



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 872 OF 1999 (O.S)

PETER THAREE MWAURA

(substituted for JOYCE NUNGARI MWAURA)PLAINTIFF

• VERSUS –

GODFREY KAGURU MWAURA.....1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED.....2ND DEFENDANT

DISTRICT LAND REGISTRAR NAIROBI.....3RD DEFENDANT

JUDGMENT

1. The originating summons by the plaintiff frames two broad issues: first, whether the 1st defendant had *capacity* to create the charges in favour of the 2nd defendant over title number Dagoretti/Riruta/T. 302. Paraphrased, was the instrument of charge *valid*? Secondly, should the 3rd defendant cancel the transfer to the 1st defendant, remove the encumbrances and restore the property to the estate of Stephen Mwaura, deceased?
2. Stephen Mwaura was the registered proprietor of the suit land. He died intestate on 31st October 1971. He left behind his widow, Joyce Nungari Mwaura (the original plaintiff and now also deceased), and a number of children. The title deed for the land, identity card and death certificate of Stephen Mwaura were entrusted or in possession of his eldest son Godfrey Kaguru Mwaura, the 1st defendant, who has since died. Unknown to the rest of the family, the 1st defendant took out letters of administration to the estate, transferred the land to his name and charged it to the 2nd defendant bank. The plaintiff only learnt of the matter when the bank advertised the land for sale.
3. The widow thus took out the originating summons on 8th July 1999. At the time of the suit, she was about 80 years. She died on 28th March 2001. She was substituted in the suit by her son Peter Tharee Mwaura under a limited grant of letters of administration *ad litem* to her estate. The originating summons was not accompanied by a supporting affidavit *per se*. However, there was an affidavit filed contemporaneously with the originating summons in support of the annexed chamber summons. In the latter, the plaintiff sought an interlocutory injunction to restrain the 2nd defendant bank from alienating the land. The injunction was granted on 20th June 2000.
4. The following material facts are *not* contested: the 1st respondent was charged and *convicted* in criminal case 5717 of 1997 at Kibera Magistrates Court *Republic Vs Godfrey Kaguru Mwaura* with theft of the deceased's (Stephen Mwaura's) title deed over Dagoretti/ Riruta/ T. 302 and

