



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NUMBER 335 OF 2009

CECILIA NJOKI NJENGA

ELIZABETH NJERI NYOIKE

IDA WAIRIMU OTIENO

JOHN KIARIE KINUTHIA.....PLAINTIFFS

-VERSUS-

JAMES MBURU NDUA.....1ST DEFENDANT

CATHERINE WANJIRU KINUTHIA.....2ND DEFENDANT

JUDGMENT

1. BACKGROUND AND PLEADINGS

The plaintiffs in this case are siblings, being children of the 2nd defendant Catherine Wanjiru Kinuthia with the deceased Augustine Kinuthia deceased who died in 2001.

Prior to his death, the deceased was the registered owner of land Parcel Known as **Nakuru Municipality 2/276** hence it formed part of his estate. Following the death the 2nd defendant with one of her children **Paul Julius Murathi** applied for and were granted Letters of Administration of the deceased's estate in **Nairobi High Court Succession Cause No. 554 of 2001**.

2. The grant was confirmed and an order issued that the 2nd defendant wife of the deceased holds the net estate as a life tenant and thereafter that it shall vest into the children as tenants in common in equal shares.

It appears however that one of the Administrators, a brother of the plaintiffs the said Paul Julius Murathi, also deceased, colluded with the 1st defendant James Mburu Ndua and misled the 2nd and his mother to fraudulently transfer the land parcel to the 1st defendant without the plaintiffs' knowledge, consent or authority.

It is upon the above backdrop that the plaintiffs brought this suit to court.

3. By their plaint dated 1st December 2009 and filed on the 2nd December 2009 the plaintiffs sought the following reliefs:

- a) A Declaration that the registration of the 1st defendant as the owner of the suit property was fraudulent, illegal, null and void and an order for cancellation and rectification of the register.**
- b) A permanent injunction to bar the defendants from dealing with the suit property in any manner.**
- c) Costs and interest of the suit.**

4. The 1st defendant in his defence filed on the 6th January 2010 denied any fraudulent scheme between himself and the Administrators and claimed a *bonafide* purchasers interest of the suit property. He further denied any existence of a trust by the Administrators, or that the suit

was based on a trust.

5. The 2nd defendant in her defence dated and filed on the 20th June 2011 denied knowledge of the transfer of the suit property to the 1st defendant and supported the plaintiffs claim that the property was fraudulently transferred to the 1st defendant. She too prayed for the cancellation of the title to the 1st defendant.

6. From above narrative it is evident that the dispute between the two opposing parties is on ownership of the suit property by beneficiaries upon a trust and a party who claims to be a *bona fide* purchaser of the same, the 1st defendant.

7. The plaintiff's case was heard before the Honourable Justice W. Ouko in 2012 (as he then was). I took over the defence hearing on 6th May 2016 with Mr. Kiangati Advocate representing the plaintiffs, Mr. Githui representing the 1st defendant and Mr. Kibet representing the 2nd Defendant.

I therefore did not have the benefit of hearing or seeing the plaintiffs and their witnesses testify.

8. PLAINTIFFS' CASE

PW1 was Cecilia Njoki Kinuthia Njenga, the 1st plaintiff. It was her testimony that the 2nd defendant who was the plaintiffs' mother and one Paul Julius Murathi, their brother, held the subject land in trust for them and that they fraudulently sold the land to the 1st defendant. It was her further testimony that their brother Paul, now deceased tricked their mother who was 80 years old to sign the sale agreement thus sold the property to the 1st defendant. She further testified that the plaintiffs did not receive the purchase price of Kshs.5.2 Million nor were they aware of the sale.

On cross examination, and shown the sale agreement dated 31st March 2008, PW1 confirmed the signature of her mother but stated that her mother denied ever travelling to Nakuru to sign the sale agreement before the Advocates nor receipt of the purchase price. It was her evidence that her mother and Paul being trustees breached the trust leading to the plaintiffs loss and suffering.

She sought cancellation of the title in favour of the 1st defendant and rectification of the register in the plaintiffs favour.

