



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 141 OF 2015

NANCY WANJIKU NG'ANG'A (Suing as an

attorney of Zipporah Wambui Ng'ang'a).....PLAINTIFF

VERSUS

PATRICK MUNYUA REGERU.....1ST DEFENDANT

STEPHEN KIARIE NG'ANG'A.....2ND DEFENDANT

JOSEPHAT GREGORY MUMIRA NJOGU.....3RD DEFENDANT

JUDGMENT

This suit was brought by Mary Nyambura (“the first attorney”) in her capacity as attorney of Zipporah Wambui Ng’ang’a (“the plaintiff”) on 17th February, 2015. Through a plaint dated 20th January, 2015, the plaintiff averred that on 20th April, 2011, she entered into an agreement of sale with the 3rd defendant in respect of all that parcel of land known as L.R. No. Ndeiya/Ndeiya/2328 (“the suit property”) under which the 3rd defendant agreed to sell and the plaintiff agreed to purchase the suit property at a consideration of Kshs. 735,000/=. The plaintiff averred that upon execution of the said agreement she left for the United Kingdom and delegated the task of completing the agreement to the 2nd defendant. The plaintiff averred that the 2nd defendant was to act as her agent and was to ensure that the transaction was completed and the suit property registered in her name. The plaintiff averred that the 2nd and 3rd defendants conspired and fraudulently caused the suit property to be registered in the name of the 1st defendant.

The plaintiff sought judgment against the defendants jointly and severally for;

- (i) A permanent injunction restraining the 1st defendant from constructing on, alienating, disposing of, selling, parting with possession or in any other manner whatsoever dealing with the suit property in a manner inconsistent with the plaintiff’s rights in the property.
- (ii) An order of eviction of the 1st defendant from the suit property.
- (iii) Any other relief this court deems fit to grant.

The 1st defendant filed a statement of defence on 17th May, 2017. The 1st defendant averred that he was a stranger to the agreement of sale that the plaintiff allegedly entered into with the 3rd defendant. The 1st defendant denied that the suit property was transferred to him fraudulently. The 1st defendant averred that he acquired the suit property through due process that was devoid of any irregularities or fraud. The 1st defendant averred that he purchased the suit property from the 2nd defendant at a consideration of Kshs. 2,400,000/= that he paid in full and had the property transferred to his name after consent of the Land Control Board was issued in respect of the transaction and the requisite stamp duty paid. The 1st defendant averred that his acquisition of the suit property was not tainted with illegality to warrant the grant of the orders sought by the plaintiff.

The 2nd defendant filed a statement of defence on 3rd April, 2017 in which he denied the plaintiffs claim in its entirety. The 2nd defendant admitted that the plaintiff left for the United Kingdom after entering into an agreement of sale with the 3rd defendant but denied that the plaintiff left him as her agent to complete the agreement with the 3rd defendant. The 2nd defendant averred that he was not privy to the agreement of sale between the plaintiff and the 3rd defendant and that the suit property was transferred to him by the 3rd defendant pursuant to an agreement of sale that he entered into with the 3rd defendant after the plaintiff failed to honour her obligations under the agreement of sale dated 20th April, 2011 between her and the 3rd defendant. The 2nd defendant denied the allegations of fraud levelled against him by the

plaintiff.

The 3rd defendant filed his statement of defence on 28th April, 2017. The 3rd defendant admitted that he entered into the agreement of sale dated 20th April, 2011 with the plaintiff in respect of the suit property. The 3rd defendant denied that he conspired with the 2nd defendant to fraudulently transfer the suit property to the 1st defendant. The 3rd defendant averred that it was the 2nd defendant who fraudulently transferred the suit property to himself and subsequently to the 1st defendant.

The plaintiff fell out with the first attorney. On 17th September, 2019, Nancy Wanjiku Ng'ang'a ("the second attorney") was substituted as the plaintiff's attorney in the suit in place of the first attorney, Mary Nyambura. At the trial, the plaintiff's second attorney, Nancy Wanjiku Ng'ang'a (PW1) gave evidence on behalf of the plaintiff. PW1 testified as follows: She was a sister and an attorney of the plaintiff. The 2nd defendant was their brother. The plaintiff purchased the suit property from the 3rd defendant on 20th April, 2011. The 2nd defendant was to process the title of the suit property on behalf of the plaintiff. The plaintiff learnt that the suit property was on sale. The plaintiff conducted a search on the suit property which revealed that the 2nd defendant did not register the suit property in the name of the plaintiff as had been agreed but instead had the same registered in his name before he sold and transferred the same to the 1st defendant. PW1 produced several documents in evidence as exhibits and urged the court to grant the reliefs sought in the plaint.

