



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISUMU
ELC CASE NO.73 OF 2016

MOHAMMED FEISAL MOHAMUD.....1ST PLAINTIFF
IBRAHIM MOHAMED OSMAN.....2ND PLAINTIFF
YASSIN MOHAMED MAHAMUD.....3RD PLAINTIFF

VERSUS

RICHARD GUYA MEMBO.....1ST DEFENDANT
DISTRICT LAND REGISTRAR KISUMU.....2ND DEFENDANT
RAMOGI CHEMISTS LIMITED.....3RD DEFENDANT
HAFISWA NAMUKHOSI MUHAMED.....4TH DEFENDANT
MUSA MUHAMED.....5TH DEFENDANT
ALI OKUMU MOHAMED.....6TH DEFENDANT

JUDGMENT

Mohammed Feisal Mohamed, Ibrahim Mohamed Osman, Yassin Mohamed Mahamud (hereinafter referred to as plaintiffs) have come to this court against Richard Guya Membo, District Land Registrar Kisumu, Ramogi Chemists Limited, Hafiswa Namukhosi Muhamed, Musa Mohamed and Ali Okumu Mohamed (hereinafter referred to as the Defendants) praying for orders that there be a **declaration that the suit land KISUMU/MUNICIPALITY/275 and 276 belongs to the Plaintiffs. Moreover, a declaration that the suit land herein was transferred to the 1st defendant fraudulently and unlawfully and the titles thereof be revoked accordingly. An order of permanent injunction restraining the 1st defendant, of his own agents, servants and/or employees from trespassing into, developing, alienating, disposing off, or in any other way interfering with the plaintiffs quiet and peaceful use and occupation of the suit land herein designated as KISUMU/MUNICIPALITY/275 and 276.**

The 1st Defendant filed a defence and Counter claim and sought reliefs a **declaration that he is the bona fide purchaser of the suit parcels Numbers KISUMU/MUNICIPALITY/275 and 276 and that the plaintiffs' agreement is null and void. Moreover, a permanent order of injunction against the**

plaintiffs, their agents, servants and or any other person from trespassing into, and or interfering with the 1st defendant's peaceful occupation and ownership of the suit land parcels Numbers KISUMU/MUNICIPALITY/275 and 276. General Damages for trespass. Costs of the suit. The 2nd Defendant filed defence generally denying the plaintiffs' claims.

The 3rd Defendant filed a defence and counter claim and sought reliefs thus an order for vacant possession of the suit premises on land parcel Numbers KISUMU/MUNICIPALITY/275 and 276 and an order for mesne profits with effect from 11th March 2016 until the delivery of the vacant possession of the suit property to the 3rd defendant. Costs of the suit and counter-claim and any other or further relief that the Honourable Court may deem fit and just to grant. It is alleged by the Plaintiffs that the property was transferred to Ramogi Chemists Ltd and therefore the said Ramogi Chemists was enjoined as 3rd Defendant.

The plaint herein was amended on 27/11/2018 and the 4th to 6th Defendants were enjoined. The 1st and 3rd Defendants filed a defence and counter claim to amended plaint on 10/11/2018. They sought an order for vacant possession of the suit premises on land parcel Numbers KISUMU/MUNICIPALITY/275 and 276. An Order for mesne profits with effect from 11th March 2016 until the delivery of the vacant possession of the suit property to the 1st and 3rd defendants, Costs of the suit and the counter-claim, any other or further relief that the Honourable Court may deem fit and just to grant.

The 1st Plaintiff, Mohamed Feisal Mohamud testified that he leased the suit premises designated as land parcel Numbers KISUMU/MUNICIPALITY/275 and 276 from the registered owners namely haji Mohamed and the 3rd to 5th defendants with a view to improving the same and converting into business complex for letting to small scale businessmen on the understanding that he would collect rents from them and pay the landlord the rent as agreed in the lease agreement.

