



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 329 OF 2011

MARK LECCHINI.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

REGISTRAR OF TITLES.....2ND DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendants through a plaint dated 4th July 2011 in which he sought judgment for;

- a) Ksh.80, 000,000/= being special damages.
- b) Interest.
- c) Costs.

2. The plaintiff averred that by an agreement of sale dated 29th May 2000, he purchased all that parcel of land known as L.R No. 214/634(Original Number 214/625/6) (hereinafter referred to as “suit property” from one, Iqbal Singh Rai (hereinafter referred to only as “the fake Rai”) at a consideration of Kshs. 8,000, 000/=.

3. The plaintiff averred that he paid the full purchase price for the suit property to the fake Rai, through his Advocates after which the property was transferred to him by the fake Rai and was registered in his favour by the 2nd defendant.

4. The plaintiff averred that he thereafter took possession of the suit property and started fencing the same when another person also bearing the name Iqbal Singh Rai (hereinafter referred to as “the real Rai” appeared and claimed to be the owner of the suit property.

5. The plaintiff averred that the real Rai filed a suit against him in the High of Kenya Court at Nairobi to assert his right over the suit property in Nairobi HCCC NO.1054 of 2001 Iqbal Singh Rai v Mark Lecchini and the Registrar of Title (hereinafter referred to only as “the High Court suit”) in which the real Rai sought among others the cancellation of the plaintiff’s title to the suit property.

6. The plaintiff averred that in a judgment that was delivered in the High Court suit on 12th September 2010, the High Court made an order cancelling the plaintiff’s title to the suit property and reverting the suit property to the real Rai as the rightful owner.

7. The plaintiff averred that while registering the suit property in favour of the plaintiff, the 2nd defendant was satisfied that; the plaintiff had acquired the suit property for valuable consideration; the documents that were presented for registration were proper and that there was no fraud on the part of the plaintiff.

8. The plaintiff averred that it had brought the suit under section 24 of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) to claim damages in respect of the loss that he suffered following the cancellation of his title to the suit property.

9. The plaintiff averred that the fake Rai who purported to sell the suit property to him was not known to him and could not be found and hence the 2nd defendant had been named as a nominal defendant.

10. The plaintiff averred that the value of the suit property as at the time of filing suit was Kshs.80, 000,000/= which he was claiming from

the defendants as damages.

11. The 1st and 2nd defendants filed a joint statement of defence on 12th September 2011. The defendants admitted the existence of the High Court suit and the determination that was made therein in favour of the real Rai.

12. The defendants averred that they were strangers to the circumstances under which the plaintiff acquired the suit property from the fake Rai. The defendants averred that in the High Court suit, the court made a finding that the plaintiff had been defrauded by one, Fred Waitthaka who was arrested, charged and convicted of the said fraud.

13. The defendants averred that the High Court did not find the defendants guilty of any acts of fraud and that the proper party who should have been sued by the plaintiff for the damages sought in this suit was the said Fred Waitthaka.

14. The defendants denied that the registration of the plaintiff as the owner of the suit property was proper. The defendants denied further that the defendants were responsible for the loss that was suffered by the plaintiff in the sum of Kshs. 80,000,000/= or at all.

15. At the trial, the plaintiff called three witnesses who testified in support of his case. The plaintiff (PW1) was the first to give evidence. The plaintiff adopted his witness statement filed on 6th July 2011 as his evidence in chief and produced his bundle of documents filed on the same date as PExh.1. In his statement, the plaintiff narrated how he acquired the suit property from the fake Rai and how his title was subsequently challenged successfully by the real Rai in the High Court suit and the loss that he suffered in the process.

16. The plaintiff's second witness was the advocate who acted for him in the transaction with the fake Rai, Michael Stefanos Kontos (PW2). PW2 adopted his witness statement that was filed on 6th July 2011 and also gave oral testimony. In his statement and oral testimony, PW2 told the court of the role that he played as an advocate for the plaintiff in the sale transaction that the plaintiff had with the fake Rai in respect of the suit property.

17. The plaintiff's last witness was a valuer, Peter Musyoki Muswii(PW3). PW3 told the court that his firm Lloyd Masika Limited had valued the suit property twice on the instructions from the plaintiff. The first valuation was carried out on 11th May, 2011 in which the suit property was valued at Kshs. 80,000,000/= while the second valuation was conducted on 14th March, 2018 in which the suit property was valued at Kshs. 150,000,000/=. He explained to the court the reason for the huge variation in the value of the suit property between 2011 and 2018. He produced his valuation report dated 14th March, 2018 as PExh. 3.

