 1st defendant. It is claimed that using the power of



attorney, the 1st defendant, without the authority of the plaintiff, fraudulently transferred the suit properties to the 2nd defendant. He contends that the transfer was fraudulent, inter alia, as he had never executed a power of attorney in favour of the 1st defendant and that the sale was conducted without the original certificates of title which were at all material times in his possession. He pleaded that the 1st and 2nd defendants have been unlawfully collecting rent from the suit properties and he claimed to be entitled to all rents received.

2. In the suit, the plaintiff seeks the following orders :-
 - a. A declaration that the power of attorney dated 15 January 2009 by which the 1st defendant purported to transfer the suit properties to the 2nd defendant was a forgery and as such is null and void.
 - b. A declaration that the forged Power of Attorney aforesaid was incapable of lawfully enabling the 1st defendant to effect the transfer of the suit properties to the 2nd defendant.
 - c. A declaration that the purported transfer of the suit properties by the 1st defendant to the 2nd defendant was fraudulent, null and void.
 - d. A declaration that the title (if any) held by the 2nd defendant over the suit properties was obtained illegally and as such is null and void.
 - e. An order cancelling the registration of the 2nd defendant as the proprietor of the suit properties.
 - f. An order that the Registrar of Titles, Mombasa do cancel from the Certificates of Title of the suit properties the transfer thereof in favour of the 2nd defendant and thereby reinstate the plaintiff in the said Certificates of Title as the proprietor of the said parcels of land.
 - g. An order for account of rents received by the 1st and 2nd defendants and payment to the plaintiff of the rent found due from the 1st and 2nd defendants.
 - h. A permanent injunction restraining the 1st and 2nd defendants, their servants, employees and/or agents from entering, selling, leasing, collecting rent from, charging or in any other way dealing with the suit properties or otherwise interfering in any manner whatsoever.
 - i. Costs of and incidental to this suit.
 - j. Any other or further relief that this Honourable Court may deem appropriate to award.
3. The 1st defendant did not enter appearance nor participate in this matter in any way.
4. The 2nd defendant filed defence vide which he denied all claims of the plaintiff. He pleaded that he received the original title documents from the 1st defendant, without which, the titles could not have been transferred to him. He pleaded that after purchasing the property he has been collecting rent. He contended to be the legal owner by virtue of the transfer, developments and renovations therein.
5. The 3rd defendant filed defence denying ever partaking in any fraudulent exercise and put the plaintiff to strict proof.



6. Together with the suit was filed an application for orders of injunction against the 2nd defendant. The application was compromised with an order that the rents collected be deposited in a joint interest earning account held by counsel for the plaintiff and 2nd defendant and rent continued being deposited in the said account.
7. In the course of time, the original 2nd defendant, Joseph Ndonga Lanyo, died and was substituted by his wife, Yuanita Aor Opiyo.

B. Evidence of the Parties

8. The plaintiff gave evidence and relied on his witness statement. He is a German citizen. He stated that he came to Kenya in the year 2001 and became a Kenyan resident in the year 2005. In August 2004, he purchased the suit properties and constructed a house thereon. He met the 1st defendant in Mtwapa and they became friends. They differed around the year 2006 and he alleges that the 1st defendant vowed to teach him a lesson and told him that “soon you will be sent home naked.” He claims that the differences with the 1st defendant was the beginning of his problems in Kenya. In November 2006, he was charged with the offence of slapping a boy, which offence he claims he never committed. He was subsequently convicted on 4 April 2007 and fined. On 24 April 2007, he was summoned to appear at the Mombasa Immigration Offices, and on the following day, he was deported from Kenya. He avers that he left behind his properties unattended together with two motor-vehicles, his household items, and personal belongings. His attempts to have the deportation lifted through the German embassy were not successful.
9. In May 2009, he entered Kenya, and while he was in the country, he was informed by the Registrar of Titles that the files relating to his properties are lost. In the company of an advocate, he presented the original titles to the Land Registrar and left copies for the Lands Office. He then put them in a safe in a bank and asserted that the 2nd defendant could not have seen them. He later learnt that in April 2010, when he was absent from Kenya, the 1st defendant forged a general power of attorney, dated 15 January 2009. He avers that he never signed the said power of attorney and was not in Kenya at the time. He has added that the postal address in the power of attorney is also not his address; that the signature is not certified by a notary public; that his passport number is not mentioned; that the place where the alleged power of attorney is granted is not given. In March 2010, using the power of attorney, the 1st defendant transferred the suit properties to Joseph Ndonga Lanyo, the original 2nd defendant. He states that the original 2nd defendant knew or ought to have known that the 1st defendant had no authority to sell the suit properties. He states that he had appointed Feli Properties to manage the properties but the 1st defendant, claiming to be the owner, appointed Jongeto Enterprises who collected rent on the suit properties. He states that on 8 October 2009, the German Embassy in Nairobi, sent Diplomatic Note No. 382/2009 together with certified copies of his title deeds to the Government of Kenya, requesting for investigations about his property in Kenya but the Kenyan Government did not respond.
10. He avers that the fraudulent transfer was executed on or about 18 March 2010, five months after this diplomatic request was submitted. He stated that he got an expert investigate the alleged power of attorney and he had a report confirming that he did not sign it. He also got a surveyor to investigate the deed plans in the title deeds of the 1st and 2nd defendants and the report received is that they are forged. He insisted that he is still the owner of the properties. He stated that he developed the Plot No. 3086 with a two storey building of 2 bedrooms each. When he saw the property it had been developed with a third storey. He never received the money on the sale of the property to the original 2nd defendant.
11. PW-2 was Edward Marenye Kiguru, a licenced land surveyor who has been in practice for over thirty years. He testified that he is the one who carried out the subdivision of the plot No. 1596 in the