He invested heavily in the buildings and constructed a temporary structure that has become extremely popular with the shoppers. He has a number of tenants and who have improved stalls and stocks. He has had a cordial relationship with the landlord over the times but unknown to him and his tenants, the landlord entered into a sale agreement with the 1st defendant on the 11th of March 2016 without taking into account his interests in the suit property which exposed him and his tenants to the risk of eviction from the suit property and that the 1st defendant threatened to evict him from the property. The purchase price was 45, 000,000 and a deposit of ksh 10,000,000 was to be made upfront and the balance within 90 days. There was a default close in the agreement that any party who defaulted was to pay 20% of the purchase price.

He looked at the sale agreement and noted that the 1st defendant was obligated to deposit a sum of Ksh 10,000, 000 at the execution of the agreement and pay the remaining balance within 90 days so that the property could be transferred into his name. However, the 3rd to 6th defendants agreed to return the money and revoke the agreement. On the 29th of March 2016 they signed another agreement with the plaintiff and he paid them 10,000,000 to be refunded to the 1st defendant and the same was refunded to the 1st defendants lawyers. He paid a total of ksh 45,000,000. The sale of the property to the 1st plaintiff was in consideration of their business relationship. They entered into a formal agreement and paid the owners as agreed. A revocation was done and the 1st defendant was paid the deposit. The plaintiffs are still in occupation and are in the process of transferring the property into their names. The 1st defendant has not paid the full purchase price and therefore not entitled to the land.

On cross –examination by Mr Carlos Ouma, learned counsel for the 2nd and 3rd plaintiffs, he reiterated the statement and his evidence under examination in chief.

On cross –examination by Mr Munyithya, learned counsel for the 1st , 3rd to 6th defendants, he stated that he paid the whole amount but when asked about the documents he became evasive and fumbled with the documents and asked for time to answer the question. He began by stating that he paid through Barclays bank, Kisumu branch. He further stated that he paid through KCB Nakuru. He further stated that payment was shown in the affidavits of the vendors. On further cross examination he states that he paid ksh45,000,000-- into the account of Haji Mohamed.

He admitted that the revocation of sale of agreement between the 1st defendant and the 3rd to 6th defendants was done without involving the 1st defendant. He admitted that at the time of revocation the parcel of land was registered in the names of the 3rd defendant. He did not know how the property was transferred to the 3rd defendant. He did not know whether the 1st defendant paid the whole amount. The plaintiff confirmed that the total income from the property per month was ksh 600, 000. The 2nd plaintiff gave evidence on oath and further relied on the witness statement filed on the 17th of May 2021. The gist of his evidence is that the plaintiffs entered into agreement with the proprietors of the suit property which was a new agreement as opposed to the old agreement between the 1st defendant and the proprietors of the suit land and that full consideration of Ksh 45,000, 000 was paid and has not been refunded.

On cross –examination by Mr Munyithya, he states that they entered agreement with the three vendors who were the registered owners and that Mohamed Haji Mohamed received the lions Share. He was aware of the agreement between the 1st defendant and the 4th to 6th defendants made on 11th March 2016 but was not aware that the title had been issued. The agreement was later revoked by the vendors. The 1st defendant testified that he was the managing director with 90% shares of the 3rd defendant and he produced the Articles of Association, the memorandum of association and the certificate of incorporation and the certificate of Change of Name.

The promoters of the company are Richard Guya Mambo and Petronila Atieno Juma. The 1st defendant testified that he purchased the suit properties from the previous registered owners sometimes on the 11th March 2016 after several negotiations and that at the time of purchasing the property the tenancy agreement existing had already expired and had not been renewed. He paid a deposit of the purchase price as agreed and took over possession and occupation of the property as per the agreement. The property was then transferred into his name. The plaintiffs then later purported to have purchased the same property and yet the agreement between the 1st defendant and the 4th to 6th defendants had not been cancelled. The plaintiff produced the agreement of sale, the bank advice slips for payment and the certificates of leases, transfer of lease to his company, the letter of consent from the commissioner of Lands to Haji Muhamed Musa and the settlement balance of payment between the registered owners and the 1st defendant. The 1st defendant produced bank statements detailing the payments and a valuation report for the property. He claims to have paid a deposit of Ksh 10,000,000 on the signing of the agreement and the balance within 90 days as agreed. He gave notice to the tenants of the change of ownership of the property. The 1st defendant prayed for mesne profits as he took possession on 15th March 2016 to-date. That the tenants are not cooperating because of the interference by the plaintiffs. The 1st defendant prays for mesne profits of Ksh 720 000 per Month.

