



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 845 OF 2016

JACKSON GATHUMBI MUTUOTA.....PLAINTIFF

VERSUS

MWIKI COMPANY LIMITED.....1ST DEFENDANT

PRISCA WAKIURU KAMAU.....2ND DEFENDANT

JUDGMENT

1. In an Amended Plaintiff dated 18th September, 2018, the Plaintiff instituted this suit against the Defendants severally and jointly seeking for the following reliefs;

- i. A declaration that the Plaintiff is the legitimate owner of parcel of land known as Plot No. 434 situated at Kahawa Sukari.*
- ii. An order to compel the 1st Defendant to transfer ownership of Plot No 434 to the Plaintiff.*
- iii. An order for vacant possession and in default, an order for eviction.*
- iv. Costs of this suit.*
- v. Any other relief that this Honourable Court may deem fit to grant.*

2. In the Plaintiff, the Plaintiff averred that he is the registered proprietor of Plot No 434 situate at Kahawa Sukari (*hereinafter the suit property*); that the 2nd Defendant has trespassed onto the property and constructed residential premises therein; that sometime in 2016, he discovered that the 1st Defendant had registered the suit property in the name of the 2nd Defendant and that the registration of the suit property in the 2nd Defendant's name was fraudulently undertaken by the Defendants in a bid to dispossess him of the property.

3. Vide an Amended Defence filed on 29th October, 2018, the 1st Defendant denied all the allegations as set out in the Amended Plaintiff. The 1st Defendant averred that the Plaintiff is not the registered owner of the suit property; that the 1st Defendant's offices were broken into and crucial documents stolen including membership share certificates and ballot certificates; that the matter was reported at Kasarani Police Station-OB. No 36/24/04/2016 and that the Plaintiff is facing criminal charges for forgery and the suit ought to be dismissed.

4. The 2nd Defendant filed an Amended Defence on the 7th January, 2019 in which she denied all the averments as set out in the Amended Plaintiff. According to the 2nd Defendant, she is an innocent purchaser for value having bought the suit property through a legal sale in 2012 after which she took ownership of the property and commenced construction of residential premises thereon; that prior to the purchase, she inquired from the vendor, Michael Njuguna Murathe, how he had acquired the suit property and that the vendor informed her that he acquired the land from the Plaintiff.

5. The 2nd Defendant pleaded that she has enjoyed peaceful ownership of the suit property to date and is likely to suffer irreparable loss should the orders sought by the Plaintiff be granted and that the Plaintiff's suit ought to be dismissed and a permanent injunction issued restraining the Plaintiff from interfering with her possession of the suit property.

The Plaintiff's case

6. The matter proceeded for hearing on 29th October, 2019. PW1, Jackson Gathumbi Mutuota, adopted his witness statement dated 18th September, 2018 as his evidence in chief. PW1 informed the court that he purchased the suit property from one Jemima Wambui Kinyanjui and produced a Sale Agreement in that regard, together with an acknowledgement of part payment of the purchase price. PW1 also produced

in evidence his Identification Card and a copy of a share certificate belonging to Jemima Wambui Kinyanjui.

7. According to PW1, he has never sold the suit property to anyone; that the purported Sale Agreement between himself and one Michael Njuguna is a forgery and that neither the ID number indicated therein nor the signature is his. It was the evidence of PW1 that when he met Njuguna in the 1st Defendant offices, he denied having met him and denied knowledge of the sale transaction.

8. It was PW1's testimony that whereas there were no structures on the property at the time he purchased it, the property currently has structures; that he asked Michael Njuguna Murathe to accompany him to an advocate's office where they swore affidavits with respect to the suit property and that he reported the matter at Ruiru Police Station and was given an OB number.

9. In conclusion, PW1 testified that it was untrue that he stole documents from the 1st Defendant's offices and reiterated that he has no pending case criminal case before any court.

10. On cross-examination, PW1 stated that he bought the suit property from Jemima Wambui Kinyanjui which transaction took place at the 1st Defendant's offices; that he left a copy of his ID card at the 1st Defendant's offices and was issued with the share certificate; that sometime in 2016, he discovered that the 2nd Defendant had constructed on his plot and demolished his semi-permanent mabati house which had been on the property and that the purported sale agreement between himself and the 2nd Defendant was fraudulent.

