



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 427 OF 2014

CHRISTINE KAVENGE NDAVI.....PLAINTIFF

VERSUS

DAVIS GEORGE NJOROGE MUNIU.....1ST DEFENDANT

NATIONAL SOCIAL SECURITY FUND.....2ND DEFENDANT

(CONSOLIDATED WITH ELC SUIT NO. 14 OF 2015)

JUDGMENT

This judgment is in respect of two suits namely, ELCC No. 427 of 2014 and ELCC No. 14 of 2015 that were consolidated on 24th July, 2017 for hearing together with ELCC No. 427 of 2014 as the lead file. ELCC No. 427 of 2014 was brought by CHRISTINE KAVENGE NDAVI (hereinafter referred to throughout only as “the Plaintiff”) against DAVIS GEORGE NJOROGE MUNIU (hereinafter referred to throughout as “the 1st Defendant”) and NATIONAL SOCIAL SECURITY FUND (hereinafter referred to throughout only as “the 2nd Defendant”). ELCC No. 14 of 2014 was brought by DAVIS GEORGE NJOROGE MUNIU (the 1st Defendant) against NATIONAL SOCIAL SECURITY FUND (the 2nd Defendant).

ELCC No. 427 of 2014 was brought by the Plaintiff through a plaint dated 4th April, 2014 in which the Plaintiff sought the following reliefs against the Defendants;

- a. A declaration that the purported transfer of L.R. No. TASSIA II-97/1396/110 (hereinafter referred to only as “the suit property”) by the 2nd Defendant to the 1st Defendant is illegal, null and void.
- b. An order compelling the 2nd Defendant to cancel the purported illegal transfer and to restore the Plaintiff as the owner of the suit property in all its records.
- c. An eviction order compelling the 1st Defendant by himself, his servants or agents to remove all unlawful structures erected on the suit property.
- d. A permanent injunction prohibiting the Defendants jointly and severally whether by themselves, their servants or agents or otherwise howsoever from remaining on or continuing in occupation of the suit property or in any way interfering with the Plaintiff’s proprietary rights in the property.
- e. Damages for illegal trespass.
- f. Costs of the suit.
- g. Any other relief that the Honourable Court may deem fit to grant.

ELC Suit No. 14 of 2015 was brought by the 1st Defendant (as the Plaintiff) against the 2nd Defendant (as the Defendant) on 13th January, 2015 through a plaint dated 9th January, 2015. In this suit, the 1st Defendant sought judgment against the 2nd Defendant for;

- a. A declaration that the 1st Defendant is the rightful owner of the suit property by virtue of having paid for the same in a transaction

approved by the 2nd Defendant as the registered owner of the suit property and the custodian of the records thereof.

b. A permanent injunction restraining the 2nd Defendant from recalling the letter dated 11th February 2013 or taking any action to reverse the fact that the 1st Defendant is the beneficial owner of the suit property.

c. A mandatory injunction to compel the 2nd Defendant to execute all the requisite documents and to furnish the 1st Defendant with all the necessary documents and to take all steps to facilitate the issuance of a title to the 1st Defendant in respect of the suit property.

d. IN THE ALTERNATIVE to the above prayers, a sum of Kshs. 4,457,580/- being the total sum spent towards purchasing the suit property and the cost of construction up to the point it had reached together with interest thereon at court rates from July, 2013 until payment in full.

e. Costs and interest at court rates.

The Plaintiff's case.

The Plaintiff's case as set out in the plaint is as follows: At all material times, the Plaintiff was the owner and entitled to possession of the suit property. On or about July, 2013 the Plaintiff was informed that someone had trespassed on the suit property and had begun construction on it. Upon investigation, the Plaintiff discovered that the 1st Defendant had through a fraudulent transfer done at the 2nd Defendant's offices caused the suit property to be transferred to his name and that it was the 1st Defendant who had commenced construction on the property.

For the purposes of having the said transfer effected, the 1st Defendant had presented to the 2nd Defendant a forged sale agreement with the Plaintiff, an identity card and a letter purportedly issued by the Plaintiff. The 2nd Defendant negligently and fraudulently allowed the transfer of the suit property to the 1st Defendant on the basis of the said forged sale agreement, identity card and letter purportedly signed by the Plaintiff. The 2nd Defendant disregarded the Plaintiff's genuine documents and signatures on its records in allowing the said transfer to be effected. As a result of the said transfer, the Plaintiff had been deprived of the ownership, use and enjoyment of the suit property. The 1st Defendant had threatened and intended unless restrained by the Court to remain in wrongful occupation of the suit property. It was on account of the foregoing that the Plaintiff had sought the reliefs set out above.

