



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
MILIMANI LAW COURTS**

**Civil Case 197 of 2001**

**JULIA ADELLO KUNGURU ..... PLAINTIFF**

**VERSUS**

**SETH LUGONZO ..... 1<sup>ST</sup> DEFENDANT**

**KENYA TOURIST DEVELOPMENT CORPORATION ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**PLEADINGS**

1. The plaintiff's case is represented by an amended plaint filed on 5<sup>th</sup> July 2001. The plaintiff seeks for the following orders:-
  - a) An urgent temporary injunction be issued to restrain the sale of the suit premises pending the hearing and determination of the suit.
  - b) A declaration that the intended sale of the suit premises by public auction and or otherwise in the circumstances of this matter is unconscionable, illegal, null and void.
  - c) An order for specific performance of the agreement between the plaintiff and the 1<sup>st</sup> defendant for the sale of the suit premises.
  - d) All necessary and consequential accounts, directions and inquiries in respect of the payment and outstanding sums due to the 2<sup>nd</sup> Defendant be taken.
  - e) Alternatively rescission of the said contracts and repayments with interest at 35% per annum by the defendants jointly and generally of all money paid by the plaintiff.
  - f) Damages for breaching of contract.
  - g) Ksh.2,928,448/- as per paragraph 9(a) above.
  - h) Costs of this suit and interest thereon at court rates.
2. The 1<sup>st</sup> defendant filed a defence denying liability in total and in specific terms. He also filed a

counter claim by way of a further amended defence and counter claim dated 20<sup>th</sup> August 2008. In which he sought for the following prayers.

- a) Ksh.8,218,295 as at paragraph 8 above
- b) Ksh.2,500 as at paragraph 10 above
- c) An order for vacant possession of the premises
- d) Mesne profits till vacant possession is obtained
- e) Any further loss on accumulation of the interest on KTDC loan till the same is fully paid.
- f) A declaration that the Transfer, Registration and issuance of the certificate of lease to the Title Number Kakamega Municipality Block 11/26 to the plaintiff JULIA AKELO KUNGURU made on 18/06/2008 is null and void Ab Initio.
- g) An order directing the District Land Registrar Kakamega to cancel the Registration and Issuance of certificate of lease for the Title Number Kakamega/Municipality Block 11/26 to JULIA AKELO KUNGURU made on 18/06/2008.
- h) An order directing the District Land Registrar Kakamega to Rectify the Register of Title Number Kakamega Municipality Block 11/26 by reinstatement of the Certificate of lease and Registration in the names of the First defendant Seth Lugonzo.

#### **IN THE ALTERNATIVE**

- i) That Judgment be entered for the 1<sup>st</sup> defendant against the plaintiff in the sum of Kenya shillings fifteen million (Ksh.15,000,000/-) being the value of Title No. Kakamega Municipality Block 11/26 as at the date of the said wrongful Transfer together with interests from the date of this suit.
- j) Cost of this counterclaim.

#### **EVIDENCE**

3. The plaintiff gave evidence in support of her claim, she testified that sometimes in 1993, she was approached by the 1<sup>st</sup> defendant who offered to sell to her property known as Kakamega town Block 11/26 at an agreed price of Ksh.4.8 million, the agreement was dated 19<sup>th</sup> May 1993. The suit premises was charged to secure a loan with the Industrial and Commercial Development Corporation (ICDC) there was another charge by the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant was unable to service the loans and the suit premises was threatened with sale by the charges to recover the loans.

4. The plaintiff produced a copy of the sale agreement entered into on the 19<sup>th</sup> May 1993. This Sale Agreement was subsequently varied by a deed dated the 15<sup>th</sup> August 1996, titled variation deed. That deed acknowledged that there was a correspondence by the 1<sup>st</sup> defendant trying to rescind the agreement; the plaintiff had paid a sum of Ksh.3.450,000/- of the agreed purchase price leaving a balance of 1.750,000/-. The parties agreed that the purchase price would be 5.250,000/- and the sum of Ksh.3.450,000/- was acknowledged as deposit. The plaintiff was supposed to make a further deposit of Ksh.50,000/- to be paid to the 1<sup>st</sup> defendant. the balance of 1.250,000/- was to be paid as follows:-

- a) Kenya shilling two hundred thousand (Ksh.200,000/-) only shall be paid on or before 30<sup>th</sup> September 1996.
- b) Kenya shilling Three Hundred Thousand (Ksh.300,000/-) only shall be paid on or before 30<sup>th</sup>

November 1996.

c) The balance of Kenya Shillings One Million Two Hundred fifty Thousand (Ksh1250,000/-) only shall be paid on or before the 30<sup>th</sup> March 1997.