9. DEFENDANTS CASE

The 1st Defendant James Mburu Ndua testified as DWI

His testimony was that he purchased the suit property through an agent Ngotho Commercial Agencies, that one Paul Julius Murathi is the one who sold the property on behalf of the plaintiffs and their mother, the 1st defendant by a sale agreement (DExt 1), as trustees. He testified that he was shown the confirmed grant of Letters of Administration at the Advocates offices and that he paid the full purchase price of Kshs.5.2 Million through the firm of Sheth Waithigo & Co. Advocates and that he was present when the 2nd defendant signed the sale agreement and left her PIN and Identity Card with the Advocates. He testified that he also signed the transfer form and that he obtained registration of the suit property in his name on the 31st December 2008. He produced the title to the property as DExt 5.

10. The 1st Defendant further testified that he subdivided the suit land into eight portions and sold three, and that there are no developments on the subdivisions due to an order of injunction against further dealing. He denied knowledge that the consent to transfer was a forgery. He also confirmed not having paid the balance of the purchase price to the trustees of Kshs. 2 Million as it was to be used for buying another property at Thika by the three parties jointly, but did not sign an agreement for the said purchase as it aborted due to this case.

He denied having been involved in any fraud, and stated that if there was any fraud, it was between the administrators who were the trustees.

THE 2ND DEFENDANT'S CASE was closed without calling any evidence, after which parties filed their respective submissions.

ANALYSIS OF EVIDENCE, SUBMISSIONS AND FINDINGS

12. The evidence adduced by all the parties was straight forward .

There is no dispute that the plaintiffs and the 2nd defendant were beneficiaries of the suit property under a trust held by the 2nd defendant and one Paul Julius Murathi, deceased.

13. There is also no dispute that the property was sold by the said trustees to the 1st defendant without the plaintiffs consent, knowledge or authority.

The 1st defendant's claim is that of a *bona fide* purchaser for value from the trustees, without notice of fraud or collusion.

The plaintiffs' claim on the other hand is that the sale was fraudulent, as they were not consulted nor did they give their consent nor did they receive the purchase price. They seek cancellation of the title in favour of the 1st defendant who admitted knowledge that the suit property was held in trust for the plaintiffs by the trustees who sold the land to him and who in particular the deceased, Paul Julius Murathi received

the purchase price. His defence that he was not aware that there existed a trust is therefore untrue. His only defence was that he did not know that a purported court order and authority for the sale of the land shown to him by the said Paul Julius Murathi and their Advocates was a forgery.

The 2nd defendant though she did not testify denied having been party to the fraudulent sale in her defence and sought for cancellation of title for having been obtained fraudulently.

14. The issues that arise for determination from the above evidence, In my view, and being re-edition of the parties framed issues are:

- 1. Whether the suit property Nakuru Municipality Block 2/276 was fraudulently sold to the 1st defendant by trustees, the 2nd Defendant and one Paul Murathi, deceased.**
- 2. Whether the 1st defendant was an innocent purchaser for value without notice.**
- 3. Whether the sale transaction can be impeached solely on the basis that it was entered into in breach of trust by the trustees.**
- 4. What are the remedies available to beneficiaries under a trust for breach of trust by the trustees.**
- 5. Whether the parties to this suit are entitled to the reliefs they seek in their respective pleadings.**

15. The suit land was registered under the now repealed **Registered Land Act**. The **2012 Land Registration Act** came into operation on 2nd May 2012 thus from the effective date, the provisions of the **Registered Land Act, Cap 300** ceased operations.

Sanctity of the land is well stated in **Section 26(1) of the Land Registration Act** that:

“The certificate of title issued by the Registrar upon Registration, or to a purchaser of land upon a transfer by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements restrictions and conditions contained endorsed in the certificate and the title of that proprietor shall not be subject to challenge except.

(a) On ground of fraud, or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.”

16. If the above is found to be true upon evidence, then **Section 80 Land Registration Act**, (Similar to **Section 143 of the Repealed Registered Land Act**), has the remedy. It provides under **Section 80(1)**

“Subject to sub-section (2) the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.”

Section 80(2) reads:

“The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission fraud or mistake or substantially contributed to it by his act, neglect or default.”

17. Under **Section 26(1) (b) of the Land Registration Act** proof of illegality would defeat a proprietors title.

I have considered the confirmed grant of letters of administration issued to the 2nd defendant and Paul Julius Murathi (PExt 1). **Nakuru Municipality Block 2/276** the suit property is one of the properties **vested into the administrators as trustees to Catherine Wanjiru Kinuthia** widow of the **deceased as life tenant and thereafter into the named children of the deceased as tenants in common equal shares.**

The named children are the plaintiffs. I therefore find that the plaintiffs are suited to bring the case against the defendants, the 2nd defendant being a trustee, for a claim of breach of trust and by fraudulently selling the property of the 1st defendant without their knowledge and/or authority. This is however subject to proof (**Section 26 (1) (b) RLA, 2012**).

