



Munyua v Jam Auto Spares & 2 others (Environment and Land Case Civil Suit 133 of 2017) [2023] KEELC 17798 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17798 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND CASE CIVIL SUIT 133 OF 2017**

EC CHERONO, J

MAY 25, 2023

BETWEEN

KENFREY GITONGA MUNYUA PLAINTIFF

AND

JAM AUTO SPARES 1ST DEFENDANT

NATIONAL BANK OF KENYA 2ND DEFENDANT

DISTRICT LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

1. The plaintiff, the owner of that parcel of land known as Mwea/Tebere/B/2264 and 2265 took out a loan facility with the 2nd defendant in the sum of Kshs 20,000,000/- by charging the said properties. On 12/7/2016, the plaintiff executed an agreement selling off the properties to the 1st defendant on terms that by 30/10/2016, the 1st defendant should have paid a total of Kshs 18,500,000/-. He avers that the 1st defendant failed to perform its obligations as per the agreement and was duly notified vide a letter dated 21/12/2016.
2. Despite failing to pay as required, the 1st defendant fraudulently transferred the parcel to itself and secured a loan of Kshs 10,000,000/- with the 2nd defendant who claims the sum of Kshs 8,810,695/- from the plaintiff which is unsecured. The plaintiff claims that the transfer of the suit property was done fraudulently. As a result, the plaintiff sought the following orders against the defendants;
 - a. A declaration against the defendants that the plaintiff herein is the legal owner of all that piece of land known as Mwea/Tebere/B/2264 and 2265.
 - b. A declaration that the transfer of Mwea/Tebere/B/2264 and 2265 to the 1st defendant is unlawful and fraudulent and order the cancellation of the 1st defendant's title deed.



- c. A permanent injunction to restrain the defendants from entering, building, selling, transferring and or in any way interfering with the plaintiff's lawful use of Mwea/Tebera/B/2264 and 2265.
 - d. Costs of the suit.
 - e. Interest on (d).
3. The 1st defendant filed her statement of defence and averred that she already paid the entire purchase price over the suit parcel of land and distanced itself from allegations of fraud attributed to it. That the plaintiff's loan could not have been left unsecured as the 1st defendant had taken up paying the loan after informing the 2nd defendant that he intended to transfer the suit parcel to the 1st defendant.
 4. The 2nd defendant filed a statement of defence and averred that the 1st defendant, being the registered owner of the parcels was entitled to charge the properties having been introduced to the 2nd defendant by the plaintiff as a willing buyer for the properties after the plaintiff was unable to pay the loan facility advanced timely. The 2nd defendant denied having committed any fraud in the manner in which it charged the properties.
 5. After pre-trial directions, the suit was set down for hearing. During the hearing, the plaintiff testified as PW-1 and stated that pursuant to a sale agreement he entered into with the 1st defendant over the suit properties, the said 1st defendant was expected to have cleared the purchase price by 30/10/2016. Upon failing to clear the purchase price as agreed, he issued a notice on 21/12/2016 informed the 1st defendant that the contract had been frustrated but in blatant disregard of the notice, the 1st defendant proceeded and fraudulently transferred the suit properties to its name and charged it in favour of the 2nd defendant. He denied having been informed of the discharge of the properties or giving his consent for the transfer of the same. He stated that the process was tainted with fraud as the 2nd defendant still demands from him the sum of Kshs 8,810,695/-
 6. PW-2, Mujudi Mwenda, the plaintiff's wife testified that they indeed sold their parcels of land which are the subject of this suit to the 1st defendant through a sale agreement entered into on 12/7/2016. She stated that at the time of executing the said Sale agreement, they also executed the land transfer forms as well as applications for consent. She further stated that it was agreed that the forms would be used within the timelines set in the agreement and if there was breach, the same would be returned.
 7. Since they were in distress, they readily signed the documents. She stated that the 1st defendant failed to pay up the money by the agreed date of 30/10/2016 and that her husband issued a notice of revocation of the Sale agreement. However, the 1st defendant through her officers from the bank and the land registry colluded to fraudulently transfer the suit property.
 8. The 1st defendant, Ciliaka Karimi on her part testified as DW-1 and stated that the plaintiff approached her with a view of purchasing his parcels of land charged to the 2nd defendant. She stated that the plaintiff then informed the bank of his intention and proceeded to execute a sale agreement for the purchase at an aggregate sum of Kshs 18,500,000/- which amount was paid in full to the 2nd defendant.
 9. The witness further stated that subsequently, she took possession of the land after the requisite consents had been obtained and now collects rent from the premises. She also stated that the 2nd defendant advanced them a loan facility to offset the balance of the purchase price and denied any allegations of fraud levelled against her.
 10. The 2nd defendant called Hellen M. Kavinya who testified as DW-1 and stated that the plaintiff was advanced a loan in the sum of kshs 20,000,000/- in the year 2014. Subsequently, he defaulted forcing



the 2nd defendant to issue notices requiring him to clear the arrears. Thereafter, the plaintiff introduced the 1st defendant as willing to take up the loan by purchasing the suit properties. She stated that the said amount was paid in full and the 1st defendant subsequently discharged the properties and charged it in favour of the 2nd defendant upon transfer of the parcel to the 1st defendant. She distanced the bank from any fraud that may have been committed, if any.

11. Upon close of their respective cases, the parties agreed to file their written submissions in further support of their respective positions which have been taken into account.

Analysis and determination.