- identity card contrary to section 275 of the Penal Code. He was sentenced to 36 months probation. The details of proceedings, conviction and sentence are in document number 4 in the plaintiff's list and produced before this court as an exhibit. The title is the one in issue in this suit.
5. The 2nd defendant's case is that the 1st defendant was registered by transmission as the sole proprietor of the land on 23rd May 1972; that the bank conducted due diligence; and, that it originally lent the 1st defendant a loan of Kshs 100,000 on the security of the land. There were further borrowings secured by the property. The 1st defendant defaulted in repayment. The bank then sought to exercise its statutory right of sale. In order to stem the sale, the original plaintiff paid to the bank Kshs 250,000 between 12th August 1996 and July 1997. Her son, Robert Mwaura paid a further Kshs 60,000 on 10th October 1996. The bank's position is that the plaintiff is estopped from challenging the charge. As I sated earlier, the plaintiff had not sworn a separate affidavit in *support* of the originating summons. The bank takes up cudgels on that matter. But I note from the record that an application to strike out the action for want of the affidavit was *rejected* by the Court on 20th November 2007.
 6. Peter Tharee (PW1) testified that he holds the letters of administration to his late mother's estate. His mother did not obtain letters of administration to the estate of the late Stephen Mwaura. The current title for the suit land is in the 1st respondent's name and held by the bank. The 1st defendant has not been substituted in the suit. The plaintiff, his mother and siblings only learnt of the charge debt when the property was advertised for sale by the bank. The 1st defendant had retained the original title, death certificate and identity card of their late father. The plaintiff's case was that the 1st defendant obtained letters of administration without consent of his mother or concurrence of his siblings. He maintained that the 1st defendant fraudulently transferred the suit land to himself. The plaintiff produced in evidence the bundle of documents and court proceedings in criminal case 5717 of 1997 *Republic Vs Godfrey Kaguru Mwaura.*
 7. PW2, Robert Mwaura confirmed paying to the bank Kshs 60,000 to save the property. He denied that his mother wrote the letter at page 66 of the 2nd defendant's bundle of documents pleading for time to repay the debt. In any event, he testified that neither him nor his mother or other siblings took the loan from the bank or benefitted from it. PW3, Alfred Gitau Mwaura testified along the same lines.
 8. The 2nd defendant called Ronald Kititi, DW1. He testified that in view of the fact that the plaintiff had no letters of administration, and in the absence of the 1st defendant, the case against the bank is unsustainable. He insisted that the bank had conducted due diligence; that its valuer had visited the property before creation of the charge. The witness could not ascertain whether Joyce Nungari, the original plaintiff, had written the letter at page 66 of the defendant's bundle. He stated that the auction sale was stopped because of that letter. He testified that the 1st defendant had borrowed a total of Kshs 435,000. The debt had since risen to Kshs 2,000,000 as a result of interest.
 9. I have considered the pleadings, oral and documentary evidence. I have also paid heed to the written submissions by the parties filed on 17th October 2013 and 30th October 2013 respectively. Under the applicable Order XXXVI of the Civil Procedure Rules (now repealed), the originating summons should be accompanied by a supporting affidavit. That was not done by the plaintiff. However, the plaintiff did file a separate affidavit at the *same* time in support of the annexed chamber summons application for injunction. I do not think that it was necessary to then file *another* and *similar* affidavit in support of the originating summons. It would be to bury my head in the sand to hold that there was *no* affidavit in support of the originating summons. The Civil Procedure Rules are subsidiary legislation. They are meant to be handmaidens, not mistresses of justice. Fundamentally, they cannot override the statute or the Constitution.
 10. This Court is now enjoined by article 159 (2) (d) of the Constitution to do substantial justice to the parties and without *undue regard* to technicalities. That overriding objective is replicated in sections 1A and 1B of the Civil Procedure Act. See *Harit Sheth Advocate Vs Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] e KLR, *Miraflowers Apartments Limited Vs Caleb Akwera and another* Nairobi, High Court ELC case 633 of 2011 [2012] e KLR, *Chimanlal K.N. Shah & others Vs Trust Agencies Limited* Nairobi, High Court case 1387 of 2001 [2012] e KLR, *Unga Limited Vs Magina Limited* Nairobi, High Court case 1250 of 1999 [2014] e

KLR.

11. This originating summons has proceeded by way of *oral* evidence. Clearly, whether the plaintiff had filed a *separate* supporting affidavit is no longer material. I agree with the 2nd defendant that in a contested matter of this nature and where fraud is pleaded, the commencement of suit by originating summons was a poor choice. See *Floriculture Limited Vs Central Kenya Limited*, Nairobi, Court of Appeal, Civil Appeal 121 of 1995 [1995] e KLR. I have also stated that an earlier objection by the bank on failure to annex an affidavit to the summons was disallowed. The failure to annex the affidavit is thus largely one of *form*: it is a technical objection to the originating summons that would be frowned upon by the Constitution. And so is the choice to present the suit by way of originating summons. It is anathema to the overriding objective for the 2nd defendant to prevent the Court from going into the *root* of the land dispute.
12. I have then studied the criminal proceedings in Kibera Magistrates Court case 5717 of 1997 *Republic Vs. Godfrey Kaguru Mwaura*. The findings of that court are *admissible* and *binding* in this suit. The accused was *convicted* of theft of the title deed and identity card belonging to his late father as well as the death certificate. The original plaintiff in this suit testified in the criminal proceedings that she had entrusted the 1st defendant with those documents. Next she knew from the daily newspapers of the impending sale of the family land. She had not seen her errant son (the 1st defendant) for 4 years. He was arrested, charged and convicted for the offences. There was then the evidence in that trial of PW5 Justus Mule, an executive officer at the Probate and Administration Division of the High Court. He had testified that no cause number was indicated in the grant or certificate of confirmation obtained by the 1st defendant. The executive officer could not establish the *authenticity* of the grant or certificate of confirmation.
13. In view of the binding judgment in the criminal case, I find that the 1st defendant *unlawfully* or *irregularly* obtained the grant and certificate of confirmation of grant to the estate of Stephen Mwaura, deceased. The subsequent transfer of his father's title to himself was *fraudulent* and disinherited his mother and his siblings. The new title issued in favour of the 1st defendant (exhibit 1 in 2nd defendant's bundle) was clearly a nullity. The consideration for it was indicated as "*succession*". Those succession proceedings have been impeached.
14. It follows as a corollary that the various legal charges created by the 1st defendant in favour of the 2nd defendant were without legal foundation; they were fraudulent; they are accordingly unenforceable covenants. True, the original plaintiff paid Kshs 250,000 on account of the charge debt between 12th August 1996 and July 1997; PW2 Robert Mwaura also paid a further Kshs 60,000 to the bank. The two were not the *beneficiaries* of the loan. There was no *privity of contract* between them and the 2nd defendant bank. They were trying in good faith to save the property from forced sale. From the standpoint of the law of contract, the payments, were merely *gratuitous*. They were not backed by any *consideration*. Those payments or even the disputed letter by the original plaintiff at page 66 of the defendant's bundle do not create a legal or factual *estoppel*.
15. The simple truth of the matter is that the bank was *defrauded* by the 1st defendant. It created charges over an irregular or fraudulent title. The contract in the charge dated 3rd August 1999 and all the subsequent variations or further charges are thus *vitiated*. See *Wilfred Kiura Mwangi Vs. Harrison Gacheche & another* Nakuru, High Court case 40 of 1998 [2005] e KLR, *Govindji Popatlal Vs. Nathoo Visandjee* [1960] E. A 361. Accordingly, the bank's attempt to enforce its statutory right of sale is on a legal quicksand.
16. Finally, the death or absence of the 1st defendant at these proceedings is no longer a central issue. The proceedings of the Magistrate's Court at Kibera in criminal case 5717 of 1997 *Republic Vs. Godfrey Kaguru Mwaura* were admitted into evidence. Those proceedings and judgment, like I stated, are *binding* in this civil case. They *settle* the question whether the 1st defendant fraudulently obtained his father's title and caused a transfer or transmission to himself on illegitimate letters of administration. Facts can be very stubborn. Even if he were to be substituted, there is a clear finding of a criminal court of competent jurisdiction establishing the theft of the title. The true remnant of the dispute in this suit is between the plaintiff and 2nd defendant bank. The bank is thus ill-placed to try to hold brief for the 1st defendant.