In her witness statement filed on 4th April 2014, the Plaintiff stated as follows: She bought the suit property from the 2nd Defendant through Kwa Ndege Self Help Group. After she completed making payment for the property, she was issued with a letter by the 2nd Defendant dated 27th June 2012 confirming that she was the owner of the suit property and that it had been paid for in full.

On 1st July, 2013, she learnt through one, Fredrick Wambua that there was someone carrying out construction on the suit property. She visited the suit property on 3rd July, 2013 and confirmed the same. The contractor on site accompanied her to the Chief's office where he stated that he was constructing a house on behalf of the 1st Defendant who had bought the suit property from two ladies one of whom purported to be the owner of the suit property and the other her sister and that the sale had been finalized through the 2nd Defendant. The said contractor confirmed that he had never seen the Plaintiff and that she was not the one who sold the suit property to the 1st Defendant.

On 4th July, 2013 she visited the 2nd Defendant's offices but her file could not be traced. However, computer records showed that she was the owner of the suit property. An officer of the 2nd Defendant gave her a letter to take to the Chief confirming that she was the owner of the suit property and for her to be assisted in evicting trespassers from the suit property. She visited the 2nd Defendant's office again on 8th July, 2013. This time round, her file was available but her name had been erased and replaced by that of the 1st Defendant. An officer of the 2nd Defendant explained to her that somebody purporting to be her had come with the 1st Defendant and presented to the 2nd Defendant a sale agreement drawn by the 1st Defendant's advocates. The imposter had also presented a fake national identification card bearing her full names. The identification card however had a different serial number and photograph. The 2nd Defendant's officer who processed the transfer should have noted these anomalies since her records were still in the file. On the advice of her advocates, she reported the matter to the Criminal Investigations Department (CID).

The investigations by the CID found several discrepancies in the Identity Card that was used in the sale and transfer of the suit property to the 1st Defendant. The investigation revealed that the identity card used in the sale and transfer of the suit property to the 1st Defendant was fake and that it belonged to someone else. The 1st Defendant admitted that the Plaintiff was not the one who sold the suit property to him. The 1st Defendant's advocates also admitted that the person who executed the sale agreement on the basis of which the suit property was transferred to the 1st Defendant was different from the Plaintiff in appearance.

Fredrick Wambua recorded a witness statement on 12th June, 2018 that was filed in ELCC No. 427 of 2014 in support of the Plaintiff's case. In the statement, he stated how he came to know the Plaintiff. He confirmed that he was the one who informed the Plaintiff of the construction that was being carried out on the suit property by the 1st Defendant.

At the trial, the Plaintiff reiterated the contents of her plaint and adopted her witness statement as her evidence in chief. The Plaintiff showed the court her original identification card in proof of the fact that she was the real Christine Kavenge Ndavi. The Plaintiff told the court that a friend of the imposter, Thekla Nthenya Mutuku was charged in Makadara Law Court in relation to the impersonation of the Plaintiff. The Plaintiff produced her bundle of documents dated 4th April, 2014 as an exhibit. Fredrick Ndundu Mwangi Wambua (PW2) gave evidence on behalf of the Plaintiff. He stated that he was the one who reported to the Plaintiff that there was construction being undertaken on the suit property.

The 1st Defendant's case.

The 1st Defendant filed a statement of defence in ELCC No. 427 of 2014 on 18th June, 2014 in which he averred as follows: He was the owner and the one in actual possession of the suit property pursuant to the documents that had been issued to him by the 2nd Defendant. He had in exercise of his proprietary rights commenced construction on the suit property but halted it on his own volition when a dispute arose over the ownership thereof. Prior to commencing construction on the suit property, he conducted the requisite due diligence with the 2nd Defendant's office on the property. Upon confirmation from the 2nd Defendant's records that the property was transferable, he paid Kshs. 2,100,000/- for the property and was issued with a letter showing that he was the owner of the suit property. He purchased the suit property for value without notice and was in possession thereof. According to the records held by the 2nd Defendant, the Plaintiff was no longer the proprietor of the suit property. As a bona fide purchaser who bought the suit property in good faith and who had never been charged in a court of law with fraud or illegality, he should not be deprived of the property.

