



REPUBLIC OF KENYA



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Kibui (Suing as Administrator of the Estate of Mary Wangechi Kibui - Deceased) v Kibui & 4 others (Cause 200 of 2016) [2022] KEELC 4929 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELC 4929 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
CAUSE 200 OF 2016
L WAITHAKA, J
JUNE 16, 2022

BETWEEN

PRISCILLA WANJA KIBUI (SUING AS ADMINISTRATOR OF THE ESTATE OF MARY WANGECHI KIBUI - DECEASED) PLAINTIFF

AND

JAMES KIONGO KIBUI 1ST DEFENDANT
CHARLES WAMBUGU GITONGA 2ND DEFENDANT
THE LAND REGISTRAR, NYERI 3RD DEFENDANT
THE HONOURABLE ATTORNEY GENERAL 4TH DEFENDANT
ECOBANK KENYA LIMITED 5TH DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated August 19, 2016 and filed on September 13, 2016, the plaintiff instituted this suit seeking a permanent injunction to restrain the 2nd to 5th defendants by themselves, their agents, servants and/or anybody claiming in their names from selling, alienating or in any other way disposing of or dealing with parcel No. Nyeri Municipality Block 11/224 in a manner inconsistent with her beneficial interest in it; an order of revocation or cancellation of the lease issued to the 2nd defendant on January 21, 2010 in respect of the suit property; an order reverting the suit property to the status it was before it was transferred to the 2nd defendant and registered in the 2nd defendant's name; an order directing the 2nd defendant to account for and deliver up to the plaintiff all the mesne profits realized from the suit property from October 21, 2010 to the date of judgment and costs of the suit.
2. The suit is premised on the grounds that the suit property was owned by the 1st defendant and the plaintiff's mother, Mary Wangechi Kibui, (deceased) as tenants in common; that the 1st defendant sold



the suit property to the 2nd defendant without the consent or authority of the plaintiff and her siblings hence compromising the interest of the plaintiff and her siblings in the suit property and that the plaintiff and her siblings have suffered damage.

3. Terming the sale of her mother's half share in the suit property null and void and arguing that the 2nd defendant was aware and fully seized of the fact that the suit property was also owned by their deceased mother whose estate had not been administered, the plaintiff contends that the 2nd defendant was not an innocent purchaser for value without notice. The plaintiff further contends that the sale and subsequent transfer of the suit property to the 2nd defendant was effected by fraud on the part of the 2nd and the 3rd defendant. The particulars of fraud are listed in paragraph 13 of the plaint, thus:-

Particulars of fraud on the part of the 2nd Defendant

- a. Presenting to the 3rd defendant fake transfer forms which were neither signed by the plaintiff's deceased mother nor the 1st defendant, in a bid to procure the registration of Nyeri Municipality Block 11/224 in his name by the 3rd defendant;
- b. Forging the deceased signature and personal details in a bid to procure the registration of Nyeri Municipality Block 11/224 in his favour by the 3rd defendant;
- c. Uttering false documents at the 3rd defendant's land registry in order to procure the registration of Nyeri Municipality Block 11/224 in his favour by the 3rd defendant.

Particulars of fraud on the part of the 3rd defendant

- a. Colluding with the 2nd defendant to have Nyeri Municipality Block 11/ 224 registered in his favour on the strength of fake and falsified transfer forms;
- b. Agreeing to register the 2nd defendant as the owner of Nyeri Municipality Block 11/224 in the absence of any genuine transfer forms signed by the deceased or the 1st defendant;
- c. Negligently and or recklessly agreeing to register the 2nd defendant as the owner of Nyeri Municipality Block 11/224.

4. In his statement of defence, the 1st defendant states that the suit property was owned by himself and his deceased mother in undivided half share each; that his mother died on October 23, 2003 and that her half share in the suit property remained unadministered until the issues raised in this suit arose. The 1st defendant admits having entered into agreement with the 2nd defendant for sale of the suit property but contends that he sold to him his half share only.