On cross examination by Mr Ouma he states that the evidence he gave was for the 1st and 3rd defendants and that when he purchased the property, the plaintiffs were in possession as tenants. He bought the property and assigned it to the 3rd defendant. The transfer was to be done after payment of the full purchase price and that Ramogi Chemist did not feature in the agreement. He reiterated the allegation that he had taken possession of the land and that the plaintiffs were collecting rent on his behalf. When he bought the property, the plaintiffs were still in possession. He argued that the revocation of the sale agreement was of no value to him. He admitted that the purchase amount was returned to him and a suit filed by the vendors but the same was withdrawn. The title was transferred lawfully.

On cross examination by Mr Onsongo, he states that he does not have a transfer of lease to Ramogi Chemists Ltd and that there was no application for consent to transfer to Ramogi Chemists. The letter of consent does not indicate the date it was made but the same is to Haji Mohamed. The transfer of lease was not signed by the Ramogi Chemists and there was no seal of the Company and no incorporation number. On cross examination by M/s Rege for the Attorney General, he states that there was no fraud and that the transfer was done legally. On re-examination by Mr Munyithya, he states that the plaintiffs were not parties to the agreement and that the vendors are not claiming anything from him.

Mohamed Aslam Khan testified as the 2nd witness for the 1st and 3rd defendants' and produced the affidavit sworn on 30th May 2016 as his evidence. On cross examination by Mr Ouma he stated that he was only aware of the agreement dated 11th March 2016 as he was the witness for the vendors and that the 1st suit filed by the vendors against the 1st defendant was engineered by the plaintiffs. Though he was a witness he was not involved by the parties in the revocation. The 1st defendant paid Ksh 10,000,000 on the 11th of March 2016. The witness stated that the final payment was to be made within 90 days and that he was not aware whether the money was paid.

The 6th defendant Ali Okumu Mohamed testified that Haji Mohamed Musa is his father, Hafiswa Namukhosi Muhamed is his mother and Musa Mohammed his elder brother. In 2016, his father was 88 years old. He adopted his affidavit- evidence at page 289 of the bound record whose gist is that the document of undertaking was prepared by Mr Ouma advocate for the 2nd and 3rd plaintiffs. The 2nd agreement was done by Ouma and Company advocates. He did not sign the undertaking and that they had already sold the land at the time of the second agreement.

On cross –examination by Mr Onsongo he admitted signing the subsequent agreement which he argues that the same did not nullify the first agreement. He further stated that the subsequent agreement was prepared by Mr Ouma but he did not receive any money from the plaintiffs. He is not aware that his family sued Ramogi Chemists.

On cross –examination by Mr Ouma, he states that the suit property was jointly owned by his father, mother, himself and his brother and that he was party to the agreement of sale between the family and the 1st defendant. That the 1st defendant paid a sum of Ksh 10,500,000 as a down payment and the balance of Ksh 35,000,000 was to be paid within 90 days and that the same was to be obtained from a loan and that the title was supposed to be charged and it was charged to Barclays Bank. He signed the subsequent agreement but did not receive any money from the plaintiffs and that the subsequent agreement was fake. He was categorical that he did not receive any purchase price for the land. When shown PEX 7H he admitted that the payment was made to him but did not remember receiving the money. On re-examination by Mr Munyithya, he states that he has not signed any acceptance letter or receipt of the money.

The 5th defendant, Musa Muhamed relied on the statement dated 14th December 2018 and filed on 23rd January 2019. On Cross examination by Mr Onsongo he states that remembers signing the agreement that was read to him but he is not good in English. He remembered the revocation agreement and admitted signing it whose import was that they revoke the agreement with the 1st defendant. He was forced by his father to do so and Ksh 2,000,000 was sent to his account by the 2nd defendant and he did not return the same. On cross examination by Mr Ouma, Counsel for the 2nd and 3rd plaintiffs, he states that he was not paid any money by the 1st plaintiff but saw Ksh 7,000,000 in his account after signing the agreement. He again changed his statement and said that he could not remember when he received the money. He did not know why the money was sent to his account. He confirmed that the family sold the suit properties to the 1st defendant.

