



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 1141 OF 2000

SAMUEL MBURU WAWERU & STEPHEN KOIGI WAWERU

(suing in their individual capacity and in their capacity as
administrators of the estate of the late

PETER WAWERU MUNGURA.....PLAINTIFF

VERSUS

ECO BANK LIMITED.....1ST DEFENDANT

DOMINIC KIMANI KAMAU.....2ND DEFENDANT

UNCLE SAM'S GITHURAI LIMITED.....3RD DEFENDANT

SAMUEL MUREITHI MURIOKI.....4TH DEFENDANT

BEATRICE KOSGEL.....5TH DEFENDANT

JUDGMENT

Plaintiff's Case

1. The plaintiff herein the lawful beneficiary and Administrators of the Estate of the late Peter Waweru Mungura through an amended further further Amended plaint dated 8th May 2015 sued the 1st, 2nd, 3rd, 4th and 5th defendants herein seeking the following orders:-

- a) A permanent injunction to restrain the 1st Defendant, its agents and/or servants from selling, alienating, interfering or in any way dealing with **LR. No. Ruiru/Kiu/Block 6/233** until the final determination of this suit;
- b) A declaration that the Estate of the deceased Plaintiff is a registered owner of **LR. No.Ruiru/Kiu/Block 6/233**;
- c) A declaration that the purported Charge in favour of the 1st Defendant is illegal, null and void;
 - i) Alternatively and without prejudice to the foregoing; the Estate of the deceased Plaintiff be compensated by the defendants for the value of the said property and the improvements thereon at a sum of Kshs.22, 500,000 plus interest at court rates.
 - ii) General damages for breach of contract by the 2nd, 3rd and 4th Defendants;
 - iii) General damages for professional negligence and/or breach of trust and confidence by the 5th Defendant.
- d) Cost of this suit;

e) Any other or further relief that this Honourable court may deem fit to grant.

2. The plaintiffs contend that the deceased plaintiff is registered proprietor of the parcels of land and the developments therein known as **L.R. Nos. Ruiru/Kiu/Block 5/233** and **Ruiru/Kiu/Block 6/1399** respectively; which two properties were formerly owned by the 2nd defendant Dominic Kimani Kamau, who had charged the same as per donated power of attorney dated 10th August 1996 to the 4th Defendant Samuel Mureithi Muriuki, to borrow money from **ICDC** vide charge dated 6th September 1996 for a sum of Kshs.4, 500,000/-.

3. The charge was made between the **ICDC** as chargee and the 2nd defendant as chargor with the 3rd defendant as the borrower and was executed by the 4th defendant Samuel Mureithi Muriuki, a Director of the 3rd defendant who had power of Attorney donated by the 2nd defendant to borrow money from **ICDC** against the title to the suit plots. The aforesaid charge was supplemental to a debenture of even date issued by the 3rd defendant to **ICDC** to secure the payment of the aforesaid loan.

4. It is contended by the plaintiffs' that in July 1999 and in exercise of chargees statutory power of sale the deceased plaintiff herein bought the said parcels of land by private treaty from the chargee M/s Investment & Commercial Development Corporation with full knowledge of the former owner for a consideration of Kshs.8,000,000, vide sale Agreement dated 8th July 1999 between the plaintiff and the 2nd defendant which was witnessed by the 5th defendant who was the Advocate for both the plaintiff and the 2nd defendant. The purchase price was duly paid as agreed and all the documents were registered, presented for registration at Thika Land Registry by the 5th defendant and two separate title documents issued on 16th July 1999. The plaintiffs contend that they hold the two original documents of Title and none of them has been charged to the 1st defendant or any bank and/or financial institution from the date registration was effected in favour of the plaintiff.

5. Plaintiffs contend that on the 1st defendant's instructions one of his properties being **L.R. No. Ruiru/Kiu/Block 6/233** appeared in the East African Standard Newspaper of 27th June 2000 being advertised for sale by public auction on 12th July 2000 by M/s Valley Auctioneer's, described as owned by the 3rd defendant M/s Uncle Sam's Githurai Limited, a company associated with the 4th defendant. The plaintiff averred it had taken extensive development of the property upon taking possession and avers its value is Kshs.22, 500,000/-.

