



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.313 OF 1998

JOYCE JULIA ONYANDO.....PLAINTIFF

VERSUS

FRANCIS KIHONGE NGANGA.....1ST DEFENDANT

NAIVASHA MUNICIPAL COUNCIL.....2ND DEFENDANT

JUDGMENT

The late **Samuel Benjamin Onyando** died on 11th April 1991. Upon his death, the widow, **Joyce Julia Onyando**, the plaintiff herein took out grant of letters of administration for his estate on 12th May 1992. Among the properties the late Onyando owned was L.R. 1144/879 Naivasha Township, the suit property. According to the plaintiff, she was surprised to discover from the Lands office, Nairobi and from Naivasha Municipal Council, the second defendant, that the property had been transferred to Francis Kihonge Nganga, the 1st defendant on 29th April 1996. The plaintiff then learnt that an agreement was purportedly executed by her late husband and the 1st defendant in which the former sold to the latter the property at a consideration of Kshs.90,000/=.

Not convinced by the discovery, the plaintiff brought this action for a declaration that the transfer dated 23rd June (1994) is null and void, and further that the subsequent registration of the 1st defendant is null and void. She has also prayed that the 1st defendant's registration be cancelled; a further declaration that the estate of the late Onyando is the lawful owner of the suit property, a permanent injunction restraining the 2nd defendant's servants or agents from selling and/ or disposing of or alienating the suit property, damages for fraud, costs and interest.

The 1st defendant filed a statement of defence and a counter-claim, in which he averred that he purchased the property from the late Onyando who executed both the sale agreement and the transfer and also received payment of the purchase price before an advocate. In the counter-claim it is deposed that should the court find the transaction void for any reason, the estate of the late Onyando be ordered to refund the purchase price with interest from January 1990 when the sale took place. It is further stated that as a result of this case, the 1st defendant has been prevented from developing the property thereby suffering great loss and damage.

Although served with the pleadings and the hearing notice, the 2nd defendant did not enter appearance or participate in the case at all.

The plaintiff and her son, **P.W.2 Daniel Odhiambo Onyando (Daniel)** testified that they were aware of the existence of the suit property which the deceased had purchased. Indeed Daniel confirmed having been to the property. Both the plaintiff and Daniel confirmed that they had not seen documents of title prior to this case; that when the plaintiff petitioned for a grant of representation, she included the suit property believing it was still in the name of the deceased.

Both testified that the deceased fell ill in 1989 and in 1990 was too ill to travel on his own; that indeed he passed on on 11th April 1991. They are unanimous that the deceased was not in Naivasha on 24th January 1990, when he is alleged to have signed the sale agreement. That the only time he left his home in Nyahera, Kisumu in 1990, was when he was going to hospital in Nairobi and that even on this occasion he was accompanied by the plaintiff. The plaintiff and Daniel have disowned the signature purported to be that of the deceased on both the agreement and the transfer. They were categorical that at no time did the deceased tell them about the transaction in question.

The 1st defendant for his part argued that he was introduced to the late Onyando by a land agent. They negotiated and the deceased agreed to sell the property to him at a consideration of Kshs.90,000/=. He paid Kshs.20,000/= in cash and Kshs.70,000/= by banker's cheque as requested by the deceased. The agreement was prepared and executed before E. N. Nganga, Advocate at Naivasha who also witnessed the payment. The deceased executed an undated transfer and surrendered the original title deed to the 1st defendant. Almost six years after the execution of the agreement and five years after the death of deceased, the transfer was registered on 29th April, 1996.

The 1st defendant explained that the date on the transfer was left blank because he had no funds to pay for registration at the time. Because the banker's cheque to the deceased was never returned unpaid, the 1st defendant maintained that it must have been encashed in favour of the deceased. Having paid the rates fully, Commissioner of Lands gave a consent for the transfer. The title deed was ultimately issued. He denied any fraud on his part in the transaction, but clarified that E. N. Nganga, advocate is his brother. The 1st defendant only learnt of the death of the deceased when this suit was filed.

Mr. Elias Ngugi (E. N.) Nganga, advocate supported the 1st defendant's evidence in so far as the preparation and execution of the sale agreement was concerned. According to him, the agreement and the transfer were drawn by him in his Naivasha office. Both the 1st defendant and the deceased signed the two documents before him. He recalled having confirmed first that the deceased was indeed Samuel Benjamin Onyando from his identification card. In preparing the transfer, the 1st defendant requested the advocate that the date be left blank as he did not have money for registration. This, he said was not uncommon in such transactions. He further maintained that the purchase price was paid to and acknowledged by the deceased in his presence.

That in summary constitutes the evidence presented in this trial.

