



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI

Civil Case 29 of 2007

FRIDAH NYAGUTHII MUNENE.....PLAINTIFF

*Versus*

PETER MURIITHI KINGAU.....1<sup>ST</sup> DEFENDANT

BERNARD KARERU KAROKI.....2<sup>ND</sup> DEFENDANT

PHYLIS WANJIRA KANGANGI.....3<sup>RD</sup> DEFENDANT

**J U D G M E N T**

This is a suit instituted by way of an amended plaint dated 23<sup>rd</sup> May, 2007 and filed in court on the same day through **Messrs Rika & Co. Advocates**. In that amended plaint, **Frida Nyaguthii Munene**, hereinafter referred to as “*the plaintiff*” sought as against **Peter Muriithi Kingau, Benard Kareru Karoki** and **Phylis Wanjira Kangangi** hereinafter referred to as “*the defendants*” the following:-

“(b.i) An order that the 1<sup>st</sup> defendant had no title to pass to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

c) An order for the cancellation of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants’ registration as proprietors of land parcel number **Inoi/Kamondo/1184** and the registration of the same in the plaintiff’s name.

d) Costs and interest of the suit.”

The suit was informed by these facts; On various dates between the year 2000 and 2001, the plaintiff sent her mother, **Regina Wanjira Njagi**, a sum of Ksh.436,000/= through one, **Berina** so that she could buy her a parcel of land. On 14<sup>th</sup> September, 2001 the plaintiff’s mother aforesaid and her brother, the 1<sup>st</sup> defendant bought land parcel number **Inoi/Kamondo/1184** hereinafter referred to as “*the suit premises*” from one **Nderi Gatimu**, using some of the aforesaid money. The understanding then was that the 1<sup>st</sup> defendant would be registered as the proprietor but would hold the same in trust for the plaintiff as she was in Spain at that time. When in 2004, the plaintiff came back to Kenya and asked the 1<sup>st</sup> defendant to transfer the suit premises to her he refused to do so. Whilst this suit was pending however the 1<sup>st</sup> defendant fraudulently sold and transferred the suit premises to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. To the plaintiff these defendants were well aware of the interest of the plaintiff in the suit premises at the time they purchased the same.

In his defence, the 1<sup>st</sup> defendant stated through **Messrs Wanjiru Wambugu**, advocate that he was a

stranger to the allegation of the plaintiff. He went on to plead that he had purchased the suit premises using his own funds. He denied having fraudulently transferred the suit premises to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants during the pendency of the suit. He denied each and every particulars of fraud attributed to him by the plaintiff and more particularly that the suit premises did not belong to him when he sold it.

Through **Messrs Gichure & Co. Advocates**, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a joint statement of defence. In the main they pleaded that they were absolute strangers to all the averments in the plaint. They contended that they were innocent purchasers for valuable consideration and that the entire transaction was lawful and procedural. Being innocent purchasers for value and having subsequently obtained registration as absolute proprietors their rights and interest to the suit premises were indefeasible.

The hearing of the case then commenced before me on 22<sup>nd</sup> July, 2009. The plaintiff testified that she ordinarily resides in Spain. The 1<sup>st</sup> defendant was her brother. Between 2000 and 2001 she had sent to her mother (PW2) money to purchase land for her. Her mother together with 1<sup>st</sup> defendant ended up buying the suit premises for Kshs.270,000/=. However since the plaintiff was away, PW2 decided to register the same in the name of her brother, the 1<sup>st</sup> defendant. In 2004 she came back for a visit and asked the 1<sup>st</sup> defendant to transfer the suit premises to her but he refused. She then registered a caution over the same. Whilst away the 1<sup>st</sup> defendant somehow managed to have the caution removed and sold the suit premises to that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

Cross-examined by the 1<sup>st</sup> defendant, she stated that she had sent the money to her mother through one, **Berina**.