6. It is in view of the above that the plaintiffs contend the purported charge over the said property in favour of the 1st defendant is illegal, unlawful and null and void and the 1st defendant should be restrained from dealing, disposing, alienating or selling by public auction or in any way interfering with the ownership of **L.R. No. Ruiru/Block 6/233** or in the alternative compensate the plaintiff. It is further averred the 4th defendant was charged in Criminal Case No. 679 of 2004 with count 3 of making documents without authority and uttering a false documents in relation to suit **L.R. No. Ruiru/Kiu/Block 6/233**, which case is still pending determination.

7. The plaintiff avers the 2nd, 3rd and 4th defendants in charging the suit property acted fraudulently and/or made misrepresentation to 1st defendant and has pleaded the particulars of both fraud and misrepresentation and further accuses the 5th defendant of professional negligence and/or breach of trust and confidentially by failing to protect the deceased plaintiff's interest during the aforesaid transaction.

1st Defendant's Case

8. The 1st defendant case is, that at all material times the 3rd Defendant in this matter was an account holder with the 1st defendant, a limited liability company, duly licensed under the Banking Act (Cap 438) of the Laws of Kenya to carry on banking business in the Republic of Kenya. That on 21st May 1998 the 3rd defendant sought a financial facility from the 1st defendant to finance the purchase of a property known as **L.R. No. Ruiru/Kiu/Block 6/233**, herein the suit property.

9. That after following all the procedures the suit property was transferred to the 3rd defendant on the 24th September 1998 and a charge registered in favour of the 1st defendant.

The 2nd defendant's Case

10. The 2nd defendant admits the contents of the plaint save the value of development claimed by the plaintiffs; particulars of fraud misrepresented and negligence. The 2nd defendant content that he passed good title to the plaintiff by signing a transfer dated 14th July 1999 in favour of the plaintiff over **L.R. No. Ruiru/Kiu/Block 6/233**. He contends the transfer was signed after title documents were released by **ICDC** on 12th July 1999. That the original certificate of lease dated 10th April 1999 which was charged to **ICDC** was deposited by the 3rd and 4th defendants in terms of certificate of security verification issued by **ICDC** dated 26/9/1996 and as such the 2nd defendant had no access to the title document till 12th July 1996.

11. The 2nd defendant further contend there was no way another charge and/or further charge could have been created over the suit property without **ICDC** giving consent to create a 2nd charge over the same property in favour of the 1st defendant. That the power of attorney dated 10th August 1996 from the 2nd defendant to 4th defendant was specifically to borrow money from **ICDC** only and not to charge the suit property in favour of the 1st defendant.

12. It is further contended pursuant to the power of Attorney to the 3rd and 4th defendants, they borrowed Kshs.4, 500,000 from **ICDC** against **L.R. No. Ruiru/Kiu/Bock 6/233**. He further contended Sale Agreement dated 21/5/1998 is not signed by directors of Kimdom Co. Ltd, where the 2nd defendant is the principal Shareholder/Director. The 2nd defendant contend that he and the Kimdom Co. Ltd have never sold the suit property to 3rd and 4th defendants for Kshs.10 million or at all nor transferred the same to the 3rd defendant pointing out the said agreement was fake document authorized by 3d and 4th defendants. He further contends certificate of lease dated 1st October 1997 over the

suit property in the name of Kimdom Co. Ltd is a fake document aimed at hoodwinking the 1st defendant to advance a loan to 3rd and 4th defendants. He further contends there are only two directors/shareholders of Kimdom Co. Ltd thus the 2nd defendant and one Martha Njeri Gichia and none of them signed the alleged transfer in favour of the 3rd defendant. The agreement dated 21st May 1998 the 2nd defendant contend is fake as it has never sealed and signed by the directors of Kimdom Co. Ltd and as such the 2nd defendant contend the loan advanced by 1st defendant to 3rd and 4th defendants in sum of Kshs.5,000,000 in 1998 was based on false documents presented by the 3rd and 4th defendants as the genuine documents of the title were in safe custody of ICDC from 1996 to July 1999 when they were released to the plaintiff after the discharging the charge.

