



REPUBLIC OF KENYA



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**Aloyo v Nyandondo & 5 others (Environment & Land Case 230 of 2014)
[2022] KEELC 14453 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14453 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 230 OF 2014
A OMBWAYO, J
OCTOBER 28, 2022**

BETWEEN

JAMES ABOKA ALOYO PLAINTIFF

AND

LUCAS OCHIENG NYANDONDO 1ST DEFENDANT

JAMES KIRUNDA 2ND DEFENDANT

JOSEPH ODERA 3RD DEFENDANT

DISTRICT LANDS REGISTRAR, KISUMU 4TH DEFENDANT

PAUL AMUGA T/A AMUGA & CO ADVOCATES 5TH DEFENDANT

KENYA PIPELINE COMPANY LIMITED 6TH DEFENDANT

JUDGMENT

1. James Aboka Aloyo (herein referred to as the plaintiff) commenced this suit against the defendant namely, Lucas Ochieng Nyandondo, James Kirunda, Joseph Odera, District Lands Registrar, Kisumu and Paul Amuga on 5th August 2014 praying for a permanent injunction directed at the 1st defendant and his employees or agents, restraining them from trespassing, encroaching, forceful entry, fencing, selling, disposing, alienating, clearing, stepping on, adverse dealing and or interfering whatsoever with the plaintiffs land parcel Kisumu/municipality Block10/24.
2. He further prayed for a declaration that the transfer of the suit land into the names of 2nd and 1st defendant respectively was illegal, hence the same should be cancelled. He prayed for an order compelling the 4th defendant to register the suit land to the names of the plaintiff. Ultimately, he prayed for costs of the suit.



3. The plaint was later amended on 19th October 2016 and filed on 26th October 2016. The amendment enjoined the Kenya Pipeline Co Ltd with a prayer that the Kenya Pipeline Company Limited do refund to the plaintiff the purchase price paid and general damages for breach of contract.
4. The plaintiff grievance was that sometimes in the year 2007 Kenya Pipeline Company Ltd advertised for sale through tender some plots it owned in Kisumu. These plots were within Kisumu Municipality Block 10. The plaintiff did submit his tender and paid the requisite deposit for a plot and by a letter dated 7th November, 2007 the Kenya Pipeline Company Ltd informed the plaintiff that his tender was successful and that the plaintiff had been awarded the property comprising of the title Kisumu Municipality/block10/204 at a consideration of Kshs.500,000/= .
5. The plaintiff did accept the award and paid the whole of the purchase price to Kenya Pipeline Company Ltd who is turn executed an agreement of sale with the plaintiff. The plaintiff states that later the Kenya Pipeline Company Ltd informed the plaintiff to retain an advocate to prepare a transfer and forward to them for execution. The plaintiff in compliance did instruct the 5th defendant herein to handle the transaction on his behalf.
6. On or about 5th December 2008, the 5th defendant did prepare the requisite transfer instruments and forwarded the same to Kenya Pipeline Company Ltd for execution.
7. Later on 23rd March, 2009 by a letter of even date Kenya Pipeline Company did return the duly executed transfer instruments sent to the 5th defendant. The documents included the lease, original certificate of lease and copy of transfer of lease for parcel Kisumu Municipality Block10/204.
8. However, on or about mid of July 2014 the 1st defendant trespassed into the plaintiff's suit property Kisumu Municipality Block10/204 and claimed ownership of the same.
9. That this surprising turn of events led the plaintiff to conduct a search at the lands office which revealed that the land was currently registered in the name of the 1st defendant with effect from 5th June 2014.
10. The plaintiff also obtained a white card from the lands office which further revealed that the property had changed hands from Kenya Pipeline Company Ltd to the 2nd defendant on 7th March 2014. Thereafter it changed hands again from the 2nd defendant to the 1st defendant on 5th June 2014.
11. Upon realization of this shocking development the plaintiff contracted his advocate the 5th defendant whom in turned laid blame upon the 3rd defendant whom he accused of having lost the plaintiff's transfer documents at the lands offices.
12. The plaintiff immediately lodged a complaint with the police at Central Police Station, Kisumu who mounted investigations. The OB number of the complaint is booked as number 59/07/2014.
13. The plaintiff stated that the 5th defendant owed the plaintiff a duty based on the trust that existed between and advocate and a client to ensure that he successfully completed the transaction and report back to the plaintiff in case of any eventuality.
14. Under the circumstances the plaintiff states that he lost his land through fraud and the same ought to be restituted back to him.
15. The suit property belonged to the plaintiff and the transfer of the property to the 2nd and 1st defendant was fraudulent and null. The 2nd defendant had no title to transfer to the 1st defendant and the 1st defendant has no iota of right to evict the plaintiff from the land. And in the event the 6th defendant indeed sold the same suit property to the 2nd defendant then the 6th defendant is liable to breach of