18. The defendant called one witness, Charles Kipkurui Ngetich, a Principal Land Registration Officer (DW1). DW1 adopted his witness statement filed in court on 2nd September, 2013 as part of his evidence in chief and produced the defendants' original and supplementary bundle of documents as DExh. 1 and DExh. 2 respectively. DW1 told the court that according to the records that were held at the Land Registry, the owner of the suit property was Iqbal Singh Rai.

19. He denied that the 2nd defendant was negligent in handling the transaction in which the plaintiff was registered as the owner of the suit property. He stated that the searches carried out on behalf of the plaintiff at the time of the transaction showed that the property was registered in the name of Iqbal Singh Rai who had acquired the property on 16th February, 1988. DW1 stated that the transfer that was presented for registration by the plaintiff's advocates showed that the transaction was between the plaintiff and the registered owner of the suit property, Iqbal Singh Rai.

20. He stated that there was no way in which the land registrar who registered the said transfer would have known that the Iqbal Singh Rai who purported to transfer the suit property was a fake one. He stated that the land registrar had no way of ascertaining the identity of the said Iqbal Singh Rai.

21. DW1 stated that the Land Registry did not normally summon parties to a transaction to appear before the land registrar and that the Land Registry normally relied entirely on the documents presented by the parties to a transaction. He stated that in this case, the information as to the identity of the parties to the transaction was provided by Paurvi Rawal advocate who acted for the fake Iqbal Singh Rai and the firm of Walker Kontos advocates that acted for the plaintiff.

22. DW1 stated that from the documents that were presented for registration at the Land Registry, there was no way the land registrar who dealt with the matter could have known that the instrument of transfer was not signed by the real Rai. He stated that the fraudster behind the transaction must have prepared a fake original title for the suit property that resembled the one that was being held by the real Rai. He denied that the land registrar was negligent in relying on the said fake title. He stated that the Land Registry normally relies on a copy of the title held at the registry rather than the original title.

23. After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiff filed his submissions on 29th September, 2020 together with the list and digest of authorities. The defendants on their part filed their submission on 4th September, 2020. The thrust of the plaintiff's submission was based on the Torrens System of land registration which guarantees sanctity of title to any person acquiring land from a registered proprietor in good faith. The plaintiff cited several authorities on the effect of the Torrens System of land registration and section 24 of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). Among the decisions that were cited by the plaintiff were; Gibbs v Messer (1891) AC 247, Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019]eKLR, Attorney General v Kenya Commercial Bank Limited & 3 others (2004)eKLR, Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others[2013] eKLR, Samuel Murimi Karanja & 2others vs Republic [2003]eKLR, David Peterson Kiengo & 2Others v Kariuki Thuo[2012]eKLR, Gitwany Investment Limited v Tajmal Limited & 3 Others[2006]eKLR, Falcon Golbal Logistics Co. Limited v Management Committee of Eldama Ravine Boarding Primary School[2018]eKLR.

24. In Shimoni Resort v Registrar of Titles & 5 others [2016] eKLR, the court relied on the Court of Appeal decision in Charles Karathe Kiarie & Others –v Administrators of Estate of John Wallace Mathare (deceased) & 5 Others(supra) where the court had stated as follows on the Torrens System of land registration:

“The Registration of Titles Act is entirely a product of the Torrens System of registration. The word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of government compensation. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens System can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved.”

25. The plaintiff submitted that as a bona fide purchaser of the suit property without any notice on the defect of its title, he was entitled to compensation under section 24 of the Registration of Titles Act (now repealed). The plaintiff urged the court to award him Kshs. 150,000,000/- as damages for the loss that he suffered as a result of the cancellation of his title to the suit property.

26. In their submissions in reply, the defendants argued that the defendants were not liable for the loss that was suffered by the plaintiff in the acquisition of the suit property and the subsequent cancellation of his title. The defendants submitted that when purchasing the suit property, the 2nd defendant issued a search to the plaintiff which indicated that the registered proprietor of the suit property was Iqbal Singh Rail. The defendants submitted that that information was accurate and reflected the true position as per the records that were held by the 2nd defendant.

27. The defendants submitted that the 2nd defendant was performing his official duty in the registration of the transfer that was lodged for registration by the plaintiff and as such once the 2nd defendant was satisfied that the documents presented by the plaintiff were regular on their face, he had an obligation to register the same.

28. The defendants submitted that the registration of the suit property in favour of the plaintiff took place before the coming into effect of the Registration of Titles (Forms) (Amendment) Rules, 2005 which brought the requirement for presentation of passport size photos and KRA pin for the persons involved in a land transaction. The defendants submitted that the only documents that the 2nd defendant required to verify ownership of the suit property were copies of the national identification cards or passports of the owners thereof.

