



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 214 OF 2004

LYDIA WANJIKU NDUBA.....PLAINTIFF

VERSUS

MARY WANJIRU KAMAU.....1ST DEFENDANT

NEW ROYSAMBU HOUSING LTD.2ND DEFENDANT

KIBE KINYITA.....3RD DEFENDANT

MBURU KINYITA.....4TH DEFENDANT

JUDGEMENT

A. Background

The plaint in this suit was dated and filed on 5th March, 2004. The plaintiff pleaded that she was at all material times the legal owner and/or purchaser of the suit premises, that is, Plot No. Nairobi/Block 116/53, having purchased the same from the 2nd defendant in her capacity as a member thereof. She pleaded that on or about 10th August, 2001 the 1st defendant in collusion with the 2nd, 3rd and 4th defendants transferred title to the suit plot and registered it in the name of the 1st defendant, and that this was an act of fraud and misrepresentation of facts which occasioned her, the plaintiff, much prejudice. She specified the particulars of fraud and prayed for certain orders.

On 26th July, 2004 the Deputy Registrar entered interlocutory judgement in favour of the plaintiff, in the following terms:

“The 1st and 2nd defendants herein Mary Wanjiru Kamau and New Roysambu Housing Ltd. having been duly served with summons to enter appearance and having failed to file defence within the prescribed period and on the application dated 14th July 2004, I enter interlocutory judgement against the said defendants as prayed in the plaint.

“The award of costs shall await judgement when the suit shall be set down for formal proof.”

On 18th November, 2004 when this case came before me for formal proof, hearing could not proceed but counsel for the plaintiff applied for another file, in respect of *Mary Wanjiru Kamau v. New Roysambu Housing Ltd*, HCCC No. 750 of 2001, to be consolidated with the instant case file, for the reason that both were in respect of the same matter though the earlier case had already been disposed of. I made the order that “At the next date of hearing, the file on this case, HCCC No. 214 of 2004 shall be accompanied

with the file on HCCC No. 750/2001.”

At the beginning of formal proof, on 19th January, 2005 learned counsel, **Mr. Nduati**, stated that although these proceedings, at this stage, concerned only the 1st and 2nd defendants, service had none-the-less been effected on all the parties.

B. Evidence

In introducing the plaintiff’s case, counsel stated the position of the plaintiff as being that the 1st defendant had, acting in cahoots with the other defendants, transferred the suit property into her own name. On that basis the plaintiff, **Lydia Wanjiku Nduba** was on 22nd February, 2005 sworn and gave her testimony which was in the Kikuyu language and was translated. She said the case was about plot No. 53 at Roysambu. She knew the 1st and 2nd defendants, and said they took away her land, the suit land. She had purchased the suit land through shares which she had acquired in the 2nd defendant company, her share certificate being No. 340, issued on 4th November, 1983. The original number of the suit plot before surveying was No. 182, and after surveying it became No. 53. She exhibited the share certificate issued to her and the payment receipts also issued. She also exhibited her receipts issued for payment of City Council rates, in respect of the suit plot. She exhibited a document from the Ministry of Lands and Settlement, dated 18th June, 2001, giving approval for subdivisions that incorporated the suit plot.