- contract and refund of the purchase price it received from the plaintiff. The plaintiff contends that the action of the defendant were illegal.
16. In the amended statement of defence filed by the 1st defendant, he avers that he is a bonafide purchaser of the suit land for value from the 2nd defendant unaware of any defect in the title and he is currently in occupation.
 17. The 1st defendant in the alternative claims for compensation from the plaintiff for negligence and a refund of Kshs4, 021,620.
 18. The 3rd defendant's defence is that he committed no fraud as he did not transfer the land to any party and played no role in the land. The parcel of land has never been in the names of the 3rd defendant.
 19. The 4th defendant's defence is a denial of allegations and states that the suit offends section 13A of the *Government Proceedings Act* Cap 40 laws of Kenya.
 20. The 5th defendant denies claim allegation by the 1st defendant of carelessness and lack of trust as duly levelled against him by 1st defendant. The 5th defendant states the 2nd defendant could not legally transfer the property to 1st defendant since the 2nd defendant had no legal title to the property. The 5th defendant denies allegations that the 1st defendant is an innocent purchaser for value without notice as the 1st defendant had express notice or ought to have express notice that the 2nd defendant had no valid title to the suit property capable of being transferred.
 21. The 5th defendant avers that the transfer of the suit land to the 1st defendant were illegal fraudulent, null and void as Kenya Pipeline the 6th defendant had executed all transfer to the plaintiff.
 22. The 6th defendant filed defence on 22nd December 2016 whose import he was not aware of any parallel dealings in respect of the suit property having sold the same to the plaintiff and forwarded the lease and other relevant documents to the plaintiff's lawyer for finalization of transaction. The 6th defendant denies any fraudulent activities and reiterates that the property was sold to the plaintiff and prays that the suit be dismissed with costs. The 2nd defendant did not file any defence and never tendered any evidence.
 23. When the matter came up for hearing on 9th October 2019 the plaintiff James Aboka Aloyo testified at length. He adopted his statement as evidence in chief. He saw an advert by Kenya Pipeline selling the suit property. He was invited to an auction in Kisumu, he won the property on 7th November 2007, he was given the amount and paid Kshs200,000. He accepted the offer and paid the balance. After the payment he did an agreement with Kenya Pipeline Company Ltd that was signed on 21st December 2007. The 5th defendant was the lawyer handling the transaction. He received the transfer documents from Kenya Pipeline Co Ltd for execution. Kenya Pipeline executed the transfer and attached the PIN certificate. The 6th defendant forwarded all the document to the plaintiff lawyer. The plaintiff kept checking with the advocate but nothing was forthcoming. His advocate, the fifth defendant had given the documents to the 3rd defendant to process the title.
 24. The plaintiff went to the suit land, took possession placed a gate and fenced with cedar posts and a barbed wire and put one Lucas Adera to be his caretaker. The 1st defendant went to the land removed the fence. His lawyer informed him that Mr. Joseph Odera (3rd defendant) had lost the transfer documents. When they went to the lands office they heard that the land had been transferred to one Lucas Ochieng Nyandondo. The white card showed that the land had been transferred in the name of James Kirunda who transferred to Lucas Ochieng Nyandondo. He lodged a complaint to the police who did their investigations.