In his witness statement filed on 18th June, 2014 in ELC No. 427 of 2014, the 1st Defendant reiterated the averments in his statement of defence and added the following: Prior to the transfer of the suit property to the 1st Defendant, land rent and rates that were due to the 2nd Defendant were paid in full before the 1st Defendant paid the purchase price to the seller. The 1st Defendant also paid Kshs. 10,000/- as legal fees and Kshs. 1000/- as registration fees. The seller thereafter wrote to the 2nd Defendant and surrendered the suit property to the 1st Defendant. The 1st Defendant applied to be registered as the owner of the suit property by the 2nd Defendant and he was issued with a confirmation letter on 11th February 2013. The damages sought by the Plaintiff should be directed at the 2nd Defendant.

In ELC Suit No. 14 of 2015 (hereinafter referred to only as "ELCC No. 14 of 2015") between the 1st Defendant as the Plaintiff and the 2nd Defendant as the Defendant, the 1st Defendant averred as follows in his plaint dated 9th January, 2015: Sometimes in December, 2012, the 1st Defendant learnt that the beneficial owner of the suit property had put it up for sale. The 1st Defendant's preliminary investigations revealed that the suit property was registered in the 2nd Defendant's name. The 1st Defendant went to the 2nd Defendant's offices and confirmed that the suit property was owned by one, Christine Kavenge Ndavi. The 1st Defendant went to the 2nd Defendant's offices with the said Christine Kavenge Ndavi and upon assurances by the 2nd Defendant's officer that he was dealing with the bona fide owner of the suit property, the 1st Defendant entered into an agreement of sale dated 15th January, 2013 with the said Christine Kavenge Ndavi whom he paid Kshs. 2,100,000/-.

Pursuant to the said transaction, the 1st Defendant was registered by the 2nd Defendant as the beneficial owner of the suit property and the name of Christine Kavenge Ndavi was removed from the 2nd Defendant's records. On the strength of a letter dated 11th February, 2013 that was issued to him by the 2nd Defendant, he obtained approval of building plans and commenced construction on the suit property. On or about July, 2013, a person claiming to be the real Christine Kavenge Ndavi reported the 1st Defendant to the police claiming that he was carrying out construction on her property.

Following this complaint, the 1st Defendant halted construction. Investigations that was carried out by the Police revealed that the Christine Kavenge Ndavi who sold and transferred the suit property to the 1st Defendant was an impostor who had used fake/forged documents to facilitate the transfer. The 1st Defendant had relied on the approval of the seller by the 2nd Defendant in entering into a sale transaction with the said impostor. It was also on the strength of a letter dated 11th February, 2013 from the 2nd Defendant that he had his building plans approved before he commenced construction on the suit property. The 1st Defendant spent Kshs. 2,199,740/- towards the construction and related expenses before it was halted. The 2nd Defendant's officers acted negligently and in dereliction of duty in failing to note that the identification documents and the general appearance of the person who passed off as Christine Kavenge Ndavi was different from that contained in the 2nd Defendant's records. The 2nd Defendant's said officers failed to notice that the appearance of Christine Kavenge Ndavi as per its records was different from that of the seller who pretended to be Christine Kavenge Ndavi. The 2nd Defendant's said officers also failed to notice that the serial number of the identity card that was presented by the impostor pretending to be Christine Kavenge Ndavi was different from the authentic one held in the records of the 2nd Defendant. The 1st Defendant accused the 2nd Defendant of aiding and abetting the fraud by the impostor.

The 1st Defendant contended that as a result of the negligence/dereliction of duty on the part of the 2nd Defendant's officers, he had been barred from continuing with construction on the suit property and ran the risk of losing his investment. The 1st Defendant particularised his loss as follows:

Cost of land	Shs. 2,100,000/-
Cost of construction	Shs. 2,199,740/-
Finder's fees	Shs. 100,000/-
Application Fees	Shs. 1,000/-
Legal fees to Defendant	to 2 nd Shs. 10,000/-
City Council Approval	Shs. 46,840/-

The 1st Defendant averred that when the Plaintiff called upon the 2nd Defendant to complain that her property had been sold without her

knowledge, the 2nd Defendant maliciously and without regard to the interests of the 1st Defendant proceeded to issue a letter asking the Chief of Embakasi to evict the 1st Defendant from the suit property.