It is common ground that prior to 29th April 1996, L.R. No. 1144/878 Naivasha was registered in the name of the late Samuel Benjamin Onyando, the deceased. On 29th April 1996, the property was transferred to the 1st defendant. It is the plaintiff's contention that the alleged transfer to the 1st defendant was a fraud, for the reasons alluded to earlier.

The plaintiff has listed two particulars of fraud, namely;

“a) Faking (sic) the signature of a deceased man;

b) pretending there was a transfer when there was not”

The suit property is registered under the **Registration of Titles Act (RTA)**. **Section 2** of that Act defines fraud to include proven knowledge by a person obtaining registration of the existence of unregistered interest on the part of some other person whose interest he knowingly and wrongly defeats

by that registration. That definition refers to statutory fraud. Further **section 75** of the **RTA** provides:

“75. Nothing in this Act shall take away or affect the jurisdiction of the court on the ground of actual fraud”

Lastly, **section 23(1)** of **RTA** stipulates that a certificate of title issued to a purchaser of land upon transfer or transmission by a proprietor is conclusive evidence that the person so registered is the absolute and indefeasible owner thereof and that the title cannot be impeached except on the ground of fraud or misrepresentation to which the registered owner is proved to be a party.

Both **Sections 23** and **75** of the **RTA** have been considered in the case of **Russel Co. Ltd V. Commercial Bank of Africa Ltd. & Another** (1986) KLR 633 in which the court of Appeal said:

“The second observation that we would like to make is that section 75 of the Registration of Title Act was not brought to the attention of the learned Judge which provides that nothing contained in this Act shall take away or affect the jurisdiction of the court on the ground of actual fraud. Therefore it could be argued that section 23 of Cap 281 may refer not only to fraud as defined but to actual fraud as referred to in section 75. It is possible to argue that if the court’s jurisdiction remains intact, it could set aside registration apart from damages which may be claimed under section 24 of this Act. It is for consideration whether section 75 preserves common law fraud.....

Thirdly, we would notice that although Jandu V. Kirpal (1975) EA 225 is an *obiter* decision of the High Court, it is some authority that even fraud as defined in section 2 of the Act have the effect of setting aside the registration“

From the above analysis of the law and the case law, the only question falling for determination in so far as plaintiff’s case is concerned is whether the sale and ultimate transfer of the suit property was tainted with impropriety amounting to fraud. I propose to consider this question on the following five grounds:

- i) the date of the alleged transfer (i.e. 24th January 1990);
- ii) the signature of the late Samuel Benjamin Onyando on the sale agreement and the transfer;
- iii) the dates and stamps on the transfer and the agreement;
- iv) the type face (font) on the agreement and the transfer;
- v) The banker’s cheque.

Starting with the first (i) issue, the plaintiff and Daniel maintained that at no time in 1990 did the late Samuel Benjamin Onyando go to Naivasha. That he was ill and only went to hospital in Nairobi once. They also maintained that the late Onyando did not inform them that he intended to sell or had in fact sold the property. The 1st defendant confirmed that the late Onyando was not known to him before the time of the alleged sale. He said he was introduced to him by an unnamed land agent. Both the 1st defendant and the E. N. Nganga, Advocate believed the person presented to them as the vendor was the late Samuel Benjamin Onyando after verifying the name from his identification card. Yet they did not keep a copy of the card as they did with other documents they received that day such as the banker’s cheque. Not even the identification card number was recorded in the agreement.

Weighing the evidence of the plaintiff that the late Onyando did not go to Naivasha on the day in question and the fact that the late Onyando was not known to the 1st defendant and to Mr. E. N. Nganga, Advocate, and the fact that they did not retain the identification card of the alleged vendor or record its number, it is most probable that the late Onyando did not sell the property to the 1st defendant.

The second (ii) issue relates to the signature of the late Onyando. The plaintiff and Daniel disowned the signature as being that of the late Onyando. The plaintiff who gave her evidence in English despite her age appeared an enlightened lady. She told the court that she had lived with her late husband for over 32 years. That he confided in her that he had purchased the suit property but did not tell her that he had sold it or of his intention to sell it. She dismissed the signatures on the agreement and the transfer alleged to be those of the late Onyando as forgeries.

She said;

“Transfer - 1st defendant’s list dated 23rd June 1994 - signature on the next page is completely different from my late husband’s. 1st defendant’s supplement list - Sale Agreement - the signature on the next page is not my late husband’s “

On his part, Daniel testified that:

“I am familiar with my father’s signature. It is not in any of the two documents. The “S” before “B” is missing and the “O” is complete while his was not a full circle. The signatures on the documents are different”

Although the two witnesses never presented to the court any previous signature of the late Onyando, their evidence comes within the provision of **Section 50** of the **Evidence Act**, which states that:

“50(1) When the court has to form an opinion as to the person by whom any document was written or

signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is admissible.