11. PW2, Jemima Wambui, testified that she sold to the Plaintiff the suit property in 1997 having bought it from the 1st Defendant; that they went to the 1st Defendant's offices where they signed the Sale Agreement; that the Plaintiff paid him the purchase price in installments of Kshs 10,000 and that the Plaintiff completed paying the balance of the purchase price in 1997. It was the evidence of PW2 that the transaction began in 1996 and the sale was only conducted within the 1st Defendant's premises.

12. On cross-examination, PW2 stated that the first payment by the Plaintiff for the suit property was in 1996; that they went to the 1st Defendant's office to effect the transfer in 1997; that she returned her share certificate upon which her name was deleted and the Plaintiff's name inserted therein; that the Plaintiff was issued with a new share certificate and that she signed the 1st Defendant's book during the transfer process.

The Defendants case

13. The 2nd Defendant, DW1, adopted her witness statement dated 7th January, 2019 as her evidence in chief. DW1 testified that before purchasing the suit property from Michael Njuguna, she went to the 1st Defendant's offices and carried out a search which revealed that the certificate belonging to Michael Njuguna Murathe was indicated in the 1st Defendant's book and that having confirmed the issue of ownership, she paid the transfer fees of Kshs 20,000 and began construction on the property which her family currently resides on.

14. It was the evidence of DW1 that there were no structures on the suit property at the time of her entrance; that she has not been charged in any court for any offence and that she should not be evicted from the suit property. It was the evidence of DW1 that she was duly issued with a share certificate by the 1st Defendant.

15. During cross-examination, DW1 testified that she has the Sale Agreement dated 6th September, 2011 and a share certificate dated 8th February 2011; that any discrepancy in the dates in the documents should be attributed to the 1st Defendant; that there were no structures on the suit property at the time of her entry and that she only became aware of the Plaintiff's claim to the suit property when he asked her about it.

16. According to DW1, she paid the sum of Kshs 550,000 for the suit property in two installments of Kshs 350,000 by bankers cheque and the balance in cash; that she was unaware that the Plaintiff's ID card number was wrong and that Michael Njuguna Murathe had his ID card and the share certificate.

17. On re-examination, DW1 reiterated that she went to the 1st Defendant's offices accompanied by Mr. Michael Njuguna Murathe who had his share certificate for the suit property; that she was introduced to the aforesaid Mr. Murathe by brokers; that she fully paid the purchase price and that she has never been charged with fraud.

18. DW2 was Michael Njuguna Murathe. He adopted his witness statement dated 7th January, 2019, as his evidence in chief. DW2 informed the court that he was engaged in buying and selling of plots; that he entered into an agreement with one Jackson Githumbi Mutuota to purchase the suit property from him; that at the time of entering the agreement, he did not know Jackson Mutuota having only met him in the 1st Defendant's office and that he paid him the sum of Kshs 380,000 in cash.

19. According to DW2, sometime in 2016, the 2nd Defendant called him and informed him that there was a problem regarding ownership of the property; that he called the 1st Defendant and informed them of the same; that the 1st Defendant's director called the Plaintiff and that when he turned up, he was a different person from the one whom he (DW2) had transacted with. It was the evidence of DW2 that he offered the Plaintiff another plot but he declined to take up the offer.

20. During cross-examination, DW2 stated that he bought the suit property vide a Sale Agreement dated 6th September, 2011 from a person with a similar name to that of the Plaintiff; that the vendor had a share certificate; that it is not the Plaintiff who sold him the suit property; that he was given a share certificate dated 8th February, 2011 when he was selling the land to the 2nd Defendant and that he did not check the date of the share certificate at the time it was issued to him. It was the evidence of DW2 that he knew the real Jackson Mutuota-the Plaintiff

in 2016.

21. It was DW2's further testimony on cross-examination that he knew the 2nd Defendant when he sold her the suit property; that before purchasing the property, he checked the records and it was in the name of the Plaintiff; that when he sold the property to the 2nd Defendant, a share certificate was issued in her name and that the person who sold him the suit property was not the Plaintiff.

