



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 1704 OF 2002**

**JAMES BONIFACE KIRAGU MAINA.....PLAINTIFF**

**VERSUS**

**JAMES WAMBUA KYULE ALIAS JAMES NGANDA MWANZIA .....1<sup>ST</sup> DEFENDANT**

**MUITA & CO. LTD.....2<sup>ND</sup> DEFENDANT**

**STEPHEN K. KARANJA.....3<sup>RD</sup> DEFENDANT**

**KHAMATI MINISHI & CO. ADVOCATES.....4<sup>TH</sup> DEFENDANT**

**NGANGA NJAU & CO. ADVOCATES.....5<sup>TH</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION.....6<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL.....7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

The dispute herein is centred on a piece of land known as Kiambu Municipality Block 111/96 which the plaintiff was interested in purchasing, and actually paid a sum of Kshs. 1,700,000/= to the alleged owner one James Nganda Mwanzia as the agreed purchase price. The said James Nganda Mwanzia was introduced to the plaintiff by the 3<sup>rd</sup> defendant Stephen K. Karanja who then posed as the Sales Manager of the 2<sup>nd</sup> defendant, Muita & Co. Limited. To facilitate this transaction, the plaintiff was represented by Arthur Igeria Advocate, while the seller was represented by the 4<sup>th</sup> defendant, Khamati Minishi & Co. Advocates. The ownership documents initially presented to the plaintiff were in the name of James Nganda Mwanzia, and a search at the land registry confirmed that position.

The plaintiff first paid a sum of Kshs. 950,000/= and subsequently charged the suit property to Housing Finance Company of Kenya for the balance of Kshs. 750,000/= to make a total of Kshs. 1,700,000/=/. Upon full payment of the purchase price, the plaintiff took possession.

This did not last long, as a person identifying himself as the owner of the property by the name Dr. James Mwanzia confronted a relative of the plaintiff who was working on the property. It then transpired that the person who initially was introduced to the plaintiff by the 3<sup>rd</sup> defendant as the owner of the property, was not actually the owner but an impersonator by the name James Wambua Kyule.

This impersonator was subsequently arrested and charged with criminal offences of forgery and obtaining money by false pretences, and upon conviction jailed.

The plaintiff then filed this suit on 12<sup>th</sup> November, 2002 claiming the sum paid as purchase price of the property, professional fees paid for the transaction, interest paid to the banks and legal fees making a total of Kshs. 2,172,991.45 against 7 defendants named therein. This plaint was subsequently amended on 27<sup>th</sup> July, 2014 and filed on 4<sup>th</sup> April, 2014 to include among other things the name of the sixth defendant, National Land Commission in place of the Commissioner of Lands and also a claim for the market value of the suit property at the time of filing the plaint. The defendants filed their respective defences which are on record.

After full compliance with the pre-trial procedures this suit was listed for hearing. At the commencement of the trial, the plaintiff withdrew his case against the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants and proceeded against the 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants.

The plaintiff testified in support of his pleadings and called one other witness, while the Managing Director of the 2<sup>nd</sup> defendant testified in its defence followed by the 3<sup>rd</sup> defendant. The 6<sup>th</sup> and 7<sup>th</sup> defendants did not call any evidence. The plaintiff filed submissions after the close of the trial and so did the 2<sup>nd</sup> defendant. The 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants did not file any submissions.

It is my duty to consider the pleadings, evidence adduced and the submissions filed, with a view to determining the salient issues that are outstanding in this dispute. It is not necessary to set out the evidence in detail that has come out in the course of the trial. It is enough to state that whatever was offered to the plaintiff by the 3<sup>rd</sup> defendant on behalf of the alleged owner of the property turned out to be false. This is because the true owner of the property James Nganda Mwanzia established his ownership thereof in the criminal trial against one James Wambua Kyule. The title documents that were presented to the plaintiff by the 3<sup>rd</sup> defendant also turned out to be fake.

There is no dispute that the plaintiff has established that he paid the sum claimed for the purchase of the property, alongside incidental costs claimed in the plaint. The 2<sup>nd</sup> defendant has denied any role in the said transactions and emphatically denied that the 3<sup>rd</sup> defendant was its employee or agent in the whole transaction. If anything, the 3<sup>rd</sup> defendant and the Managing Director of the 2<sup>nd</sup> defendant, one Evans Mukunga Mwita stated that his relationship with the 3<sup>rd</sup> defendant is that they are good friends and come from the same village. Both of them also sell properties. He did not know the plaintiff, and did not deal with him neither has he ever seen him. He knew nothing about this claim.