13. The 2nd defendant contends that he is the complainant in the Criminal Case No.679 of 2004. The 2nd defendant prays judgment be entered in favour of the plaintiff in terms of prayers Nos. (a), (b), (c) but prayer c (1) and (ii) of the Amended plaint be dismissed with costs.

The 3rd and 4th Defendants' Case

14. The 3rd and 4th defendants filed a joint amended defence dated 18th September 2012. It is contended by 3rd defendant that 4th defendant was not authorized to transact any business on behalf of the 3rd defendant and any such transaction entered into is null and void for want of compliance with the relevant provisions of the **Companies Act (Cap 486) Laws of Kenya** since there was no company resolution sanctioning such alleged transactions. The 3rd and 4th defendants contend the suit property is registered in the name of the 3rd defendant M/s Uncle Sam's Githurai Ltd. The 3rd and 4th defendants aver the original title deed is in custody of the 1st defendant and that the suit property has a valid legal charge in favour of the 1st defendant for sum of Kshs.5,000,000/-. The 3rd and 4th defendants specifically deny the contents of the plaintiff's plaint and praying for the plaintiff's suit to be dismissed.

The 5th Defendant Case

15. The 5th defendant's case is that while in private practice as an Advocate she acted for ICDC after being given instruction on transaction involving **L.R. No. Ruiru/Kiu/Block 6/233**. That the property was sold by Excellent Auctioneers as per notification of sale given to the 5th defendant, by ICDC to Peter W. Mungura at a purchase price of Kshs.8, 000,000. The 5th defendant acted for both the buyer and the seller and proceeded to prepare a sale agreement in respect of the properties, transfer of lease of **L.R. No. Ruiru/Kiu/Block 6/233** from Dominic Kimani Kamau to Peter Waweru Mungura and both parties signed the agreement before the 5th defendant and the 5th defendant attested that signatory. The 5th defendant forwarded the documents for registration on 16/7/1999. The 5th defendant did the same for **Ruiru/Kiu/Block 6/1399**. The two properties had been used as security guaranteeing Uncle Sam's Githurai Limited, in which Dominic Kimani Kamau, 2nd defendant was the guarantor, who had given the two titles to guarantee the 3rd defendant, Uncle Sam's Githurai Ltd.

16. The initial charge was made on 19/6/1996 between Dominic Kimani Kamau, 2nd defendant and ICDC charging the two plots herein above. The two titles were from 1996 in custody of ICDC. The 5th defendant carried out search (*exhibit D1*) on 9/9/1996 and confirmed the property belonged to Dominic Kimani Kamau, on the encumbrance part thus has a charge in favour of ICDC to secure a loan of Kshs.4.5 million. The original titles were in custody of ICDC. The 5th defendant prepared a Discharge of the charge and obtained a discharge of the charge in respect of the two titles. The Discharge was signed by the Bank; the 5th defendant, registered the Discharge of the charge on 4/7/1999. The 5th defendant filed application for transfer of the titles in the name of the purchaser and returned titles to the purchaser Peter Waweru Mungura. She then released the proceeds to ICDC who released the 5th defendant from her undertaking and she gave the balance of the proceeds to Dominic Kimani Kamau, the 2nd defendant.

17. On 27/6/2000 the 5th defendant conducted search on the two plots **Ruiru/Kiu/Block 6/233** and **1399** but search for plot **Ruiru/Kiu/Block 6/233** could not be availed, the file allegedly having gone missing and could not be traced. The 5th defendant contends she tried her best in tracing the file but the same has gone missing.

18. The 5th defendant contends that Peter Waweru Mungura and Dominic Kimani Kamau had an agreement executed before her and witnessed by her in respect of a building or **Plot No.233**. She averred the 4th defendant came before her and signed an agreement as he was running a bar business on **Plot No. Ruiru/Kiu/Block 6/233** and also selling movable.

Analysis and Determination

19. The plaintiff called one witness, whereas the 1st defendant called one witness, the 2nd defendant did not appear during the hearing and could not be traced to give evidence; the 3rd and 4th defendants called one witness and the 5th defendant called one witness.

