



**Andea v Mage & 2 others (Environment & Land Case 269 of 2016)
[2022] KEELC 14858 (KLR) (14 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14858 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 269 OF 2016
MAO ODENY, J
NOVEMBER 14, 2022**

BETWEEN

JANE WEKESA ANDEA PLAINTIFF

AND

EZEKIEL BESA MAGE 1ST DEFENDANT

LAND REGISTRAR KILIFI 2ND DEFENDANT

CREDIT BANK LIMITED 3RD DEFENDANT

JUDGMENT

1. By a plaint dated October 11, 2016 the plaintiff herein sued the defendants jointly and severally seeking for the following orders: -
 - a. A mandatory injunction restraining the defendants by themselves, their servants, employees, agents from selling, charging, mortgaging, subdividing, pledging, disposing, alienating or dealing in the suit property known as Kilifi/ kijipwa/ 198 in any other manner that will affect the plaintiff's title to the said property.
 - b. A declaration that the title deed that was used to secure the loan from the 3rd defendant was a fake title deed.
 - c. An order that the charge placed on the plaintiff's title deed be removed and/or be lifted.
 - d. Costs of the suit.
2. The 3rd defendant filed a statement of defence and counter claim dated February 8, 2017 seeking the following orders -
 - a. The suit be dismissed with costs.



- b. A declaration that the plaintiff and the 1st defendant did execute a legal and valid charge dated October 4, 2014 and deed of guarantee and indemnity dated October 4, 2014 over the property known as Kilifi/ Kijipwa/198 registered in the name of Jane Wekesa Andea to secure a sum of Kshs 6,500,000/- plus interest.
- c. The 3rd defendant also seeks orders that the 3rd defendant be at liberty to exercise its statutory power of sale over the property known as Kilifi/ Kijipwa/ 198 forthwith.
- d. Costs of the suit and counterclaim.
- e. Interest on (iv)
- f. Any other relief this honourable court may deem fit.

Plaintiff's Case

3. PW1, Jane Wekesa adopted her statement and list of documents and stated that she is the registered proprietor of the suit property and that on or about September 15, 2016, she received a phone call while at her Kitale home from the 3rd defendant's security officer who informed her that he was investigating a possible fraud case involving the use of a forged title deed to secure a loan from the bank.
4. It was her evidence that on September 21, 2016 she visited the 3rd defendant's office in Nairobi and was shown documents including a title deed that had been presented to the bank by the 1st defendant in the process of securing a loan.
5. PW1 stated that the documents that were presented to the bank neither had an edition number nor opening entry date when she compared with the documents in her possession.
6. It was PW1's testimony that the original title which she had in her possession had never been charged and that she did not sign any documents to guarantee the 1st defendant. She further stated that the signature on the forged guarantee did not belong to her and that she was born on January 1, 1948 and that the ID on the forged document the date of birth is October 10, 1948 at page 60 of the defendant's bundle of documents.
7. PW1 noted some anomalies on the photograph affixed to the identity card which belonged to another woman, date of the issue of the said identity card was different from hers, date of birth was incorrectly stated; and signature thereon was not hers.
8. On cross examination PW1 told the court that she bought the land from Anderson Tsuma who did a transfer and confirmed that the signature on the charge does not belong to her. She also stated that the 1st defendant took a loan of Kshs 6.5 million from Credit Bank and that the signature in the offer letter at page 15 did not belong to her. She further stated that she does not know the 1st defendant
9. On re-examination by Ms Chala she told the court that the signatures on the documents did not belong to her and she did not appear before the advocates to sign the said documents. It was her testimony that there was a complaint by the Credit Bank for forensic investigations whereby she gave them her documents and wrote a statement and that the documents were later returned to her.
10. PW2 Chief Inspector Daniel Gutu No 2xxx3 told the court that there were three requests to ascertain whether the signatures were made by the same author. That he examined and came to the conclusion that all signatures were made by the same author. He also stated that he did another examination and came to the conclusion that the question signature marked B were made by different authors. His conclusion was that the title deed marked B had a forged signature.