year 1995, and produced thirteen sub plots including the two suit properties. He testified that during survey, deed plans are created which were used for acquisition of title. He testified that the deed plans attached to the Certificates of Title held by the 2nd defendant were fake and that the genuine deed plans are those in the Certificate of Titles held by the plaintiffs. He pointed out that the ones in the titles of the 2nd defendant do not bear his name and he did not prepare them. He produced his report as an exhibit.

12. With the above evidence, the plaintiff closed his case.
13. DW-1 was Yuanita Aor Opiyo. She is a businesswoman based in Nairobi. She is widow of the original 2nd defendant. She had a witness statement which she adopted and produced various documents as exhibits. Her evidence was that her husband was shown a power of attorney by the 1st defendant and entered into a sale agreement. Transfer was then effected for the two plots and he obtained the original title deeds. He then took possession and renovated the premises. She was not present when her late husband transacted with the 1st defendant and has never seen the 1st defendant. When the property was sold, the plaintiff was not within the country.
14. DW-2 was Kenneth Maundu Muthoka, who is engaged in the property business. He is the one who sourced for the suit properties for purchase by Mr. Lanyo. He testified that he was introduced to the 1st defendant who was described as wife of the owner. They were given a price of Kshs. 16 million for the properties. Mr. Lanyo paid the 1st defendant. The selling price was Kshs. 11 million. Mr. Lanyo then renovated the premises by adding another floor. He never met the plaintiff. They never asked for his email or phone number and did not reach out to him. He never went to look for the 1st defendant after they started receiving letters from the plaintiff's advocates contesting the sale.
15. With the above evidence, the defendants closed their case.
16. The 3rd defendant did not offer any evidence.

C. Submissions of Counsel

17. I invited counsel to file submissions which they did and I have taken them into account before arriving at my disposition. For the 2nd defendant, Mr. Kabue, learned counsel, urged that the plaintiff did not call a forensic document examiner to prove that he did not sign the power of attorney and pointed to the principle that he who alleges must prove. Counsel also submitted that it was not proved that the plaintiff was outside the country at this time. He did not think that fraud has been proved. Counsel submitted that Mr. Lanyo renovated the premises for a duration of over 7 months and that delay by the plaintiff defeats equity. He added that Mr. Lanyo was a bona fide purchaser for value without notice.
18. For the plaintiff, Mr. Okanga, learned counsel, inter alia submitted that the power of attorney is unattested and it is not known who drew it. He pointed to the evidence of the plaintiff that he was not in the country on the date indicated in the power of attorney. He submitted that the burden shifted to the 2nd defendant to demonstrate that indeed it was signed by him. He submitted that fraud has been proved by exhibition of the original title deeds vis-à-vis the titles held by the 2nd defendant.