5. The plaintiff testified that the 1<sup>st</sup> defendant also executed a power of attorney on 19<sup>th</sup> May 1993 in which the plaintiff was given the powers to pay the outstanding loans to ICDC, KTDC, and Kakamega Municipal Council and then transfer the suit premises in her name. The plaintiff denied that she was served with a purporting to rescind the agreement dated 16<sup>th</sup> December 1996. Indeed she claimed that she saw that letter for the first time during the hearing of the matter. The plaintiff contends that she made the following payments:-

- a) ICDC..... Ksh.1,335,184.85
- b) Kakamega Municipal Council ..... Ksh. 209.659.00
- c) KTDC ..... Ksh.1,300,000.00
- d) Processing Renewal of the lease ..... Ksh. 12,700.00
- e) Discharging caution ..... Ksh. 50,000.00
- f) Seith Lugonzo (1<sup>st</sup> defendant) ..... Ksh. 934,040.00

**TOTAL** **Ksh.3,841,583.85**

6. This suit was prompted by an advertisement that appeared in a Newspaper Advertisement by the 2<sup>nd</sup> defendant on 12<sup>th</sup> February 2001, in which the suit premises was advertised for sale. Simultaneously with the filing of the suit, the plaintiff filed an application for injunction and sought for interim orders which were granted restraining the 2<sup>nd</sup> defendant from selling the suit premises by public auction. The plaintiff contends that she overpaid the 1<sup>st</sup> defendant and expended money to renovate the premises. When the plaintiff completed payment of the loan to the 2<sup>nd</sup> defendant, she proceeded to register the discharge of charge and a transfer to herself through the use of the power of attorney.

7. She contends that the property was properly transferred because the defendant had signed the power of attorney. The title was transferred on 18<sup>th</sup> June 2008 at the Lands office Kakamega. The plaintiff also denied that the power of attorney had been revoked because in the first place it was an irrevocable power of attorney appointing the plaintiff to effect the transfer of the suit premises to herself.

8. As regards the counter claim by the 1<sup>st</sup> defendant the plaintiff denied that the 1<sup>st</sup> defendant was entitled to the rent. The plaintiff testified that she occupies part of the premises where she runs a bar and a restaurant while the 1<sup>st</sup> defendant collects rents from the shops down stairs. The plaintiff denied the rent of Ksh.59,000/- stated in the valuation report is an over statement. When the valuation was conducted the valuer did not speak to her to find out about the premises she occupies, in any case the sale agreement allowed her to occupy and use the western wing of the first floor of the premises together with the executive room and the balcony and kitchen. The plaintiff therefore contended that the 1<sup>st</sup> defendant cannot claim for rent, moreover, the power of attorney allowed the plaintiff to utilize the premises just like the proprietor.

9. The 1<sup>st</sup> defendant gave evidence in support of the defence and the counter claim and also relied on the evidence of James Sigona Onari DW2. DW2 produced the original transfer dated December 2007 in which the plaintiff transferred the suit premises on 17<sup>th</sup> June 2008 to herself pursuant the power of attorney registered as P/A NO. 854/7/6/94. He also produced a revocation of the power of attorney which

he claims was registered on 18<sup>th</sup> October 2007. He testified that the power of attorney which was used to register the transfer had been revoked and there was a restriction registered on the title on 8<sup>th</sup> July 2008.

During cross examination he confirmed that when the transfer was registered he was not working in the Kakamega Lands office. The transfer was effected by his predecessor Mr. Philip Kiraka.

10. Mr. Philip Odongo Karitha DW3 also testified that he carried a valuation assessment to ascertain the value of the suit premises. He assessed the rent collectable from the suit premises as Ksh.59,710/- per month. He was instructed by the 1<sup>st</sup> defendant and he visited the premises on 26<sup>th</sup> September 1999 when he compiled the report.

11. The 1<sup>st</sup> defendant gave evidence, and admitted that he entered into a sale agreement with the plaintiff on 19<sup>th</sup> May 1993. The agreement was varied later and the purchase price was increased to 5,250,000/- the 1<sup>st</sup> defendant was supposed to execute the transfer documents and in the event of default the 1<sup>st</sup> defendant was entitled to a refund of all the monies paid. It was also agreed that the 1<sup>st</sup> defendant would resolve all the disputes over the suit premises with KTDC and facilitate the transfer upon full payment of the purchase price.