11. On cross examination, he stated that the document D1 had no date when they were signed and that document C1 was signed on November 15, 1994 and February 3, 1998. He also stated that he did not have samples of the Land Registrar's signature but further stated that if the signature is not there they go for known signatures of the person.
12. Upon cross examination, he told the court that C2 and C3 were the known signatures of Mary Kai the Land Registrar.

Defence Case.

13. DW1 Wainaina Francis Ngaruiya adopted his statement and list of documents dated February 8, 2017 which he produced as Dexh. 1-14 and stated that upon the 1st defendant applying for an overdraft, the bank engaged Acumen Valuers to carry out a valuation and the search confirmed that the title was in the name of the plaintiff. It was his testimony that they did due diligence and the charge was registered. According DW1, they followed all the processes in respect of registration of a charge and that the plaintiff had executed the charge alongside the 1st defendant.
14. It was DW1's further evidence that they reported the matter to Anti Bank Fraud Unit and are yet to get progress update from the Bank Fraud Unit. He also testified that the Bank complied with all the requisite procedures for registration of a charge.
15. On cross examination, DW1 told the court that he was not able to tell whether a charge can be valid if the title deed was forged and that the parties appeared before independent advocates and not before him.

Plaintiff's Submissions

16. Counsel for the plaintiff filed submissions and highlighted the anomalies identified by the plaintiff on the copy of the identity card that was presented to the bank, the photograph affixed to the identity card, the date of the issue of the said identity card, date of birth, and the signature were all not for the plaintiff.
17. Counsel further submitted that the title deed that was used by the 1st defendant to acquire the loan from the 3rd defendant was forged and further that the bank did not undertake proper due diligence.
18. Ms Chala submitted that the validity of the charge is dependent inter alia on whether the title used to charge the suit property is genuine and relied on the cases of *Jane Achieng' Muga v Engen Kenya Limited & 5 others* (2018) eKLR and *James Mogunde Mogunde (Suing on behalf of and as Donee of Power of Attorney From Edward Sakawa Nyasaka) v Faulu Micro Finance Bank Limited* [2019] eKLR where the court held "that the charge created in favour of the defendant was never created by the rightful proprietor of the suit land and it was never created using the genuine documents of the suit land". The court was persuaded that the charge is fraudulent and declared the same null and void and the entry was cancelled.

3rd Defendant's Submissions

19. Counsel identified the following issues for determination, whether there was fraud or misrepresentation as alleged by the plaintiff, whether the threshold for a mandatory injunction has been met, whether the court should declare that the plaintiff and the 1st defendant executed a legal and valid charge dated October 4, 2014 and deed of guarantee and indemnity over the suit property registered in the name of the plaintiff to secure a sum of Kshs 6,500,000/- plus interest and if so,



- whether the 3rd defendant is at liberty to exercise its statutory power of sale and who should bear the costs.
20. On the first issue as to whether there was fraud or misrepresentation as alleged by the plaintiff, counsel relied on the case of *Kuria Kiarie & 2 others v Sammy Magera* (2018) eKLR where the court held that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.
 21. Counsel also relied on the case of *Kinyanjui Kamau v George Kamau* (2015) eKLR on the standard of proof and submitted that the 3rd defendant has pleaded and proved that it obtained all the necessary consents as required by law in the registration of its charge against the subject title.
 22. Ms Kagure submitted that no affidavit of marriage or marriage certificate was produced before court and the alleged husband did not testify in person and that the Plaintiff's testimony that she is married must fail as the same was not proven to the required standard.
 23. Counsel further submitted that the 3rd defendant produced a copy of the application for the Land Control Board Consent to charge and letter of consent to charge from the Land Control Board and that the plaintiff has only inferred fraud in her particulars but has failed to demonstrate why and how she arrived at the conclusion the 3rd defendant failed to get the plaintiff's consent as guarantor of the loan.
 24. It was counsel's submission that the evidence of the forensic document examiner did not dispute that his findings had a margin of error and relied on the case of *Kagina v Kagina & 2 others* (civil appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021). Counsel invited the court to note that when the 3rd defendant presented the plaintiff's title deed in its possession at the land registry for registration of the charge, the 2nd defendant did not see any irregularities with the title hence registered the charge.
 25. Counsel submitted the fact that there was a clear entry of the charge in favour of the 3rd defendant, the 3rd defendant is indeed holding the proper title as security and the plaintiff's case is only meant to frustrate the 3rd defendant from exercising its statutory power of sale.
 26. Counsel therefore urged the court to dismiss the plaintiff's case with costs as she has failed to prove fraud or misrepresentation against the defendants.

