



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO 1025 OF 2000

ABIERO PLAINTIFF

VERSUS

THABITI FINANCE COMPANY

LTD & ANOTHER.....DEFENDANT

JUDGMENT

The plaintiff's claim against the defendants as stated in the plaint dated 24th January, 1997 is that the 1st and 2nd defendants fraudulently transferred his property namely LR No 209/6252 (hereinafter referred to as the suit property).

The plaintiff seeks the following three main reliefs:-

- (i) A declaration invalidating and nullifying the purported sale and transfer of the suit property.
- (ii) An order directed to the Commissioner of Lands to rectify the register to its status prior to the 20th day of September, 1994.
- (iii) General damages for fraud.

Briefly, the facts leading to this case are that the plaintiff herein charged the suit property to the 1st defendant as security for financial facilities and banking accommodation granted by the 1st defendant to one Mathews Ouma Mwangi (hereinafter the principal debtor) in the sum of Ksh 40,000/- and a further loan to the plaintiff in the sum of Ksh 25,000/-. Subsequently, the principal debtor fell into arrears with the loan repayments. The plaintiff paid off the principal sum of Ksh 25,000/- but was unable to pay the accrued interest. The 1st defendant thereby advertised the suit premises for sale by public auction. The plaintiff then requested the 1st defendant to reschedule the facility.

By a rescheduling agreement dated the 9th January, 1992, which was produced in evidence as plaintiff's exhibit 6, the parties agreed that the outstanding balance of Ksh130,000/- plus interest was to be repaid by 48 equal monthly installments of Ksh 4,100/- each commencing on the 5th of February, 1992 and thereafter on the 5th of every month until payment in full. The repayment was thus rescheduled to end the 5th January, 1996.

However, there was a further default in repayment which prompted the

1st defendant to once again on 25th January, 1994 issue notification of its intention to sell the suit property by public auction unless the outstanding sum stated then at Ksh 263,710/- was paid by the plaintiff within fourteen (14) days from that date. The plaintiff did further request the 1st defendant for some indulgence in his letter dated the 1st February, 1994 and in the plaintiff's advocates' letters to the 1st defendant's advocates and to the first defendant respectively dated 15th and 30th August. These letters were produced as plaintiff's exhibits 7, 11 and 12 respectively. By their said letter, the plaintiff's advocates informed the 1st defendant that the plaintiff had decided to sell the suit property so as to utilize part of the proceeds to pay off the outstanding loan amount. They requested the 1st defendant to accommodate the plaintiff for a period of 60 days and asked for the release of the title documents to them to facilitate the intended sale.

The 1st defendant responded to the above letter by its letter dated the 25th October, 1994 which was produced in evidence as plaintiff's exhibit 14. In this letter, the 1st defendant advised the plaintiff's advocates that the plaintiff had previously authorised the 1st defendant's Executive Director to sell the suit property by private treaty to avoid the embarrassment of public auction advertisement. The 1st defendant further advised the plaintiff's advocates that it had identified a purchaser and although the sale was at an advanced stage it was willing to give the plaintiff some consideration if he could immediately pay off the two accounts.

It subsequently emerged that the 2nd defendant had as at the 20th September 1994 transferred the suit property to one David Mburu Gichere. It is the plaintiff's case that the said transfer was fraudulent. The issue is therefore whether fraud on the part of the defendants or either of them has been proved.

The plaintiff (PW2) in his testimony described how he together with his wife met the said David Githere who gave them details of how he came to acquire the property. He further testified that Mr Githere acknowledged the unlawfulness of the deal leading to him acquiring the suit property and offered to sell the suit property to the plaintiff for Ksh1,800,000/- and when the plaintiff could not purchase the suit premises, the plaintiff testified that Mburu Gichere promised to help him recover the same and did in fact give him a cheque for Ksh 30,000/- to enable him commence a suit.

PW2, who is the plaintiff's wife corroborated the plaintiff's evidence that

Mr Githere had admitted the unlawfulness of the transaction between him and the 1st defendant.

It is the defence case that this part of the evidence relating to what Mburu Gichere said is hearsay evidence and is therefore inadmissible in evidence.

Section 63 of the Evidence Act provides that oral evidence must in all cases be direct evidence. In relation to what could be heard, as it is in this case, direct evidence is defined as the evidence of a witness who says he heard it.

