



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO. 640 OF 2017

JRW

(suing through VWW).....PLAINTIFF

VS

MWW.....1ST DEFEDANT

EVA NYAWIRA MUKUNYA.....2ND DEFENDANT

ANNE MURUGI MUKUNYA.....3RD DEFENDANT

JUDGEMENT

1. The Plaintiff has filed suit through the guardian ad litem namely VWW vide orders of guardianship issued by the Court in Misc Application No 94 of 2017 on 14/6/2017 VWW and MWW are wives to JRW.
2. The Plaintiff avers that he is ill and mentally incapacitated hence the filing of the suit through a guardian.
3. It is his case that the 1st Defendant through fraud and misrepresentation registered herself as proprietor of RUIRU/RUIRU EAST BLOCK x/xxx purportedly as a gift while the Plaintiff was mentally incapacitated. Subsequently the 1st Defendant unlawfully and fraudulently conveyed the property to the 3rd and 4th Defendants.
4. The Plaintiff sought the following orders;
 - a. That the Court be pleased to issue an order reversing the transfers and reinstating the name of the Plaintiff on the register of the suit land.
 - b. That a permanent injunction order be issued restraining the Defendant their families servants employees and or agents from claiming entering using or alienating selling leasing renting disposing building cultivating the suit land
 - c. That any structures build on the suit land by the Defendants be demolished and the Defendants to give the Plaintiff vacant possession
 - d. Costs of the suit.
5. The 1st Defendant denied the Plaintiff's claim and contended that her husband became ill and mentally incapacitated in 2007. She denied all acts of misrepresentation and fraud as alleged by the Plaintiff. To the contrary she contends that the Plaintiff shared out his properties between his two wives to avoid squabbles and transferred the suit land to her as part of her share of the family assets.
6. The 2nd and 3rd Defendants equally resisted the Plaintiffs claim and contended that they purchased the property on a willing buyer willing seller and denied any fraud and or misrepresentation on their part.
7. At the hearing VWW – PW1 testified and relied on the witness statement dated the 5/7/2017 and list of documents marked as PEX 1-17 in support of the Plaintiffs case.
8. She stated that the 1st Defendant is her co-wife, being wives of the Plaintiff. That the Plaintiff has been ailing since 2017 and was declared mentally incapacitated by his doctors. That her husband suffered from dementia. That in 2011 when the land was registered in the name of

the 1st Defendant Wamai was unwell and bedridden at their home in Naivasha and could not have transferred the land to the 1st Defendant. She was categorical that W did not give his consent nor transferred the land to the 1st Defendant.

9. The witness stated that the agreement dated the 4/10/2009 was between W, herself and the 1st Defendant in the presence of a cousin and the District Officer. That they agreed to share the family properties at Kinangop and Nairobi which did not include the suit land which is situate at Ruiru. That in any event the agreement did not permit them to sell the properties but to manage them.

10. She stated that though W suffered dementia from 2007 she only obtained guardianship in 2017 on realizing that the 1st Defendant had transferred the suit land into her names.

11. That W had other properties in Nairobi – Buruburu, Ruiru, Naivasha and Kinangop.

12. DW1 – JWN testified and relied on her witness statement dated the 9/4/2019. She stated that she and FWW were appointed guardian ad litem(s) vide HCCC Misc 157 of 2017 on the 14/11/2017 on behalf of the 1st Defendant who also is her sister. That the 1st Defendant was adjudged mentally incapacitated on account of a mental disorder.

13. That she is aware that on the 4/10/2009 W held a meeting before the District Officer Kinangop with his wives and agreed in writing on how to share the family assets to avoid future squabbles. Kinango land was shared V – 24.5 acres while M got 16.5 acres. All properties in Naivasha went to Virginia while M got the properties in Nairobi. That M sold the buruburu and Ruiru properties which had been given to her by her husband.

