



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MURANG'A

ELC NO. 418B OF 2017

BENINA WATHUMA KAMAU.....PLAINTIFF

VERSUS

NAHASHON GICHANGI MACHARIA.....1ST DEFENDANT

JOHN GATHOGO KIRIKO..... 2ND DEFENDANT

JOHN RICHARD GATHONGO.....3RD DEFENDANT

EDWARD NGINYI MWANGI.....4TH DEFENDANT

ESTHER NJOKI NGINYI.....5TH DEFENDANT

THE HON ATTORNEY GENERAL.....6TH DEFENDANT

JUDGMENT

1. Vide a Complaint, the Plaintiff sued the Defendants seeking Orders for; -

a) A declaration that the 1st Defendant having acquired ownership of NGINDA/SAMAR/BLOCK1/155 through fraud, his title and subsequent transfers were null and void in that he had no valid title capable of conferring proprietary interests to third parties.

b) The 4th and 5th Defendants title be cancelled and their names be deleted and the name of BENINA WATHUMA KAMAU restored as the registered proprietor.

c) Costs of the suit and interest.

2. The 1st and 2nd Defendants neither filed a memorandum of appearance nor a defence and consequently Plaintiff applied for default judgment on 14/03/2018. Indeed, summons to enter appearance were duly served on 1st, 2nd, 3rd and 4th Defendants by way of substituted service in the Standard Newspaper as evidenced by the Return of Service dated 14/03/2018 and filed on even date pursuant to this Court's leave granted on 15/02/2018. The suit proceeded for formal proof and the Plaintiff's case as far as 1st and 2nd Defendants are concerned is uncontroverted.

3. The 3rd and 4th Defendants entered appearance and defence and Counterclaim were filed against the Plaintiff reiterating the Orders sought in Murang'a ELC No. 408 of 2017. They denied any fraudulent dealings on their part and averred that they purchased the suit land from the 2nd Defendant for Kshs. 8,250,000/= vide a Sale Agreement executed on 30/06/2016.

4. Similarly, a memorandum of appearance and statement of defence was filed on behalf of the 5th Defendant.

5. The Plaintiff testified as PW1 and adopted her witness statement dated 4/4/2018 and testified that she never sold her land and produced her documents including the Abstract of title (green card) for the suit land and a copy of title for the suit land issued on 11/10/90 as listed in the Plaintiff's List of Documents dated 6/7/2017 as Plaintiff Exhibits Nos. 1-7.

6. On cross-examination, she explained that the suit land initially belonged to her late husband, Kamau Gichure who died in 1989 before he

was registered as the proprietor thereof. PW1 states that she did not have the original title of the suit land in Court as it had been taken by the County Council. She also admitted that she did not know how long it took for the 1st and 2nd Defendants to register their interests on the suit land. PW1 further clarified that she had not blamed the 3rd and 4th Defendants for any fraud but had sued all Defendants as they appeared on the abstract of title.

7. PW1 was adamant that her husband acquired the suit land from the County Council and she had receipts in his name and a photocopy of the Title. She alleged that she had the acquisition documents but were in possession by someone outside the Courtroom. She admitted to not living on the land but maintained that she used to farm on the land. In the end, PW1 contradicted herself saying the original Title deed was at the Criminal Investigation Office (CID) who had refused to release the Title to her.

8. John Mwangi, PW1's son-in-law, testified as PW2 and adopted his witness statement dated 4/4/2018 as his evidence in chief. That he had requested PW1 if he could cultivate on the suit land and in the Company of PW1 and Paul Mwangi, they visited the suit land and were surprised to find it cultivated and fenced off. They visited the Murang'a Lands Registry and learnt of the illegal transfers and reported the matter to Murang'a Police Station.

9. On cross-examination, PW2 told the Court that maize and potato farming was ongoing on the suit property but he did not know who was the occupier. He confirmed that the Land Registrar was not charged in the Murang'a CMCC Criminal Case No. 258 of 2017.

10. That marked the close of the Plaintiff's case.

11. The 4th Defendant, Esther Njoki Nginyi, relying on their respective pleadings as filed in Court testified as DW1. She stated that her late husband was sued as the 3rd Defendant and later substituted by their son, Dennis Mwangi Nginyi. She adopted her joint witness statement dated 16/02/2018 in her capacity as the administrator of his estate. She produced a myriad of documents notably the Sale Agreement, Title and copy of official search, Green card in respect of the suit land, Applications for Land Control Board consent, Consent dated 27/6/16 as D. Exhibits Nos. 1-14.

12. DW1 was firm that they bought the suit land for Kshs. 8 million and prior to that undertook all due diligence incidental to such a purchase. She denied knowing the 1st Defendant and admitted that she did not know how the 2nd Defendant acquired the suit land but the 2nd Defendant had a sale agreement dated 17/12/90 in respect of the suit land between him and the 1st Defendant.