25. On cross examination by Mr Njoga learned counsel for the 1st defendant the plaintiff stated that the property was first registered in the names of the 2nd defendant who transferred it to the 1st defendant. His lawyer lost the documents that were to be used for transfer in the plaintiff's name. He did not register any caution or inhibition or caveat. On further cross examination by Mr. Omayo learned counsel for 3rd defendant, he states that he was dealing with the lawyer and not the agents.
26. On cross examination by Mr. Madialo for the 5th defendant he states that he did not agree with the lawyer's explanation for a delay from 2010 to 2014. His lawyer's fault was to delay to process the title. On cross examination by M/s Achieng counsel for 6th defendant he stated that Kenya Pipeline Co. Ltd executed a transfer and handed all documents to his lawyer for the registration of the transfer at the lands office and preparation of the certificate of title.
27. PW2, Lucas Oduor Adera adopted his statement filed in court as his evidence in chief and reiterated in cross examination that the plaintiff is his brother. He was employed by his brother as a caretaker. He adduced no evidence of placing a signpost on the land. The signpost was removed. He met the 1st defendant on 22nd March 2014 and 29th March 2014 and that the 1st defendant claimed that the land was his. He does not know Joseph Odera and has never dealt with him. The property belonged to his brother, but his lawyer had documents. That was the close of the plaintiff's case.
28. The defendant case was opened on 1st December 2021 when the 1st defendant adopted his witness statement, testified that he did not visit the land prior to 2014. When he visited the land there was a fence and nothing else. In July 2014, when he was re-aligning the fence, he was informed that the land belonged to someone else. He met the plaintiff in July 2014. He put a notice on the land that the land was not for sale. He learnt of the parallel claim on 14th July 2014. He was the registered owner of the land. He bought the land from the 2nd defendant who had a certificate of lease in his name. He did a search and obtained a certificate of official search. The agreement of sale was executed between him and the 2nd defendant. He was given vacant possession. There was nothing to suggest that Mr. Kirunda had obtained the title fraudulently.
29. On cross examination he stated that the property was identified by his spouse. When he went to the property he found it fenced. He did due diligence.
30. On cross examination by Mr. Madialo he stated that the property was in the name of Parklane Housing Development Ltd when the 2nd defendant transferred the property to him. The rates clearance certificate was in the names of Kenya Pipeline Co. Limited.
31. The 6th defendant called Elizabeth Rop who works with Kenya Pipeline Company who adopted the statement dated 23rd March 2017 and produced the documents filed on 17th May 2017 as the 6th defendant exhibits. In a nutshell, she stated that Kenya Pipeline sold the land to James Aboka Aloyo.
32. The plaintiff in his written submission filed by the firm of Bruce Odeny and Copy Advocates contended that the 6th defendant sold the suit property to the plaintiff. The 6th defendant thereafter prepared and executed transfer instrument in favour of the plaintiff and released the same alongside other completion documents and the original certificate of lease title to ensure the plaintiff proceed with the transfer of the land. The plaintiff retained the legal services of the 5th defendant to register the transfer of the property of the land in his name. The plaintiff took possession but the 1st defendant later stormed the premises and replaced part of the fence. The plaintiff further submitted that the registration of the suit property in the names of the 1st defendant from that of the 2nd defendant was not lawful because the property initially belonged to the 6th defendant who sold it to the plaintiff and later to the 2nd defendant who caused the property to be registered in his name fraudulently.