17. The answer to the first question in the originating summons is therefore in the *negative*: the charge executed by the 1st defendant in favour of the 2nd defendant over title number Dagoretti/Riruta/T.302 is *not* valid. The answer to the second question in the originating summons is in the *affirmative*: The charge dated 3rd August 1987, and the subsequent variations and further charges are *vitiated* by fraud. On the third question, the answer is *negative*: The 1st defendant did *not* have *capacity* to create or execute the charge, the variations or further charges.
18. In the result, the suit property reverts back to Stephen Mwaura's estate. The interest in the title devolves to the plaintiff and other beneficiaries of the estate of Stephen Mwaura (deceased). I thus order that the 3rd defendant, District Land Registrar Nairobi, or his successor, do rectify the title number Dagoretti/Riruta/T.302 by cancelling the transfer dated 23rd May 1972 and also cancelling the title issued or reissued to Godfrey Kaguru Mwaura (also deceased) on 23rd May 1972 and 19th June 1987 respectively. The 3rd defendant shall remove or cancel all the encumbrances on the title placed by the 2nd defendant under the charge dated 3rd August 1987 and registered on 13th August 1987, variation of charge dated 13th September 1988, further charge dated 13th March 1990, 2nd further charge dated 22nd May 1991 and 3rd further charge dated 4th June 1992 or any such security by the bank registered on diverse dates against the title.
19. Costs follow the event and are at the discretion of the court. This is a family dispute over beneficial interest in land belonging to their patriarch Stephen Mwaura (deceased). The original plaintiff, his widow Joyce Nungari, is dead. The 1st defendant who engaged in the shenanigans and fraudulent transfer is also dead. The 2nd defendant bank is holding tainted securities that have now been impeached. The charges and variations are unenforceable. The bank had lent monies to the 1st defendant. Its claims on the debt remain unsettled. Granted all those circumstances, it would be unjust to condemn the bank to further costs. In the interests of justice, the appropriate order to make is that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of

March 2014.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr. H. Shah for Mr. Onyango for the plaintiff instructed by Kigano & Associates Advocates.

No appearance for the 1st Defendant.

Mr. M. M. Maweu for the 2nd defendant instructed by Adera & Company Advocates.

No appearance for 3rd defendant.

Mr. C. Odhiambo, Court clerk