



REPUBLIC OF KENYA



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**Etiang v Uyoga & 3 others (Environment & Land Case 259 of 2007)
[2022] KEELC 3851 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3851 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 259 OF 2007**

NA MATHEKA, J

JULY 28, 2022

BETWEEN

HANNAH MANDI ETIANG PLAINTIFF

AND

GRACE WANJALA UYOGA 1ST DEFENDANT

MORRIS KIWINDA MWAKUGU 2ND DEFENDANT

MUNICIPAL COUNCIL OF MOMBASA 3RD DEFENDANT

COUNTY GOVERNMENT OF MOMBASA 4TH DEFENDANT

JUDGMENT

1. At all material times to this suit, the plaintiff was the beneficial and legal owner of all that part or parcel of land known as plot number 528 Mikindani. On or about the May 20, 2004, the plaintiff purchased for consideration all that parcel of land known as plot number 528 Mikindani and has subsequent to such purchase quietly enjoyed possession thereto. The plaintiff avers that on or about the July 11, 2007, the 1st defendant did cause address to the plaintiff to the effect that the plaintiff is in fact a tenant to the 1st defendant in all that parcel of land known as plot number 528 Mikindani, plus developments thereto and that the 1st defendant is entitled to rent payments from the plaintiff and the plaintiff's tenants in the aforesaid premises and 1st defendant did issue notice to the plaintiff to vacate premises should the illegal rent payments not be receipted. The plaintiff further states that upon scrutiny and fact finding at the 3rd defendant's offices it was discovered that the 2nd defendant had fraudulently and illegally transferred the property known as plot number 528 Mikindani, to the 1st defendant. The plaintiff contends that the aforesaid transaction is illegal, unlawful, wrongful, null and void as the 2nd defendant is/was a donor of a special and irrevocable power of attorney and has no right, dealings and/or any other transaction whatsoever overall that parcel of land known as plot number 528 Mikindani. The plaintiff also contends that the 1st defendant has now caused to be addressed a notice to vacate



premise on or before the October 30, 2007, which notice the plaintiff states is illegal, null and void. Reasons wherefore the plaintiff prays for judgment against the defendants jointly and severally for;

1. Permanent injunction restraining the, 1st, 2nd and 3rd defendants, their servants, agents, workers, employees and/or howsoever from dealing, transacting, evicting, transferring and/or in any other manner howsoever dealing with plot number 528 Mikindani.
 2. A declaration that all transactions made with regard to the suit property between the 1st and 2nd defendants were fraudulent, illegal, unlawful, and wrongful and void ab initio and the same be cancelled and/or deleted forthwith.
 3. A declaration that the plaintiff is the absolute owner of plot number 528 Mikindani and the 4th defendant be compelled to register the plaintiff as the legal owner of the suit property.
 4. Costs, incidentals and interests at court rates.
 5. Any other relief that this honourable court may deem fit to grant.
2. The 2nd defendant avers that if at all that the plaintiff bought the suit property then the said sale was null and *void ab initio* for want of capacity to sell on the part of the vendor. The 2nd defendant avers that if indeed the plaintiff bought the suit property as alleged or at all, then she was negligent in buying the property without ascertaining whether or not the purported vendor had title to pass and the 2nd defendant should not be held liable for the plaintiffs' negligence. The 2nd defendant admits having transferred the suit property to the 1st defendant but avers that the same was valid, lawful and within his right as the bonafide owner. The 2nd defendant denies any and all particulars of fraud on its part in relation to the dealing in the suit property and the plaintiff is put to strict proof of her averments. The 2nd defendant avers that the said special power of attorney was null and void as it was signed under duress and undue influence and therefore the purported donee of the power of attorney had no authority to deal with the 2nd defendant's property. The 4th defendant puts blame on the plaintiffs' failure to conduct due diligence to ensure that the vendor was the registered owner of plot No 528 Mikindani before purchasing. Reasons wherefore, the 4th defendant prays for the plaintiffs' suit to be dismissed with costs because it is scandalous, vexatious and an abuse of the court process and does not display any cause of action against it.
3. It is the plaintiff's case that Morris Kiwinda Mwakugu, the 2nd defendant, executed a special power of attorney in favour of Richard Ethan Ndubai on October 22, 2002 (PEX 3). The power donated were irrevocable and the donee was given the powers to represent the donor in all legal matters pertaining plot No 528 Mikindani. The 2nd defendant on August 23, 2002 entered into a sale agreement with Richard Ndubai over plot No 528 Mikindani, the suit property for a consideration of Kshs 160,000. The plaintiff then entered into a sale agreement with Richard Ndubai over the suit property on May 20, 2004 for a consideration of Kshs 3,200,000. In his defence, the 2nd defendant denied the particulars of fraud and illegality and claimed that he sold the suit property in his capacity as the registered owner. He claimed that the special power of attorney was null and void for being executed under duress and was later revoked. He maintained that Richard Ndubai did not pass any good title to the plaintiff and urged court to dismiss the plaintiff's suit. A power of attorney has been defined by the *Black's Law Dictionary* (8th Edition 2004) as;

“an instrument granting someone authority to act as agent or attorney-in-fact for the grantor. An ordinary power of attorney is revocable and automatically terminates upon the death or incapacity of the principal.”