In his witness statement filed in ELCC No. 14 of 2015, the 1st Defendant reiterated the contents of his plaint which I have highlighted above. The 1st defendant added that he was shown the suit property by one, Boniface Anyika Amuhanda who introduced him to the owner of the property who identified herself as Christine Kavenge Ndavi. The said Christine Kavenge Ndavi was accompanied by a lady called Thekla Nthenya. He went with the said Christine Kavenge Ndavi and her companion to the 2nd Defendant to verify the status of the suit property. The 2nd Defendant's officer checked the said Christine Kavenge Ndavi's identification documents against their records and confirmed that Christine Kavenge Ndavi was the beneficial owner of the suit property. It was on the strength of this confirmation that the 1st Defendant made a decision to enter into a transaction with the said Christine Kavenge Ndavi that led to the transfer of the property to his name by the 2nd Defendant. The 1st Defendant stated that if the court finds that the Plaintiff's land was irregularly transferred to the 1st Defendant, the Plaintiff should be compensated by the 2nd Defendant. He stated that the other option that was prejudicial to him was for the 2nd Defendant to compensate him for the loss he had incurred in the sum of Kshs. 4,457,580/-.

Boniface Anyika Amuhanda recorded a witness statement on 9th January, 2015 that was filed in ELCC No. 14 of 2015 in support of the 1st Defendant's case. In the statement, he stated how he met a lady who introduced herself as Christine Kavenge Ndavi and who claimed to be the owner of the suit property. The lady was accompanied by a friend by the name Thekla who later on claimed to be her sister. He stated how he linked up the two ladies to the 1st Defendant who he was told was looking for a parcel of land to purchase in Tassia.

At the trial, the 1st Defendant adopted his witness statement filed in ELCC No. 14 of 2015 as his evidence in chief in ELCC No. 427 of 2014 and ELCC No. 14 of 2015. He also produced his bundle of documents filed in ELCC No. 14 of 2015 as an exhibit in the two cases. The 1st Defendant told the court that the Plaintiff who gave evidence in court as PW1 was not the one who sold the suit property to him. The 1st Defendant told the court that he was aware of the criminal case in Makadara Law Court against Thekla Nthenya and that he had been summoned to give evidence in that case although he did not testify. He told the court that he had carried out construction on the suit property for about a month before he learnt that the property was sold to him by an imposter.

The 2nd Defendant's case.

The 2nd Defendant filed a statement of defence dated 29th August, 2014 in respect of the Plaintiff's claim in ELCC No. 427 of 2014 and a statement of defence dated 17th February, 2015 in respect of the 1st Defendant's claim in ELCC No. 14 of 2015. In the statement of defence filed in ELCC No. 427 of 2014, the 2nd Defendant averred as follows: The 2nd Defendant denied that the Plaintiff was the owner of the suit property. The 2nd Defendant also denied that it fraudulently transferred the suit property to the 1st Defendant. The 2nd Defendant denied the allegations of negligence pleaded against it by the Plaintiff. The 2nd Defendant contended that on 8th January, 2013 or thereabouts, the Plaintiff and the 1st Defendant came to its offices at which the Plaintiff expressed a desire to sell the suit property to the 1st Defendant. The 2nd Defendant averred that the Plaintiff and the 1st Defendant subsequently submitted to it a sale agreement between them prepared by their advocates and a letter by the Plaintiff surrendering ownership of the suit property to the 1st Defendant on the strength of which it transferred the suit property to the 1st Defendant. The 2nd Defendant averred that it carried out the transaction between the Plaintiff and the 1st Defendant in accordance with the laid down procedures on the basis of the sale agreement presented by the two to the 2nd Defendant. The 2nd Defendant averred that when the sale and transfer of the suit property as between the Plaintiff and the 1st Defendant was completed, its obligations to the parties came to an end.

In its statement of defence filed in ELCC No. 14 of 2015, the 2nd Defendant denied the 1st Defendant's claim in its entirety and put the 1st Defendant to strict proof thereof. The 2nd Defendant denied that the sale agreement between the 1st Defendant and the person who purported to sell to him the suit property was induced by the 2nd Defendant or its employees. The 2nd Defendant averred that the 1st Defendant entered into the said sale transaction on reliance upon his own judgement and advice of his advocates. The 2nd Defendant denied that it was guilty of negligence or dereliction of duty. The 2nd Defendant denied that it abetted or acquiesced to the acts of fraud that were committed against the 1st Defendant. The 2nd Defendant denied that the 1st Defendant was entitled to the reliefs sought against the 2nd Defendant.