5. It is the 1st defendant's case that the 2nd defendant with the assistance of officers at the lands office Nyeri, fraudulently transferred the entire suit property into his name. The particulars of fraud levelled against the 2nd defendant are listed in paragraph 7 of the 1st defendant's statement of defence thus:-

- a. Procuring and presenting for registration fake transfer forms allegedly executed by him;
- b. Transferring the property to his name without the consent and executed transfer forms by the 1st defendant's mother who was a joint owner;
- c. Causing the property to be transferred into his name after the death of the 1st defendant's mother and without the letters of administration of the estate;
- d. The 2nd defendant did not obtain from the 1st defendant and his mother necessary documents such as ID card, Pin certificate, Passport photograph etc;



- e. There was no consent from the Municipal Council of Nyeri.
6. Through his statement of defence filed on November 11, 2016, the 2nd defendant denied all the allegations levelled against him and put the plaintiff to strict proof thereof. It is the case of the 2nd defendant that he was not aware of the interest of the plaintiff or her deceased mother in the suit property; that he bought the suit property from the 2nd defendant free of any encumbrances or third party or knowledge of estate of the deceased and contends that if the plaintiff has any claim it should be against the 1st defendant.
7. Through their statement of defence filed on March 5, 2018, the 3rd and 4th defendants have denied all the allegations of wrongdoing levelled at them or attributed to them and put the plaintiff to strict proof thereof.
8. In its statement of defence filed on March 29, 2017, the 5th defendant acknowledges that it advanced to the 2nd defendant Kshs. 26,000,000/- on the strength of the security offered by the 2nd defendant being the owner of the parcel of land known as Nyeri Municipality Block 11/224; that before it advanced the loan facility to the 2nd defendant, it conducted due diligence and confirmed that the property belonged to the 2nd defendant; that it registered a charge in its favour and that there is no threat of sale of the suit property because the 2nd defendant is meeting his obligations to it.

Evidence

The Plaintiff's case.

9. When the case came up for hearing, the plaintiff's list of documents filed on September 13, 2016 were admitted in evidence. She informed the court that she is the administrator of the estate of her mother, Mary Wangechi Kibui and produced a limited grant of letters of administration ad litem as Pexbt 1.
10. The Plaintiff relied on her statement filed on September 13, 2016 after it was adopted as her evidence in chief. She told the court that her mother inherited the suit property from her father and had been granted letters of administration for her father's estate which she produced as Pexbt 3 showing the suit property listed as one of her father's assets.
11. After confirmation of grant, the suit property was registered in the names of her mother and the 1st defendant, (she referred to a document marked as MFI 5) to hold the property as tenants in common. The plaintiff informed the court that her mother died on October 23, 2003 and produced the certificate of death as Pexbt 6. She stated that her mother was survived by 9 children as per the letter from the area chief dated June 9, 2016, Pexbt 7 although they have not filed a succession cause for the estate of their mother.
12. She explained that in 2010, they conducted an official search (Pexbt 8) and discovered that the suit property was registered in the name of Charles Gitonga (2nd defendant herein). Explaining that her mother did not sale and transfer the suit property to any person, the plaintiff informed the court that when she sought to know from the 1st defendant the circumstances upon which the 2nd defendant became registered as the proprietor of the suit property, the 1st defendant informed her that he sold to the 2nd defendant his half share in the property only.
13. The plaintiff informed the court that the Land Registrar, Nyeri was added in the suit as a party because he aided the 2nd defendant to get the ½ of the suit property that belonged to her mother. Explaining that the lease was clear that the suit property was registered in the name of the 1st defendant and her



deceased mother, the plaintiff stated that the 2nd defendant was reckless in registering the entire suit property in the name of the 2nd defendant.

14. In cross examination, the plaintiff stated that she became the administrator of her mother's estate in 2016; By that which, time she had become aware that the 2nd defendant had been registered as proprietor of the suit property; she stated that she had never seen the agreement between the 1st and the 2nd defendant; was not aware that the 1st defendant had transferred the suit property to the 2nd defendant but only knew what the 1st defendant had told her that he had sold only his half share to the 2nd defendant.

The 1st Defendant's case.