20. I have very carefully considered the parties pleadings herein, the evidence by the parties, exhibits and annexures in support of parties evidence, counsel submissions and authorities relied upon, and from the aforesaid the issues arising for consideration can be summed up as follows:-

a) **Who is the lawful owner of Land Parcel No. Ruiru/Kiu/Block 6/233?**

b) **What was the relationship between 2nd, 3rd, 4th defendants, ICDC Limited and the plaintiff?**

c) **Whether there is a valid registered charge over L.R. No. Ruiru/Kiu/Block 6/233 and if so in whose favour?**

d) Whether the 5th defendant was professionally neglect in handling the sale transaction between the plaintiff, ICDC Limited, 2nd, 3rd and 4th Defendants?

A. Who is the lawful owner of Land Parcel No. Ruiru/Kiu/Block 6/233?

21. This suit commenced hearing before the later Hon. Justice Onguto, who heard one witness. I took over the matter and proceeded with the hearing from where the matter had reached. **PW1** who had given evidence was cross-examined whereas I proceeded to hear the rest of the witnesses thus **DW1**, **DW2** and **DW3**.

22. The plaintiff's case through his personal representative **PW1** is that the interest in the suit property was acquired through a lawful purchase by him from the 2nd defendant who through his defence admitted the sale of the suit property to the plaintiff through the 5th defendant, who acted in the transaction as an Advocate for both parties. The 5th defendant gave evidence as **DW3** in the matter and averred that while running her own practice as M/s Kosgei & Company Advocates from 1999 – 2004, she acted for **ICDC**, who instructed her over land **L.R. Ruiru/Kiu/Block 6/233**, informing her the property had been paid for by the buyer, with a copy of notification of sale, from M/s Excellent Auctioneers given by **ICDC**. The buyer was given as Peter Waweru Mungura and a purchase price of Kshs.8, 000,000. On behalf of the buyer and seller Dominic Kimani Kamau, the 2nd defendant. **DW3**, prepared a sale agreement in respect of the two plots **Ruiru/Kiu/Block 6/233** and **1399**, which the parties executed. She also prepared a Transfer of Lease from Dominic Kimani Kamau to Peter Waweru Mungura, and both parties executed the document, before her and she attested their signatures. The document was forwarded for registration on 16/7/1999 (*Exhibit P-1*).

23. **DW1** testified that the **ICDC** had been involved in the two properties as they had been used as security to guarantee Uncle Sam Githurai Limited; in which Dominic Kimani Kamau, 2nd defendant, had been a guarantor of the 3rd defendant, Uncle Sam Githurai Limited to get a loan in respect of a charge dated 19/9/1996. The original documents were in custody of **ICDC** as per page 183 of the list of documents of the plaintiff (*Exhibit P-1*), which included certificate of lease. (*See search certificate at page 229 Exhibit P-1*) of 9/6/1996 stating charge in favor of **ICDC** of 9/9/1996 to secure a loan of Kshs.4.5 million. The original document was deposited with **ICDC**. **DW3** obtained the discharge of the charge (*see page 234 exhibits P-1*) duly signed by the Bank and proceeded to register the document (*see page 235 Exhibit P-1*) on 4/7/1999 and proceeded to file the transfer, collected the titles in the name of the plaintiff (*see Plaintiff's supplementary documents filed on 22/7/2000 on pages 1 – 4*). (**MFI-7 and MFI-8**). **DW3** returned the two tiles to Peter Waweru Mungura, released the proceeds to **ICDC** and balance to Dominic Kimani Kamau. **DW3** was thereafter released from her undercharging by **ICDC**. The certificates were issued on 16th July 1999. **DW3** did search on 27/6/2000 but only received search for **Ruiru/Kiu/Block 6/1399** showing proprietor as Peter Waweru Mungura but for **Ruiru/Kiu Block 6/233** the same went missing.

24. During the hearing of the suit the original Title document was produced showing the registered proprietor of the suit property; duly executed sale agreement and transfer of lease were also produced duly attested by **DW3** and signed by the parties thus Peter Waweru Mungura and Dominic Kimani Kamau. Dominic Kimani Kamau though he did not attend hearing in his defence he acknowledged the sale and admitted having sold the property to Peter Waweru Mungura.