In separate witness statements filed together with the two statements of defence on 6th September, 2014 and 17th February, 2015 respectively, the 2nd Defendant's officer, Aggrey Nyandong, reiterated the contents of the 2nd Defendants defences in ELCC No. 427 of 2014 and ELCC No. 14 of 2015. He admitted that the 2nd Defendant sold the suit property to the Plaintiff at Kshs. 550,000/- in January, 2006 and that in January, 2013, a lady calling herself Christine Kavenge Ndavi came to the 2nd Defendant's office with the 1st Defendant to inquire about the ownership and payment status of the suit property since the said lady wanted to sell the suit property to the 1st Defendant. The 2nd Defendant's staff who served the two confirmed from the online records that the suit property was registered in the name of Christine Kavenge Ndavi. The two left and the 1st Defendant later on returned with a copy of a sale agreement dated 15th January, 2015 between him and Christine Kavenge Ndavi, a letter from the said Christine Kavenge Ndavi, a letter from him, a copy of his identity card and that of Christine Kavenge Ndavi and an application form. The letter from the 1st Defendant and the said Christine Kavenge Ndavi requested the 2nd Defendant to change its records to reflect the 1st Defendant as the owner of the suit property. The 2nd Defendant complied with the said request. The 2nd Defendant subsequently received a demand letter from the Plaintiff's advocates claiming that the person with whom the 1st Defendant had entered into an agreement was an imposter and not the Plaintiff. The 2nd Defendant's officers did not know the Plaintiff personally and as such they relied entirely on the documents that were presented by the 1st Defendant and the said lady who sold the suit property to him in carrying out the transaction.

The 2nd Defendant filed a further witness statement dated 28th August, 2018 by Pius Sila. Pius Sila was the 2nd Defendant's Accounts Assistant in its Capital and Money Market department. He reiterated the contents of the witness statement by Aggrey Nyandong. She stated

as follows: Sometimes in January, 2013 a lady who introduced herself as Christine Kavenge Ndavi went to the 2nd Defendant offices accompanied by the 1st Defendant. The lady wanted to sell the suit property. The 2nd Defendant's officer checked the 2nd Defendant's records and confirmed that Christine Kavenge Ndavi was the owner of the suit property. The two later came back with an executed sale agreement dated 15th March 2013, Christine Kavenge Ndavi's identity card and letters by the said Christine Kavenge Ndavi and the 1st Defendant requesting that the 2nd Defendant change its records to reflect the 1st Defendant as the owner of the suit property. The 2nd Defendant complied with that request.

In July, 2013, the 2nd Defendant received a demand letter claiming that the agreement dated 15th January 2013 between the 1st Defendant and the said Christine Kavenge Ndavi was not between the 1st Defendant and the Plaintiff but with an imposter. The letter demanded immediate demolition of the structures on the suit property as well as cessation of trespass. The 2nd Defendant received another letter from the Chief dated 4th July, 2013 to the effect that the Plaintiff had complained about a construction on her plot. The Chief sought to know the owner of the suit property. Since it was apparent that the person who had sold the suit property to the 1st Defendant was an imposter, the 2nd Defendant's officer confirmed that the Plaintiff was the owner of the property. The 2nd Defendant's officers did not know the Plaintiff in person and relied on the letter dated 15th January, 2013, the identity card presented, the sale agreement and the records in its possession which tallied. The 2nd Defendant did not act negligently and was not guilty of dereliction of duty.

At the trial, Enos Kiplagat Cherono gave evidence on behalf of the 2nd Defendant. He adopted the witness statement by Pius Sila as his evidence in chief and produced the 2nd Defendant's bundle of documents filed in ELCC No. 14 of 2015 as an exhibit. He stated that when the Plaintiff made a complaint that the suit property had been sold to the 1st Defendant by an imposter, they reverted the property to the name of the Plaintiff in their records. He stated that it was the 1st Defendant who brought the imposter to the 2nd Defendant's office. He stated that according to the 2nd Defendant's records, the suit property was owned by the Plaintiff.

The submissions.