The 2nd defendant called Ogeto Nelson the land registrar Kisumu who stated that the registered owner of the suit land was Ramogi Chemists Ltd. He produced documents as proof of ownership.

On Cross –examination he states that the sale agreement is dated 11th of March 2016 but there is no agreement between Ramogi Chemists and the vendors. The Vendors transferred the property to Richard Guya Membo trading as Ramogi Chemists Ltd. The transfer was received on 22nd Mach 2016 and entered in the presentation book on the same date as number 438. The property was transferred to Richard Guya Membo trading as Ramogi Chemists. On cross examination by Mr Ouma he states that the agreement dated 11th March 2016 is relevant though they do not insist on the agreements. The most important documents are the transfer instruments, consent, requisition for stamp duty, receipt of payment. In this case, they were given a sale agreement to register a caution. On the sale agreement there was no name of the Ramogi Chemists Ltd as the purchaser. He did not have any certificate of incorporation of Ramogi Chemists Ltd but according to the Registrar of lands the registration of Ramogi Chemists Ltd was not an issue and the transfer to Ramogi Chemists was in order as the same person was the director of the company. The consent to transfer was given on 21st March 2016, The Transfer of Lease was signed on the 21st of March 2016 and registered on 22nd March 2016. Stamp duty was paid on 21st March 2016 when consent was given and valuation was done on the same date, and Barclays bank gave out a loan of Ksh 5,000,000

ANALYSIS AND DETERMINATION

The brief facts of this case are that the registers for Kisumu/Municipality/Block 7/275 and 276 were opened on 28/9/1975 by reconstruction. The parcels of land were initially allocated to Alibhal Kassam (Alijah) Hashantah Jamal, Robert Kennest, Gordon Russel & Hassen Kassam and a lease issued for a term of 99 years from 1/12/1935. Both parcels of land measured 0.0465 acres.

On 21/12/1976, the properties were registered in the names of Abdul Majid Khan C/O Klardin P.O. Box 218 Kisumu.

On the 18/3/1982, and 20/1/1986 both properties registered charges in terms of Section 70 of the R.L.A (repealed).

On the 31/8/1995, the properties were registered in the names of Haji Mohamed Musa Hafiswa Namukhosi Mohamed, Moses Mohamed and Ali Okmu Mohamed. On the 3/3/2010, a certificate of lease was re-issued for bloc 7/275 whilst for Block 7/276 it was issued on 20/12/2007.

On 22/3/2016, a transfer was registered in the names of Ramogi Chemists Ltd and certificates of lease were issued on the same date. On the 19/4/2016 both properties were charged to Barclays Bank of Kenya Ltd for Kshs. 5,000,000.

At the time of transfer to Ramogi Chemist Ltd who is the 3rd Defendant herein the Plaintiffs were tenants on the land and the Landlords were the 4th, 5th, 6th Defendants including Haji Musa deceased. On the 11th March 2016, the 4th, 5th and 6th defendants including Haji Musa deceased entered into agreement with the 1st defendant and agreed to transfer the suit property to the 1st defendant. The plaintiffs as tenants having leased the property for a long period of time and having extensively improved the premises by constructing several business stalls that were leased to small scale traders for rent were interested in the property. By the time the agreement was entered into between the Defendants number 1, 4, 5 and 6, the plaintiffs were paying rent dutifully and were still in occupation until the date of filing suit and todate the agreement made between the 1st Defendant and the 4th, 5th and 6th Defendants on 11/3/2016 was followed by another agreement between the plaintiffs and the 4th, 5th, 6th Defendants and one Haji Musa now deceased. On 29/3/2016 for a consideration of Kshs. 45,000,000.

The Plaintiffs paid the Haji family Kshs. 10,500,000 as a deposit.

The Kshs. 10,500,000 was done in Bankers cheques by the Lawyers for the Plaintiffs to the lawyers for the 1st Defendant.

These bankers cheques were returned to Plaintiffs by the advocate of the 1st defendant. The plaintiffs did not come out clearly that they paid the 4th, 5th and 6th Defendants the purchase price.

After execution of the 1st agreement that was between the 1st Defendant and the 4th, 5th and 6th Defendants, the lease tenancy was not renewed.