According to *Halsbury's Laws of England* Vol 15 3rd Edition at page 263 evidence is admissible and the Court to which it is tendered should receive it, unless there is a legal reason for its rejection. Irrelevant facts should be rejected. Hearsay evidence should also be rejected. Circumstances under which facts will be excluded under the hearsay rule are set out at page

266 of *Halsbury's Laws of England* (*supra*) as follows:

"A witness cannot be called, in proof of a fact, to state that he heard someone else state it to be one. Care must be taken to distinguish between evidence which is tendered to prove that someone else has spoken certain words when the fact of which proof is required is merely the speaking, and evidence which is tendered to prove that someone else has spoken certain words as leading to a conclusion that the words spoken were true. The former is admissible (as in the case where the uttering of a slander has to be proved), the later is not."

The Court adopted these passages with approval in the case of *Mayers v Akira Ranch Limited* [1974] EA

169. Where parts of the affidavit in support of an application contained information obtained from a third party and held that the parts of the affidavit which contained hearsay evidence were inadmissible.

And in the 4th Edition of *Halsburys Laws of England (supra)* at page 294 it is stated:

“A statement is hearsay if tendered to prove the truth of the facts asserted; it is sometimes called original evidence if its relevance depends on the fact that it was made, and not on the fact that it was true”

The plaintiff wants this Court to believe in what he testifies David Githere told him. In my view this disqualifies this particular part of the plaintiff’s evidence from being admissible to prove the truth of the allegation of fraud on the part of the 1st defendant.

In the circumstances I find and hold that these parts of the plaintiff’s testimony which relate to words uttered by David Mburu Gichere are hearsay evidence and therefore inadmissible.

The 1st defendant’s response to the plaintiff’s advocates’ request for the release of the title documents was by its letter dated 18th October 1994.

This is not in dispute. It is also not in dispute that the suit property had been transferred to the said David Mburu Gichere on the 20th September, 1994.

It was the plaintiff’s testimony that in order to procure the money to pay up the loan in terms of the said 1st defendant’s letter dated 18th October, he identified a buyer with whom he entered into an agreement for sale. He further testified that while trying to obtain the title documents so as to complete the sale he learnt that his property had long been sold and transferred to the said David Mburu Gichere on 20th September, 1994.

The pertinent part of the 1st defendant’s letter dated the 18th October, 1994 is as follows:

“.....we then looked for a buyer and the sale process is at an advanced stage. We can give consideration if your client can immediately pay off

the two accounts”.

Clearly by this letter the 1st defendant gave the plaintiff the impression that he could sell the suit property by private treaty. The position at the time was that the suit property had already been sold and transferred to the said David Mburu Gichere. There is therefore untruth in this letter and the defendant knew that the statements in the letter were false. In *BEA Timber Co Ltd vs Inder Singh Gill* [1959] EA 463, Forbes VP stated that:

“It is of course as stated by the learned judge, that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleading. Fraud, however is a conclusion of law. If the facts alleged in the pleading are such as to create a fraud is not necessary to allege the fraudulent intent. The facts alleged to be fraudulent must be set out, and then it should be stated that these acts were done fraudulently, but from the acts fraudulent intent may be inferred.”

I find that in view of the above it is argued that the sale of the suit property by private treaty was done without the plaintiff’s consent and the subsequent transfer and registration of the transfer was fraudulent. This is clear evidence of fraud. In the circumstances, the 1st defendant cannot be heard to argue that it lawfully exercised its statutory power of sale.

Fraud can clearly be inferred from the defendants acts. *Black’s Law Dictionary*, fraud is defined as:

“A generic term, embracing all multifarious means which human urgently and devise, and which are resorted to by one individual to get advantage over another by false suggestions, or by suppression of truth, and includes all surprise, trick, winning, dissembling and any unfair way by which another is

cleared”

The manner in which the transfers were done without informing the plaintiff and misrepresentations to the plaintiff that he could redeem the suit property when the suit property had already been transferred is to me inconsistent with innocence of the 1st defendant. The defendants were clearly using false suggestions and suppression of the truth to gain undue advantage over the plaintiff. Fraudulent intent can further be inferred from the defendant’s failure to account to the plaintiff.