14. That pursuant to the said agreement W transferred the suit land to M and obtained Land Control Board consent for the transfer of the land to M which was done in 2011. That M and W attended the Land Control Board meeting at Githurai. Later M sold the land to the 2nd and 3rd Defendants. That though the suit land was omitted in the agreement under Nairobi properties, she stated that they included the suit land which is situate in Ruiru, the outskirts of Nairobi. That the Land Control Board is at Githurai, Nairobi.

15. That it is not true that M committed any fraud and in any event the Police did not find any fault in the transaction and that explains why M was not charged with any offence.

16. That M has no relations with the 2nd and 3rd Defendants.

17. DW2- Eva Nyawira Mukunya testified and relied on her witness statement dated the 6/2/18 and list of documents dated the 5/2/18 as her evidence in chief. She stated that the 3rd Defendant is her sister. That they were introduced to the property by a land agent and upon carrying out due diligence they found that the land was registered in the name of M. Negotiations led to the agreement of sale and payment of the purchase price and transfer of the suit land in their names. That the transfer was done legally and denied any fraud and misrepresentation on their part.

18. The Plaintiff submitted that the Plaintiff did not give consent not transfer the suit land to M because by 2011 he had been sick since 2007 suffering from dementia. The Plaintiff referred to several treatment notes by the Plaintiff's doctors. Further that the Plaintiff did not leave his home in Naivasha where he was under the care of the guardian to attend the Land Control Board.

19. Further that the 1st Defendant was aware of the Plaintiffs condition all this while and if indeed he did obtain consent and transferred the land to her, the said transfer is invalid on account of his non compos mentis and the same ought to be nullified by the Court. He referred to the case of **Grace Wanjiru Munyinyi & Anor Vs Gideon Waweru Githunguri & 5 others (2011) EKL**R and **Manan Jayendra Chunibhai & Anor Vs Jitendakumar C Patel & Anor (2019) EKL**R.

20. With respect to the agreement dated the 4/1/2019, the Plaintiff gave the 1st Defendant land in Nairobi and not Ruiru. He argued that the suit land is situate in Kiambu County and not Nairobi. That the agreement did not permit the beneficiaries to transfer the land but to own by themselves. He concluded that the transfer was a forgery and the 1st Defendant received no good title capable of being conveyed to the 2nd and 3rd Defendants.

21. The 1st Defendant submitted that V was not lawfully appointed a guardian under the law. That the orders obtained in Mis application No 94 of 2017 were before CMCC Court which she argues does not have jurisdiction under Section 26 and 28 of the Mental Health Act which vests jurisdiction in the High Court.

22. The 1st Defendant submitted that she was not aware of the Plaintiffs incapacity at the material time of the transaction as the dementia if any is a recent occurrence. That the Plaintiff suffered no mental condition in 2011. That the Plaintiff failed to show that on the 11/10/2011 the Plaintiff did not possess the mental and physical ability or capacity to execute the transfer.

23. Finally, that the 1st Defendant conveyed a good title to the 2nd and 3rd Defendants.

24. The 2nd and 3rd Defendants submitted that they have no relations to the 1st Defendant. That they had no knowledge of the dealings between the guardian and the 1st Defendant. They dealt with the 1st Defendant who was the registered owner of the suit land. That they carried out due diligence in the purchase of the suit land and paid a consideration in the sum of Kshs 3 million to the 1st Defendant. That they are innocent purchaser for value without any notice of any taint on the title.

25. Further that the Plaintiff did not prove any fraud and made mere unfounded allegations devoid of substance.

26. The issues for determination;

- a. Whether the Plaintiff was mentally incapacitated at the time of the transfer of the suit land to the 1st Defendant?
- b. Whether the Plaintiff has proved fraud and misrepresentation?
- c. Whether the 2nd and 3rd Defendants are bonafide purchasers?
- d. Who meets the cost of the suit?