12. The suit premises comprises of a double storey building, as per the agreement the plaintiff was allowed to use the western wing, executive room, the kitchen and the balcony, and the agreement did not have a clause for taking possession of the premises. The 1<sup>st</sup> defendant denied that he authorized the plaintiff to repair the premises and it is not true that the plaintiff has effected any repairs. The 1<sup>st</sup> defendant contends that he rescinded the contract by a letter dated 8<sup>th</sup> October 1999. However he contends the plaintiff forcefully took the possession of the premises by destroying a combination lock valued at Ksh.2,500/-. The plaintiff has also been in illegal possession of the suit premises, and more seriously the plaintiff fraudulently registered a transfer using a power of attorney which had already been rescinded and the transfer should be cancelled.

13. The 1<sup>st</sup> defendant admitted in his testimony that the plaintiff can be refunded the money she paid, but after the deduction of the rent that she has been collecting and for the use of the premises. According to the 1<sup>st</sup> defendant, the plaintiff did not complete payment of the purchase price. The loan payable to KTDC was high because of the accrued interest. He urged the court to enter judgment as prayed in the counter claim.

### **Analysis of evidence**

14. The 2<sup>nd</sup> defendant did not adduce any evidence nor did they file any submissions, this is perhaps because they did not have any further interest after the loan was paid. It is evident that the plaintiff registered the title in her favor on 17<sup>th</sup> June 2008 using the Power of Attorney dated 19<sup>th</sup> May 1993. Thus, the plaintiff's claim and prayers in particular, a, b, c, d and e are spent. The plaintiff's attempt to make an oral application to further amend the plaint on 2<sup>nd</sup> June 2009 when the matter was scheduled for hearing was unsuccessful.

15. The issues that fall for determination is whether the plaintiff is entitled to damages as sought in the outstanding prayer; whether the transfer using the power of attorney that had been revoked is fraudulent? Whether the counter claim by the 1<sup>st</sup> defendant should be allowed, is the 1<sup>st</sup> defendant entitled to the rents, mesne profits and the several declaratory orders including cancellation the title of the suit premises from the plaintiff and reinstating it to the 1<sup>st</sup> defendant?

16. According to DW2, the transfer which the plaintiff signed to transfer the suit premises to herself was dated December 2007. He produced a copy of a notice of revocation of power of attorney which was registered on 18<sup>th</sup> October 2007. This witness could not explain how a transfer was effected using a power of attorney that had been revoked especially because land transactions are registered

chronologically. He testified that he was not working in the office of the Registrar of Titles Kakamega when the transfer was registered. Was the transfer fraudulently registered in the name of the plaintiff? This will become clearer as I analyze the evidence further.

17. Going by the evidence on record and the agreements signed between the 1<sup>st</sup> defendant and the plaintiff, the 1<sup>st</sup> defendant was selling the suit premises to pay loans and also to get some money. The 1<sup>st</sup> defendant did not seem to deny that he signed the power of attorney, although he blamed his former lawyers for misleading him to sign a document he did not understand. However the plaintiff did not deny signing the agreement of sale dated 19<sup>th</sup> May 1993 and the further deed of variation dated 15<sup>th</sup> August 1996 which revised the conditions of sale.

18. Was the contract of sale rescinded? The 1<sup>st</sup> defendant claims that he issued a notice by a letter dated 16<sup>th</sup> September 1996 to the plaintiff rescinding the sale when the plaintiff failed to complete the sale in terms of the deed of variation. The plaintiff however claims that her advocate responded showing the 1<sup>st</sup> defendant was the cause of delay for failing to obtain the necessary extension of lease, she further demanded to be paid all the money she had spent amounting to over Ksh 6million. It is also evident from the records that although the 1<sup>st</sup> defendant purported to rescind the agreement, there are receipts dated 19<sup>th</sup> October 1999 in which the 1<sup>st</sup> defendant was receiving money from the plaintiff in respect of the same suit premises. For this reason I am of the opinion that the agreement was not rescinded.

19. Under that sale agreement titled a deed of variation, the plaintiff was entitled to occupy a portion of the premises and indeed the 1<sup>st</sup> defendant has continued to occupy the ground floor where he collects rent. The plaintiff contends that she paid the entire purchase price and actually overpaid the 1<sup>st</sup> defendant. She also claims to have renovated the premises to the tune of 2,928,448/- which she is claiming as special damages.