Even if the bank was lawfully exercising its statutory power of sale, it is suspect that the bank could only see its only duty as recovering its outstanding debt without informing the plaintiff that it was selling the suit premises by private treaty and was under a duty to account to the plaintiff.

I accordingly find that the evidence before the Court proved fraud on the part of the defendants and hold that the transfer of the suit property on 20th September, 1994 to the said David Gichere was fraudulent.

I now turn to the issue whether this Court has the power to grant the reliefs’ sought by the plaintiff.

The plaintiff seeks orders invalidating and nullifying the sale and transfer of the suit property to David Mburu Gichere and directing the Commissioner of Lands to rectify the register in respect of the suit property to its status prior to the 20th September, 1994 when the transfer was made. It was submitted in the plaintiffs’ written submissions that where fraud is proved, the whole transaction is void in which case this Court has power to grant these orders. The case of *Fazal Karsam Millo Ltd vs Abdul Naji Kassam and Another* [1968] EA 1842 was cited to show that the Court has such power, in which Law J held:

“I hold that this Court has the power to set aside the transfer and right of occupancy and to declare the 1st defendant to be the owner of the land in question, should the plaintiff company be able to prove that the transfer was the result of a fraudulent conspiracy between the defendants to prevent the plaintiff company from enforcing its rights against the land as a creditor of the 1st defendant where by attachment or execution or otherwise”.

The case of *Suleiman vs Azzan* [1958] EA 533 was also cited in which Windham J after making a declaration that the transfer of the land was null and void, proceeded to set aside the transfer. The defendants case is that if granted, these reliefs will have the affect of depriving the said David Mburu Gichere the suit property whereas he is not a party to this suit and has not been heard. It is argued that this alone defeats the plaintiffs’ first two prayers.

In support, section 23 (1) of the Registration of Titles Act was cited. This section provides that:

“The certificate of title issued by the Registrar to a purchaser of land upon a transfer or transition by the proprietor thereof shall be taken by all Courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements restrictions and conditions contained thereon or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.

The Court of Appeal case of *Ngo’k v Ole Keiwua* Civil Application No

NAI 60 of 1997 (unreported) in which the Court of Appeal gave this section judicial interpretation was also cited. In that case, in a unanimous decision, the Court of Appeal said:

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in

relation to ownership of property in Kenya would be placed in jeopardy.”

In the case of *Ngok v Ole Keiwua (supra)* the Court of Appeal held that since no fraud on the part of the registered proprietor of leasehold interest in the suit property has been pleaded there was no arguable appeal.

I abide by this decision of the appellate court and adopt the words of the honourable judges of appeal and accordingly find that the registration of title having been issued to the purchaser, one David Mburu Gichere as registered proprietor of the suit property, such title is absolute and indefeasible, there having been no proof of fraud on the part of the said David Mburu Gichere. This title can only be challenged on the grounds of fraud or misrepresentation to which he is a party.

The consequence is that I hold that the two reliefs for the invalidation and nullification and for the rectification of the register in respect of the suit property must fail and are accordingly dismissed.

The plaintiff further claims general damages for fraud and it is now the issue whether the Court can grant this relief that I must now turn. PW1 testified that he received a monthly rent of Kshs 60,000/- from the suit property. Because of the fraud he has been denied this income since the 20th September, 1994 when the fraudulent transfer was effected. He further testified that he intended to sell the suit property to a Mr Peter Otieno Owidu for Kshs 3.5 million and that even a Mr Jared Maina had offered to buy the property for Shs 3.6 million in 1998. It is submitted for the plaintiff that damages should be awarded for this loss.

The defendants’ case on the other hand is that even if fraud is proved, the nature of damages which the plaintiff could have incurred are special damages and not general damages. That the particulars of the special damages have not been pleaded as required by law and therefore cannot be awarded.

Halsbury’s Laws of England Vol 12 4th Edition at paragraph 1113 on page 416 sheds some light as to what are special damages as follows:

“In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of trial, whilst ‘general damages’ relates to all other items of damage whether pecuniary or non-pecuniary”

The question is therefore whether the damages claimed were calculable as at the date of trial. If they were, then they must have been claimed as special damages and specifically pleaded and proved as required by law.

In my view for a loss to be calculable at the date of trial it must be a sum that has actually been spent or a loss that has already incurred.