13. On cross-examination, DW1 explained that her late husband asked for the sale agreement (the one dated 17/12/90) as part of their due diligence and was also shown a copy of the Title Deed issued on 20/12/90. DW1 admitted that they did not deal with the 1st Defendant but the 2nd Defendant only.

14. DW1 further informed the Court that their Sale Agreement with the 2nd Defendant was dated 30/6/2016 whereas the 2nd Defendant's Application for change of name was dated 11/4/2016 and resultant Consent for the same obtained on the same day.

15. DW1 was also not sure whether stamp duty was paid for the land purchase and denied knowledge of any criminal case in respect of the suit land. On re-exam, DW1 maintained that they obtained the Land Board Consent in 2016 and immediately occupied the land.

16. That was the end of the 3rd and 4th Defendants' case.

17. Alice Gisemba, the Land Registrar Murang'a, took the stand as DW2 and adopted her witness statement dated 30/1/2019. Having worked at the Lands Registry for two years, DW2's evidence was largely based on the record before her and she admitted to not knowing the makers of the impugned entries on the Green card. Besides, DW2 did not have any supporting documents in relation to the said entries as the file was said to be missing from the Lands Registry.

18. During cross-examination, DW2 could not tell if the transfer entries Nos. 7-10 were correct as she did not see the actual transfer. She described the process for correction of names was done on 5/7/16 pursuant to the 2nd Defendant's application approved on 14/4/16 and Consent issued on 16/4/16.

19. DW2 added that Entries Nos. 4, 5, 6 & 7 were not done in Murang'a office and that the parcel file was not in the Registry and confirmed Entry No. 11, being the restriction. She confirmed that there were no documents to support Entry Nos. 1-3 and without such documents. DW2 could not confirm whether the entries were genuine or not. With respect to documents for Entry Nos. 1-10, DW2 she reiterated that they were missing from the registry.

20. That was the close of the 5th Defendant's case and the parties were directed to file their respective submissions.

21. The Plaintiff filed her written submissions dated 27/01/2021 on 28/01/2021 and argued that she never sold or transferred the suit land to the 1st Defendant and therefore any subsequent transfer was illegal and irregular as he did not have any title to pass.

22. She cast doubt on how the impugned title was transferred from the 1st Defendant to the 3rd and 4th Defendants and cited the exceptions under Section 26(1) of the Land Registration Act to warrant cancellation of the title on grounds of fraud as the instant case. Reliance was placed on the Court of Appeal case of **Arthi Highway Developers Limited V West End Butchery Limited & 6 others (20150 eKLR** and High Court case of **Alice Chemutai Too -vs- Nickson Kipkurui Korir & 2 Others [2015] eKLR**.

23. On behalf of the 3rd and 4th Defendants, written submissions dated 09/02/2021 and filed on 11/02/2021 contended that the Plaintiff's case

should fail for want of description of the suit land. They pointed out that parties are bound by their pleadings and since the Plaintiff describes the suit property as NGINDA/SAMAR/BLOCK 1 and not NGINDA/SAMAR/BLOCK 1/155, she led evidence in respect of the latter without amending her Plaintiff to reflect as such.

24. They went ahead to submit on a without prejudice basis that though the Plaintiff's claim that the land initially belonged to the County Council of Murang'a, the evidence adduced in Court was crystal clear that the land initially belonged to the Government of Kenya as opposed to the alleged defunct Council. Additionally, they argue that the registration for the Government of Kenya and Plaintiff were done on the same date, 11/10/1990, and the same is practically impossible and thus denied she was the proprietor thereof.

25. The 3rd and 4th Defendants have outlined how being innocent purchasers for value from the 2nd Defendant have a good and valid title to the exclusion of anyone else. They pointed out that particulars of fraud directly to the 1st Defendant and further the 5th Defendant - Land Registrar under Paragraph 6 of the Plaintiff but not no such allegation or proof was tendered in respect of the 2nd, 3rd and 4th Defendants.

26. They attacked the evidenced of DW2 as incredible in so far as she alleged that there were anomalies in entry nos. 4 - 7 but not entry nos. 1 - 3 entered on 11/10/90.

27. On the issue of stamp duty, they are vehement that whether the same was paid and if not, it does not make a transaction void as the law sets the parameters of recovering stamp duty as a civil debt payable with penalties.

28. Citing a number of authorities including **Katende –vs- Haridas & Company Ltd, Court of Appeal at Uganda, Virjah Morjaria –vs- Nasingh Madhussing Drabar & Another [2000] eKLR, Court of Appeal Civil Appeal No. 146 of 2014 Lawrence P. Mungai –v- The Hon. Attorney General & 4 Others**, they prayed that the Plaintiffs suit be dismissed with costs and their counter-claim be allowed.