18. The plaintiffs claim is against the trustees for the sale of the property either through fraud or breach of trust or both. The trustees did not seek authority from them. They obtained a court order authorising the sale fraudulently by forgery.

In her own evidence, PW1 on cross examination stated:

“The court in its letter confirmed that the order was obtained fraudulently. The 1st defendant was not implicated --- The 2nd defendant Paul and the 1st defendant have singed before an Advocate Ndege Gatimu.

I do not doubt the 2nd defendants signature --- I am complaining against the administrators who abused their power as trustees --- There was collusion between Paul and the defendants as there was no consent of the dependants? (plaintiffs).

The principal players were the 2 defendants and Paul---

19. The above evidence clearly states the plaintiffs case, against the trustees for breach of trust.

Section 39 of the Registered Land Act Cap 300 (now repealed) is the applicable law in this suit.

The 2012 Registration of Land Act has similar provisions (See **Section 80 and 26 thereof**).

It provides:

“Where the proprietor of land or lease or charge is a trustee, he shall in dealing therewith be deemed to be the absolute owner thereof and no disposition by a trustee to a bona fide purchaser for valuable consideration will be defeated by reason of the fact that the disposition amounted to a breach of trust.”

20. It is not clear why the 2nd defendant despite her pleadings failed to testify and more so when her co-trustee was dead. It is trite that failure to adduce evidence to support statements in pleadings makes the said statements mere statements and of no consequence - **Section 107 and 109 of the Evidence Act**. See also **Civil Appeal No. 88 of 2009 DT Dobie & Co. (K) Ltd -vs- Wanyonyi Wafula Chebukati (2014) e KLR**. In such case, the plaintiffs evidence remains controverted, there being no challenge or at all.

What then does it mean in respect of this case? In my considered view, there is no other meaning save to conclude that the 2nd defendant and Paul Julius Murathi as trustees colluded to sell the suit property to the 1st defendant. The 1st plaintiff absorbed the 1st defendant from any fraud. She squarely blamed her mother and brother for the collusion and fraud.

21. That brings me to the issue as to whether the 1st Defendant was a bona fide purchaser for value, and without notice.

The 1st plaintiff testified that the plaintiffs did not receive the purchase price – that they would not have received the purchase price as the sale was secretly done. Evidence was adduced that the purchase price was paid by the purchaser pursuant to the sale agreement to the trustees. However in his own evidence the 1st Defendant owned up that there was an unpaid balance that ought to have gone into a purchase of another property at Thika but which sale aborted. He testified to have paid and proof by way of payment receipts (DExt 2 and b) Kshs.2,800,000/=. The property at Thika was to be sold for Kshs.2,000,000 - DExt 6. He did not say whether or not he paid the balance of the purchase price of Kshs.2,400,000/=:, and if so, to which party.

He also opted out of the purchase of the Thika property when this case was filed, and if so, to which party.

22. In his own words, the 1st defendant stated:

“I paid Kshs.2.8 Million to the Advocates Sheth Waithogo & Company Advocates by cheque on 26th February 2008 --- balance was to be paid to Royal Gate Ltd. I did not pay the balance because Kshs. 2 Million was to purchase the Thika property between me, Catherine and Paul by another agreement---

23. He did not however testify as to whether or not he paid the balance of Kshs.2,400,000/= after the Thika property sale aborted.

Without any such proof, I find that the balance of Kshs.2,400,000/= was not paid to the trustees, or disbursed otherwise prior or after commencement of this case. The evidence in its totality persuades me to come to the findings that the 1st defendant was a *bona fide* purchaser for value without notice of fraud or collusion by the trustees.

24. Having come to the findings that the suit land was sold to the 1st defendant as a *bona fide* purchaser for value, and without notice, by the trustees, then what are the appropriate remedies available to the beneficiaries the plaintiffs?

Section 39 of the repealed Land Registration Act (Cap 300) gives the answer, that the disposition shall not be defeasible by reason that it amounted to a breach of trust.

Clearly, the main issue between the plaintiffs and the defendants is purely a matter of breach of trust. A trust is a creation of equity, and a property held under trust for the beneficiaries ought to be so held in trust into the legal and beneficial title.