The paragraph in *Halsbury’s Laws of England (supra)* further states that “special damages” and ‘general damages’ are used in corresponding senses. Thus in personal injury claims, ‘special damages’ refers to past expenses and lost earnings, whilst ‘general damages’ will include anticipated future loss as well as damages for pain and suffering and loss of amenities. In my view special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses.

Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated as at the time of trial.

I continue to quote *Halsbury’s Laws of England (supra)* at the same page where it is stated:

“..... Special damage must be pleaded, but so must future pecuniary loss if it may lead to surprise. Nonpecuniary damage must not be quantified in a pleading”.

The plaintiff’s claim is that he lost the suit property and the income therefrom as a consequence of the

fraud of the first defendant. There is therefore a loss that was clearly calculable at the date of trial and there was also anticipated future loss. Such anticipated loss was not calculable at the time of trial. It was not calculable because if we were asked the question – how much income would the plaintiff lose at the end of it all?

We would definitely have no conclusive answer. We would however know how much he had lost at the date of trial. The loss during the trial was continuing such that even if we could calculate the amount the plaintiff had lost at the date of trial, there would still remain an amount not calculable from the date of trial to the date the reparation is made by a judgment of this Court. This amount in my view falls in the realm of general damages.

There ought to be a distinction between past pecuniary losses or expenses already incurred and could quite easily be calculated by say reference to receipts obtained and an anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage which must of necessity await the completion of the suit to be assessed by the Court. Special damage on the other hand is calculable at the date of trial out of which a round figure will be obtained.

I do not however think that the damages claimed by the plaintiff herein are in the nature of special damages alone. Furthermore, it is clear from the above quoted passage from *Halsbury's Laws of England* that it is not necessary to plead future pecuniary loss if it will not lead to surprise.

The difference between special and general damages was explained by Lord Macnagten in *Stoms Broks Aktie Bolag v Hutchinson* [1905] AC 51 J where he said:

“General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly”.

The learned counsel for the defendants cited the case of *Sande v Kenya Cooperative Creameries* Mombasa Civil Appeal No 154 of 1992 (unreported) where the appellant had sued the respondent claiming a multiplicity of reliefs and evidence was led before the trial court showing that the appellant had some Kshs 14,151,650.70 in profits he would have otherwise earned but for the respondents' breach of a contract it had with the appellant. The trial judge declined to award the said amount on the ground that the same had not been pleaded. Aggrieved by that decision, the appellant appealed to the Court of Appeal which in a unanimous and celebrated judgement upheld the decision of the trial judge on the issue in the following words at page 12 of the ruling:-

“We now turn to the appellants main ground regarding the alleged loss of profits and other expenses in all amounting to Kshs 14,151,650.70. As we pointed at the beginning of this judgment, Mr Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded.

It is now trite law that special damages must not only be pleaded but must be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of law”.

Indeed this trite position of the law could not be stated any better. This decision of the highest Court in this country is binding authority on this Court. I cannot depart from it. However, I can, as I shall hereafter, distinguish it from the instant case.

Firstly, in *Sande v KCC* (case) there was a definite loss in the sum of Kshs 14,151,650.70 which the appellant in that case claimed he had sustained. At page 13 of the ruling the learned judges of appeal asked the questions:

“At the time of filing its defence how was the respondent to know that the appellant would ask for Kshs

14,151,650.70 so as to deal with the issue in its defence?

How could the respondent even ask for particulars of what had not been pleaded?.....”

In our instant case, the plaintiff did not know what he had lost up until the date of trial and the estimate of the value of the suit property. He did not however know exactly how much income he was going to lose as a result of the fraud of the 1st defendant after the hearing. In my view, in this case, special damage would constitute the loss of income down to the date of trial while general damage would constitute future anticipated losses after the date of trial.

In *Kimani v Attorney General* (1969) 502 the Court held that specific loss of profits consequent upon the loss of use of an article for a specific period to the date of the plaint is special damage which must be pleaded. The Court further held that in certain circumstances loss of profits could be included within a claim for general damages.

In *McGregor on Damages* 15th Edition pages 1119 – 1129, the learned author is of the view that general damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. He further states that where damage has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount.