4. In a special power of attorney, the donor limits the powers of a donee to one specific matter. An irrevocable special power of attorney, does not lapse, it is continuing and cannot be revoked. The irrevocable special power of attorney dated October 22, 2002, is specific to the suit property No 528 Mikindani and is therefore valid and irrevocable.

In the case of *CCB v MIB & another* [2014] eKLR, the court held that;

“An extract from the free Law Library describes an irrevocable power of Attorney as a power of Attorney that cannot be revoked by the principal. A power of Attorney lapses for legal reasons (by operation of law) such as for incapacity or death. An irrevocable power of Attorney will not lapse because it is continuing (enduring) and irrevocable, cannot be cancelled. An irrevocable power of Attorney must say that it is irrevocable and it must be given for valuable consideration. From the definition given herein above, there are certain elements which must exist before a power of Attorney can be said to be irrevocable. One of those elements is that it must be given for valuable consideration. It is a power which only lapses by operation of law such as for incapacity or death.”

5. I find that the transfer of title between the 2nd defendant and Richard Ndubai is not fraudulent as per the sale and transfer agreement dated August 23, 2002. The 2nd defendant executed a specific power of attorney authorising Richard Ndubai to deal with the suit property. Richard Ndubai entered into a sale agreement on May 20, 2004 with the plaintiff over the suit property for a consideration of Kshs 3,200,000/=. Richard Ndubai signed and gave a specific power of attorney (PEX5) to the plaintiff over the suit property dated the May 26, 2002. On June 23, 2004, the 4th defendant informed the firm of Musinga Munyithya & Co Advocates, who were on record for the plaintiff that, for a change of ownership they had to clear rent arrears and pay for the transfers. PW1 the plaintiff testified that she took possession and has been living in the suit property to date. DW1 the 2nd defendant admits that he signed the said power of attorney (PEX3) which was dated October 22, 2002 but did so under duress as he had been accused of theft by servant by Richard Ndubai in the company where he worked as an accountant. He then revoked the same on the October 14, 2004 and registered the revocation on the October 15, 2004. By an agreement dated May 4, 2004 he sold the suit property to the 1st defendant who is his younger sister for Kshs 5,000,000/= and transferred the property to her on May 10, 2004. He has never visited the suit property since 2002 and has not been in possession of the same. He admits that prior to the revocation he did author a letter to the Director of Housing (PEX1) saying he had transferred his three properties namely, plot No 274 – Mikindani, plot No 528 – Mikindani and plot No 293 – Miritini to the said Richard Ndubai. The 2nd defendant is being dishonest when he says he signed the power of attorney over his properties in 2002 under duress as he never reported to the police but secretly when back and revoked the said power of attorney in 2004 and “sold” the suit property to the 1st defendant in 2005 and left the rest of the properties with the said Richard Ndubai. What is more curious is that the 1st defendant who is now the registered proprietor of the suit property never attended court to give evidence. I find that the purported revocation of the special power of attorney given to Richard Ndubai was invalid and fraudulent. The agreement between 1st defendant and the 2nd defendant could not take effect on the basis that the agreement was intended to defraud the plaintiff of the suit property. The plaintiff had already bought the property in 2004 and it was not available for sale in 2005. I find that the plaintiff was a *bona fide* purchaser for value. For the reasons given, I find that the plaintiff has established her case on a balance of probabilities and I grant the following orders;
 1. Permanent injunction restraining the, 1st, 2nd and 3rd defendants, their servants, agents, workers, employees and/or howsoever from dealing, transacting, evicting, transferring and/or in any other manner howsoever dealing with plot number 528 Mikindani.



2. A declaration that all transactions made with regard to the suit property between the 1st and 2nd defendants were fraudulent, illegal, unlawful, and wrongful and *void ab initio* and the same be cancelled and/or deleted forthwith.
3. A declaration that the plaintiff is the absolute owner of plot number 528 Mikindani and the 4th defendant be compelled to register the plaintiff as the legal owner of the suit property.
4. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF JULY 2022.

NA MATHEKA

JUDGE