22. On re-examination, DW 2 stated that he bought the property from Jackson Gathumbi Mutuota; that the share certificate was prepared by the secretary of the 1st Defendant whom he trusted; that he bought the property in 2011 and sold it in 2012 for Kshs 550,000 and that he was issued with a share certificate on the same day.

23. DW3 was Robert Wariri, a director of the 1st Defendant. He adopted his witness statement filed on 11th April, 2018 as his evidence in chief. It was his testimony that the Plaintiff went to the 1st Defendant's offices to complain that his plot had been sold off to another person; that investigations were conducted which revealed that the suit property was registered in the name of the Plaintiff and also registered in the name of the 2nd Defendant and that the transfer of the land from Jackson Gathumbi Mutuota (the Plaintiff) to Michael Njuguna Murathe (DW2) was not proper.

24. It was the evidence of DW3 that he signed the share certificates belonging to Michael Njuguna Murathe and the 2nd Defendant; that the parties attempted to resolve the matter and that Michael Njuguna Murathe (DW2) agreed to transfer his Plot No 503 to the Plaintiff and that the aforesaid plot is still reserved for the Plaintiff.

25. During cross-examination, DW 3 conceded that Michael Njuguna Murathe (DW2) did not have a plot to sell; that the suit plot belongs to the Plaintiff; that it was his secretary who carried out the transfers between DW2 and the 2nd Defendant and that a meeting was set between all the parties and it was agreed that because the area and location of the property is similar, Michael's plot No 503 should be transferred to the Plaintiff.

26. DW3 further testified on cross examination that the share certificates in the names of Michael Njuguna Murathe and the 2nd Defendant originated from his office; that there was a mistake in the manner in which the property was transferred to the 2nd Defendant; that he signed the share certificates unaware of their fraudulent background and that the 1st Defendant's receptionist was arrested and jailed in respect to this and other related fraudulent activities.

Submissions

27. The Plaintiff's advocate submitted that the Sale Agreement of 6th September, 2011 has an ID Card number different from the Plaintiff's ID Card number; that pursuant to the afore-stated sale, the 1st Defendant purportedly issued a share/plot certificate to Michael Njuguna Murathe on 8th February, 2011 before the sale occurred and that as a result of the aforesaid and by the 1st Defendant's own admission, there is clear evidence of fraud.

28. On whether the 2nd Defendant acquired a valid title to the suit property, it was submitted that in the case of **Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others [2015] eKLR**, the court stated that a purchaser of land is required to dig deeper into the title; that had the 2nd Defendant made proper inquiries from the 1st Defendant's offices, she would have discovered that the alleged seller did not have any capacity to sell the land and that pursuant to Section 26 of the Land Registration Act, any title acquired by way of fraud cannot be protected the court.

29. According to counsel, the 2nd Defendant's witness testified that he purchased the suit property from a person holding himself out as the Plaintiff and further admitted that he did not have a good title to pass to the 2nd Defendant. It was submitted that the Court of Appeal in **Arthi Highway Developers Limited vs West End Butchery Limited & 6 others [2015] eKLR** affirmed the position that a title acquired fraudulently cannot be allowed to stand and that the 2nd Defendant's remedy lies against the person who illegally sold her the suit property for recovery of money.

30. On whether the 2nd Defendant is an innocent purchaser for value without notice, counsel submitted that having purchased the suit property from a fraudster, the purchaser cannot be said to be an innocent purchaser for value but ought to be treated as a trespasser and that the court in **John W Katende vs The Uganda Land Commission, Kampala Civil Suit No 573 of 2015** was of the view that title acquired by fraud is void *ab initio* as against all the parties privy to the fraud.

31. The 1st Defendant's counsel submitted that that in the circumstances of this case, fraud was perpetuated by the 1st Defendant's secretary; that it is the 1st Defendant's secretary who introduced the vendor of the plot together with his ID card and original share certificate to DW2 and that the aforesaid secretary was acting on her own volition and her actions cannot be imputed on the 1st Defendant. Reliance was placed on the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & another [2000] eKLR** where the court reiterated that fraud must be specifically pleaded and proved and cannot be left to be inferred from the facts.