The 1st defendant adopted his witness statement dated 10th May, 2017 as his evidence in chief and produced the documents attached to his list and bundle of documents dated 10th May, 2017 as exhibits. In the statement, the 1st defendant stated that he purchased the suit property from the 2nd defendant at Kshs. 2,400,000/= after carrying out a search which confirmed that the 2nd defendant was the owner of the property. He stated that he paid the purchase price in full and had the property transferred to his name on 25th September, 2014 after Land Control Board consent was issued for the transaction on 11th September, 2014. He stated that he was issued with a title deed in respect of the suit property on 25th September, 2014. He stated that there was no way he could have known that the property was not owned by the 2nd defendant as claimed by the plaintiff. He stated that he was not aware of the alleged fraud. The 1st defendant stated that he was an innocent purchaser of the suit property for value without notice. The 1st defendant averred that the plaintiff's claim if any should be against the 2nd and 3rd defendants.

The 2nd defendant adopted his witness statement filed on 3rd April, 2017 and a replying affidavit that he had sworn on 28th August, 2015 in response to the plaintiff's interlocutory application for injunction as his evidence in chief. He produced his bundle of documents filed on 3rd April, 2017 as exhibit. The 2nd defendant denied that the plaintiff had given him the balance of the purchase price for the suit property in British Pounds to pay to the 3rd defendant. He stated that he never received any money from the plaintiff on account of the purchase price for the suit property. He stated that the plaintiff had no money to purchase the suit property and that was why he decided to purchase the property from the 3rd defendant.

The last to give evidence was the 3rd defendant. The 3rd defendant adopted his witness statement dated 27th April, 2017 as his evidence in chief and produced the documents that were attached to his list of documents dated 27th April, 2017 as his evidence in chief. The 3rd defendant stated that the 2nd defendant lied to the court in his evidence. He denied having taken a loan from Family Bank as claimed by the 2nd defendant in his statement. In his witness statement, he admitted having entered into an agreement of sale dated 20th April, 2011 with the plaintiff. He also admitted that the plaintiff paid him Kshs. 400,000/= upon the execution of the agreement and the balance through 2nd defendant who acted as her agent. The 3rd defendant stated that he only received a total of Kshs. 735,000/= on account of the purchase price for the suit property. He stated that after being paid the full purchase price, he handed over to the 2nd defendant the completion documents in favour of the plaintiff. He stated that he was not privy to what the 2nd defendant did with the said documents after the same were handed over to him. He stated that he fully performed his part of the contract with the plaintiff and that if there was any fraud, the same was committed by the 2nd defendant.

After the close of evidence, the parties made closing submissions in writing. The plaintiff filed her submissions on 19th February, 2020. The 1st defendant filed his submissions on 2nd June, 2020. The 2nd and 3rd defendants filed their submissions on 29th July, 2020 and 12th August, 2020 respectively. I have considered the pleadings, the evidence tendered and the submissions of counsels. The following in my view are the issues arising for determination in this suit.

- (i) Whether the plaintiff entered into an agreement of sale with the 3rd defendant in respect of the suit property.
- (ii) Whether the 2nd defendant acted as the plaintiff's agent in respect of the transaction.
- (iii) Whether the 2nd defendant entered into an agreement of sale with the 3rd defendant in respect of the suit property.
- (iv) Whether the suit property was transferred and registered in the name of the 1st defendant fraudulently.
- (v) Whether the plaintiff is entitled to the reliefs sought in the plaint.
- (vi) Who is liable for the costs of the suit?

Whether the plaintiff entered into an agreement of sale with the 3rd defendant in respect of the suit property.

I am satisfied from the evidence on record that the plaintiff and the 3rd defendant entered into an agreement of sale of the suit property on

20th April, 2011 under which the 3rd defendant agreed to sell to the plaintiff the suit property at Kshs. 735,000/= on terms and conditions that were set out in the said agreement. The 3rd defendant admitted the existence of the agreement. The 2nd defendant also admitted the agreement but claimed that it was breached by the plaintiff while the 1st defendant contended that he was a stranger to the same. The parties to the agreement having admitted the same and the agreement having been produced in evidence without any objection, it is my finding that the plaintiff and the 3rd defendant entered into an agreement of sale dated 20th April, 2011 in respect of the suit property.

Whether the 2nd defendant acted as the plaintiff's agent in respect of the transaction.

The 2nd defendant denied that the plaintiff had appointed him as her agent for the purposes of completing the sale of the suit property. The plaintiff did not produce in evidence any formal agency agreement between her and the 2nd defendant or a power of attorney donated by her to the 2nd defendant on the strength of which the 2nd defendant could have acted on her behalf in the transaction. From the totality of the evidence before the court however, I am convinced that the plaintiff and the 2nd defendant had an informal agreement that the 2nd defendant would assist the plaintiff in the completion of the transaction while the plaintiff was away in Britain. The 3rd defendant testified that when he entered into the said agreement of sale with the plaintiff, the plaintiff was accompanied by the 2nd defendant. This fact was not disputed by the 2nd defendant. I am in agreement with the 2nd defendant that he could not have completed the agreement of sale by executing documents on behalf of the plaintiff. Nothing could however stop him from remitting the balance of the purchase price to the 3rd defendant and obtaining or receiving the completion documents from the 3rd defendant on behalf of the plaintiff. It is therefore my finding that the 2nd defendant was an agent of the plaintiff for the purposes of remitting the balance of the purchase price to the 3rd defendant and obtaining the completion documents from him on behalf of the plaintiff. The 2nd defendant could not however execute the instrument of transfer of the suit property on behalf of the plaintiff to facilitate the registration of the suit property in favour of the plaintiff.