Analysis And Determination

27. The issues for determination are as follows: -
 - a. Whether the plaintiff executed any instrument in favour of the 1st defendant as a guarantor in respect of the suit property
 - b. Whether spousal consent was obtained in respect of the suit property
 - c. Whether the plaintiff appeared before the Land Control Board and law firm which executed the charge document
 - d. Whether the 3rd defendant carried out due diligence before charging the suit property.
28. It should be noted that the 1st and 2nd defendants did not participate in these proceedings. It is only the plaintiff and the 3rd defendant who participated in the case as they are the ones who their title and monies at stake.



29. It is not disputed that the plaintiff is the rightful owner of the suit land known as Kilifi/ Kijipwa/ 198. What is in dispute is whether she guaranteed the 1st defendant to take a loan from the 3rd defendant whereby a charge was registered for Kshs 6.5 million
30. It is further on record that the 3rd defendant called the plaintiff on the September 15, 2016 informing her that they were investigating a possible fraud case that involved the suit property Kilifi/ Kijipwa/ 198 in which a fake title was used to secure a loan from 3rd defendant. The 3rd defendant has equally not disputed the fact that the plaintiff's title deed had been used as security to secure a loan of Kshs 6,500,000/= which loan was advanced to the 1st defendant.
31. On the first issue as to whether the plaintiff executed any instrument in favour of the 1st defendant as a guarantor in respect of the suit property, the plaintiff's evidence unearthed several anomalies which involved the documents used in the registration of the charge which included, the identity card, the photograph affixed on the identity card, the date of issue of the identity card, date of birth, edition of the title, opening entry of the title and the signature used.
32. From the plaintiff's evidence on record, she stated that the original title which she had in her possession had never been charged and she was born on January 1, 1948 and that the ID on the forged document had her date of birth as October 10, 1948 at page 60 of the defendant's bundle of documents which is an anomaly. The 3rd defendant did not counter this evidence to show how the anomaly occurred and whether they were dealing with the real or purported owner and guarantor.
33. The court is of the view that the issues of the anomalies raised by the plaintiff on the photograph affixed to the identity card which she stated that belonged to another woman, date of the issue of the said identity card which different from hers, date of birth was incorrectly stated; and signature are issues that cannot be ignored. This was a well-orchestrated scheme for the 1st defendant to reap where he did not sow.
34. All these anomalies were tell-tale signs that something was wrong with this transaction. The demeanor of the plaintiff who is an old woman and from observation on how she gave evidence indicated that she was a truthful witness. The plaintiff's evidence was corroborated by PW2 who was a forensic document examiner who confirmed that the signature was forged on the charge document.
35. It is also on record that the advocate who purportedly witnessed the signature of the plaintiff and the 1st defendant were not called to give evidence as to whether the plaintiff appeared before him. DW3 who gave evidence said that the attestation and registration of the charge together with the due diligence was carried out by an independent advocate and that they engaged the services of Acumen Valuers.
36. Section 44 (1), (5) and 45 of the [Land Registration Act](#), 2012 are to this effect. Those provisions read: -
 44. Executions of instruments in writing.
 1. Except as otherwise provided in this Act, every instrument effecting any disposition under this Act shall be executed by each of the parties consenting to it, in accordance with the provisions of this section.
 - (5) The transferee shall in addition to executing the instrument, attach the following—
 - a. a copy of an identity card or passport; and
 - b. a copy of a personal identification number certificate;