32. On whether the 2nd Defendant is a bona-fide purchaser for value without notice, counsel submitted in the affirmative. Counsel submitted that prior to purchasing the suit property, the 2nd Defendant carried out due diligence which confirmed that Michael Njuguna Murathe was the registered owner of the property. Reliance was placed on the case of **Shimoni Resort vs Registrar of Titles & 5 others [2016] eKLR** where the court stated that a bona-fide purchaser would be protected even if it was that there had been fraudulent transactions on the property before he acquired the property.

33. According to counsel, upon discovering the fraud perpetrated by its employee, the 1st Defendant attempted to remedy the situation by convening a meeting with the parties wherein Michael Njuguna Muratha agreed to transfer his plot No 503, which plot is of a similar value, size and situate in the same area as the suit property, to the Plaintiff, and that the 1st Defendant has reserved the said plot and is willing to transfer it to the Plaintiff

34. The 2nd Defendant's counsel submitted that the 2nd Defendant is entitled to own property pursuant to **Article 40 of the Constitution**; that a person can only be deprived of property as set out in **Article 40(3) of the Constitution** and that any claim to the effect that the 2nd Defendant acquired the suit property fraudulently must be specifically proven. Reliance was placed on the case of **R. G. Patel vs Lalji Makanji [1957] EA 314** where the former Court of Appeal for Eastern Africa held that whereas the standard of proof in allegations of fraud must not be beyond reasonable doubt, it must be more than a mere balance of probabilities.

35. It was submitted that the process through which the Plaintiff acquired the share certificate was similar to the process in which the 2nd Defendant acquired her share certificate and that the Plaintiff cannot impugn that process nor can he claim that his share certificate is authentic and the 2nd Defendant's fraudulent. Reliance was placed on the case of **Daudi Kiptugen vs Commissioner of Lands & 4 Others [2015] eKLR** where the court emphasized that the acquisition of title cannot be construed only as the end result.

36. The 2nd Defendant's counsel also placed reliance on the case of **Munyu Maina vs Hiram Gathiha Maina [2013] eKLR** where the court held that when a registered proprietor's root of title is under challenge, it is not sufficient that the registered proprietor dangles the instrument of title as proof of ownership. He must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal.

Analysis & Determination

37. Having carefully considered the pleadings, the evidence and submissions by the parties herein, the following issues arise for determination:

- i. *Whether the Plaintiff has proven allegations of fraud against the Defendants?*
- ii. *Whether the 2nd Defendant is a bona-fide purchaser for value without notice?*
- iii. *What are the appropriate orders to issue?*

38. It is trite that whoever alleges fraud must prove it. **Sections 107, 108, 109 of the Evidence Act** are instructive and provide as follows:-

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

39. As correctly stated by the parties, the requisite standard of proof in claims of fraud was set out by the former Court of Appeal of Eastern Africa in the case of **R. G. Patel vs Lalji Makanji (1957) E.A. 314**, where the court stated thus;

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

40. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. This position was reiterated by the Court of Appeal in the case of **Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia [2020] eKLR**, in which the court cited the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & another [2000] eKLR**, where Tunoi JA (as he then was) stated as follows:

“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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

41. The Plaintiff instituted this suit seeking, *inter-alia*, a declaration that he is the legitimate owner of the suit property having been deprived of the same by the Defendants through fraudulent actions. It is the Plaintiff's case that sometime in 1997, he purchased the suit property from one Jemima Wambui Kinyanjui who was the initial registered owner of the same having bought it from the 1st Defendant.

42. According to the Plaintiff, sometime in the year 2016, he visited the suit property and discovered residential houses had been constructed thereon by the 2nd Defendant; that on inquiring from the 1st Defendant, he discovered that the suit property had been sold to the 2nd

Defendant by one Michael Njuguna Muratha who purportedly bought the suit land from someone passing off as him (the Plaintiff).

43. In support of his claim to ownership, the Plaintiff adduced in evidence the Sale Agreement entered into between himself and Jemima Wambui Kinyanjui dated 19th September 1997, plot certificate No 201 in the names of Jemima Wambui Kinyanjui, plot certificate No 1441 in his names and a receipt for Kshs 4,000 being payment of transfer fees. Jemima Wambui, DW 2 acknowledged having received the full purchase price.