12. The following facts emerge as uncontroverted and undisputed;
 - a. The plaintiff sold his parcels of land to the 1st defendant.
 - b. At the time of such sale, the properties were charged to the 2nd defendant.
 - c. An agreement for the sale of the properties was entered into on 12/7/2016 on terms that the completion date was 30/10/2016.
 - d. The suit parcels are now registered in favour of the 1st defendant's name and charged to the 2nd defendant.
13. According to the plaintiff, the process of the transfer of the suit parcels to the 1st defendant and the subsequent charge in favour of the 2nd defendant was fraudulent for the reason that the 1st defendant failed to complete the purchase of the land on the completion date.
14. In the circumstances, I find it imperative to interrogate the terms of the sale agreement entered into between the plaintiff and the 1st defendant. Paragraph 2 thereof provides;
 - a. Kenya shillings 1, 700,000/- shall be paid to the vendor on signing hereof. (The same was paid as exhibited by RTGS receipt).
 - b. The sum of Kenya shillings 10,000,000/- shall be paid by the purchaser's financiers National Bank of Kenya limited to clear part of the vendor's outstanding loan balance owed to national bank of Kenya and to enable the transfer to the purchaser.
 - c. The balance of Kenya shillings 6, 800,000/- shall be paid b the purchaser directly into the vendor's bank account held at the national bank of Kenya to clear the outstanding loan balance upon signing the necessary transfer documents to enable the transfer of the said parcels to the purchaser's name which shall be on or before the October 30, 2016.
15. As averred by the plaintiff in his pleadings, the 1st defendant failed to pay as agreed leading to the issuance of a notice of frustration of contract on 21/12/2016 on grounds that the 1st defendant had not paid as agreed and the plaintiff undertook to refund the monies paid by the 1st defendant less 50% as per the agreement. However, there is no mention of the sums already paid as at that time of issuance of the notice aforementioned.
16. The 1st defendant on her part contends that she paid the entire purchase price and the last payment having been made on July 24, 2017 by way of direct credit by the 2nd defendant into the plaintiff's bank account to offset a loan so owed by the plaintiff.



17. A look at the ownership details of the suit property shows that the 1st defendant was registered as the proprietor on 19/4/2017 over both parcels.
18. The issue then that presents itself for determination is whether the issuance of the notice on 21/12/2016 vitiated the agreement and any subsequent transfer of the suit parcel was unlawful. It is not contested that the entire sum was ultimately paid for through a direct credit by the bank in liquidating the loan owed by the plaintiff to the 2nd defendant.
19. It is also apparent that ultimately, a charge over the suit properties was registered on 9/4/2017 after a discharge of the plaintiff's obligations to the bank was registered on 19/4/2017.
20. Upon the discharge of the properties, the 1st and 2nd defendants obtained consent for the transfer and the charge of the suit properties in favour of the 1st and 2nd defendants. The instruments of transfer were duly signed and a spousal consent executed by the plaintiff's wife.
21. In *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others* [2018] eKLR, it was held;

It is settled law, as correctly submitted by the 1st respondent, that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties. Indeed, when a contract is clear and unambiguous, a court's role is to interpret the contract as written and not rewrite it because, just as with any other contract, a contract for the sale of land can only be changed with the agreement of both parties and not unilaterally, and the learned judge's ultimate findings cannot by any stretch of imagination be faulted.

22. In the instant case, the agreement was unequivocal that the purchase price was to be financed by a charge over the properties in favour of the 2nd defendant so that the loan owed by the plaintiff could be offset at source. This fact was well known to the plaintiff and the transactions that followed after the execution of the agreement shows that the plaintiff was aware that the 1st defendant was in the process of taking out the loan and this informed his attendance at the control board for the requisite consents and even executing a discharge of charge. He cannot now turn around and allege that the transfer of the suit parcels were fraudulent.
23. The plaintiff also pleaded fraud in the manner in which the transfer and the charge of the suit properties was conducted. He particularized the instances inter alia as; discharging the property and leaving the plaintiff's loan as unsecured, discharging the suit property without his knowledge and conspiracy between the defendants to defeat his legal rights.
24. As in the preceding paragraphs, it is clear that the sale agreement was entered into at a time the plaintiff was in financial distress and his properties were facing risk of foreclosure by the 1st defendant.
25. PW-2 indeed confirmed that DW-1 offered to bail them out by buying the properties and take over servicing the loan. An agreement was entered into and admitted that they executed the transfer forms and the application for consent at the advocate's office. The evidence however shows that the plaintiff signed the discharge of charge indicating that the process of securing the loan from the 2nd defendant by the 1st was in progress.



26. As the law states, fraud is a serious allegation that must be specifically pleaded and proved. This was as stated in *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR, where it was stated;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

27. As regards the standard of proof where fraud is alleged, it was stated in *Kinyanjui Kamau v George Kamau* [2015] eKLR that:-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 wherein the court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

28. Having gone through the evidence in this matter, I find that the plaintiff’s case is not supported by the evidence on record. I am satisfied that the plaintiff has failed to establish his case on a balance of probabilities and do hereby to dismiss it with costs to the 1st defendant.

29. It is so ordered.

READ, DATED AND DELIVERED VIRTUALLY AT BUNGOMA THIS 25TH DAY OF MAY 2023

HON. E.C CHERONO

ELC JUDGE

In the presence of;

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M/S Kariuki H/B for Okach for the plaintiff

PARAGRAPH 2.

M/S Hamba H/B for Magee for 1st defendant

PARAGRAPH 3.

2nd defendant/Advocate-absent

PARA 4.

M/S Joy C/A