The 4th, 5th and 6th defendants witnesses stated that the money they received from the plaintiffs was for rent and they did not understand why they were being paid.

This court finds that the 1st defendant and the 4th, 5th and 6th Defendants executed a legal and binding agreement for the sale of the suit properties. In the agreement dated 11/3/2016 executed by the 1st Defendant as the purchaser and the 4th, 5th and 6th Defendants as vendors witnessed by Mohamed Ashan Khan for vendors and Patrick Lumumba Owiti for purchasers, it was agreed that land parcel numbers Kisumu/Municipality/Block 7/275 and 7/276 be sold to the 1st Defendant.

Section 3 (3) of the Law of Contract Act provides:-

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

I do find that the 1st Defendant and the 4th, 5th and 6th Defendants complied with the Law because the sale agreement was in writing, signed by all the parties, which signatures were attested by an advocate of the high court of Kenya.

The Plaintiffs and the 4th, 5th and 6th Defendants purported to revoke the agreement between the 1st defendant and the 4th, 5th and 6th Defendants however by the time of the purported revocation, the 4th, 5th and the 6th Defendants had ceased being the proprietors of the suit property and therefore the 4th, 5th and 6th Defendants did not have the capacity to revoke the agreement of 11/3/2016. Moreover, the 1st and 3rd defendants were not parties to the revocation and therefore not bound by the revocation.

This court further finds that the sale between the plaintiffs and the 4th, 5th and 6th defendants was also a nullity because, the 4th, 5th and 6th Defendants had ceased being the proprietors of the suit properties.

The argument by Mr. Onsongo counsel for the 1st Plaintiff that the agreement dated 29/3/2016 superseded all the others does not hold water due to the reasons given herein above thus that the property had ceased being in the ownership of the defendants no. 4-6 and that the 1st defendant was not involved in the revocation deed and that a revocation deed can only bind the parties to the same and not third parties.

It is a fact that the properties were purchased by the 1st Defendant but transferred in the names of the 3rd Defendant who was not a party to agreement and who was not a transferee. The instrument of transfer

executed according to law on the 21st March 2016, between the 1st Defendant and 4-6 defendants and registered on 22nd March 2016 and certificate of lease was issued on the same date but in the names of Ramogi Chemist Ltd.

Mr. Onsongo argues that the act of transferring the parcel of land in the names of the 3rd Defendant by the 4th -6th Defendants before completing the payments was unlawful, illegal, fraudulent as it was a clear break of clause 8.2 of the agreement. I do find that this argument cannot be sustained due to the fact that it was the 4-6 defendants who transferred the property to the 1st Defendant and that the plaintiffs were not party to the agreement dated 11/3/2016 and therefore they can't complain of breach of the same.

It is a fact that the 3rd Defendant was not party to the agreement dated 11/3/2016 but was registered as the proprietors of the suit properties. How did they find themselves in the register?

This court finds that the 3rd Defendant was registered as the proprietors of the suit property with the instructions of the 1st Defendant. The 3rd defendant is a limited liability company and therefore distinct from its promoters who are the 1st Defendant and his wife. There was no agreement between the 3rd defendant and the 4th -5th Defendants and none with the 1st Defendant but she found herself as the proprietor of the suit property. This is the basis of the plaintiffs averring that this was through fraud illegality and unlawfulness.

The Land Registrar Mr. Ogeto admitted that the registration was not in line with the transfer form of the suit properties.

On this issue, I do find that this complaint could have been valid if it was raised by the 4-6th defendants who were the proprietors of the property before transfer but not the plaintiffs whose interest in the property was only a lease tenancy and not proprietorship.

Even if the 4-6 defendants had complained, still the same could not be invalidated as they had received full consideration in terms of the agreement and had signed the transfer forms, transferring the property to the 1st Defendant and the Land Registrar had registered the transfer document. However, the Land Registrar acted against known practice when entering the register and that instead of entering the names of the 1st Defendant, he entered the names of the 3rd Defendant. This court observes that the 4-6 defendants testified that the suit properties were registered in their names and that they sold the same to the 1st Defendant and not the plaintiffs.