On the other hand, the 3<sup>rd</sup> defendant said he knew the plaintiff who approached him wanting to acquire property in Runda. He did an advertisement on his behalf as a result which one James Nganda Mwanzia called to say he had a property in Runda for sale. This property was shown to the 3<sup>rd</sup> defendant who then called the plaintiff to view the property. After negotiations with alleged owner purchase price was agreed.

It was his evidence that thereafter he lost contact with the plaintiff but it was his evidence that, he did due diligence and did not conspire with the 1<sup>st</sup> defendant to defraud the plaintiff.

The 3<sup>rd</sup> defendant gave the plaintiff a card showing that he was the Sales Manager of the 2<sup>nd</sup> defendant. This has been denied very emphatically by the 2<sup>nd</sup> defendant insisting that he had no relationship whatsoever with the 3<sup>rd</sup> defendant. There is no reason why the 3<sup>rd</sup> defendant, who also said run a business of selling property, could not use his own name or company to transact this particular business with the plaintiff.

A party is bound by his pleadings. Starting with the 2<sup>nd</sup> defendant, the statement of defence at paragraph 12 stated as follows,

**“12 In response to paragraph 15 of the amended plaint, the 2<sup>nd</sup> defendant admits that it had a duty of care to the plaintiff. The 2<sup>nd</sup> defendant however did everything within its scope to ensure that its duty of care to the plaintiff was fulfilled.”**

At paragraph 15 of the same statement of defence the 2<sup>nd</sup> defendant stated as follows,

**“The 2<sup>nd</sup> defendant fulfilled its duty of care to the plaintiff and was also a victim of fraudulent misrepresentation perpetrated by the 1<sup>st</sup> defendant and as such denies all liability to the plaintiff in regard to compensation, general and exemplary damages.”**

The Managing Director of the 2<sup>nd</sup> defendant provided a further witness statement dated 18<sup>th</sup> December, 2015 in which he denied that the 3<sup>rd</sup> defendant was an employee of the 2<sup>nd</sup> defendant company. He also stated in the same statement that the plaintiff failed to provide any document showing he had instructed the 2<sup>nd</sup> defendant to procure the suit property. Further he stated the following,

**“ I wish to categorically state that the 2<sup>nd</sup> defendant was not a party to this suit as the 3<sup>rd</sup> defendant was not an employee of the 2<sup>nd</sup> defendant company at all times material to this suit as alleged by the plaintiff.”**

In determining whether this entire transaction was clouded by fraud and or mis-representation, one must start from the fact that in the end of it all, the documents that were used by the alleged owner who turned out to be the impersonator by the name James Wambua Kyule were fraudulent. That is why there was a criminal prosecution, and despite the plaintiff holding what he believed to be a genuine title, and which he had charged to obtain a facility from a financial institution, all that turned to be based on fraudulent documents.

The issuance of title documents is the preserve of the government represented in these proceedings by the 6<sup>th</sup> and 7<sup>th</sup> defendants. That duty cannot be delegated neither can it be blamed on any other parties. If there is any deficiency in title, then the first office to be questioned is the 6<sup>th</sup> defendant in this case. The 6<sup>th</sup> and 7<sup>th</sup> defendant knew or ought to have known that there was likelihood of false documents being peddled around as genuine in ownership of properties. That a search by Mr. Igeria Advocate confirmed the ownership of the said land in the name of a person who turned out to be an impositor, shows how vulnerable that office is.

Among the plaintiff's list of documents is a report in the Daily Nation Newspaper of September 30, 2002 with a title **“Land con men on the prowl , says ministry.”** Part of that report reads as follows,

**“ Meanwhile, Kiambu District Lands Officer Hillary Osodo has cautioned land buyers to check the authenticity of documents with his office before sealing any deal.**

**‘There are many transactions being carried out using forged documents. Land buyers should check with us before concluding any transaction’ Mr. Osodo told journalist in his office on Friday.’**

**He was reacting to complains by people who have lost their money to commen.....**

**A case is pending in court involving a man in Kiambu alleged to have sold land belonging to a former Director of Medical Services Dr. James Mwanzia for Kshs. 1.7 Million.**

**Mr. Osodo said many more cases of land documents were pending in court.”**

It is instructive that the suit property herein had its title originating from Kiambu Land registry, and in fact the Land Registrar had specifically referred to this particular case.

The plaintiff’s case against the 6<sup>th</sup> and 7<sup>th</sup> defendants is captured in paragraph 12 of the amended plaint to the effect that the District Land Registrar Kiambu, as the servant or agent of the 6<sup>th</sup> defendant represented to him, that is the plaintiff, that the title documents issued to the 1<sup>st</sup> defendant were genuine. Following that belief, the said Registrar proceeded to issue a fake transfer in favour of the plaintiff. As if that was not enough, a charge in favour of Housing Finance Company of Kenya was registered against the same title which was not genuine.