- c. passport-size photographs;
- d. where applicable, a marriage certificate; or
- e. a copy of the certificate of incorporation, in the case of a corporate entity; or
- f. such other identification documents as the Cabinet Secretary may prescribe

45. Verification of execution.

- (1) Subject to subsection (3), a person executing an instrument shall—
 - a. appear before the Registrar, public officer or other person as is prescribed; and
 - b. be accompanied by a credible witness for the purpose of establishing identity, unless the person is known to the Registrar, public officer or other person.
- 2. The Registrar, public officer or other person shall identify the person and ascertain whether the person freely and voluntarily executed the instrument, and shall complete thereon a certificate to that effect.
- 3. The Registrar may dispense with verification under this section—
 - a. if the Registrar considers that it cannot be obtained or it can only be obtained only with difficulty and is otherwise satisfied that the document has been properly executed;
 - b. if the Registrar knows the document has been properly executed, and shall record on the document the reasons for dispensing with the appearance of the parties; or
 - c. if the instrument has been electronically processed and executed by the parties consenting to it..

37. In the case of *[Daniel Kipruto Metto v Chase Bank \(Kenya\) Limited](#)* [2018] eKLR this court held that: -

“The defendant should have done due diligence and get the history of the land not just from the lands registry but also from the neighbours. The plaintiff and his witnesses indicated that they have mud structures and not permanent structures as was put in the valuation report by Metro Cosmo Valuers. The parties who engaged in this act must have been a cartel that has been fleecing people of their hard earned money or property. The defendant should therefore be held vicariously liable for the wrongful acts of its agents.

With the digital age, where people are developing software day in day out, banks should be ahead in innovative ways to curb any unforeseen and foreseeable compromise to their systems. Banks must be extra diligent when dealing with properties to be charged or mortgaged.”

38. This was a case of fraudulent dealings to derive the plaintiff of her suit land through charging the same with no intention of repaying. From the evidence of record and the anomalies in the identification card, date of birth, photograph, signature which was corroborated by PW2’s evidence it is evident that the plaintiff neither signed nor appeared before the advocate or Land Control Board for the consent to charge the suit land. The con game did not end up well. Why was there an investigation on the fraudulent charging of the suit land?



39. I am persuaded by the findings in the case of *Jane Achieng' Muga v Engen Kenya Limited & 5 others* (2018) eKLR and *James Mogunde Mogunde (Suing on behalf of and as Donee of Power of Attorney From Edward Sakawa Nyasaka) v Faulu Micro Finance Bank Limited* [2019] eKLR (supra) where the court held ; -

“that the charge created in favour of the defendant was never created by the rightful proprietor of the suit land and it was never created using the genuine documents of the suit land”.

40. Similarly in the case of *Macfoy v United Africa Co Ltd* [1961] 3 ALL ER 1169 at 1172 Denning LJ stated; -

“If an act is void, it is in law a nullity. It is not only bad, but incurably bad. 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.”

41. I have considered the pleadings, the exhibits produced, the evidence and submissions by counsel and come to the conclusion that the plaintiff has proved her case on a balance of probabilities and therefore make the following specific orders

- a. A mandatory injunction is hereby issued restraining the defendants by themselves, their servants, employees, agents from selling, charging, mortgaging, subdividing, pledging, disposing, alienating or dealing in the suit property known as Kilifi/ kijipwa/ 198 in any other manner that will affect the plaintiff's title to the said property.
- b. A declaration is hereby issued that the title deed that was used to secure the loan from the 3rd defendant was a fake title deed.
- c. An order is hereby issued for the removal of the charge placed on the plaintiff's title deed.
- d. Costs of the suit.
- e. 3rd defendant's counterclaim is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF NOVEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