(2) For the purpose of subsection (1) and without prejudice to any other means of determining the question, a person is said to be acquainted with the handwriting of another person when he has seen that person write or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person; or when in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him”.

(Emphasis supplied)

Although not handwriting experts, the two witnesses being persons acquainted with the handwriting and signature of the late Onyando were able to say that the signatures on the agreement and transfer were not those of the late Onyando, I am similarly persuaded by that evidence.

Turning to the dates on the transfer (iii) above, there was unanimous evidence of the 1st defendant and Mr. E. N. Nganga, advocate that both the transfer and the agreement were prepared and executed on the same date at the same time, yet the agreement is shown to have been made on 24th January, 1990 while the transfer is dated 23rd June 1994 some four years later. The 1st defendant has explained that the date on the transfer was left blank after the late Onyando allegedly signed it because he (the 1st defendant) had no funds for immediate registration. That may have been so but considering that even after the date of 23rd June 1994 was inserted in the transfer, the transfer was not presented for registration until 29th April 1996, another two years. There is no explanation for this apparent anomaly.

Secondly, on this issue, the stamps appended on the two documents are markedly different. The one on

the sale agreement reads:

“E. N .NGANGA & CO ADVOCATES.....,”

while that on the transfer reads:

“ NGANGA E. N. ADVOCATE”

The third issue is on the fonts of typing of the documents, which are equally different. The agreement appears to have been prepared on a computer while the transfer on a typewriter. There is yet again the question of whether the agreement was made in Nairobi or Naivasha as the same is shown to have been drawn in Nairobi- Beaver House 4th Floor. Again, if the agreement was made in 1990, how is it possible that the address of E. N. Nganga, Advocate has a code of 00105 when there were no codes in 1990? The question the 1st defendant and Mr. E. N. Nganga, Advocate did not answer adequately is why would there be such discrepancies on two documents if indeed they were made on the same day at the same place. That also raises doubt as to the authenticity of the two documents. Related to this question is the failure of the 1st defendant to intimate the existence of the agreement and the transfer at the earliest time in these proceedings. Although a mention was made in the statement of defence and counter claim that the property had been sold to the 1st defendant, the actual date of the agreement is not specified. It is simply averred that the property was sold to the defendant “*on or about January 1990.*” The same averment was made in the 1st defendant’s replying affidavit filed on 13th February 1997:

“.....that I bought the subject property from Samuel Benjamin Onyando sometimes in January 1990.....”

Even though the affidavit alludes to the signing of an agreement, it is curious that it was not annexed to the affidavit as exhibit, yet that was a crucial, indeed the basis of the 1st defendant’s case. As a matter of fact, that failure led the court in deciding on the plaintiff’s application for injunction to state that:

“The agreement on which the purported transfer was based was not also produced and the cheque also appears to have not been deceased (sic)”

Even when the 1st defendant filed his list of documents on 11th November 2010, the agreement was not one of the documents listed. The agreement was brought forth by supplementary list of documents filed just a day before the hearing of the suit. All these matters raise serious questions of the integrity of the agreement and the transfer.

The final point (v) above deals with the issue of the banker's cheque. The cheque was issued in the name of S. B. Onyango while the deceased was called S. B. Onyando, where S.B. are acronyms for Samuel Benjamin.

Learned counsel for the 1st defendant has submitted that the mistake on the name on the face of the cheque was minor, caused by the issuing bank and further that since the 1st defendant was not alerted of the failure to honour it, it must have been paid to the late Onyando. It is a requirement under **Section 7(1)** of the **Bills of Exchange Act**, that where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.

S. B. Onyango cannot be the same person as S. B. Onyando. Secondly, there is no evidence that the cheque was infact paid to S. B. Onyando. Mr. E. N. Nganga, advocate confirmed that when he noticed the anomaly, he called Barclays Bank Kisumu to confirm if the cheque was paid but got no assistance.

I come to the conclusion that all the matters discussed above show that there was fraud or misrepresentation to which the 1st defendant appeared to have been aware of in view of the role he played.

The 2nd defendant is said to have threatened to sell the suit property for failure by the owner to pay rates. In view of the fact that that allegation has not been controverted by the 2nd defendant and bearing in mind the issues raised in this dispute, the relief sought against the 2nd defendant is granted. In the result there will be judgment in terms of prayers a, b, c and e of the amended plaint, amended on 21st July 1998.

I award costs to the plaintiff.

Dated, Signed and Delivered this 25th day of January, 2012.

W. OUKO

JUDGE