15. The 1st defendant relied on his witness statement dated February 6, 2017 and his list of documents filed on April 17, 2018 and a further list of documents filed on 24th September, 2018 after they were adopted in evidence.
16. In cross examination, the 1st defendant stated that his father and he were jointly registered as the proprietors of the suit property; that after his father died, succession was done and the property was registered in the name of his mother and he himself; that he could not tell whether his mother had signed any transfer forms before she died; that the property was never registered in his name as shown in Dexbt 5 and that he could not tell who carried out the official search he produced as Dexbt 5. He informed the court that he filed the document (Dexbt 5) because he obtained it in his list of documents filed in a different case of 2011. He further stated that the subject matter of this case had gone to the Criminal Investigation Department (CID) for investigation and urged the court to refer to Dexbt 11 where the CID officer was confirming owners of the suit property. He acknowledged that Dexbt 11 was written when this suit was pending in court (2017) and that he did not inform the 2nd defendant about the inquiry he had initiated with the CID.
17. The 1st defendant admitted that in 2007 he sold to the 2nd defendant a portion of the suit property claiming that in the agreement, he stated that the land was jointly owned by himself and another person and that the land had been subdivided. He acknowledged that what he stated in the agreement to the effect that the land had been subdivided was not true. He also acknowledged that in the agreement, he did not talk about any remaining portion of the suit property.
18. Maintaining that he only sold his half share of the suit property, he stated that the person to blame for the loss of the half share of the suit property claimed by the plaintiff is the 2nd defendant. He accused the 2nd defendant of fraudulently transferring the ½ portion claimed by the plaintiff to himself but admitted that before he entered into the sale agreement with the 2nd defendant, he did not present to the 2nd defendant a search or consent showing he was the sole registered owner.
19. At close of hearing, the plaintiffs and the 1st defendant filed submissions which I have read and considered.
20. The 2nd, 3rd, 4th and 5th defendants did not attend court on the hearing date and hearing was closed without them testifying. Thereafter, the 2nd defendant filed an application seeking to review the orders issued on February 12, 2019 closing hearing for the suit and filing of written submissions. He urged the court to allow him tender his evidence before parties could file their written submissions. His application was dismissed with costs on April 4, 2019. The 5th Defendant filed a similar application dated July 30, 2021 and filed on August 2, 2021 seeking leave to amend its defence, issue a notice of claim against the 2nd, 3rd and 4th defendants, that the case be reopened and parties be allowed to file



their pleadings in response to the amended defence and notice of claim against the co-defendants. The aforesaid application was equally dismissed with costs to the plaintiffs and the 1st defendant.

Analysis and Determination.

21. From the pleadings, evidence and the Submissions filed in this matter, I find the issues for determination to be;
 - i. Whether the registration of the suit property was procured by fraud?
 - ii. Whether the 2nd defendant was aware of the interest of the plaintiff or the plaintiff's deceased mother in the suit property?
 - iii. What orders should the court make
22. With regard to the 1st issue, both the plaintiff and the 1st defendant have pleaded that the suit property was fraudulently registered in favour of the 2nd defendant. As by law required, in particular by Order 2 Rule 4 of the *Civil Procedure Rules*, the plaintiff and the 2nd defendant provided particulars of fraud allegedly committed by the 2nd and 3rd defendants in transferring the suit property to the 2nd defendant. Those particulars are as reproduced in paragraphs 4 and 7 of this judgment.
23. A sub issue arises from this issue, to wit, did the plaintiff and the 1st defendant prove to the required standard of proof the pleaded particulars of fraud against the 2nd and 3rd defendants?
24. Concerning this sub-issue, it is important to note that the plaintiff's case turns on the pleaded aspects of fraud only. Those are that the 2nd defendant relied on forged transfer documents that were neither signed by the deceased nor the 1st defendant. The plaintiff also accused the 2nd defendant of forging the deceased's signature and personal documents and uttering them to the 3rd defendant. The plaintiff further accused the 3rd defendant of having colluded with the 2nd defendant to transfer the suit property on the basis of forged documents.
25. On whether the plaintiff proved the pleaded fraud against the 2nd and the 3rd defendant, I note that in her evidence, the plaintiff did not lead any evidence concerning the transfer forms relied on in transferring the suit property to the 2nd defendant. Instead she led evidence showing that her mother had interest in the suit property. She also failed to lead any evidence capable of showing that the transfer documents relied on to effect the transfer of the suit property bore the signature of her mother or forged signature of the 1st defendant. There was no evidence also capable of proving the alleged collusion between the 2nd defendant and the 3rd defendant in effecting transfer of the suit property to the 2nd defendant.
26. Being the one who desired judgment on the pleaded fraud against the 2nd and 3rd defendant, it behooved the plaintiff to lead evidence not only capable of proving the pleaded fraud but also to the required standard of proof, which in the circumstances of this case is higher than on a balance of probability. In that regard see the case of *Demutilla Nanyama Purumu v. Salim Mohamed Salim* (2021) eKLR where the Court quoted the decision in the case of *Ndolo vs Ndolo* (2008) 1 KLR (G & F) thus:-