29. The defendants submitted that the documents that were presented for registration by the plaintiff bore the name of the registered proprietor of the suit property as per the records that were held at the Land Registry, that is, Iqbal Singh Rai. The defendants submitted that in proper exercise of his functions, the 2nd defendant could not have detected that the person who purported to transfer the suit property to the plaintiff was a fraudster and not the registered proprietor thereof. The defendant submitted that in the circumstances, there was no negligence on the part of the 2nd defendant in the transaction in issue.

30. The defendants relied on West End Butchery Limited v Arthi Highway Developers Limited & 6 Others [2012] eKLR and submitted that the 2nd defendant could only be held liable to indemnify the plaintiff for his loss under section 24 of the Registration of Titles Act if he had participated actively in the fraud that led to the loss. The defendants submitted that the 2nd defendant was not found to have been complicit in the said fraud in the High Court suit. In support of this submission, the defendants relied also on Attorney General v Law Society of Kenya & another [2017] eKLR in which the court held that there is no liability without fault.

31. The defendants submitted that the plaintiff had a duty to prove that the 2nd defendant was complicit or negligent in the process of registration of the transfer in favour of the plaintiff for any liability to accrue, a duty that the plaintiff had failed to discharge.

32. The defendants submitted further that, the person who defrauded the plaintiff was Fred Waithaka who was charged with obtaining money from the plaintiff by false pretenses was found guilty and sentenced to two years in prison in Nairobi Criminal Case Number 24 of 2001.

33. The defendants submitted that the plaintiff could not claim compensation from public funds since there was an alternative person against whom he could pursue his claim. The defendants submitted that the plaintiff's loss arose from misrepresentation by a person who presented himself as the registered proprietor of the suit property and that it was that person together with Fred Waithaka who was his accomplice that the plaintiff should claim compensation from.

34. The defendants submitted further that the Plaintiff had the opportunity to verify the identity of the person with whom he was transacting. The defendants submitted that from the evidence on record the plaintiff's own advocate never met the party from whom the plaintiff was purchasing the suit property. The defendants submitted that proper due diligence was not conducted on the part of the plaintiff.

35. The defendants submitted further that even if the court was to hold that the plaintiff was entitled to compensation, the compensation payable to the plaintiff could not be the value of the suit property at the time of filing suit. The defendants submitted that the loss to be compensated should be the value of the suit property as indicated in the sale agreement at the time of purchase thereof by the plaintiff.

36. In support of this submission, the defendants relied on Hassanali Asaria v Sarbjit Singh Rai & 2 Others [2019] eKLR, in which it was held that a party cannot be compensated for the value of land at the time of judgment, but for the amount lost as a result of a fraudulent sale, that is, the purchase price.

Issues for determination.

37. From the pleadings the following are the issues arising for determination in this suit;

1. Whether section 24 of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) is applicable to the plaintiff's case.
2. Whether the plaintiff is entitled to the special damages sought.
3. Who is liable for the costs of the suit?

The first issue.

38. The plaintiff's claim against the defendants was brought under section 24 of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) which provides as follows:

“Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription:

Provided that—

(i) except in the case of fraud or of error occasioned by any omission, misrepresentation or misdescription in the application of a person to bring the land under the operation of this Act, or to be registered as proprietor of the land or interest, or in any instrument signed by him, that person shall upon a transfer of the land bona fide for value cease to be liable for the payment of any damages, which, but for that transfer, might have been recovered from him under the provisions herein contained; and in the last-mentioned case, also in case the person against whom the action for damages is directed to be brought is dead or has been adjudged insolvent or cannot be found within the jurisdiction of the court, then the damages with costs of action may be recovered out of the public funds of Kenya by action against the registrar as nominal defendant;

(ii) in estimating the damages, the value of all buildings and other improvements erected or made subsequently to the deprivation shall be excluded;

(iii) no such damages may be recovered out of public funds for any loss, damage or deprivation occasioned by the improper or irregular exercise of the mortgagee's statutory power of sale conferred by the Transfer of Property Act, 1882, of India, in its application to Kenya.

39. It is common ground that the plaintiff obtained an invalid title in respect of the suit property from a fraudster who impersonated the owner of the property. This was the finding that was made by the court in the High Court suit. The mastermind of the fraud was identified, arrested, charged, convicted and sentenced to serve 2 years in jail. The High Court found that the plaintiff did not acquire a valid title to the suit property and proceeded to cancel his title.