Cross-examined by **Mr. Mwangi**, learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, she stated that the defendants would not have known about the transaction involving her, 1<sup>st</sup> defendant and their mother. The agreement of sale did not show that the 1<sup>st</sup> defendant was buying the suit premises on her behalf. The suit premises were transferred to the 2<sup>nd</sup> & 3<sup>rd</sup> defendants on 3<sup>rd</sup> May, 2007. The suit premises were then vacant. But now there was a permanent house put up by the 2<sup>nd</sup> defendant.

PW2, **Regina Wanjera** is the mother to both the plaintiff and 1<sup>st</sup> defendant. She confirmed that between 2000 and 2001 she had received money from the plaintiff to buy the suit premises. She did so but registered the same in the name of the 1<sup>st</sup> defendant as she was away in Spain. They had then agreed that the 1<sup>st</sup> defendant would subsequently transfer the suit premises to the plaintiff when and if she came back. However the 1<sup>st</sup> defendant had since refused to do so.

Cross-examined by the 1<sup>st</sup> defendant, she denied that the 1<sup>st</sup> defendant had bought the suit premises with his own resources. It is the plaintiff who bought the same.

Cross-examined by **Mwangi**, she conceded that she did not know when the suit premises were sold. However some surveyors had found her on the suit premises and uprooted her coffee.

With that the plaintiff closed her case.

The 1<sup>st</sup> defendant testified that the plaintiff was his sister. He bought the suit premises from **Nderi Gatungu** on 24<sup>th</sup> September, 2001 with his own resources. Thereafter he charged the suit premises to AFC for a loan of Ksh.175,000/=. He was unable to repay the same and looked around for a person to bail him out. On 12<sup>th</sup> February, 2007 the 2<sup>nd</sup> defendant paid off the loan and the title was discharged. On 26<sup>th</sup> February, 2007 he sold and transferred the suit premises to the 2<sup>nd</sup> defendant after going through the land control board. He maintained that the suit premises he sold belonged to him and not the plaintiff.

Cross-examined by **Mrs. Rika**, learned counsel for the plaintiff, he stated that between 2000 and

2001, the plaintiff was away in Spain. He was not aware of her sending money to their mother. He bought the suit premises for Kshs.275,000/= out of the proceeds of his charcoal business. Though he sold the suit premises to the 2<sup>nd</sup> defendant on 26<sup>th</sup> April, 2007, he did not know that this case had already been filed. He did not however have a copy of the sale agreement, application form for the land control board consent or even the transfer.

With that 1<sup>st</sup> defendant closed his case.

On behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the 2<sup>nd</sup> defendant testified as follows; that he did not know the plaintiff and her mother. He only came to know them when they testified in court. The 1<sup>st</sup> defendant was introduced to him in February, 2007 as he had land to sell. The 1<sup>st</sup> defendant told him that he had obtained a loan using the suit premise as security and had been unable to service it. They agreed that he repays the loan and once the title was discharged he would transfer the suit premises to him. He ended up paying Kshs.600,000/= for the suit premises. They went through the normal process until the suit premises were transferred and registered in his name. Consent to the transaction was given by the relevant land control board. He was unaware of any arrangement between the plaintiff and the 1<sup>st</sup> defendant and any interest the plaintiff may have had in the suit premises. Since then he had put up a 3 bedroomed permanent house in which he stayed with the family.

Cross-examined by counsel for the plaintiff he stated that he bought the suit premises in 2007 after conducting a search in the lands office. The only charge on the title was to AFC. Nobody told him that the suit premises were subject of a dispute between the 1<sup>st</sup> defendant and plaintiff.

That also marked the close of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' case.

Whereupon respective parties opted to file and exchange written submissions. This was subsequently done. I have carefully read and considered them together with cited authorities.