D. Analysis and Final Disposition

19. The plaintiff is of German origin and was at some point resident in Kenya where he had some sort of relationship with the 1st defendant. The plaintiff was subsequently deported after the immigration department formed the opinion that he is not a person of suitable character to be hosted in the country. This arose after he was convicted in the Kilifi Magistrates' Court of the offence of assaulting a minor. In his statement, he claims that he never committed the offence and that he was unfairly convicted. Of



course, I do not believe him. If he thought he was truly innocent, the avenue of appeal was there for him. On 25 April 2007, he was deported from the country. In his statement, he complains of illegal deportation, but again I do not believe him, not that it is an issue in this case. Given his conviction, and his previous despicable character, the country had all right to deport him. I only hope that he has learnt his lesson and will adopt to being a better person. But as I have said, all this is not in issue before me. As far as I am concerned, the plaintiff's poor character is neither here nor there for the purposes of this case. Irrespective of what sort of human being he may be he still deserves justice if at all he has been unlawfully deprived of property rightfully belonging to him. Such is the blindness of the justice system in the country.

20. The plaintiff's case is that the 1st defendant forged a power of attorney and used it to purport to transfer title to the suit properties to the original 2nd defendant. I agree with Mr. Kabue that the burden of proof was on the plaintiff to prove that he is not the one who signed that power of attorney. Registered documents are generally considered valid unless proven otherwise. The plaintiff did not provide a document examiner's report to prove that he never gave a power of attorney to the 1st defendant and that the purported power of attorney was not signed by him. He did of course testify that he was not within the country at that time but he never provided his passport to show where he was on 15 January 2009 which is the date indicated in the power of attorney.
21. However, what we cannot run away from is that we have two sets of Certificates of Title here and one could only transfer what was the genuine title. Thus, irrespective of whether or not the power of attorney is proved, so long as it is proven that a forged title was what was used in the transaction, the transfer of the suit property would be fraudulent and null and void. In our case, both plaintiff and the 2nd defendant hold what they deem to be the original title documents. They were produced in court as exhibits. The plaintiff availed PW-2, Mr. Kiguru, who is the land surveyor that did the subdivision which created the two suit properties. He did point out that the genuine title deed is that held by the plaintiff. The defendants did not provide any evidence to rebut this important evidence of the surveyor.
22. The Registration of Titles Act, Cap 281, which is the law under which the titles were prepared, and which is the applicable law in our case, outlined the procedure on transfer at Sections 35 and 36 which provided as follows:-

35.

- (1) If the transfer purports to transfer the whole or part of the land contained in any grant or certificate of title, the transferor shall deliver up the grant or certificate of title of the land, and the registrar shall, when registering the transfer, enter in the register, and endorse on the grant or certificate of title, a memorandum cancelling it, either wholly or partially, according as the transfer purports to transfer the whole or part only of the land contained in the grant or certificate of title. (2) Any wholly cancelled grant or certificate shall be retained by the registrar, and any partially cancelled grant or certificate shall be returned endorsed to the transferor. (3) The registrar shall make out to the transferee a certificate of title to the land mentioned in the transfer, and, whenever required by the proprietor of the untransferred portion, shall make out to the proprietor a certificate of title to that portion. 36. (1) If a transfer purports to transfer the whole of the land mentioned in any grant or



certificate of title, the registrar may, instead of cancelling the grant or certificate as provided by sections 22 and 35, enter in the register and endorse on the grant or certificate a memorandum of the transfer, and deliver the grant or certificate so endorsed to the transferee, and every grant or certificate with that memorandum shall be as effectual for the purpose of evidencing title, and for all other purposes of this Act, as if the grant or old certificate had been cancelled and a new certificate had been issued to the transferee in his own name, and the foregoing process in lieu of cancellation may be repeated upon every transfer of the whole of the land, but when in the opinion of the registrar any grant or certificate cannot for want of space or other cause conveniently bear any further endorsement, he may require cancellation and the issue of a new certificate. (2) Where part only of the land is transferred the registrar shall apportion any rent or other annual payments payable to the Government in respect of the land, and shall enter on the certificate of title issued by him to the transferee and transferor respectively the amounts thenceforward payable in respect of the part transferred and the balance respectively:

- (3) If either party is dissatisfied with the apportionment made by the registrar he may request the registrar in writing to refer the question of apportionment to the court, and the registrar shall thereupon refer it accordingly.