40. In the High Court and before this court, the plaintiff did not prove that the 2nd defendant was to blame in any way in his acquisition of the invalid title. The scene depicted in the evidence before this court was as follows: The plaintiff reads an advert posted in a newspaper by a fraudster by the name Fred Waithaka that the suit property was on sale. The plaintiff calls the fraudster. The plaintiff and the fraudster meet. The fraudster shows the plaintiff the suit property and tells him that the property belongs to one, Iqbal Singh Rai whose advocate was one, Paurvi Rawal. The plaintiff engages one of the most established law firms and leading conveyancing practitioners in the country, Walker Kontos Advocates to act for him in the transaction.

41. The firm of Walker Kontos Advocates writes to Paurvi Rawal Advocate informing her of the firm's appointment to act for the plaintiff in the purchase of the suit property from “Mr. Rai” and asks to be supplied with a draft agreement for sale and the documents of title.

42. Paurvi Rawal Advocate sends to the firm of Walker Kontos Advocates a draft agreement of sale and a copy of “the title” for the suit property. The firm of Walker Kontos Advocates finds nothing unusual in “the title” that was in fact a forgery and undertakes a search at the Land Registry.

43. The search reveals that the suit property was indeed registered in the name of Iqbal Singh Rai who was selling the same to the plaintiff. Upon satisfactory search, the parties execute the agreement of sale and the plaintiff pays to the fraudster's advocate, Paurvi Rawal a deposit of Kshs. 800,000/=. The firm of Walker Kontos Advocates thereafter gives to Paurvi Rawal Advocate a professional undertaking to pay the balance of the purchase price in the sum of Kshs. 7,200,000/= within 7 days of registration of the suit property in the name of the plaintiff.

44. Upon receipt of the undertaking, Paurvi Rawal advocate forwards to Walker Kontos Advocates a duly executed transfer, rates clearance certificate and a purported original certificate of title for the suit property so that the said firm could proceed with registration of the suit property in the name of the plaintiff.

45. Once again, Walker Kontos Advocates finds nothing wrong with the purported original certificate of title that was also fake. They take the title to the Land Registry together with the instrument of transfer executed by the fraudster and have the property transferred to the name of the plaintiff after paying the necessary stamp duty. Walker Kontos Advocates thereafter releases the balance of the purchase price to the

fraudster's advocate, Pauvi Rawal advocate. The plaintiff then proceeds to take possession of the suit property and meets resistance from the real owner of the suit property (the real Rai). The plaintiff insists that he was the lawful owner of the suit property.

46. A suit is then filed against the plaintiff at the High Court by the real Rai for the cancellation of the plaintiff's title. While cancelling the plaintiff's title, the High Court stated as follows: **"...The 1st defendant(the plaintiff herein) dealt with a fraud, who was not the registered proprietor of the land, and consequently obtained a fraudulent registration, Certificate and Deed Plan. This registration did not give him a valid title and therefore he cannot seek to be protected by the provisions of section 23(1)In the same way, there is no way the 1st defendant can claim to have a good title when he obtained it through forgery"**

47. It is clear from the foregoing that the plaintiff was defrauded by Fred Waithaka who was the agent of the fake Rai. According to the record that was held at the Land Registry, the suit property was registered in the name of Iqbal Singh Rai. This is the same person from whom the plaintiff purported to purchase the suit property only that the plaintiff dealt with a fake Iqbal Singh Rai, an imposter.

48. There was no error or mistake committed by the 2nd defendant in the registration of the plaintiff as the owner of the suit property. It was the plaintiff's advocates who presented the transfer executed by the fraudster and the fake original certificate of title to the Land Registry so that the property could be registered in the name of the plaintiff. I am in agreement with the defendants' advocate that it was the duty of the plaintiff to conduct due diligence on the person he was purchasing the suit property from.

49. The fake title did not originate from the Land Registry. The 2nd defendant did not provide the plaintiff or his advocates with any erroneous information or document. In his evidence, the plaintiff's advocate in the transaction Michael Stefanos Kontos(DW2) told the court in cross-examination that: **"There was no way the Land Registrar could have known that whoever was transferring the suit property was a fraudster"**. He had earlier told the court that **"I don't recall getting Iqbal Singh Rai's identification documents."** The 2nd defendant does not keep original titles. I wonder how the 2nd defendant could have been expected to detect that the transfer in favour of the plaintiff was not being effected by the real owner of the suit property. The plaintiff's own advocate did not detect the fraud.