It was therefore the plaintiff’s case that, the issuance of certificate of lease in his favour and the registration of the charge ratified all the wrongful acts of the defendants. Due diligence on the part of the Land Registrar should have detected that the records at his registry had been interfered with.

The 6<sup>th</sup> and 7<sup>th</sup> defendants denied liability in the statement of defence and stated they owed the plaintiff no duty of care. Considering the special position they occupy in relation to issuance of titles and custody of all official records, such denial cannot find favour in the administration of justice.

It is instructive to note that the 6<sup>th</sup> and 7<sup>th</sup> defendants did not call any evidence to support of their statement of defence. A pleading is a statement of fact which must be supported by evidence. In the absence of any evidence such a statement remains a hollow platitude without any value. Indeed, the courts have had occasion to pronounce themselves on this issue. See- **CMC Aviation Ltd vs Cruisair Ltd ( 1976-80) 1 KLR 835, Shaneebal Limited vs County Government of Machakos (2018) e KLR**

There is no way the 6<sup>th</sup> and 7<sup>th</sup> defendants can escape liability to the plaintiff in view of the evidence on record and attendant circumstances. I so find.

On the other hand, the representations by the 3<sup>rd</sup> defendant to the plaintiff in relation to the said documents which turned out to be fake lacked due diligence by any standards. The 3<sup>rd</sup> defendant took it upon himself to source, advertise and facilitate the transfer of the land from the alleged seller to the plaintiff. He cannot extricate himself from that web.

The connection of the 3<sup>rd</sup> defendant to the 2<sup>nd</sup> defendant is obvious by his own action of pledging the 2<sup>nd</sup> defendant as his employer, who issued him with a business card showing he was the Sales Manager of the 2<sup>nd</sup> defendant. Although the 2<sup>nd</sup> defendant has denied him, the defence filed on behalf of the 2<sup>nd</sup> defendant and the statement of the Managing Director does not absolve him. The fact that the advocate hired by the plaintiff conducted a search on his behalf did not absolve the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from the duty of care.

Having considered the evidence presented the following conclusions are irresistible. The 3<sup>rd</sup> defendant acted with express and or implied authority of the 2<sup>nd</sup> defendant in this transaction. Their respective denials cannot withstand the weight of the plaintiff’s evidence and attendant circumstances. There is clearly more than meets the eye. The two are therefore liable as agents for the plaintiff.

Even if all the money paid by the plaintiff was received by the then advocate for the alleged owner, all the financial losses visited upon the plaintiff could not have been incurred had it not been for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants setting the ball into action. Liability in this case is wider than the mere receipt of the money paid. It matters not that the plaintiff dropped his case against the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. The evidence adduced clearly implicates the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

The 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants owed the plaintiff a duty of care. The denial in that regard by the defendants, again cannot withstand the evidence adduced in this case. The plaintiff, in my judgment has discharged the duty imposed upon him by law to establish his claim against the cited defendants on a balance of probability to deserve judgment in his favour the sum of Kshs. 2,172,991.45.

I pointed out earlier that in the amended plaint the plaintiff sought full compensation in terms of the market value of the suit property. Whereas such a claim may find favour in the circumstances of this case, it should be noted that the dominant document in this case is the agreement for sale dated 15<sup>th</sup> January, 2001 executed by the alleged James Nganda Mwanzia and the plaintiff herein.

The cause of action herein is a failure of the said transaction in favour of the plaintiff due to misrepresentation and possibly fraud to the detriment of the plaintiff. Had the true owner of the suit property been a party to this transaction and breached the terms thereof, the plaintiff would have had some ground to base his claim as set out in the amended plaint. This of course would be subject to the laws of limitation.

The agreement signed by the impersonator being a contract, any breach thereunder could only have been acted upon within six years from

the date of the said breach. The amended plaint was filed in April 2014 a period of about 13 years from the date of said agreement. This issue was not raised by counsel but it is my duty to raise it in these proceedings. I am unable, despite evidence of the appreciated value of the suit property, to find in favour of the plaintiff.

I believe however, that he shall be adequately compensated by an award of interest for the amount of money that I have found due and owing to him by the 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants.

The totality of the evidence adduced herein has established that the plaintiff is entitled to the money he lost in this transaction. This was a claim in special damages which must be specifically pleaded and strictly proved. The plaintiff achieved that threshold.

Accordingly there shall be judgment in favour of the plaintiff in the sum of Kshs. 2,172,991.45, against 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants jointly and severally. The plaintiff shall have the costs of the suit plus interest at court rates from the date of the filing of this suit.

**Dated, signed and delivered at Nairobi this 26<sup>th</sup> Day of September, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**