27. This Court has been invited to invalidate the guardianship of the guardian ad litem of the Plaintiff. I concur with the 1st Defendants observation that the Law under Section 26 and 28 of the Mental Health Act gives the High Court the power and jurisdiction with respect to the determination of guardianship. My reading of the order also shows that the Plaintiff was not adjudged mentally ill so as to appoint guardian ad litem. Be that as it may, I note that this Court does not possess jurisdiction on the subject and I leave it at that. The parties retain the liberty to challenge the orders at the right forum.

28. It is not in dispute that W has two wives; V and M. I have seen the orders dated the 27/11/2017 where the Court adjudged M as suffering from a mental disorder and appointed FWW and JWW as her guardians. It is pursuant to the said orders that JWW gave evidence on behalf of the 1st Defendant. The Court would have expected the Plaintiff to amend the suit to provide for the guardianship. How can one execute against a person such as the 1st Defendant already adjudged mentally ill? This is incorrect pleading. Be that as it may, I shall proceed to determine the matter as if the 1st Defendant has been sued through the guardian ad litem as disclosed in para 4 of the said orders which states that the legal guardians shall represent the patient in Court proceedings.

29. The green card adduced in evidence shows that the suit land became registered in the name of W on the 7/6/91 and was transferred to the 1st Defendant on the 13/12/2011 by way of gift. On the 16/1/2013 the 2nd and 3rd Defendants became registered as owners of the suit land by way of purchase from the 1st Defendant.

30. The Plaintiff's case is that he fell ill in 2007 and remained incapacitated to date. That during the period of incapacitation the 1st Defendant illegally and fraudulently transferred the land to herself and later sold to the 2nd and 3rd Defendants. That the Plaintiff never transferred the land nor obtained consent to transfer as he never left his home in Naivasha.

31. The 1st Defendant contends that the land was transferred by the Plaintiff pursuant to the family consent, obtained Land Control Board consent and all the while had the mental capacity to do so.

32. The 2nd and 3rd Defendants posit that the transaction was above board and acquired the property as bonafide purchasers for value without notice of any defect.

33. Whether the Plaintiff was mentally incapacitated at the time of the transfer of the suit land to the 1st Defendant. The Plaintiff led evidence that W was diagnosed with mental illness as early as 2007 and that the 1st Defendant knew of his condition and took advantage by transferring the land to herself in a fraudulent manner. The Court was informed of an agreement dated the 4/10/2009 which was presented by DW1 and admitted by PW1. I shall reproduce the agreement for its effect as follows;

“agreement between two wives of JRW (89xxxxx concerning plot NYAMURUAKI xxx, xxx and xxxx totaling 41 acres.

4/10/2009

I JRW ID No 89xxxxx has agreed to subdivide my land totaling 41 acres. This I have subdivided to my two wives namely VWW and MWW. This I have subdivide as follows;

(i) MWW to have 16.5 plus the permanent house.

(ii) VWW to have 24.5 acres.

Note; That all the properties at Naivasha belongs to VWW.

(iii) That all the properties in Nairobi belongs to MWW.

The agreement is signed by Wamai and his two wives in the presence of the DO, Kinangop Division on the 1/12/2009. The Plaintiff admitted to the presence of the agreement but that it was only for purposes of sharing Kinangop land which she admits that she got a share. Further that the land was not to be sold. She led evidence that she sold her Kinangop land just like M did. It is clear that W gave both wives properties; Virginia got properties in Naivasha and M in Nairobi which would include its environs.

The conclusion therefore is that the transfer of the land to M was in pursuance to this agreement which has not been contested.

34. Was the transfer vitiated by the mental incapacity of the Plaintiff? It is trite that the question of capacity is one of degree, the person's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. **See Halsbury's Laws of England Vol 1 Page 904.**

35. For a defence of mental incapacity to succeed the one alleging it must show that the incapacity of the Defendant due to mental illness in one form or another and that the Plaintiff knew of the condition of the Defendant. see the case of **Wiltshire Vs Cain (1958-69) 2 Barbardos 149** referred to in the case of **Grace Wanjiru Munyinyi & Another v Gedion Waweru Githunguri & 5 others [2011] eKLR.**

36. A person may become of unsound mind because he has lost the ability to reason by disease, grief or other accident. Where a person is shown to have suffered under a mental incapacity and the other party was unaware of this incapacity then any contract other than a contract for necessities made by such a person is not binding on him.