50. I am not satisfied from the foregoing that any fraud, error or mistake in registration occurred in the registration of the plaintiff as the owner of the suit property that would entitle him to compensation under section 24 of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). The plaintiff was a victim of a known fraudster. There is no evidence that the fraud was perpetrated by the 2nd defendant or that the 2nd defendant colluded with the fraudster. The remedy under section 24 of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) is in the circumstances not available to the plaintiff.

The second issue.

51. In Attorney General v Law Society of Kenya & another(supra) that was cited by the defendants, the court stated that:

"We reiterate the oft-cited passage in Kiema Mutuku V Kenya Cargo Hauling Services Ltd. (1991) 2KAR 258,that;

"..there is as yet no liability without the fault in the legal system in Kenya, and a Plaintiff must prove some negligence against the defendant where the claim is based on negligence...."

I have made a finding above that the 2nd defendant committed no wrong in the registration of the plaintiff as the owner of the suit property. There was no negligence or fraud proved against the 2nd defendant. In the absence of any fault on the part of the 2nd defendant, the plaintiff cannot look to the defendants for compensation.

I am of the view that the plaintiff's claim should be directed at the fraudster who is known. Even under section 24 of the Registration of Titles Act, Chapter 24 Laws of Kenya (now repealed) compensation can only come from public funds if the fraudster cannot be found. I am in agreement with the decision in Wibeso Investments Limited & another v Tamarind Meadows Limited & 5 others [2020] eKLR, where the court stated that:

"Where fraudsters, trespassers, squatters, or any other person operating in such syndicates, create a fake document purported to be a Grant, they are liable to those who suffer losses as a result of the said fake document. If the integrity of the land register and the protection of registered proprietors is to be safeguarded, the courts should not indemnify the very people who introduce forged documents in the land registry. The 1st Defendant's claim for indemnity therefore fails."

52. It is my finding therefore that the plaintiff is not entitled to the special damages claimed. I wish to add that if I had found the defendants liable to compensate the plaintiff, I would have awarded him Kshs. 8,000,000/- being the purchase price for the suit property that he paid out to the fraudster and not the pleaded sum of Kshs. 80,000,000/- or the claimed amount of Kshs. 150,000,000/-. I am in agreement with the decision in Hassanali Asaria v Sarbjit Singh Rai & 2 others(supra) where the court stated as follows on assessment of compensation:

"I now turn to the issue of quantum of damages. The plaintiff, through counsel urged the court to award him Kshs 667,421,409. I have in the preceding paragraphs come to the finding that the plaintiff never acquired a valid title to the suit property. Indeed, had his conveyancing agents done adequate due diligence in relation to the impugned provisional certificate of title to satisfy themselves that the provisional certificate of title met the requirements of Section 71 of the Act, the plaintiff would have mitigated his losses. In my view, the plaintiff will be properly indemnified by the national exchequer, and by extension, the Kenyan tax payer, through an award equivalent to the purchase price which he lost (Kshs 16,000,000) together with interest thereon at court rate effective from the date of filing Nairobi ELC 604 of 2006. I therefore hereby assess and award the plaintiff damages of Kshs 16,000,000 plus

interest at court rate from the date of filing Nairobi ELC 604/2016 against the 2nd and 3rd defendants.”

53. See also, West End Butchery Limited v Arthi Highway Developers Limited & 6 Others(supra) where the court stated as follows:

“Indemnity by the 1st and 4th Defendants under section 24 of the Registration of Titles Act is a proper remedy in the event of any loss occasioned to the 5th and 6th Defendant for reasons of their complicity in and participation in the fraud perpetrated by the 2nd and 3rd Defendant.Indemnity by the 1st Defendant will in addition be determined by the provisions of the sale agreements entered into with the 5th and 6th Defendants”

The third issue:

54. Under section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, costs of and incidental to a suit is at the discretion of the court. I am of the view that following the decision that was made in the High Court suit in which the court did not find any fault on the part of the 2nd defendant who was also a party to that suit, the plaintiff should not have brought these proceedings. In any event, I am of the view that if the plaintiff felt that he could maintain a claim for compensation against the 2nd defendant, he should have brought the same in the High Court suit rather than waiting until he lost the suit to wage a fresh claim against the defendants. I will for the foregoing reasons condemn the plaintiff to pay the costs of the suit.

Conclusion.

In conclusion, I find the plaintiff’s suit not proved. The same is dismissed with costs to the defendants.

Dated and Delivered at Nairobi this 25th day of February 2021

S. OKONG’O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Owiti h/b for Mr. Mwihuri for the Plaintiff

Ms. Fatma h/b for Mr. Kamau for the Defendants

Ms. C. Nyokabi - Court Assistant