



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 22 of 2007

COOPERATIVE BANK OF KENYA LTD.....PLAINTIFF
VERSUS
FENANCIO MARINE NDERI
OSMOND NDERI MARINE..... DEFENDANTS
JUDGMENTS

The plaintiff herein, that is Cooperative Bank of Kenya Ltd, sued Fenancio Marine Nderi and Osmond Nderi Marine, the 1st and 2nd Defendants herein by way of the plaint dated 3rd April 2007. In the aforesaid the plaintiff prayed for judgment against the defendants in the following terms:

1. ***An order of rectification of the register directing that the registration of the transfer of title No. L.R. No.Thegenge/Karia/2900 from the 1st Defendant to the 2nd Defendant be cancelled, so that the proprietorship of the suit premises reverts to the 1st Defendant absolutely.***
2. ***Costs of this suit and interest thereon at court rates.***

The record indicates that the summons to enter appearance plus the plaint were served upon the defendants. The defendant merely filed a notice of appointment of advocate on 25th June 2007 whereas the 2nd defendant entered appearance on 30th April 2007. None of the defendants filed a defence to answer the plaintiff's case. Interlocutory judgment in default of defence was entered against the defendants on 28th June 2007. When this suit came up for hearing as a formal proof, Mr. Muhoho, learned advocate for the defendants was present but he did not turn up at the time allocated for the commencement of the hearing of the formal proof, hence the suit proceeded for hearing exparte.

At the hearing, the plaintiff presented the evidence of its Nyeri Branch Business Development/Relations Officer, Ms Daina Njoki Kingori (P.W.1). She told this court that Fenancio Marine Nderi, the 1st Defendant herein, had been a long time customer to the plaintiff, trading as Lenana Commercial Agencies. It is said the 1st Defendant operated several accounts with the plaintiff jointly with one Florence Wanjiru Marine. P.W.1 told this court that the plaintiff advanced to the 1st Defendant Kshs, 300,000/= who in turn pledged title No. Thegenge/Karia/813 as a security. P.W.1 produced a certified copy of the charge dated 14th February 1997 as an exhibit in evidence. It is said the 1st Defendant fell into

arrears and this prompted the plaintiff to realize its security by disposing of the charged property by way of public auction held in the month of August 2003 to one Ms Ann Wanjiru Kimani. When the plaintiff attempted to put Ann Wanjiru Kimani into occupation, P.W.1 said it discovered that the 1st Defendant had informally subdivided the land into several subdivisions and that she had even sold 10 of those subdivisions to purchasers who were already in occupation. P.W.1 produced copies of the ten agreements as exhibits in evidence. It is the evidence of P.W.1 that some of those purchasers approached the bank (plaintiff) with a view of retaining their portions because the sale proceeds had been used to settle the 1st defendant's outstanding debt with the plaintiff. The plaintiff acceded to the purchasers' request on condition that a portion marked 'P' on a proposed subdivision plan would remain charged to plaintiff to secure the 1st Defendant's outstanding liabilities. P.W.1 produced a copy of the letter of acceptance by the plaintiff dated 9th February 2005 as an exhibit in evidence. In short, the plaintiff formalized the subdivisions informally carried out by the 1st Defendant i.e.

- (a) Ten parcels i.e. 8 parcels of $\frac{1}{8}$ acre each and two parcels of $\frac{1}{4}$ acre being transferred to the purchasers.
- (b) 3.09 acres remained with the 1st Defendant but charged with the plaintiff to secure the outstanding loan. The aforesaid transaction was made possible when the plaintiff and the entered into a compromise agreement dated 24th February 2005 which was produced by P.W.1 as an exhibit in evidence. The compromise agreement basically allowed the 1st Defendant to formalize what she had initially done. The bank also agreed to discharge the charge over the original parcel to enable the 1st Defendant formally subdivide the charged land. In the light of the public auction held in August 2003, the 1st Defendant entered into another compromise agreement dated 24th February 2005 with the buyer at the auction, Ms Ann Wanjiru Kimani. The aforesaid agreement was produced as an exhibit in evidence.

Two important clauses emerge to be relevant to this case vizly:

- (i) The property to be transferred by the chargor to the purchaser is $\frac{1}{8}$ acre marked as "A"
- (ii) The Consideration is that the purchaser abandons the purchase of the entire property by public auction and Kshs. 200,000/= already paid to the bank on the chargor's account.

The plaintiff proceeded to register a discharge thus giving rise

to the following subdivisions:

1. a. Thegenge/Karia/2901 *each measuring $\frac{1}{4}$ acre*
- b. Thegenge/Karia/2902
- c. Thegenge/Karia 2903
- d. Thegenge/Karia/2904
- e. Thegenge/Karia 2905

- f. Thegenge/Karia/2906 each measuring 1/8 acre
- 2. g. Thegenge/Karia 2907
 - h. Thegenge/Karia/2908
 - i. Thegenge/Karia 2909
 - j. Thegenge/Karia/2910
- 3. Thegenge/Karia/2900 – 3.09 acres to remain in the 1st Defendant's name but to be charged with the plaintiff. P.W.1 told this court that a charge was to be registered over L.R. No. Thegenge/Karia/2900 to secure a sum of Kshs. 5,245,194/05. There is evidence that the 1st Defendant executed an application for the land control board consent dated 31st October 2006. The plaintiff's witness told this court that the bank was shocked to learn in late January 2007, that the 1st Defendant had taken advantage of the gap between the closure of the original title and the creation of the new titles resulting from the subdivisions to secretly and fraudulently transfer L.R. No. Thegenge/Karia/2900 to his son Osmond Nderi Marine, the 2nd Defendant herein. It is apparent from the official search that the 2nd Defendant was registered as the proprietor of L.R. No. Thegenge/Karia/2900 on 23rd January 2007. It is the testimony of P.W.1 that the 2nd Defendant knew of the transactions between the plaintiff and the 1st Defendant, hence he acted fraudulently when he accepted to short change the plaintiff. On the basis of the aforesaid evidence the plaintiff urged this court to issue orders directing the Land Registrar to rectify the register so that the registration of the transfer of title No. Thegenge/Karia/2900 from Frenancio Marine Nderi to Osmond Nderi Marine is cancelled, so that ownership of the aforesaid parcel reverts to the 1st Defendant to enable the plaintiff register a charge.