From the pleadings, facts and evidence presented before court, two issues arise for determination by this court;

- a) **Whether the 1<sup>st</sup> defendant bought the suit premises from money sent to their mother by he plaintiff and therefore held the suit premises in trust for the plaintiff and,**
- b) **Did the 1<sup>st</sup> defendant have a valid title that he could pass to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and was the sale of the suit premises fraudulently done.**

With regard to the 1<sup>st</sup> issue, I have no doubt at all that the money used by the 1<sup>st</sup> defendant to purchase the suit premises was sent to him by the plaintiff through their mother (PW2). The plaintiff produced receipts from Western Union to authenticate the fact that she used to sent money to her mother. PW2 testified in support of PW1's case. She struck me as a honest, candid and truthful witness. She had nothing to gain by testifying falsely against her own son, the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant claimed that PW2 was testifying in support of the plaintiff because he does not assist her financially as the plaintiff does. I find this excuse incredible to believe. PW2 is a mother to both the plaintiff and 1<sup>st</sup> defendant. I do not think therefore that she would come up with a story of having purchased the suit premises for the plaintiff and caused it to be registered in the name of the 1<sup>st</sup> defendant for no apparent reason. It must be true and I believe this what happened. The 1<sup>st</sup> defendant did not strike me as a honest and candid person. Most of the time he was deliberately evasive in his answers. He claimed to have purchased the suit premises from his own resources. However he did not produce the sale agreement for the purchase of the same from **Nderi Gatimu**. He did not also tender in evidence the application form for the land control board or even the transfer form from **Nderi Gatimu** to himself. He alleged that he paid the transfer and legal fees but did not have anything to support this fact. He did not even know how much the stamp duty was. As correctly submitted by **Mrs. Rika**, the 1<sup>st</sup> defendant was clearly telling lies to the court for if he was truthful, he would have had all these documents.

From the evidence on record, it is common ground that the plaintiff stays in Spain. The 1<sup>st</sup> defendant himself concedes that much. There is uncontroverted evidence that the plaintiff did send colossal sum of money to PW2 totalling about Kshs.436,000/- through, one **Berina**. There is also uncontroverted evidence that the suit premises were purchased from one **Nderi Gatimu**. According to the plaintiff it is the money that she was sending to her mother as aforesaid that the 1<sup>st</sup> defendant used to buy the suit premises and caused the same to be registered in his name. However, according to the 1<sup>st</sup> defendant, he used his own resources to purchase the suit premises. However as I have already stated, I do not think that the 1<sup>st</sup> defendant was telling this court the truth. He did not dispute the fact that twice, the plaintiff had asked him to retransfer the suit premises to her and he refused. It is also on record that the plaintiff had twice registered cautions on the suit premises which somehow 1<sup>st</sup> defendant managed to remove. Surely, the plaintiff would not have done all these if she genuinely thought that the suit premises did not belong to her. The 1<sup>st</sup> defendant did not even allege existence of any grudge between him and the plaintiff or PW2 as would have propelled them testify falsely against him. Eventually she filed this suit. I do not think that the plaintiff would mount this challenge and incur the expense if indeed she believed that the suit premises were purchased by the 1<sup>st</sup> defendant through his own resources. The 1<sup>st</sup> defendant claims to have used proceeds from his charcoal business to purchase the suit premises. I have my own doubts as to whether truly the 1<sup>st</sup> defendant was running such mighty charcoal business as would have provided such capital. He did not tender any evidence in that regard other than his word of mouth.

The 1<sup>st</sup> defendant has questioned the credibility of the evidence given by PW1 and PW2. That although PW1 alleged that she sent the money to **Berina** who in turn gave the money to PW2, the said **Berina** was never called as a witness to confirm that any monies were received by her from PW1 for onward transmission to PW2 for the purchase of the suit premises. My response to this is that her evidence was not absolutely necessary as PW2 testified as to having received the money from her which they used jointly with 1<sup>st</sup> defendant to buy the suit premises and had the same registered in the name of the 1<sup>st</sup> defendant. In any case there is on record a bundle of receipts from Western Union verifying that fact. The 1<sup>st</sup> defendant did not at all challenge this evidence.