25. On the other hand, **DW2** Samuel Mureithi Murioki, who gave evidence on behalf of the 3rd defendant and for himself (*4th defendant*) admitted that both the sale agreement and the transfer, the basis of which they claimed interest over the suit property, were not properly executed and attested before an Advocate. He admitted the sale was not attested by Andrew Gachoka Advocate but someone else, who he had not disclosed. Mr. Andrew Gachoka Advocate, in his evidence in criminal Trial Court in Criminal Case No. 679 of 2004 whose judgment was produced by **DW2**, in his list of supplementary list of documents (*see pages 16 & 17*) denied that he attested the 3rd and 4th defendants documents. The Agreement of sale allegedly executed by Kimdom Company and 4th defendant, that allegedly created the 4th defendant's ownership interest in the suit property was not executed by directors, nor sealed and further was not attested by Mr. Andrew Gachoka Advocate as alleged. It was unsigned as between the parties thereto and as such I find such unsealed and unattested document to be null and void and incapable of confirming any interest to 3rd and 4th defendants. Further I find in the 2nd defendant's pleadings, by the former proprietor, he recognizes the plaintiff's interest and denied any of the 3rd and 4th defendants. The transaction having been denied by the plaintiffs, 2nd defendant, and in view of the incomplete documents or properly attested and witnessed, I find the 4th defendant's interest over the suit property to be tainted in fraud, and as such I find and hold there is no instrument that could have possibly conferred any interest in law to 3rd and 4th defendants at all.

26. It is of great concern to note the 4th defendant opted not to produce any original document in support of his claim urging the original documents were with bank, which did not produce any through **DW2** either. **DW3** in her evidence alluded to the fact that on 27/6/2000 when she carried search at Thika Land Registry on **Ruiru/Kiu/Block 6/233** the relevant file went missing. The 3rd and 4th defendants on their part produced green card and certificate of official search to buttress their ownership. This therefore reveal that there may be two 2 files in relation to one property. The plaintiff produced the original title document which was neither denied nor challenged by the defendants. The 1st defendant who allegedly holds a charge over the said property and the 4th defendant did not opt to produce the original title. The plaintiff produced a copy of an official search that showed the 2nd defendant as opposed to the 4th defendant was the former proprietor of the suit property, who sold the property to offset the debt by **ICDC** in which the 4th defendant was a principal borrower (*see page 241 of exhibit P-1*). The 3rd and 4th defendants admitted the existence of debt to **ICDC** but without any support or elaboration claimed the same was paid off (*see pages 202 to 211 exhibit P-11*). Further the defendants have not given an explanation on how the property could be transferred while the original title was with **ICDC** without discharge of the charge. I find the 3rd and 4th defendants are not truthful in their alleged dealings with the suit property. I however believe the evidence of **PW1** and **DW3**; I find their version of evidence to be truthful and I believe them. I am satisfied the lawful owner of the Land Parcel **No. Ruiru/Kiu/Block 6/233** to be the plaintiff.

B. What was the relationship between 2nd, 3rd, 4th defendants, ICDC Limited and the plaintiff?

27. The relationship between the above-named parties can be found from the evidence of **PW1**, **DW2** and **DW3**. From the pleadings of the

2nd defendant as the former registered proprietor of the suit property, he charged the same with ICDC to secure a loan as a guarantor of the 4th Defendant, who was the principal debtor/borrower with the 3rd defendant as a director. The plaintiff came into this matter when ICDC threatened to auction off the suit property, that belonged to the 2nd defendant, however, he agreed to sell the same to the plaintiff. The 5th defendant on instruction of ICDC prepared all requisite instruments and ensured the suit property was transferred to the plaintiff when the debt procured by the 4th defendant against ICDC was liquidated. I therefore find that there existed a valid and binding contractual relationship between the plaintiff, the 2nd, 3rd and 4th defendants with the 5th defendant instructed and tasked to ensure transfer of valid title is issued to the plaintiff herein. I find no other legal relationship between all the parties other than ensuring the ICDC as chargee and 2nd defendant as chargor fulfilled their contractual agreement, which led to the plaintiff procuring the property following a private treaty with the 2nd defendant and 5th defendant discharging her clients instruction as an Advocate leading to transfer of the suit property into plaintiff's name.