After the close of evidence, the parties were directed to make closing submissions in writing. In her submissions filed on 12th October, 2020, the Plaintiff submitted that the evidence that she tendered in proof of her claim against the Defendants was not controverted. The Plaintiff submitted that the Defendants did not contest the fact that she was the real Christine Kavenge Ndavi and that she never sold the suit property to the 1st Defendant. The Plaintiff submitted that she had proved her case against the Defendants on a balance of probabilities.

On his part, the 1st Defendant filed his submissions on 21st September, 2020. In his submission, the 1st Defendant limited his claim to the reliefs sought in prayers (d) and (e) in his plaint filed in ELC No. 14 of 2015. The 1st Defendant admitted that he acquired the suit property from a fraudster and that the fraudster had no proprietary interest in the suit property that she could transfer to him. The 1st Defendant submitted that the 2nd Defendant was negligent in the manner it handled the transaction between him and the said fraudster. The 1st Defendant submitted that the 2nd Defendant owed him a duty of care to ensure that he did not suffer any harm or injury while dealing with the fraudster in respect of the suit property. The 1st Defendant argued that as the keeper of records relating to the suit property, the 2nd Defendant owed him a duty of care in ascertaining that he was dealing with the bona fide owner of the suit property. The 1st Defendant submitted that the 2nd Defendant breached that duty of care as a result of which he suffered loss and damage for which he held the 2nd Defendant liable.

The 2nd Defendant filed its submissions on 1st October, 2020. The 2nd Defendant submitted that it did not owe the 1st Defendant any duty of care as it was the 1st Defendant who took the imposter who purported to sell the suit property to him to the 2nd Defendant's offices. The 2nd Defendant submitted further that the 1st Defendant entered into a sale agreement with the imposter in which he was represented by an advocate who should have done due diligence on the seller. The 2nd Defendant submitted that the 1st Defendant was in a hurry to seal the deal. He did not bother to ask the imposter who sold him the suit property of any document of ownership that she held in respect of the suit property. He also decided to pay the full purchase price in cash. The 2nd Defendant submitted that the 2nd Defendant cannot be called upon to compensate the 1st Defendant for the losses suffered as a result of his dealings with the fraudster. The 2nd Defendant submitted further that in any event, the damages claimed by the 1st Defendant were not proved. The 2nd Defendant submitted that special damages must be pleaded and proved. The 2nd Defendant submitted that the 1st Defendant tendered no proof that he paid Kshs. 2,100,000/- for the suit property. The 1st Defendant did not also produce the evidence of Kshs. 100,000/- that was allegedly paid to the agent who assisted him in getting the suit property. The 2nd Defendant submitted further that even the costs of construction claimed in the sum of Kshs. 2,199,740/- was not proved.

With regard the Plaintiff's claim, the 2nd Defendant submitted that the same should be dismissed with costs being borne by the 1st Defendant since the suit property had been transferred back to the Plaintiff. The 2nd Defendant submitted that since the suit property was already in the name of the Plaintiff, there was no transaction to cancel. The 2nd Defendant submitted further that there was no evidence that the 2nd Defendant was interfering with the Plaintiff's occupation of the suit property or that it had trespassed therein. The 2nd Defendant submitted that in the circumstances, there was no basis for the grant of the permanent injunction or damages for trespass sought by the Plaintiff.

Issues for determination.

From the pleadings, the following in my view are the issues arising for determination in the consolidated cases;

1. Whether the transfer of L.R. No. TASSIA II-97/1396/110 (the suit property) by the 2nd Defendant to the 1st Defendant was illegal, null and void.

2. Whether the 1st Defendant acquired a valid title over the suit property and as such the 1st Defendant is the lawful owner thereof.
3. Whether the Plaintiff is entitled to the reliefs sought in ELCC No. 427 of 2014.
4. Whether the 1st Defendant is entitled to the reliefs sought in ELCC No. 14 of 2015.
5. Who is liable for the costs of the suit?

Whether the transfer of L.R. No. TASSIA II-97/1396/110 (the suit property) by the 2nd Defendant to the 1st Defendant was illegal, null and void.

In Alberta Mae Gacie v Attorney General & 4 Others [2006] eKLR the court stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come....”