The plaintiff testified that there was a time when she was required to make a payment to facilitate the transfer of the suit plot into her name, but she fell ill and this increased expenses, so that she was unable to make the payment. In these circumstances, the plaintiff identified a purchaser for her plot; she needed money to pay off her medical bills. On 15th August, 2001 she signed an agreement with the ladies who were to purchase her plot. She exhibited a copy of the sale agreement (which had also been produced in an earlier application under the same suit) and the transfer which she had executed on 15th August, 2001 in favour of the purchasers. The witness produced a letter by which the 2nd defendant informed her that another person had already occupied her plot. She then tried to lodge a caution at the Lands Office, but this could not be accepted, as there was already litigation, in HCCC No. 750 of 2001 affecting her own plot, though not then known to her. That suit ended in a consent order between the parties therein, to facilitate transfer of the suit plot, instead of a different plot, Nairobi/Block 116/233, into the name of the 1st defendant herein. Although the suit in HCCC No. 750 of 2001 was in respect of Nairobi/Block 116/233, by some less-than-transparent arrangement, it was a plot hitherto not involved, that of the plaintiff herein, plot No. Nairobi/Block 116/53, that was now being transferred into the name of the 1st defendant (who was the plaintiff in HCCC No. 750/2001), and all this completely behind the back of the plaintiff herein. The plaintiff saw this as fraud; and it was her counsel’s contention (quite justified, in my view) that the fraud was a conspicuous one as the plaint in HCCC No. 750 of 2001 had not been amended to make the suit plot, Nairobi/Block 116/53, part of the pleadings; and hence the consent order recorded on 21st May, 2001 was an order fraudulently arrived at. The witness produced that consent order, which was made without at all consulting her as the owner of the plot, as exhibit No. 13. She also exhibited the extracted version of that order which was signed by the Deputy Registrar. She said that on the basis of that order, her plot, Nairobi/Block 116/53 was transferred to the 1st defendant. She exhibited a copy of the said transfer signed by the Deputy Registrar (exhibit 15). While these questionable transactions were taking place, the plaintiff was ill and unavailable; she produced some five hospital discharge summaries issued by Prime Care Hospital, demonstrating her unavailability at the time, on health grounds. She testified that her illness was a fact within the knowledge of the managers of the 2nd defendant.

The plaintiff said it was her belief that the transfer of her property to the 1st defendant was wrongful. She prayed that the Court do help her to regain the suit land; to nullify the title-holding in the name of the 1st defendant; and to order issuance of the title deed in the plaintiff’s name.

C. Submissions

Counsel thereupon closed the plaintiff's case and made his submissions. He submitted that it was clear from the plaintiff's evidence and from the documentary evidence, that the suit plot was fraudulently transferred to the 1st defendant, with the collusion of the 2nd defendant. The two purported to enter a fraudulent consent regarding the suit plot, in a different case which had nothing to do with the suit plot, at a time when the plaintiff was ill, and to the knowledge of the officials of the 2nd defendant. The 2nd defendant very well knew that the plaintiff was the owner of the suit land; yet the 2nd defendant still facilitated the transfer of the suit land to a person who had no valid interest in the same. Counsel submitted that the transfer was irregular and in bad faith. The proceedings in HCCC No. 750 of 2001 confirmed that the plot that belonged to the 1st defendant was Nairobi/Block 116/233, but not Nairobi/Block 116/53. In that earlier case the 1st defendant herein had prayed for transfer to her of Nairobi/Block 116/233; and there was no basis in legal procedure in which those pleadings did transform to validate and incorporate prayers for transfer of the suit plot to the 1st defendant herein.

Learned counsel, **Mr. Nduati**, prayed for judgement in favour of the plaintiff; for orders revoking the title to the suit property issued in the 1st defendant's name; for rectification of the register.

D. Further Analysis, and Decrees

I am in perfect agreement with the submissions of counsel. The plaintiff's evidence is clear and unambiguous, and carries a specific message which cannot be reconciled with any hypothesis but that of a major fraud committed by the 1st and 2nd defendants, for the purpose of confiscating the plaintiff's property. The Court must set its face firmly against such wrongful and dishonest conduct which was clearly aimed at taking advantage of the plaintiff's frailty and her illiteracy.

I therefore give this judgement in favour of the plaintiff and against the 1st and 2nd defendants, and specifically decree as follows:

1. It is hereby declared that the suit plot, namely L.R. No. Nairobi/Block 116/53 is in law the property of the plaintiff herein, **Lydia Wanjiku Nduba**.
2. The Land Registrar, Nairobi shall forthwith, and in any event within 15 days of the date hereof, cancel and revoke the registration in the name of the 1st defendant, of the title to the suit plot, L.R. No. Nairobi/Block 116/53.
3. The 1st and 2nd defendants shall jointly and severally bear the costs of this suit, which shall carry interest at Court rate, from the date of filing suit until payment in full.

DATED and DELIVERED at Nairobi this 15th day of April, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff: Mr. Nduati, instructed by M/s. Muchangi Nduati & Co. Advocates

Defendants absent and unrepresented.