C. Whether there is a valid registered charge over L.R. No. Ruiru/Kiu/Block 6/233 and if so in whose favour?

28. In the suit, the 1st and 4th defendants contend that there is no evidence that there was a loan facility taken by the 4th defendant from ICDC guaranteed by the 2nd defendant. DW2 averred that the only existing facility that he is aware of is that from the 1st defendant. DW2 testified at the time of the loan, the property belonged to Kimdom Company Ltd but that the 1st defendant did not meet the director of the company. He referred to the agreement relied upon dated 21/5/1998. He did not produce the original agreement as he did not have it; and averred it had been witnessed by Mr. Andrew Gachoka and that it was not signed by the 3rd defendant nor was the document signed by the Kimdom Company Ltd. DW1 states the document by Uncle Sam Githurai Company; required to be signed by two directors but was executed by one director and had no company seal.

29. On cross-examination DW1 averred that no director signed for the two companies and none had company seal and that the agreement does not disclose who drew the same. DW1 testified the lease transfer was denied by the vendor and the Advocate. He also admitted Gachoka Advocate was not involved. DW2 testified he was not involved with the plaintiff in any transaction. He testified he was a director of the 3rd defendant. He claimed in 1998 one director could sign for the other but said he does not have the resolution to that effect. He claimed the agreement was sealed but stated he does not have the original agreement. DW2 claimed the agreement between Kimdom Company Ltd and 3rd defendant company was drawn by Gachoka & Company Advocate and was witnessed by an advocate in his presence. On being shown a copy he agreed signature do not appear nor seal. He stated the bank should produce the original document. DW2 admitted Gachoka Advocate in the criminal proceedings denied attesting the agreement. DW2 on further cross-examination changed his version and stated the agreement was signed by another Advocate whose name he could not give, who he did not see sign and confirmed he did not sign before such an Advocate. He stated PW4 in Criminal Case said the agreement was attested by a client. DW2 testified the agreement he was talking of is not in the court file. DW2 further confirmed the company resolution of the 3rd defendant do not allow one director to sign a charge. He further admitted the charge was not attested by an advocate before whom he signed. DW2 further stated on transfer document it was executed by one director but it was not attested by Mr. Andrew Gachoka Advocate. DW2 admitted that he got some money from ICDC after plaintiff gave him power of Attorney but before 1994.

30. From the above, I find that there is undeniable evidence that sale Agreement and transfer that purported gave proprietary interest in the suit property to the 3rd and 4th defendants was not properly executed, sealed, signed and attested as required by law and as such any purported interest resultant thereto from the said transaction was and is incapable of confirming any interest in law. The acts of the 3rd and 4th defendants as well as the 1st defendant went contrary to the provision of Companies Act (Cap 486) (Repealed) vide Part II thereof, that provides for the regulations that govern a Private Company Limited by Shares through the REGULATIONS FOR THE MANAGEMENT OF A PRIVATE COMPANY LIMITED BY SHARES in regulation 113 of Part I of which Part II is subject to, provides "*verbatim*"

“The directors shall provide for the safe custody of the seal, which shall only be used by the authority of the directors or of a committee of the directors authorized by the directors in that behalf, and every instrument to which the seal shall be affixed shall be signed by a director and shall be countersigned by the secretary or by a second director or by some other person appointed by the directors for the purpose”

31. I therefore note the various undenied non-compliance with the provisions of the Companies Act as regards documents of sale, and transfer from Kimdom Company Ltd as averred by the 3rd and 4th defendants were not properly sealed, signed and attested, and confirm that any purported charge that is registered placing reliance on documents which have not been properly sealed, attested and/or executed thereby remain irregular, and are incapable of confirming the interest it sought to create. In view of all the above and all irregularities which go to the root of the whole transaction, I find the charge herein ostensibly registered by 1st defendant to be null and void. I find that there is no valid registered charge in favour of the 1st defendant over L.R. No. Ruiru/Kiu/Block/6 /233.

D. Whether the 5th defendant was professionally neglect in handling the sale transaction between the plaintiff, ICDC Limited, 2nd, 3rd and 4th Defendants?