“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 civil cases, namely proof upon a balance of probabilities.”
27. In the circumstances of this case, the pleaded fraud cannot be inferred from the mere fact that the property was subject of some undisclosed interest of the plaintiff or the plaintiff's mother. Before the



court can find in favour of the plaintiff, on account of the pleaded fraud, it must be satisfied that the 2nd defendant was indeed aware of the plaintiff's interest or the interest of the plaintiff's mother in the suit property and did the actions complained of.

28. In their pleadings and oral evidence, both the plaintiff and the 1st defendant claim that before the suit property was transferred to the 2nd defendant, it was registered in the name of the 1st defendant and that of the plaintiff's mother, each having half share thereof. It is noteworthy that no documentary evidence capable of proving that fact was presented before court. The document the plaintiff sought to rely on, initially marked PMFI-5, and later on produced as Pexbt 5, is not proof that the suit property was at any time registered in the name of the 1st defendant and the plaintiff's deceased mother. In fact, the document does not suggest that any lease was issued in the joint names of the 1st defendant and the plaintiff's mother. The lease as per that document, is in favour of the plaintiff's mother alone. The document also suggests that the lessor had received known consideration from the plaintiff's deceased mother, yet her lease ought to have been a mere transfer to her on account of her having succeeded her deceased husband. It also suggests that the Lessee appeared before the person who executed the lease, yet at that time, the person named in the document as the lessee, Mary Wangechi Kibui, was, according to the evidence adduced by the plaintiff and the 1st defendant, dead.
29. To me, the document produced as Pexbt 5 appears to be a forgery. No wonder, the plaintiff could not procure an original or certified copy thereof. In view of the foregoing, I find that the plaintiff has failed to prove the pleaded fraud on the part of the 2nd and the 3rd defendants.
30. With regard to the 1st defendant's pleaded fraud as against the 2nd defendant, like the plaintiff, the 1st defendant alleged that the 2nd defendant used forged documents to transfer the suit property to himself; that the transfer documents were neither signed by himself nor his deceased mother who was a joint owner of the property at the time the property was transferred to him; that when the property was transferred, the estate of his mother was not administered; that the 2nd defendant did not obtain the relevant transfer documents from him or his mother and that the 2nd defendant did not obtain the consent of the Municipal Council of Nyeri.
31. On whether the 1st defendant proved the pleaded fraud on the part of the 2nd defendant, I note that just like the plaintiff, the 1st defendant claimed that the suit property was at the material time registered in his name and the name of the plaintiff's mother as tenants in common. He however, did not produce any documentary evidence capable of proving that fact. The document attached to his list of documents and described as a green card is actually the document produced by the plaintiff as Pexbt 5. I have already given my opinion of that document. Save to add that the said document is not a green card but an extract from a purported lease issued to the plaintiff's deceased mother. If there exists such a lease, I don't understand why the plaintiff and the 1st defendant could not produce the entire lease document for this court to appreciate its contents and to whom it was issued. There being a certificate of lease purportedly issued to the 1st defendant on January 19, 2010, a day before the 2nd defendant was issued with a certificate of lease in respect of the suit property and further there being evidence that the 1st defendant had sold the suit property to the 2nd defendant, there is a huge possibility that the lease produced as Pexbt 5, if it indeed exists, was issued in favour of the 1st defendant and not the plaintiff's deceased mother. Be that as it may, since speculation is not evidence, I leave it at that.
32. There being no evidence adduced before this court capable of proving the alleged forgery of transfer documents, I find the allegations that the transfer documents were forged on account of bearing the signature of the 1st defendant's mother not proved.