At the close of the evidence, the plaintiff's counsel was permitted to file written submissions which he duly filed. I have carefully considered both the evidence and the written submissions. By way of his submissions the plaintiff's counsel identified three issues to be determined by this court namely:

- (i) Whether or not the transfer of the suit premises by the 1st Defendant to the 2nd Defendant was fraudulent?
- (ii) Whether or not the 2nd Defendant was aware of the fraud?
- (iii) Whether or not the Plaintiff is entitled to the orders sought?

I will start by determining the first issue. I have examined the documents tendered by the plaintiff's witness and it has emerged that the plaintiff actually discharged the charge registered over L.R. No. Thegenge/Karia/813 to enable the 1st Defendant subdivide the property on certain conditions. The registration of the discharge indeed paved the way for the 1st Defendant to create 8 subdivisions each measuring 1/8 acre and 2 subdivisions each measuring 1/4 acre. Since the

proceeds of the sale of those subdivisions had been used to offset the outstanding debt due from the 1st Defendant to the plaintiff, partial discharges were made so that the purchasers of the aforesaid subdivisions were given titles. I am convinced it was a condition precedent by the plaintiff that the 1st defendant would be allowed to subdivide the land and retain the portion measuring 3.09 acres in his name for purposes of securing the outstanding debt with the plaintiff. There was a compromise agreement between the plaintiff and the 1st defendant to that effect. The 1st Defendant blatantly went behind the agreement by transferring the parcel of land measuring i.e. L.R. No.Thegenge/Karia/2900 to his son the 2nd defendant herein. The transfer was meant to frustrate the agreement and to avoid meeting his obligations to the plaintiff of settling the outstanding debt. It is quite obvious that the 1st Defendant wanted to steal a match from the plaintiff. I am convinced that the transfer of L.R. No.Thegenge/Karia/2900 was fraudulent. It was simply actual fraud which no court of law can countenance. The 1st defendant knew he had executed a compromise agreement with the plaintiff. He also knew that he had even executed a charge which the plaintiff would register against the remainder of the subdivisions i.e. L.R. No. Thegenge/Karia/2900. The 1st Defendant conduct of stily transferring the property to his son without informing the plaintiff is a clear manifestation of fraud on the 1st Defendant's part. He did not even disclose the existence of the compromise agreement dated 24th February 2005 to the District Land Registrar. If this is not fraud on the part of the 1st Defendant then another meaning should be assigned to the word 'fraud'.

Having come to the conclusion that the 1st Defendant acted fraudulently, let me now address my mind to the second issue as to whether or not the 2nd Defendant was aware of the 1st Defendant's fraudulent conduct? I have already stated that the 2nd Defendant was served with the plaint and the summons to enter appearance. Through the firm of Muhoho Gichimu & Co. advocates, the 2nd Defendant merely filed a memorandum of appearance. A careful perusal of the plaint will reveal that the plaintiff gave the particulars of fraud indicting the defendants jointly and severally in paragraph 8. It is clearly stated that the 2nd Defendant knew and contributed to the 1st Defendant's fraudulent transactions and activities. The 2nd Defendant did not bother to respond to those serious allegations. There is therefore no joinder of issue hence this court is entitled to infer that the allegations is admitted under order VI rule 10 of the Civil Procedure Act. In a nutshell, since there is clear evidence that the 1st Defendant acted fraudulently and there is an express allegations in the plaint that the 2nd defendant knew and was aware of the 1st Defendant's fraudulent acts, I think there is no reason why I should doubt the plaintiff's assertion. There is no evidence that the 2nd Defendant paid stamp duty nor did he obtain the relevant consent for transfer nor did he make valuable consideration for purchase of the property. This is another manifestation of fraud on his part. I can also infer that being the son of the 1st

Defendant, he was aware of the subdivisions going on and that he is bound to know the reasons behind the subdivisions and subsequent sale and transfer to third parties. He is bound to know from his father (1st Defendant) that the title to the property had been charged with the plaintiff. If he was not aware he would have come out fighting to clear his name. In the end I am convinced that the 2nd Defendant was privy to the 1st Defendant's fraudulent activities.

Having disposed of the first two issues, it is not difficult to determine the third issue. It is obvious that the plaintiff discharged a charge it registered against L.R. No.Thegenge/Karia/813, on conditions reduced into writing. One of the conditions was that the resultant subdivision i.e. L.R. No.Thegenge/Karia/2900 would be registered in the name of the 1st Defendant and thereafter the plaintiff would register a charge to secure payment of Kshs. 5,245,194/05. The 1st Defendant breached that agreement by transferring the aforesaid property to his son. The 1st Defendant had no justification to go behind the back of the plaintiff. I am further convinced that the 2nd defendant did not acquire the land for valuable consideration and that he knew and participated in perpetuating the fraud. I am satisfied the plaintiff is entitled to the orders sought in the plaint.

In sum, judgment is entered for the plaintiff and against the defendants as prayed in the plaint with costs.

Dated and delivered this 17th day of September 2010.

J.K. SERGON

JUDGE

In open court in the absence of the parties with notice.

J.K. SERGON

JUDGE