In Iqbal Singh Rai v Mark Lecchini and the Registrar of Titles, Civil Case No 1054 of 2001, the court (Machelule J.) held as follows:

“At the time when the 1st Defendant sought to buy the land in dispute the registered proprietor was the Plaintiff. There is no dispute that he never dealt with the Plaintiff in the transaction that followed. The person with whom he dealt was not the registered proprietor of the land in dispute. The person was a fraud who had no claim whatsoever to the land. The consequence is that the 1st Defendant was a purchaser who did not deal with the registered proprietor of the land. Section 23(1) protects ‘title issued to a purchaser upon the transfer or transmission by the proprietor thereof’. The 1st Defendant did not obtain a transfer from the Plaintiff who was the registered proprietor. He obtained a transfer from a fraudulent person who had no claim to the land. He cannot I find invoke the provisions of section 23(1) to say he obtained an indefeasible title.”

It is common ground that the Plaintiff was at all material times the beneficial owner of the suit property. It is also common ground that the Plaintiff did not sell the suit property to the 1st Defendant. It is also not disputed that the 1st Defendant purported to purchase the suit property from an imposter who held herself out as the Plaintiff. It is not disputed that the transaction in which the 1st Defendant entered into with the said fraudster was invalid and as such incapable of conferring any interest in the suit property upon the 1st Defendant. The imposter had no interest in the suit property that she could sell or transfer to the 1st Defendant. It is my finding that the purported sale of the suit property by the fraudster to the 1st Defendant and the subsequent transfer of the suit property in the records of the 2nd Defendant from the name of the Plaintiff to the 1st Defendant was in the circumstances illegal, fraudulent, null and void.

Whether the 1st Defendant acquired a valid title over the suit property and as such the 1st Defendant is the lawful owner thereof.

This issue has been answered above. The 1st Defendant acquired the suit property from a fraudster. As the 1st Defendant admitted in his submissions and as I have held above, the fraudster had no valid proprietary interest in the suit property that she could transfer or convey to the 1st Defendant. As the saying goes, out of nothing comes nothing. The 1st Defendant acquired no interest in the suit property from the fraudster who had none to give. The 1st Defendant similarly has no interest in the suit property. It is my finding therefore that the 1st Defendant did not acquire a valid interest in the suit property and as such he is not the lawful owner thereof.

Whether the Plaintiff is entitled to the reliefs sought in ELCC No. 427 of 2014.

I am in agreement with the Plaintiff that the evidence that she tendered in proof of her case was not controverted. The Plaintiff proved that she was the lawful beneficial owner of the suit property and that she did not sell the suit property to the 1st Defendant or to anyone else. The Plaintiff also proved that the 1st Defendant purported to purchase the suit property from an imposter who held herself out as the Plaintiff. It is common ground that the said imposter had no proprietary interest in the suit property that she could transfer to the 1st Defendant. The Plaintiff demonstrated that the said imposter did not only dupe the 1st Defendant but also the 2nd Defendant who purported to transfer the suit property to the 1st Defendant pursuant to the said fraudulent transaction between the 1st Defendant and the said fraudster. The Plaintiff proved that the 1st Defendant entered into the suit property illegally pursuant to the purported sale agreement with the said imposter. I am satisfied that the Plaintiff is entitled to prayers (a), (b), (c), (d) and (e) of the plaint filed in ELCC No. 427 of 2014.

Whether the 1st Defendant is entitled to the reliefs sought in ELCC No. 14 of 2015.

The 1st Defendant’s claim against the 2nd Defendant is based on the tort of negligence whose ingredients as rightly submitted by the 1st Defendant entail the existence of a duty of care, breach of that duty and injury resulting from the breach. I am not persuaded that in the circumstances of this case, the 2nd Defendant owed the 1st Defendant a duty of care. It is common ground that the 1st Defendant was a victim of fraud by an imposter. The 2nd Defendant was not a party to the agreement between the 1st Defendant and the imposter. The 2nd Defendant did not make any representation to the 1st Defendant that the imposter was the real Christine Kavenge Ndavi. It was the 1st Defendant who took the fraudster to the 2nd Defendant. What they sought to confirm from the 2nd Defendant was that the suit property was registered in the name of Christine Kavenge Ndavi. The 1st Defendant did not seek confirmation from the 2nd Defendant whether the person he was dealing