32. By a charge dated 6/9/1996 ICDC entered into a transaction with the 2nd defendant, Dominic Kimani Kamau, charging the property Ruiru/Kiu/Block 6/233 and 1399 at Kshs.4, 500,000. The charge was supplementary to a debenture by ICDC over assets of 3rd defendant for lending and advancing to 3rd defendant Kshs.4, 500,000 pursuant to the resolution of the directors of the 3rd defendant company dated 8/8/1996 (*see page 202 and 187 from the copy of the charge and Debenture in exhibit P-1*). The titles that were charged were Ruiru/Kiu/Block 6/233 and 1399 belonging to the 2nd defendant.

33. The Debenture was signed by the 4th defendant and Karen Wanjiku Thumbi being the directors of 3rd defendant (*see page 201 exhibits P-1*).

34. On 30th November 1998 the chargor had failed to repay the loan advanced and notification of sale by Excellent Auctioneers was issued for the sale of **Ruiru/Kiu/Block 6/233** and **1399** (see page 212 Exhibit P-1). **ICDC** allowed the 2nd defendant to find a buyer and through a letter dated 13/7/1999, Khirrecu agencies wrote to M/s Kosgei & Company Advocate instructing the firm to prepare a sale agreement between Peter Waweru Mungura the plaintiff (deceased), and Dominic Kimani Kamau, the 2nd defendant as M/s Kosgei & Co. Advocates were acting for **ICDC**. All parties agreed to use one Advocate namely M/s Kosgei & Co. Advocates.

35. The sale agreement was prepared in July 1999 between the plaintiff and 2nd defendant over the two properties at purchase price of Kshs.8, 000,000. Kshs.6, 000,000 was paid as a deposit with the firm of the Advocate pending transaction in July 1999; purchaser took possession on 12th July 1999. The **ICDC** forwarded the original documents to Kosgei & Co. Advocates including discharge of the charge upon the advocate professional undertaking to hold them to **ICDC's** orders returnable on demand until payment of Kshs.5,854,382/-.

36. **DW3** testified that she carried out the transfer and duly registered the discharge of the charge (see page 234 of exhibit P-1) and collected fresh titles issued to Peter Waweru Mungura, and issued the title to the new owner on 12th July 1999, however sometimes in 2000, when it came to his knowledge his plot **No.Ruiru/Kiu/Block 6/233** was on a charge by the 3rd defendant from the 1st defendant search was carried by **DW3** but the search could not be produced as Lands Registry file was missing.

37. When 4th defendant was applying for loan of Kshs.4.5 million from **ICDC** he filled all necessary forms together with his pictures (see page 313 exhibits P-1). Kshs.4.5 million was duly released to Uncle Sam's Guthurai Limited through Standard Chartered Bank Limited, Ruaraka, on 4th October 1996 through Account No.010205238610. M/s Kosgei & Co. Advocates through a letter dated 20/7/1999 forwarded the sum of Kshs.5,854,382/- to **ICDC** being balance of the loan, which **ICDC** acknowledged through a letter dated 30/7/1999 (see page 233), hence the firm of Advocates were duly released from their professional undertaking (see page 232 exhibit P-1).

38. The plaintiffs have in their plaint given particulars of the professional negligence and/or breach of trust and confidentiality by the 5th defendant but **PW1** from his evidence failed to demonstrate that the 5th defendant was professionally negligent and was in breach of trust and confidentiality entrusted on her. From their submissions the plaintiff contend that there was fraud on part of the 2nd, 3rd and 4th defendants as per evidence of **PW1** and 5th defendant and point out that from the evidence on record the 3rd and 4th defendants are tainted with fraud.

39. From the evidence, the agreement dated 4th July 1999 purportedly made between the plaintiff and the 4th defendant; it refers to the plaintiff as the owner. The 5th defendant who attested to the same, averred the agreement was for sale of furniture and fixtures within the precincts of then existing bar. The agreement was signed by both parties. I have further considered the evidence on particulars of fraud and/or misrepresentation by 2nd, 3rd and 4th Respondents and I am satisfied that **PW1** and **DW3** called sufficient evidence in proof of the particulars of the fraud and representation against 3rd and 4th defendants. The purported charge of the property when it had already been charged with **ICDC** and not discharged was proved. There was no proof of consent from chargee **ICDC** before the alleged charge to the 1st defendant. No proof of existence of charge with 1st defendant before charge with **ICDC** have been made. The 3rd and 4th defendants did not prove they had valid title with which they could obtain a loan. The plaintiff proved the 3rd and 4th defendants conspired to execute a fraudulent transfer of the deceased plaintiff property.