23. It will be seen from the above that the original document of title needed to be presented to the Land Registrar for transfer to be effective. Under Section 35 a new title could issue upon the cancellation of the previous title or, under Section 36, an endorsement in the existing title could be made to confirm the transfer. From my experience, in most cases, Section 36 would be used so that there is only one title which is used even for subsequent transfers and transactions, and going through it, one would see the history of the land.
24. In our case, it is clear as day, that the plaintiff never surrendered his original title deeds so that they can be used to transfer the suit properties to the original 2nd defendant (Mr. Lanyo). It would mean therefore that the plaintiff was not privy to the sale between the 1st and 2nd defendant and it cannot be said that he endorsed such sale. The 1st defendant could not purport to enter into any lawful and legitimate sale agreement on behalf of the plaintiff without having the original title documents. She never had them and it is also as clear as day that what she did was to manufacture some documents to pass them off as the genuine title documents and use them to purport to transfer title to the original 2nd defendant. In reality, there was never any transfer of title for the plaintiff still retained his original certificates of title. It goes without saying that the purported transfer of the titles of the suit properties to Mr. Lanyo was done fraudulently and no title passed to him. Thus, whether or not there was a power of attorney, there was never a proper transfer of title from the plaintiff to Mr. Lanyo.
25. Mr. Kabue did submit that his client was an innocent purchaser for value and is to be protected. As a threshold point, there first needed to be a proper passage of title to Mr. Lanyo even before it can be claimed that he could claim protection as an innocent purchaser. I have already demonstrated above that there was never any transfer of the legitimate title and therefore all that the 2nd defendant holds are mere pieces of paper.



26. Even then, I wouldn't think that the 2nd defendant is protected under the innocent purchaser for value without notice doctrine. Mr. Kabue did refer me to the case of Elizabeth Wambui Githinji & 29 Others vs Kenya Urban Roads Authority & 4 Others where the Ugandan case of Katende vs Haridar & Company Limited (2008) 2EA 173, which elaborated on when one would qualify as an innocent purchaser for value, was cited. In the latter case it was held that :-

“It suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove that :

- a. He holds a certificate of title
- b. He purchased the property in good faith;
- c. He had no knowledge of the fraud;
- d. He purchased for valuable consideration;
- e. The vendors had apparent valid title;
- f. He purchased without notice of any fraud;
- g. He was not party to any fraud.”

27. If I am to follow the above principles, the 2nd defendant does not qualify for protection. First, the 2nd defendant actually holds no valid certificate of title. What he holds are forged documents of title. I am not also persuaded that he could not have had knowledge of the fraud of the 1st defendant with exercise of due diligence. What the 1st defendant held was a purported power of attorney. If one looked at it, he would have found out that it was unattested. That by itself ought to have raised a red flag to any buyer exercising due diligence. Moreover, the purchaser never deemed it fit to contact the original owner of the land. A phone call or email would have revealed to him that he was dealing with a fraudster. The fact that the 1st defendant never entered appearance and could not be availed by the 2nd defendant to testify on her behalf is also very telling by itself. When DW-2 testified, she did affirm that the stamp duty payment particulars have the mobile number of the 1st defendant. She did not know if the 1st defendant was ever contacted by her husband. She did not say that she has tried to contact her in vain. In those circumstances, it is difficult to conclude that the original 2nd defendant was an innocent purchaser for value without notice.

28. I also do not think that the 3rd defendant is not culpable. I think it was within their power to see that a fake title was being used to transfer the suit land to the 2nd defendant.

29. The long and short of it is that I must hold for the plaintiff. I declare that it is the plaintiff who is the rightful proprietor of the suit properties. I further declare that the genuine title documents are those held by the plaintiff and which bear his names. I direct the Land Registrar, Mombasa, to proceed and cancel the entry which purported to pass title to the original 2nd defendant and have it that the current title holder is the plaintiff. There is the issue of the rents accrued and which were deposited. In his pleadings, the plaintiff did ask for these monies. Now that I have held for the plaintiff, the monies herein be released to the plaintiff through his advocate on record.

30. I am sorry for the 2nd defendant but Mr. Lanyo was simply conned by the 1st defendant.



31. The last issue is costs. The plaintiff shall have the costs of this suit jointly and/or severally against the defendants. There was a notice of claim filed by the 3rd defendant against the 1st defendant. The 3rd defendant may pursue any costs that she may pay against the 1st defendant.
32. Judgment accordingly.

DATED AND DELIVERED THIS 29 DAY OF MARCH 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

MOMBASA