25. When there is breach of trust, the beneficiaries are entitled to either personal or proprietary claim against the trustees.

The trustees had a duty to act in good faith and not to benefit the 1st defendant without obtaining their and authority. They sold the property secretly, and the sale was done fraudulently by forging a court order of consent for its sale. In these circumstances the plaintiffs ought to have sued the Trustees. At least the surviving trustee was sued, and as I have stated above, she opted not to adduce any evidence in court to support her claim that she was misled to sign the sale agreement. This is not to say that the 1st defendant ought not to have been sued. He is the beneficiary of the trustees wrong doing, and further did not pay the full purchase price to the trustees.

26. The scenario hereof can be distinguished with the holding in the **Re-Diplock (1948) All EA 318** where it was held:

“Absence of exhaustion of beneficiaries rights to go against the wrong doing executor or administrator ought properly to be regarded as the justification for calling equity to come to their aid of the law by providing a remedy which would otherwise be denied to the party who has been denied of which was justly his---”

27. In the **Case Sinclair Investments (UK) Ltd -vs- Versailles Trader Finance Ltd (CA) 2011 3 WLR 1153** it was held that beneficiaries whose property has been disposed off by a trustee in breach of trust can only follow or trace the property only to the extent that it has not passed into the hand of a *bona fide* purchaser for value. Further in the case **Target Holdings -vs- Redferns (1995) 3 WLR 352**, a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach of compensation for such loss.

28. The Judges in the **Target Holdings Case** proceeded to hold that:

“---if specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed---”

In the present case, and the circumstances stated above, the trustee property was passed to the 1st defendant and a title duly issued in his name. It is therefore not available for tracing and giving it back to the plaintiffs.

29. That leaves compensation as the only available remedy to the plaintiffs by the 2nd defendant, the surviving trustee.

To that extent, the purchase price of the trust property being the suit property was Kshs.5.2Million. I have made a finding that only a sum of Kshs.2.8 Million was proved to have been paid to the trustees leaving a balance of Kshs.2.4Million not paid, there having been no prove of payment to either of the trustees. A trust is a creation of Equity.

Equity will not allow the 1st defendant though absorbed from the fraudulent and corrupt scheme by the trustees, to benefit unduly by unjust enrichment to keep the trust property which is already registered in his name and subdivided as well as keep the balance of the purchase price whose none payment he satisfactorily explained as due to the commencement and dependency of this suit.

30. To that end, I find and direct that the 1st defendant shall pay to the plaintiffs being beneficiaries under the trust the balance found to be outstanding out of the purchase price of the suit property of Kshs.2,400,000/= with interest from the date of commencement of this suit, the 2nd December 2009.

This is informed by the fact that the 1st defendant has been in possession and use of the suit property and by his own evidence has even subdivided and sold portions thereof.

Under **Section 26 of Civil procedure Act Cap 21**, the Court is empowered to order interest at such rates as it may deem reasonable either before or after filing of a suit or any other period as it may deem fit.

As a result, and due to the circumstances I have stated, I direct that interest on the sum adjudged due and payable to the plaintiffs by the defendants be at 6% per annum from the date stated above until payment in full.

31. The upshot is that the plaintiffs have partially proved their case to the required standards, upon a balance of probability as stated in the case **Miller -vs- Minister of Pension cited in D.T. Dobie Company (K) LTD -vs- Wanyonyi Wafula Chebukati(2014) e KLR.**

Consequently and by way of determination, I find

(1) that the declarations sought by the plaintiffs in their plaint are not available to them.

(2) That the 1st defendant shall pay to the plaintiffs the balance of the purchase price of Kshs.2,400,000/= with interest at 6% per annum from the 2nd December 2009 until payment in full.

(3) That the 2nd defendant is found to be liable for breach of trust to the plaintiffs and therefore an order of compensation is issued against her, to pay sufficient compensation to the trust estate, including to the plaintiffs as beneficiaries to the tune of Kshs.2,800,000/= with interest at the rate of 6% from January 2010 until payment in full.

(4) This case being between family members, I shall make no orders as to costs.

Dated and Signed this 23rd Day of October, 2017.

J.N. MULWA

JUDGE

Delivered this 24th Day of October, 2017.

R. LAGAT KORIR

JUDGE