33. On whether or not the signature appearing on the transfer forms is forged, apart from making that claim, the 1st defendant did not produce any evidence capable of showing that the signature in those documents is not his. He who alleges must prove. In that regard see Section 107 of the *Evidence Act*, cap 80 Laws of Kenya.
34. On whether the 2nd defendant did not obtain necessary transfer documents, the 1st defendant did not prove to the required standard that the 2nd defendant did not obtain the documents he relied on to transfer the suit property to himself from him. In fact, despite having been aware of the transfer, the 1st defendant did not lodge any complaint to the police for investigating the alleged fraudulent transfer of the suit property by the 2nd defendant. To the contrary, he, the 1st defendant faced a case of obtaining money by false pretences reported by the 2nd defendant.
35. If the police investigated any case of fraud in the transfer of the suit property by the 2nd defendant, without the sanction or authority of the 1st defendant, the 1st defendant would have provided that evidence. There being no such evidence and the 1st defendant having admitted that his personal details and photograph were used to transfer the suit property, it behooved him to lead evidence capable of showing that he indeed did not give those documents to the 2nd defendant to facilitate the transfer of the suit property.
36. On the contention that the 2nd defendant did not obtain the consent of the Municipal Council of Nyeri, it's my considered view that the subject matter of this suit being registered land, no consent of the Municipal Council of Nyeri was required. The consent, if any, that was required was that of the Commissioner of Lands. In any event, the 1st defendant did not lead any evidence capable of showing that the consent of the Municipal Council of Nyeri was required and was not obtained.
37. I think I have said enough to demonstrate that the 1st defendant has not proved the pleaded fraud against the 2nd defendant.
38. On whether the 2nd defendant was an innocent purchaser for value without notice of the plaintiff's interest in the suit property, having determined that no evidence was led capable of showing that at the time the 2nd defendant bought the suit property, the suit property was registered in the joint names of the 1st defendant and the plaintiff's mother and there being no evidence that the 2nd defendant was made aware of the interest of the plaintiff's mother in the suit property, in the peculiar circumstances of this case, I am convinced that the 2nd defendant was an innocent purchaser for value without notice of the plaintiff's interest or the interest of the plaintiff's mother.
39. If the lease issued to the plaintiff's mother was issued in 2009 as purported by the document produced by the plaintiff and the 1st defendant (Pexbt 5), it means that if the 2nd defendant conducted a search at the registry concerning the suit property, it would not have revealed any interest in the name of the plaintiff's mother. No green card/white card was produced by the plaintiff capable of showing the registration status of the suit property at the time the 1st and 2nd defendants entered into the sale agreements (2007) in respect thereof.
40. One of the documents produced by the 1st defendant is a certificate of search dated 8th March, 2007. That document shows that the registered proprietor of the suit property as at 8th March 2007 was the 1st defendant herein, having been so registered in 1994.



41. Section 143(2) of the *Registered Land's Act*, Cap 300 Laws of Kenya which by virtue of Section 107 of the *Land Registration Act*, 2012 applies to the title held by the 2nd defendant and affords protection to the 2nd defendant. The section provides:-

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

42. Section 107 of the *Land Registration Act*, on the other hand provides as follows:-

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

43. The upshot of the foregoing is that the plaintiff has not made up a case of being granted the orders sought or any of them. Consequently, I dismiss her suit with costs to the 2nd to 5th defendants to be paid by the 1st defendant whom I find to be solely to blame for the circumstances leading to filing of this suit.

44. Orders accordingly.

DATED AND SIGNED AT ITEN THIS 30TH DAY OF MAY, 2022.

L. N. WAITHAKA

JUDGE

READ, DELIVERED AND SIGNED AT NYERI THIS 16TH DAY OF JUNE, 2022.

J. O OLOLA

JUDGE