Secondly, the 1<sup>st</sup> defendant claims in his submissions that from the copy of the title extract produced in court it is clear that no particulars of any trust are noted therein. My answer to that submission is that although the effect of registration of land is to vest absolute legal ownership of that land to the registered proprietor, this does not relieve a trustee of his duty or obligations to which he is subject to. There is no requirement under the Registered Land Act that a beneficiary of registered land held on trust be entered or noted in the register or the particulars of trust under which the registered trustee acquired the land in fiduciary capacity. For all the foregoing reasons, my answer to the 1<sup>st</sup> issue is in the affirmative. Indeed even the answer to issue 2 above is along the same lines. The 1<sup>st</sup> defendant was well aware that the suit premises were never his. Yet he went on to sell and transfer the same to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. That in itself is fraudulent. It is even more fraudulent when one considers the fact that he sold the same during the pendency of this suit. The plaintiff filed this suit on 24<sup>th</sup> April, 2007. However the 1<sup>st</sup> defendant transferred the suit premises to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on or about 26<sup>th</sup> April, 2007. That can only mean one, thing the 1<sup>st</sup> defendant was being fraudulent.

The plaintiff has asked me to invoke *section 143* of the Registered Land Act so as to rectify the Register by directing that any registration be cancelled or amended if I am satisfied that the registration was obtained by fraud or mistake. I have no doubt at all that everything considered the transfer and subsequent registration of the suit premises in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was fraudulent and therefore liable to rectification. However the power of rectification of the register is not invoked willy nilly. It is restricted. The person who wishes to have the register rectified as the plaintiff must demonstrate to the satisfaction of the court that the subsequent registered proprietor was party to the fraud or mistake. In other words the register shall not be rectified so as to effect 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.

There is unchallenged evidence that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant purchased the suit premises for a consideration. It is also common ground that the said defendants are in possession of the suit premises and have put up thereon a 3 bedroomed permanent house where they stay with their family. There is no evidence that the defendants when purchasing the suit premises had prior knowledge of the fraud being perpetrated on PW1 by the 1<sup>st</sup> defendant or caused such fraud and or substantially contributed to the same. If anything, the two defendants appear to have been innocent purchasers for value without notice of any incumbrances. The said defendants had to clear the loan from AFC. Thereafter they proceeded to the land control board and obtained the necessary consent to the transaction and the title was subsequently issued to them. There is no evidence for me to hold that the two defendants were party to the fraud perpetrated by the 1<sup>st</sup> defendant. In any event the plaintiff allowed the said defendants to invest in the suit premise heavily by putting up a 3 bedroomed house without as much as raising a finger. It I was to grant the prayer, who will bear this loss! There is also no evidence that by the time the suit premises were being transferred to them as aforesaid they had been made aware of this case and chose to proceed with the transaction, the suit notwithstanding. I cannot therefore order rectification of the register in the circumstances.

The orders which commend to me in the circumstances are that the 1<sup>st</sup> defendant should refund to the plaintiff the sum of Ksh.275,000/= being the purchase price paid to **Nderi Gatimu** on account of the suit premises. That amount shall attract interest at court rates from 24<sup>th</sup> September, 2001 being the date of purchase of the suit premises from **Ndei Gatimu** using the plaintiff's money. I am aware though that in making this order, the plaintiff had not in her pleadings and evidence asked for the same. However I am doing this for the ends of justice to be met. I am of course invoking *section 3A* of the Civil Procedure Act as well as *section 60 (1)* of the Constitution of Kenya. However, there will be no rectification of the register with regard to the suit premises. To that limited extend, the suit succeeds in relation to the 1<sup>st</sup> defendant. The plaintiff shall have the costs of this suit as against the 1<sup>st</sup> defendant. The suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is however dismissed with no order as to costs.

*Dated and delivered at Nyeri this 29<sup>th</sup> day of November, 2009.*

**M.S.A. MAKHANDIA**

**JUDGE**