



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 8 OF 2011

JAMES NJOROGE KAMAU.....1ST PLAINTIFF

MILKAH NYAMBURA 2ND PLAINTIFF

VERSUS

FRANCIS NJUGUNA.....1ST DEFENDANT

MOLYN CREDIT LIMITED.....2ND DEFENDANT

JUDGEMENT

1. When considering an Application for Injunction herein Kimondo J. on 19th January 2012 observed:-

“I have heard the rival arguments. I am of the following considered opinion. From the particulars of the title deed of the property known as Kabete/Karura/2443, the sole proprietor is James Njoroge Kamau ID [particulars withheld]. That is the 1st Plaintiff. The 2nd Plaintiff, who is his Wife does not appear in the property section of the title. Although it is alleged at paragraph 5 of the Plaint that the 1st Plaintiff held the suit property in trust for himself, his family and the 2nd Plaintiff, that is not borne out by the title. I would in those circumstances find that the 2nd Plaintiff for want of proprietary rights has no capacity to injunct the Defendants in dealing with the suit”.

2. The subject matter of this suit is Kabete/Karura/2442 (the suit land). At all times material to the matters herein, the 1st Plaintiff was the registered proprietor of that land. The 2nd Plaintiff was the wife of the 1st Plaintiff. In the Plaint presented to Court it was also averred that the 1st Plaintiff held the suit property in trust both for himself and for his family, including the 2nd Plaintiff.

3. On or about 11th July 2009, the 2nd Defendant advanced a loan to the 1st Plaintiff pursuant to an agreement of the same date. One of the terms of the Agreement was that the 2nd Defendant would take a charge over the suit land as security therefor.

4. The claim by the Plaintiffs is that the 2nd Defendant in collusion with the 1st Defendant irregularly, fraudulently and/or unlawfully transferred the suit land to the 1st Defendant. Particulars of fraud, collusion and irregularity by both the 1st Defendant and the 2nd Defendant are set out separately in the Plaint.

5. In a Defence dated 11th April 2011 and filed on 14th April 2011 the 1st Defendant resisted the Plaintiffs' entire claim. One defence is of particular interest. The 1st Defendant denies that the Plaintiff held the suit land in trust for himself and his family, including the 2nd Plaintiff.

6. On 11th June, 2013 the parties herein identified three issues for the Court's determination. These are:-

i. Whether the suit is properly instituted.

ii. Was the transfer of the suit property by the 2nd Defendant of the 1st Plaintiff's charged property lawful and if not, what orders should the court make?

iii. Who will pay the costs of this suit?

7. The parties herein agreed that the matter be disposed of by way of written submissions.

8. From a copy of the Title Deed to the suit land it was registered under the Provisions of the now Repealed Registered Land Act. A certified extract of the Title taken out on 13th July 2010 reveals that, prior to the matters complained of, the 1st Defendant was the registered proprietor thereof. The interest of the 2nd Defendant, if any, is not shown on the Title. And just like Kimondo J., I would hold that the assertion by the 2nd Plaintiff that the 1st Plaintiff is holding the property in trust for himself, his family and the 1st Plaintiff is not borne but by the Title.

9. In the Witness Statement of 21st February 2013, the 2nd Plaintiff says nothing of the alleged Trust arrangement while the 1st Plaintiff has not filed any Statement whatsoever herein.

10. It would seem therefore that the evidence before Court, again, does not bear out the assertion of Trust. The evidence available is that the 1st Plaintiff was the sole proprietor of the suit land at the time when he charged it to the 2nd Defendant. Given this finding it is only the 1st Plaintiff (as registered proprietor of the suit land at the material time) who can press for the prayers in the Plaint which are:-

a. A declaration that the sale and subsequent transfer of the suit property to the 1st defendant by the 2nd defendant was irregular.

b. An order nullifying the sale and subsequent transfer of the suit property to the 1st defendant and reverting the ownership thereof to the 1st Plaintiff.

ALTERNATIVELY

c. Damages equivalent to the current market value of the suit property.

d. Costs.

11. That then leads this Court to consider the first agreed issue, that is, whether the suit was properly instituted. At the time of filing this suit, only the 2nd Plaintiff signed the Verifying Affidavit. Simultaneously with the filing of the Plaint and Verifying Affidavit she filed a Document intituled "Authority to Appear, plead and/or Act". That document reproduced in full:-

"AUTHORITY TO APPEAR, PLEAD AND/OR ACT

(Under Order 1 Rule 13 and Order 4(3) of the Civil Procedure Rules 2010)

I, JAMES NJOROGE KAMAU of Kenyan National ID No. [particulars withheld] and of P.O. Box 50661-00200 Nairobi do hereby authorize my co-Plaintiff MILKA NYAMBURA to act, appear

and/or plead and do all that appertains thereto for an on my behalf in High Court Milimani Civil Suit No....of 2011.

Dated this 9th day of January 201..

Signed

JAMES NJOROGI KAMAU

12. The position of the 2nd Plaintiff is that her authority to bring this suit also on behalf of the 1st Defendant stems from a General Power of Attorney granted to her by the 1st Plaintiff. That Power of Attorney is , for its importance in this matter, reproduced below:-

GENERAL POWER OF ATTORNEY

I James N. Kamau of ID No.[particulars withheld], hereby appoint Milkah N. Njoroge of ID No. [particulars withheld], of Nairobi Kenya, as my attorney in fact to act I my capacity to do every act that I may legally do through an attorney in fact. This Power shall be in full force and effect on the date below written and shall remain in full force and effect until further notice or unless specifically extended or rescinded earlier by either party.

Signed

Dated 7/29/2015

State of Washington State

County of Pierce

BEFORE ME, the undersigned authority, on this 07/29/2015 personally appeared before me Peter Wachiuri to me well known to be the person described in and who signed the foregoing, and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein expressed.

WITNESS my hand and official seal the date aforesaid.

Signed

NOTARY PUBLIC

My Commission Expires 04.05.2017

13. But that may not help matters for the 2nd Plaintiff, because as pointed out by the Defendants, the Power of Authority did not exist at the time of institution of the suit. The Power of Attorney is self speaking and expresses that it shall be in force and effect from 29th July 2015. This would be at least four years after the suit was filed on 20th January 2011.

14. There then was an argument by the 2nd Plaintiff's Advocate that she is a recognized Agent in terms of Order 9 Rule 2 (b) of The Civil Procedure Rules which provides:-

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;

This however is not consistent with her attempt to fall back to a Power of Attorney which unfortunately was granted after the institution of the suit. In any event the Court understands the Provisions of Rule 2(b) to cover persons carrying on trade or business for and in the names of Parties not resident within the local limits of the jurisdiction of the Court. Whilst it is common ground that the 1st Plaintiff is resident in the United States of America, there is no suggestion that the 2nd Plaintiff carries on trade or business **for and in** his names.

15. On the first issue, I would hold that the institution of the suit on behalf of the 1st Plaintiff was a cropper for lack of proper authority. And as the 2nd Plaintiff, on her own, cannot insist on and sustain the suit, it is hereby struck out with costs.

Dated, Signed and Delivered in Court at Nairobi this 19th day of April, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Irungu for Plaintiffs

Kabaru for 1st Defendant

Kabaru h/b for Kioko for 2nd Defendant

Alex - Court Clerk