20. On the part of the 1<sup>st</sup> defendant he admits having received a sum of about Ksh. 900,000/- and also admits the plaintiff paid the outstanding loans to ICDC, KTDC, The Kakamega Municipal Council, also paid another person who had lodged a caveat on the property but blames the plaintiff for the delay in paying the loans, for taking possession of the property, and for the registering the suit premises in her favor using the power of attorney. Can the 1<sup>st</sup> defendant sell the property, have his liabilities paid by the plaintiff and also enjoy some money and then demand the property back. The 1<sup>st</sup> defendant can certainly not have his cake and eat it. The effect of the power of attorney demonstrates the 1<sup>st</sup> defendant's intention to sell.

21. From the evidence on record it is not clear that the 1<sup>st</sup> defendant rescinded the contract of sale. There is evidence on record that the 1<sup>st</sup> defendant had attempted to rescind the original sale agreement which prompted the parties to enter into the deed of variation. This transaction took inordinately too long to complete. It is also evident the plaintiff was not able to comply with the terms and conditions of sale by paying the money according to schedule. That is perhaps why the original agreement was varied and the price of the suit premises was revised.

22. The plaintiff did not also pay the loans according to the deed of variation and that explains why the interest rate accrued and the 2<sup>nd</sup> defendant threatened to auction the suit premises to recover the loan. Indeed the plaintiff admits that in her amended plaint she was unable to pay the outstanding loan to the 2<sup>nd</sup> defendant because she was making arrangements to get a financier. It is on that basis she was given an interim order of injunction. Later on, she was able to pay the 2<sup>nd</sup> defendant and she obtained the discharge of charge.

23. The plaintiff was all along in possession of the power of attorney which the defendant signed simultaneously with the signing of the sale agreement in 1993. According to that power of attorney, the plaintiff was entitled to execute all instruments necessary to effect the transfer of the suit premises to her name. It was given to the plaintiff after paying the 1<sup>st</sup> defendant a sum of Ksh.207,080.30/- being the

balance of the purchase price after she had paid KTDC, ICDC and Kakamega Municipal Council. The power of attorney stated that property would be transferred in her name, some of the provisions in the agreement were revised but others remained.

24. I am of the opinion that the transfer was not fraudulent in the face of this power of attorney. However I find the plaintiff has not proved that she completed the payment of the balance of the purchase price in accordance with the deed of variation. The record shows that she paid the 1<sup>st</sup> defendant Ksh.50,000/- on 15<sup>th</sup> August 1996. A further sum of Ksh.120,000/- is apparent from the documents as it was paid on 28<sup>th</sup> November 1999. On 28<sup>th</sup> September 1999 the advocate for the plaintiff was demanding a balance of Ksh.1.250,000/- as outstanding. Although the plaintiff contends that part of it was to be paid to KTDC, the variation agreement stipulated as follows:-

25. . . . “The purchase price shall now be Kenya shillings Five million two hundred fifty thousand (ksh.5,250,000/-) only which shall be paid as follows:-

a) A deposit of Kenya shillings three million four hundred fifty thousand (Ksh.3,450,000/-) only had been paid before the date of variation hereof under the principal agreement AND the seller hereby acknowledges receipt thereof.

b) A further deposit of Kenya shillings fifty thousand (ksh.50,000/-) only has been paid on the date of execution hereof AND the seller hereby also acknowledges receipt thereof.

c) The balance of Kenya shillings one million seven hundred fifty thousand (Ksh1.750,000/-) only shall be paid as follows:-

a) Kenya shillings two hundred thousand (Ksh.200,000/-) only shall be paid on or before the 30<sup>th</sup> September, 1996.

b) Kenya shillings three hundred thousand (shs.300,000/-) only shall be paid on or before 30<sup>th</sup> November 1996.

c) The balance of Kenya shillings one million two hundred fifty thousand (Ksh.1,250,000/-) only shall be paid on or before the 30<sup>th</sup> March 1997.”

26. The plaintiff attached so many receipts of the payments she made in respect of this property, however I am not persuaded the plaintiff paid the entire purchase price. The 1<sup>st</sup> defendant is claiming rent from the plaintiff but going by the provisions of agreement, it was agreed that the plaintiff would occupy a portion of the premises which she has been in occupation. The 1<sup>st</sup> defendant was not able to prove that there was fraud in the registration of the transfer and that the plaintiff forcefully took possession of the premises.

27. Accordingly I dismiss the plaintiff’s suit and enter judgment for the 1<sup>st</sup> defendant in the counter claim for the sum of Ksh.1.250,000/- with interest at court rates from 30<sup>th</sup> March 1997 until full payment. The 1<sup>st</sup> defendant will also have the costs of the counter claim.

JUDGEMENT READ AND SIGNED ON 27<sup>TH</sup> NOVEMBER 2009 AT NAIROBI.

**M.K. KOOME**

**JUDGE**