37. The Plaintiff led evidence that W was diagnosed with dementia as early as 2007 but she only applied for guardianship in 2017, 6 years later for purposes of recovering the suit land. The Court was informed that W and his wives travelled to Kinangop in 2009 to attend to the distribution of his properties before the District Officer, Kinangop. If indeed he was mentally incapacitated in 2007, how did he have the mental ability travel and distribute his properties in 2009? The guardian cannot elect to have the benefit of the agreement only when it suits her and alleges mental incapacity when it is in favour of the 1st Defendant.

38. Furthermore, the Plaintiff did not call a medical doctor to testify and confirm the state of the mental status of W in 2011 when he attended the Land Control Board and effected the transfer. The Court will never know what is state was.

39. PWI also led evidence that W operated an account at Family bank which was later transferred to Naivasha. At no time did she state that she was appointed a manager to operate the account. The inference is that W still operated the account despite his illness, if any.

40. DW1 led uncontroverted evidence that though W was sick, he had the mental capacity in 2011 to transfer the land. That the alleged dementia was a recent occurrence which did not affect the actions of Wamai in 2011.

41. The Court finds that the allegations that the transfer was vitiated by mental incapacity of W is unfounded.

42. Has the Plaintiff proved fraud? Section 26 of Land Registration Act provides for two instances within which a Title may be challenged: first is where Title is obtained through fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme.

43. **Black's Law Dictionary, 9th Edition** defines fraud as thus;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

44. Fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. The Court cannot infer fraud from the Pleadings. It must be pleaded in a particularized manner and proven by leading evidence.

45. In the case of **Koinange & 13 Others v Koinange [1968] KLR 23** the Court of Appeal held that allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings, that is on the balance of probabilities.

46. He who asserts must prove. The Plaintiff's case is that W did not execute the transfer to the 1st Defendant. That the whole transaction was a forgery. The Plaintiff however failed to proof forgery. This could have been done through calling a document examiner to proof that the signatures of W on the transfer and the Land Control Board consent were forged. Better still the Plaintiff would have called a witness from the District officers office at Githurai to confirm that W never attended the Land Control Board meeting.

47. In the case of **Kimotho Vs Kenya Commercial Bank (2003) 1 EA 108** the Court held; -

“failure by a party to call as a witness any person whom he might reasonably be expected to all if that persons evidence be favourable to him, may prompt a Court to infer that the persons evidence would not have helped the party's case”. This is the natural and reasonable inference that can be made in this circumstance.”

48. It was the duty of the Defendant to call a document examiner to proof the signatures. She did not.

49. The Court concludes that the Plaintiff has not proven fraud and or misrepresentation.

50. Whether the 2nd and 3rd Defendants are bonafide purchasers. The Uganda case of **Katende Vs Haridas & Company Limited (2008) 2 EA 174** defined a bonafide purchaser as thus;

“a Bonafide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the Bonafide doctrine he must prove the following; he holds a certificate of title; he purchased the property in good faith; he had no knowledge of the fraud; he purchased for valuable consideration; the vendors had apparent good title and he purchased without notice of any fraud”.

51. The Court having held that the Plaintiff has not proven fraud, it is the holding of the Court that there are no circumstances that warrant the impeachment of the title held by the 2nd and 3rd Defendants. The Court is satisfied that they are bonafide purchasers for value without any notice of defect in title.

52. In the end costs follow the event.

53. Final orders and disposal

a. The Plaintiffs case fails. It is dismissed

b. The costs of the suit shall be in favour of the Defendants.

54. It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 21ST DAY OF JANUARY 2021

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Ms Musyoka HB for Magani for the Plaintiff

Mungai HB for Ngugi for the 1st Defendant

2nd & 3rd Defendants – Absent

Court Assistant: Lucy