Whether the 2nd defendant entered into an agreement of sale with the 3rd defendant in respect of the suit property.

The 2nd defendant claimed that after the plaintiff failed to pay the balance of the purchase price thereby frustrating the agreement that the plaintiff had entered into with the 3rd defendant, the 2nd defendant entered into afresh agreement of sale with the 3rd defendant under which the 3rd defendant sold the suit property to him at Kshs. 800,000/=. The 3rd defendant denied having entered into such agreement with the 2nd defendant. The onus was upon 2nd defendant to prove the existence of this agreement. The law is clear as to the form which an agreement for sale of land should take. The agreement must be in writing and must be signed by all the parties thereto in the presence of witnesses. See, section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya and section 38 of the Land Act, 2012. The 2nd defendant did not produce the alleged agreement between him and the 3rd defendant in evidence. The 2nd defendant claimed that the agreement was oral. The 2nd defendant did not also produce any evidence that he paid Kshs. 800,000/= to the 3rd defendant as the purchase price for the suit property. He claimed that he made the payment in cash. I believe that even with cash payments, one can obtain evidence of payment in the form of cash payment vouchers or payment acknowledgment receipts. In this case, no evidence of whatsoever nature was produced to show that the 2nd defendant had Kshs. 800,000/= and that he paid the same to the 3rd defendant. Due to the foregoing, it is my finding that the 2nd defendant did not enter into a valid or any agreement with the 3rd defendant for the purchase of the suit property and that he did not pay Kshs.800,000/= to the 3rd defendant. The 2nd defendant did not also produce evidence to show how the suit property was transferred to him by the 3rd defendant. He did not produce a copy of the instrument of transfer that was allegedly executed in his favour by the 3rd defendant who had denied executing such transfer. There is therefore no evidence that; the 2nd defendant entered into an agreement of sale of the suit property with the 3rd defendant; that he made any payment to the 3rd defendant for the property; and that the 3rd defendant transferred the suit property to him.

Whether the suit property was transferred and registered in the name of the 1st defendant fraudulent.

In the absence of evidence that, the 2nd defendant had an agreement with the 3rd defendant for the purchase of the suit property, that the 2nd defendant paid for the property and that the same was transferred to him by the 3rd defendant, the only inference that the court can draw is that the 2nd defendant acquired the suit property fraudulently and as such illegally. The title that was held by the 2nd defendant was therefore illegal, null and void. As a holder of an illegal title, the 2nd defendant had no valid interest in the suit property that he could transfer to the 1st defendant. The title that was transferred by the 2nd defendant to the 1st defendant was similarly null and void. There is however no evidence that the 1st defendant was aware of or was involved in the fraudulent acquisition of the suit property by the 2nd defendant. The 1st defendant acquired a fraudulent and invalid title that was held by the 2nd defendant. He did not however acquire the same fraudulently since he was not a party to the fraud.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

I have at the beginning of this judgment set out the reliefs that have been sought by the plaintiff. The principal reliefs sought by the plaintiff are a permanent injunction and an order of eviction of the 1st defendant from the suit property. I am of the view that the plaintiff is not entitled to these reliefs. First, it is not disputed that the suit property is registered in the name of the 1st defendant. Although I have held that the 1st defendant acquired an invalid title from the 2nd defendant, the court was not called upon to nullify or cancel the 1st defendant's title. There is no basis therefore upon which the court can grant an injunction against the 1st defendant or order him to vacate the suit property. Secondly, the plaintiff has only established the existence of an agreement of sale that she entered into with the 3rd defendant. The plaintiff has not established a title over the property or asked the court to order specific performance in her favour. The injunctive and eviction orders sought by the plaintiff are being sought in vacuum. Thirdly, it was not disputed that the sale transaction between the plaintiff and the 3rd defendant was a controlled transaction under the Land Control Act, Chapter 302 Laws of Kenya. The plaintiff did not tender any evidence showing that Land Control Board Consent was obtained in respect of the transaction. In the absence of such consent, the transaction was void and unenforceable by the court.

Due to the foregoing, it is my finding that the plaintiff is not entitled to the reliefs sought in the plaint.

Who is liable for the costs of the suit?

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. In the case of before me, I am of the view that the dispute before the court came about as a result of the wrongful acts of the 2nd defendant. I will therefore condemn the 2nd defendant to pay the costs of the suit.

Conclusion:

In conclusion, I find no merit in the plaintiff's suit. The same is dismissed with costs to the 1st and 3rd defendants to be paid by the 2nd defendant.

Dated and Delivered at Nairobi this 4th day of February 2021

S. OKONG'O

JUDGE

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

N/A for the Plaintiff

Ms. Mwihuri for the 1st Defendant

Mr. Burugu for the 2nd Defendant

N/A for the 3rd Defendant

Ms. C. Nyokabi - Court Assistant