33. The plaintiff relies on the case of *Albert Mae Gacii -vs- Attorney General and 4 others* (2006) eKLR the directions of Justice Onyacha (retired) and the holding in *Macfoy -vs- united African Co. Ltd* (1961) E ALL ER 1169 where the court held that if an act is void, then it is in law a nullity. It is not bad, but incurably bad. Moreover, that there is no need for an order of the court to set it aside. It is automatically null and void without more ado though it is sometimes convenient to have the court declare it to be so and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. The plaintiff submitted that the 1st defendant counter claim should be dismissed with costs. The 6th defendant submitted that the behavior of the 2nd defendant amount to admission of the claim and that the plaintiff and 6th defendant have established that the 2nd defendant action were fraudulent. Failure to file defence and further to give evidence despite the fact that he was given opportunity by the court signify that the 2nd defendant action were fraudulent. The 3rd, 4th and 5th defendant filed their statement of defence but did not testify hence the plaintiffs and 6th defendant pleadings stood unchallenged. The 6th defendant further submitted that the 2nd defendant did not obtain good title and therefore had nothing to transfer to the 1st defendant.
34. I have considered the pleadings, evidence on record and submission and records and do find the following salient facts not rebutted. That on 19th July 1982, the register for Kisumu Municipality/ block 10/204 was opened in edition 1 maps sheet. The lessor was the government of Kenya and the lessee was Parkline Housing Development Ltd. The land tenure was leasehold for a term of 99 years from 1st of April 1982. The parcel of land did not have any encumbrance then. On the 7th October 1987 a caution was registered by the bank of Credit and Commerce International claiming charges interest. On 20th January 1989 the caution was withdrawn and on the same date a charge entry was made. On the 5th of March 1991 a discharge of charge was entered followed by an entry on 16th July 1991 in favor of Kenya Pipeline Co. Ltd and a certificate of lease issued to the Kenya Pipeline Company on the same date.
35. On the 7th March 2014 the property was registered in the name of the 2nd defendant by way of a transfer instrument. A certificate of lease was issued on 10th March 2014. On 5th June 2014 the 2nd defendant transferred the property to the 1st defendant and a certificate of lease was issued on 6th June 2014. There is no explanation as to how Mr. James Kirunda, the 2nd defendant was registered as the proprietor of the land. There is no transfer of lease executed by Kenya Pipeline Company transferring the property to Joseph Kirunda. Moreover, the property was sold by Kenya Pipeline to the plaintiff and not the 2nd defendant. The facts of this case depict a very serious corrupt scheme executed by the 2nd defendant against the plaintiff and the 1st defendant. The documents sent by the 6th defendant to enable the plaintiff be registered as the proprietor were intercepted by the hawk eyed fraudsters who defrauded the plaintiff and the 1st defendant.
36. It has come to a time when buyers of properties have to be extra- careful. Due diligence has to be re-defined so that it includes doing not only official search but historical background search which entails obtaining a full certified white card and enquiring from the previous owners. If the 1st defendant had enquired from Kenya Pipeline Co. Limited as to the whether they had sold the property to the 2nd defendant who appeared to be fraudster, they could have obtained the information that was readily available that the property had been sold to the plaintiff and not the 2nd defendant. The 1st defendant ought to have been extra careful when he found the plaintiffs care taker on the land.
37. I do find that the property was lawfully purchased by the plaintiff from the 6th defendant but fraudulently registered in the 2nd defendant name and unlawfully transferred to the 1st defendant.



38. I do grant a permanent injunction directed at the 1st defendant and his employees or agents, restraining them from trespassing, encroaching, forceful entry, fencing, selling, disposing, alienating, clearing, stepping on, adverse dealing and or interfering whatsoever with the plaintiffs land parcel Kisumu/ municipality Block10/24.
39. I do further grant a declaration that the transfer of the suit land into the names of 2nd and 1st defendant respectively was illegal, hence the same is hereby cancelled.
40. Further, I do grant an order compelling the 4th defendant to register the suit land in the names of the plaintiff. I do find no merit in the counter- claim by the 1st defendant and the claim against the co-defendant by the 1st defendant and the same are dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF OCTOBER 2022.

A. O OMBWAYO

JUDGE