40. From the evidence on record especially by **PW1**, **DW1**, and **DW3**, I find that this is a case of fraud orchestrated by 4th defendant the director of the 3rd defendant. I do not find evidence connecting the 1st defendant and 5th defendant with the fraud, but do sympathize with the 1st defendant who appears to be the main loser. The forging of documents, the creation of documents and error; the disappearance of the files from the lands office at Thika Lands Registry was clearly planned and/or designed and created by the 4th defendant with others. He acted with intention to defraud the plaintiff and the 1st defendant and he should not be allowed to benefit from his unlawful acts as evidenced herein. The production of the alleged green card, is indeed, an act of furtherance of his crime for the alleged Green card had the following unanswered issues around it:

i) Where is the original?

ii) The first entry on the said card must, as matter of course be, from the date the lease commences, in this case 1st August 1982;

iii) The first entry on the card reads 22nd February 1991.

41. I find in spite of the 5th defendant, who gave evidence as **DW3**, having acted diligently and doing everything necessary to ensure, that the requirement of law was met in transferring the property to the plaintiff, she was not able due to fraudulent acts met by 3rd and 4th defendants. I have found no evidence of negligence in respect of any step she walked in carrying out her instructions. She should not have been enjoined as a defendant but she should however have been brought in this suit as a key witness. **PW1** in this case termed 5th defendant work as a good job. The plaintiff in this suit did not call evidence demonstrating that the 5th defendant in exercise of her duties failed to act diligently and failed to follow the process followed ordinarily by ordinary advocates in processing the process of transfer. The extent of duty of care owed to a client is honestly and diligently the one that requires the care and skill that would be used at the time of the process by other competent person in the same profession or calling in discharging similar process. I find from the evidence on the record she ensured the original documents for both properties were available from the **ICDC** and Discharge of the charge. Prior to the discharge of the properties she ensured that a search was available, which showed the properties were registered in the name of the 2nd defendant. She had thereafter had documents transferred, and registered in the name of the plaintiff; paid stamp duty and obtained certificate of lease in the name of the plaintiff; she throughout the process conducted search but one of the file could not be located. The 5th defendant ensured the plaintiff took possession of both properties. The plaintiff however has the original title. The other plot **Ruiru/Kiu/Block 6/1399** has no issue. In view of the above I am satisfied the claim against the 5th defendant cannot stand.

42. The upshot is that the plaintiff's claim is meritorious. I proceed to enter judgment in favour of the plaintiff as follows:-

- a) A permanent injunction be and is HEREBY issued restraining the 1st Defendant, its agents and/or servants from selling, alienating, interfering or in any way dealing with LR. No. Ruiru/Kiu/Block 6/233;
- b) A declaration be and is HEREBY issued that the Estate of the deceased Plaintiff is the registered owner of LR. No.Ruiru/Kiu/Block 6/233;
- c) A declaration be and is HEREBY issued that the purported Charge in favour of the 1st Defendant is illegal, null and void;
- d) Alternatively and without prejudice to the foregoing; the Estate of the deceased Plaintiff is at liberty in lieu of enforcing prayers (a) and (b) above to be compensate by the 3rd and 4th defendants for value of the said property and improvement thereon at a sum of Kshs.22, 500,000 plus interest or in default of agreement on the value to have the valuation carried out within 60 days by a valuer agreed upon by the parties.
- d) General damages for breach of contract by the 2nd, 3rd and 4th Defendants. No damage proved. Awarded nil;
- e) Nil damages for professional negligence and/or breach of trust and confidence by the 5th Defendant;
- f) The plaintiff is awarded costs of the suit against 3rd and 4th defendants;
- g) 5th defendant is awarded costs to be borne by the 3rd and 4th defendants;
- h) 1st defendant is awarded costs to be borne by the 3rd and 4th defendants.

Dated, signed and delivered at Nairobi this 31st day of July, 2019.

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J .A. MAKAU

JUDGE