44. The 1st Defendant, despite denying the Plaintiff's assertion of ownership of the suit property in its Defence, conceded through its witness, DW3, that the Plaintiff was indeed the proprietor of the suit property. It was the evidence of DW3 that the person who sold the suit property to Jemima Wambui, who eventually sold it to the 2nd Defendant had defrauded her.

45. It was DW3's testimony that the sale of the property to Michael Njuguna Murathe was fraudulent, which fraud was orchestrated by their employee who had access to all the crucial documents and that he signed the plot certificates in the names of the Michael Njuguna Murathe and the 2nd Defendant in the mistaken belief that due procedure had been followed in the purchase. On her part, the 2nd Defendant claims that she is a *bona fide* purchaser for value of the suit property and should be protected by this court.

46. The Plaintiff has proved by way of a Sale Agreement entered into between himself and Jemima Wambui Kinyanjui dated 19th September 1997 that he purchased the suit property, and was issued with plot certificate No 1441 by the 1st Defendant.

47. Although the 2nd Defendant purchased the suit property from one Michael Njuguna vide an agreement dated 2nd March, 2012 Michael Njuguna conceded that the person who sold to him the land vide an agreement dated 6th September, 2011 was not the Plaintiff, but someone who passed off as the Plaintiff. In a nutshell, Michael Njuguna conceded that he had been defrauded by someone who was not before the court.

48. The concession by Michael Njuguna Muratha that he purchased the suit property from a fraudster, and considering that as at the time the said Michael Njuguna Muratha purported to buy the suit land the same was owned by the Plaintiff, it follows that Michael did not have a title to pass to the 2nd Defendant in the year 2012 or at all.

49. The 2nd Defendant's case is that she is an innocent purchaser for value without notice. **Black's law Dictionary, 8th Edition** defines "*bona fide* purchaser" as follows:

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

50. The Ugandan Court of Appeal in ***Katende vs Haridar & Company Limited (2008) 2 E.A 173*** defined a *bona fide* purchaser thus:

"For a purchaser to successfully rely on the bona fide doctrine.... he must prove that:-

- a. he holds a Certificate of Title;***
- b. he purchased the property in good faith;***
- c. he had no knowledge of the fraud;***
- d. he purchased for valuable consideration;***
- e. the Vendors had apparent valid title;***
- f. he purchased without notice of any fraud;***
- g. he was not party to any fraud."***

51. Despite the above definition of an innocent purchaser for value without notice, this court has always held the firm view that where a fraudster purports to pass title to an innocent purchaser, such title should revert back to the rightful owner of the land because nothing actually passed from the fraudster in the first place. As was held by Lord Denning in ***Macfoy vs United Africa Limited (1961) 3 All E.R.***, if an act is void, then it is in law a nullity and not a mere irregularity.

52. This is the same position that the Court of Appeal took in the case of ***Arthi Highway Developers Limited vs West End Butchery Limited & 6 others [2015] eKLR*** where it affirmed the position that a title acquired fraudulently cannot be allowed to stand and that the Defendant's remedy lies against the person who illegally sold her the suit property for recovery of money.

53. From the foregoing, the court finds that the Plaintiff is the rightful owner of the suit property and the share certificate held by the 2nd Defendant over the suit property is invalid and of no legal effect, the same having been obtained illegally and un procedurally.

54. In conclusion, this court is satisfied that the Plaintiff has proved his case against the Defendants and enters Judgment for the Plaintiff in the following terms:

a. A declaration be and is hereby issued that the Plaintiff is the legitimate owner of the parcel of land known as Plot No. 434 situate at Kahawa Sukari within Thika.

b. An order be and is hereby issued that the 2nd Defendant do give vacant possession of the suit property known as Plot No 434 situate in Kahawa Sukari to the Plaintiff and demolish the structures erected thereon within 60 days' failure of which the Plaintiff, at the 2nd Defendant's costs, do demolish the said structures.

c. The 1st Defendant to pay costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF FEBRUARY, 2022.

O. A. ANGOTE

JUDGE

IN THE PRESENCE OF;

MS. GITHAIGA FOR THE PLAINTIFF

MR. KAMUNJO FOR THE 1ST DEFENDANT

MS KOECH FOR MUTHOMI FOR 2ND DEFENDANT

COURT ASSISTANT - OKUMU