As submitted by Mr. Munyathaya for the 1st, 3rd, 4th, 5th and 6th Defendants, this court will be acting in vain to invalidate the registration of the 3rd Defendant as the proprietor of the suit properties because the defendants will just move and have another transaction transferring the property to the 3rd Defendant. I do not agree with Mr. Onsongo that the 1st defendant concealed material facts to the Land Registrar because the Land Registrar had the transfer form properly executed between the vendors and the purchaser.

The 1st Defendant was the transferee and not the transferor and therefore it cannot be alleged that he transferred the property to the 3rd Defendant. He admitted that he instructed the Land Registrar to register the property into the names of the 3rd Defendant.

The contract and transfer herein between the 1st Defendant and the 4-6 Defendants were legal and cannot be faulted.

Section 26 of the Land Registration Act provides:-

(1) "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission 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 or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

The import of this section is that any registration done illegally, unlawfully and tainted with fraud and corruption cannot be sustained. In this case, the Land Registrar registered the 3rd Defendant as the proprietor instead of the 1st Defendant.

I do agree with Mr. Onsongo’s argument that there is no privity of contract in respect of the 3rd Defendant in the agreement dated 11/3/2016. However, by not being party to the agreement of 11/3/2016 per se is not evidence of fraud and that the plaintiffs also were not privy to the said agreement.

I have looked at the submissions of Mr. Carlos Ouma learned counsel for the 2nd and 3rd Plaintiffs who contends that the certificate of title held by the 3rd Defendant was obtained through fraud, illegality procedurally and clearly through a corrupt scheme considering the anomalies in the transfer, the speed at which the transfer was done and fact that improper duty was paid to facilitate to transfer.

There is no irregularity in the agreement and transfer. The only alleged irregularity comes into place in the registration. The plaintiffs’ interest in the property prior to registration of the 3rd Defendant was a lease tenancy. Their subsequent interest of purchasing the property from the 4th – 6th Defendants did not materialize because it had been transferred to the 3rd Defendant and therefore this court concludes that the plaintiffs have no cause of action against the 3rd defendant as the only persons that could have sued the 3rd Defendant are the 4th-5th Defendants who are in fact supporting the 4th Defendant.

I do agree with Mr. Carlos Ouma counsel for the 2nd – 3rd plaintiffs that the agreement by the 1st Defendant is not supported by an instrument of assignment however, having stated that the plaintiff have not demonstrated any interest in the property other than the lease tenancy have no cause of action against the defendants.

I agree with the submissions of Lorna Orege Senior Litigation Counsel for the 2nd Defendant that the plaintiff has not proved fraud and illegality against the Land Registrar.

Section 107 of the Law of Evidence Act Cap 80 Laws of Kenya provide:-

“(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.”

There is no evidence of fraud against the 2nd Defendant. The 2nd Respondent through Mr. Ogeto came to court and produced documents of transaction that included the green card, agreement, receipt for payment of stamp duty and requisition for valuation. Moreover, the persons who could have complained in respect of alleged transfer should have been the 1st defendant and or the 4th- 6th Defendants and not the plaintiffs because the plaintiffs are not party to the agreement of 11/3/2016.

The evidential standard for proof of fraud in civil cases is higher than a balance of probabilities but lower than the criminal standard of proof beyond reasonable doubt. Evidence of especially high quality and strength is required to discharge the high burden of proof in a case alleging fraud. See **Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others Civil Appeal No. 45 of 1996** where the Court stated:

“Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary case.” (Emphasis added)

In **Paragon Finance PLC v D B Thakerar & Co 1999 1 ALL ER 400**, the Court stated of fraud:

“It is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. An allegation that the defendant ‘knew or ought to have known’ is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud even if the court is satisfied that there was actual knowledge. An allegation that the defendant had actual knowledge of the existence of a fraud perpetrated by others and failed to disclose the fact to the victim is consistent with an inadvertent failure to make disclosure and is not a charge of fraud. It will not support a finding of fraud even if the court is satisfied that the failure to disclose was deliberate and dishonest. Where it is expressly alleged that such failure was negligent and in breach of a contractual obligation of disclosure, but not that it was deliberate and dishonest, there is no room for treating it as an allegation of fraud.”