with was really, Christine Kavenge Ndavi. I am in agreement with the 2nd Defendant that the 1st Defendant entered into an agreement of sale with the imposter not on the strength of any representation that was made to him by the 2nd Defendant but from the information he got from his agent, the so called “finder” and his advocates. There is no evidence that the 2nd Defendant misled or gave wrong information to the 1st Defendant. The suit property was indeed registered in the name of Christine Kavenge Ndavi. That is the information that was given by the 2nd Defendant to the 1st Defendant. It was the duty of the 1st Defendant who was entering into an agreement of sale to undertake due diligence and ascertain whether he was dealing with Christine Kavenge Ndavi. It is surprising that the demand by the imposter to be paid the full purchase of Kshs. 2,100,000/- in cash did not ring a warning bell. There is also no evidence that the 1st Defendant sought and obtained from the imposter any document evidencing her ownership of the suit property. This is what this court said in Mark Lecchini v The Hon. Attorney General & Another[2021]eKLR which had similar facts as the present case:

“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.”

For the foregoing reasons, I am not satisfied that the 1st defendant has proved negligence against the 2nd Defendant that would entitle him to an award of damages. I am also in agreement with the 2nd Defendant that apart from Kshs. 1,000/- paid to the 2nd Defendant as application fees and Kshs. 46,840/- paid to the City Council of Nairobi for the approval of the building plans, the 1st Defendant did not prove the other heads of damages claimed in his plaint. The 1st Defendant’s claim is in the nature of special damages. Special damages must be pleaded with the necessary particulars and strictly proved. No evidence was placed before the court to show that the 1st Defendant actually paid Kshs. 2,100,000/- to the imposter. Even if the imposter was paid in cash, there should have been some form of evidence showing that the 1st Defendant withdrew Kshs. 2,100,000/- from his account to pay the fraudster. With regard to the construction costs, what the 1st Defendant placed before the court is some unsigned tabulation which he claimed to contain the amount he spent in the construction he was carrying out on the suit property. There was nothing placed before the court to support the expenses set out in the table submitted to court. There was also no evidence that Kshs. 100,000/- was paid to the “finder” of the suit property. For legal fees paid to the 2nd Defendant in the sum of Kshs. 10,000/-, I have noted that the receipt was issued in the name of the imposter. It follows from the foregoing that if I had found that the 1st Defendant was entitled to damages which is not the case, I would have awarded only a sum of Kshs. 47,840/- under the alternative prayer. As conceded in the submissions, the 1st Defendant is not entitled to the reliefs sought in prayers (a), (b), and (c) of the plaint filed in ELCC No. 14 of 2015.

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. As a general rule, costs follow the event. The Plaintiff has succeeded in her claim in ELCC No. 427 of 2014 while the 1st Defendant has failed to prove his claim against the 2nd Defendant in ELCC No. 14 of 2015. I have not found any fault on the part of the 2nd Defendant in both cases that would warrant condemning it to pay costs. When it was brought to its attention that the suit property was transferred to the 1st Defendant through fraud that was committed by an imposter, it took immediate steps to restore the property in the name of the Plaintiff. The 1st Defendant as the losing party in both cases shall bear the costs of the consolidated suits.

Conclusion.

In conclusion, I hereby make the following orders;

1. Judgement is entered for the Plaintiff in ELCC No. 427 of 2014 as follows:

- a. It is declared that the purported transfer of L.R. No. TASSIA II-97/1396/110 (the suit property) by the 2nd Defendant to the 1st Defendant is illegal, null and void.
- b. The 2nd Defendant shall cancel the purported illegal transfer and shall restore the Plaintiff as the owner of the suit property in all its records if it has not done so.
- c. The 1st Defendant by himself, his servants or agents shall vacate and remove all unlawful structures he has erected on the

suit property within 45 days from the date hereof in default of which the Plaintiff shall be at liberty to remove the said structures at the 1st Defendant's cost or take over the property together with the said structures.

d. A permanent injunction is issued restraining the Defendants jointly and severally whether by themselves, their servants or agents or otherwise howsoever from remaining on or continuing in occupation of the suit property or in any way interfering with the Plaintiff's proprietary rights in the property.

e. Kshs. 100,000/- being general damages for trespass to be paid by the 1st Defendant.

f. Costs of the suit to be paid by the 1st Defendant.

2. ELCC No. 14 of 2015 is dismissed with costs to the Defendant in the suit.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH 2021

S. OKONG'O

JUDGE

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

Mr. Gaita for the Plaintiff

Mr. Khayega for the 1st Defendant

Mrs. Mbabu for the 2nd Defendant

Ms. C. Nyokabi - Court Assistant