In the circumstances, I hold that the plaintiff’s loss of income upto the date of trial is a special damage and not recoverable in this case having not been specifically claimed and proved and that the loss of income after the date of trial is a general damage which is recoverable.

I accordingly find that the damage the plaintiff suffered as a consequence of the 1st defendant’s fraud was largely a special damage required to be specifically pleaded and proved as mandatorily required by law of special damages and part of it a general damage. There are in my view severable such that I shall/award general damages in the absence of specific pleading and proof of special damages.

The fraud or fraudulent activities occasioned on the plaintiff by the defendant have led to the extinction of any proprietary rights which the plaintiff had on the suit property. In so far as the provisions of the Registration of Titles Act, s 23 in particular, are concerned, the title conferred on Mr Githere as such, by these nefarious actions of the defendant, cannot be impeached, as it has been proved that he was a party to such actions exhibited by the defendant.

Accordingly, the plaintiff cannot have his title back, the only recourse, which this Court can do, is to deal with the matter in monetary terms. In *John Wambugu Njoroge vs KCB Ltd* CA No 179 of 1992 (Kisumu) the Court of Appeal stated:

“.....it means that the appellant is entitled to in terms of money to be put in the same position as he was immediately before he was wrongfully deprived of his land and the development being and erected thereon.

Since he cannot, now, have the return of his land, this

Court can only deal with the matter in terms of money”.

This authority is binding on me and stipulates that where a party has been wrongfully deprived of his land whose title has been conveyed to an innocent third party with full proprietary rights, the only recourse which the Court can deal with the situation is to deal with the matter in monetary terms by awarding damages.

As a general rule, the object of an award of damages is to give the plaintiff compensation for the damage, loss or injury he has suffered, see *McGregor on Damages*, 17th Edition page 8. The basic criterior is what the plaintiff has lost and not what the defendant ought fairly and reasonably to pay (*General Tire &*

Rubber Company vs Firestone Tyre & Rubber Co (1975) 1 WLR 819, H L).

In *John Wambugu Njoroge vs KCB Ltd* (*supra*) the proposition that damages are compensatory was upheld. The Court stated:

“There are a number of decisions of this Court as to the nature and measure of damages. Broadly, they are to the effect that whether it be contract or whether it be tort, damages are to be compensatory, save in exceptional circumstances. They are compensatory when they restore or give back to the injured party what he had lost. In other words, the injured party, so far as immediately prior to the wrongdoing which gave rise to his complaint or injury.”

It therefore follows, applying these principles, that the plaintiff will have the value of the land and developments thereon as at the time the property was transferred to Mr Githere. *Friedman & another vs Njoro Industries* (1971) EACA 172, is an authority relied upon by the plaintiff to be used in ascertaining the material date as set out above at page 175, it was stated:

“The material date is the date of sale and what had to be ascertained was the true value as part from any inducement value of the property on that date.”

At the time the consideration for the transfer was Kshs 1.1 million, whereas the plaintiff submits that he had found a buyer, one Mr Peter Owidi for Kshs 3.5 million, and even there was one Mr Jared Maina who had offered Kshs 3.6 million. Due to the cavalier nature of the transfer, I do not find that the consideration for the transfer reflects the fair price of the land and developments thereon. I am therefore of the opinion the plaintiff’s submission of Kshs 3.5 million is the correct evaluation of the suit property as at the date of transfer.

The plaintiff further claims for general damages, using a quotation of the monthly rent. As stated by the Court of Appeal in *John Wambugu Njoroge vs KCB* (*supra*). I am not of the opinion that it would be proper to allow him recover any general damages in respect of expected monthly rental income.

This is because the value of an element, including land, includes an inherent element related to the profitable use of the article to the future (see *Kimani vs Attorney General* [1969] EA 504). Accordingly the assessed value of the land as at the date of sale (*Friedman & another vs Njoro Industries Ltd* (1971) 21 EACA 172 at 175) inevitably includes the element of its profitable use.

The upshot of all these is that the prayers (i) and (ii) sought as set out above, given the failure to prove the involvement of the transferee in the fraud, cannot be granted. However, I enter judgment for the plaintiff for Kshs 3.5 million as general damages. They will also have the costs of this suit.

Dated and delivered at Nairobi this 27th day of July, 2001

J.K. MULWA

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JUDGE