In **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR Tunoi JA** as he then was stated:

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

69. In **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR** the Court of Appeal stated:

“.....It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo (2008) 1 KLR (G&F) 742 wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

In the particulars of fraud, the appellant alleged that he did not consent to the transfer of the property. We find this was not true; as pointed out by the courts below, the appellant had full knowledge of and consented to the transaction. The evidence of the chief (DW2) was instructive in this regard, as was a letter to the Land Registrar, Kiambu. This letter in particular shows that the appellant was fully aware of the transaction between the respondent and his deceased brother.

The evidence that was adduced by the Land Registrar seemed to indicate that there may have been some mischief in the manner that the title in favour of the respondent was procured. In his evidence, the Land Registrar indicated that the file in respect of the subject property could not be found, and as such, any transfer that may have been undertaken may have been fraudulent. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of**

2000) 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.” (Emphasis added)

It is not enough to plead fraud, it is not enough to infer fraud from the facts, one must specifically prove. In this case the plaintiffs inferred fraud against the defendant whereas the land registrar testified that the 1st defendant who was a beneficiary of the transfer instructed him to register the the two parcels of land in the names of the 3rd defendant. The act of transferring the properties in the names of the 3rd defendant cannot be described as fraudulent because it was the beneficiary of the transfer who instructed the same to be done. Fraud is intended to employ dishonesty to deprive another of money, property or a right, in this case the property belonged to the 4th to 6th defendants and not the plaintiffs.

Mr. Munyithya, counsel for the 1st, 3rd, 4th, 5th and 6th Defendants insisted this court to find that the 2nd and 3rd plaintiffs did not file suit against the defendants because the suit is founded on amended plaintiff field in court on 27/11/2018 through the firm of Onsongo and Company advocates who represents the 1st Plaintiff. There is no amended plaint by the firm of Ouma Anyumba & Co. Advocates for the 2nd and 3rd Plaintiffs.

The verifying affidavit to the amended plaint is by the 1st plaintiff. I do find this argument is based on mere technicalities and does not go to the substance of the case as the 2nd and 3rd Plaintiffs field verifying affidavits on the commencement of the suit.

Article 159 of the Constitution of Kenya provides that:-

“159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles— (a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

(3) Traditional dispute resolution mechanisms shall not be used in a way that—

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law.”

I do dismiss this argument.

However, I do agree with Mr. Munyithaya's submissions that the 4th – 6th Defendants who are the Haji family including Haji himself now deceased collectively agreed to transfer the suit property to the 1st Defendant and even signed the transfer form. Whether they held the title in joint ownership or as tenants in common is not disclosed in the certificate of lease. But they all agreed to transfer the property to the 1st Defendant. Whether they received money or not from the plaintiffs as consideration for the second agreement is a matter for another day as the plaintiffs are not praying for a refund.

I have already held that this court cannot act in vain and leave the parties in limbo by nullifying the Registration of the 3rd Respondents as the registered owner of the suit property.

The court has perused and discerned the submissions filed by Mr. Munyithiya and observes that it has already held that the agreement entered on the 29/3/2016 did not confer title of the suit properties to the plaintiffs and by the time they were signing the agreement the horse had already bolted so to speak. Moreover, the deed of revocation of agreement had no legal consequences.

In conclusion, I do find that the plaintiffs have not proved on a balance of probabilities that the suit properties belong to them and therefore the suit is dismissed with costs.

The 1st and 3rd defendants filed a counter-claim for mesne profits as the plaintiffs have been in possession of the suit property and are earning income from the suit property.

The 1st defendant produced a valuation report that indicated that the plaintiffs were making an income of Kshs. 720,000/= per months whilst the plaintiffs admitted that they were making an income of Kshs. 680,000 per months.

I will go by the plaintiffs' figure and award the 1st defendant and 3rd defendant jointly an award of Kshs. 680,000 per months from April 2016 to the date of payment of the same. Moreover, I do grant the 1st and 3rd Defendants an order for vacant possession of the suit premises on land parcel number Block 7/275 and 276. The plaintiffs to vacate within the next 60 days. I do grant the defendants costs of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 11th DAY OF MARCH, 2022

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.