



REPUBLIC OF KENYA

IN THE HIGH COURT AT MILIMANI

Civil Case 865 of 2002

MARY WAMBUI MBUCHUCHU PLAINTIFF

VERSUS

DAVID KITHINJI MUAMBI & ANOTHER.....DEFENDANT

JUDGMENT

I: Background of suit

1. Mary Wambui Mbuchucha, a dowager aged 80 years old or more filed this suit before court against David Kithinji (1st defendant herein) and Kenya Commercial Bank (2nd defendant herein) alleging fraud.
2. She had allegedly bought land parcel LR No. Ruiru East /Block 5/2002 as a group of a land buying company belonging to a Women Group. To prove this to tendered in evidence the receipts payments.
3. She alleges that a title deed was issued to her on 12 January 1988. She then left the land went to her home area. She did nothing with the parcel of land.
4. Sometime in June 2001 she decided to visit the suit land and was shocked to find it being occupied by the 1st defendant herein. He began to place illegal structures and subsequently trespassed.
5. On making a search at the Thika Land Registry it was revealed that the 1st defendant was the registered owner and issued a second title being so in his name as of 14 January 1997.
6. She filed suit on 21 May 2002 against the 1st defendant who subsequently changed the property to his employer Kenya Commercial Bank for a Ksh.1.9 million loan. She sued 2nd defendant also.
7. The grounds of her case was based on fraud. The 1st defendant infact forged transfer documents purporting to have been executed by the plaintiff.
8. The defendant 1 and 2 both entered appearance and filed separate defence. The 1st defendant alleged in the evidence the plaintiffs son one Charles sold the land to him. He in fact introduced him to the plaintiff who signed the requisite papers, appeared before the Land Control Board to give her consent to the transfer.
9. That there after he under took to obtain and did obtain a loan from his employer Kenya Commercial Bank. The said property was thereafter changed to the bank for Ksh.1.9 million which loan he pays to date.

10. The bank stated that they had taken all precaution in identifying the lands free from any encumbrances and duly owned by the defendant.

11. The parties herein put in agreed issues for determination by this court to be answered as follows.

III Agreed issues for determination

12. The plaintiff was most certainly the first registered owner of LR Ruiru East/block 5/202 herein referred to as the suit property. There was a sale agreement between the parties duly witnessed by Chacha Mutua a commissioner of oath and an advocate of the high court of Kenya

13. This document is alleged to be false. The plaintiff did not table it court as she said he had never made it. Where a fraud is alleged the first matter is required to be placed before the police as a report and to investigate. The plaintiff said she was fearful and did not make report. She instead filed his suit and claimed the title to the defendant cancelled.

13. The parties asked I determine whether the signature on the said agreement was forged. he said agreement (original document) was never produced to court. There was no indication of the said documents were placed before the "hand authority expert" of the police to determine whether there was forgery or not that had been committed.

14. The consideration for the sale of property was said to be Ksh.250,000/- according to defendant No.1. The plaintiff alleged she never received these money. That the sale transaction was before a lawyer who received the sale proceeds of the money paid.

15. The plaintiff required to prove on a balance of probability that the transaction with the defendant was fraudulent. She did not. She failed to call the Land Registrar to establish the transfer was not genuine.

16. According to the evidence before court the agent of the plaintiff was her son one Charles now deceased. He seems to have been involved in this transaction on behalf of his mother. The fraud would if any arose between the defendant 1 and the said late son.

17. The plaintiff stated in evidence that she had no case against the bank. That the charge created against the title was in order

Finding

18. One of the difficulties the advocate for the plaintiff encountered was not producing documents to prove her case. There was an allegation that the defendant No.1 held all of them.

19. In a case of fraud – what requires to be first done is to report to the police. This being a criminal offence. The police on investigating the case would charge the persons concerned in a court of law. In this case it would have been the 1st defendant and late son.

20. Upon a trial being held the evidence before the criminal courts would be recoded. If that court found there was no fraud the plaintiff would have no case if the court would find there was fraud then the plaintiff would use the proceeding of the criminal courts in this civil court under Section 34 of the Evidence Act Cap.80 Laws of Kenya without recalling any of the witnesses such as the document examiner.

21. It would have been in the criminal court case investigating the matter that would compel the production of the documents to the police by the parties and which would then become the basis of further evidence in a civil suit. The finding of guilty or not guilty in a criminal court would not effect the decision in a civil matter where the standard of proof in a civil matter is on a balance of probabilities

22. In a civil matter where there is no criminal case involved the advocate for plaintiffs would have sort for discovering of the documents and issued a notice to produce such documents for inspection interrogatives would have been sort and affidavit duly filed (Order 10r 11a, order 12 r 2(3) Civil Procedure Rules

23. None of these pre-trials requirements was undertaken by the advocate for plaintiff.

24. I have therefore only the verbal word of the plaintiff that she did not enter into a sale agreement yet no explanation is made as to the role of her late son took.

25. I also have the defendant say she was at the advocate and signed the documents, at the land control board which board would have requied her presence to give consent to transfer the land

II Conclusion

26. I hereby hold the plaintiffs case must fail. The particular of fraud have not been established. The suit be and is hereby dismissed with costs to the defendant 1 and 2.

Dated this 2nd day of May 2007 at Nairobi.

M.A. Anga'wa

Judge

M.W. Muchiri for Waweru Gatonye & Co. Advocates for the plaintiff

D.K. Njogu for Munene Wambugu & Co. Advocates for the 1st defendant

B.W. Masinde for Macharia Njeru & Co. Advocates for the 2nd defendant