29. Lastly the 5th Defendant filed submissions dated 10/02/2021 on 16/02/2021 and denying any fraud on their part, submitted that the Land Registrar registers documents as presented by parties as long as they are legally compliant. The 5th Defendant insisted that the Plaintiff has not discharged his burden of proof on fraud on its part and especially since no registrar had been arrested or charged in any criminal case thereof.

30. The 5th Defendant prayed for dismissal of Plaintiff's case with costs and that they ought not be found liable in any way for any allegations advanced.

31. Having read and considered the pleadings, the evidence adduced at the hearing, the written submissions and all other materials placed before me, the issues that commend themselves for determination are as follows; whether the Plaintiff has pleaded and proven fraud against the 3 & 4th Defendants; whether fraud has been proven against the 5th Defendant; are the 3rd and 4th Defendants bonafide purchasers for value without notice; who bears the cost of the suit?

32. The case of the Plaintiff against the 1st and 2nd Defendants is uncontroverted. It was alleged that the 2nd and 3rd Defendants refer to one person.

33. The Plaintiff claims that she is the registered owner of the suit land having been so registered on the 11/10/1990 as per the certified copy of the green card. That on the 12/1/17 she discovered that the 1st Defendant had fraudulently transferred the suit land to the 2nd Defendant on the 20/12/90 who in turn transferred to the 3rd and 4th Defendants for valuable consideration on the 5/7/16. That she did not transfer her land to the 1st Defendant.

34. The definition of fraud in my view is in exhaustive. Courts must be careful not to create definitional strictures in the manner in which fraud is defined. Fraud as it may well be said manifests in various fashions and flairs and it is important that Courts are vigilant to identify its head howsoever it postures itself. For this case I shall adopt the definition given in Black's Law Dictionary, 9th Edition which defines fraud as thus;

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

35. Fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. The Court cannot infer fraud from the Pleadings. It must be pleaded in a particularized manner and proven by leading evidence. The former Court of Appeal for Eastern Africa in **R.G. Patel versus Lalji Makanji (1957) EA 314** stated as follows:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.” See also the case of **Koinange & 13 others v Koinange [1968] KLR 23**.

36. In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the Court held that; -

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a

balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (**Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308**).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (**see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221**). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (**Davy V Garrett (1878) 7 ch.D. 473 at 489**). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

37. Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence. The onus was on the Plaintiff to prove fraud on the part of the Defendant. He did discharge that duty. In the case of **Insurance Company of East Africa vs. The Attorney General & 3 Others Hccc135/1998** it was held that whether there was fraud is, however, a matter of evidence.

38. Under para 6 of the Plaintiff, the Plaintiff has pleaded and particularized 5 incidences of fraud, malfeasance and misrepresentation on the part of the 1st Defendant. For purposes of emphasis I find it relevant to repeat them here;

- a. Causing the land to be transferred to him when he knew the Plaintiff was not privy to any transaction pertaining to the transfer.
- b. By denying the Plaintiff the right of use of her parcel of land.
- c. Presenting forged and irregularly acquired documents to effect the transfer.
- d. Transferring the land to himself without following the right procedures with a view to depriving the Plaintiff his lawfully acquired title.
- e. Conniving with unknown individuals to defraud the Plaintiff of her land.

39. In her testimony in Court she stated that that she was issued with a title in 1990 and she did not occupy the land but visited it sometimes and that for 26 years all was well until 2017 when she was alerted by her son in law that the land had been fenced and was under cultivation. Her position is that she did not sell the land to any of the Defendants.

40. During trial she informed the Court that she did not have the original title nor the original receipts showing payments for the land. When asked about the whereabouts of her original title she contradicted herself and answered in various fashions; that the title was taken by the County Council; that it is with the Director of Criminal investigation; that it is with her lawyer.

41. Further she stated that she did not know the Defendants as she only learned of their names through the green card. Further that she did not know that the 1st Defendant became registered as owner of the land a month after she was registered nor how long it took the subsequent transfers to the other Defendants. She stated that she did not blame the 3rd and 4th Defendants for any fraud although she has sued them.

42. In her further testimony and in answer to a question by Ms. Mwalosi learned Counsel for the 5th Defendant, she stated that the documents of title were with someone outside the Court. She did not elaborate further.

43. The Plaintiff accuses the 1st Defendant of transferring the land to himself in exclusion of the Plaintiff. No documents of transfer were presented before the Court in support of this allegation. As to the presentation of forged and irregularly acquired documents by the 1st Defendant, it is imperative to note that the Plaintiff failed to present any documents, handwriting expert opinion to support the allegation of forgery. With respect to transferring the land without following the right procedures equally no evidence was laid before the Court to show the irregularity pleaded by the Plaintiff.

44. Her second witness did little to aid her case as he reiterated similar evidence presented by the Plaintiff.

45. In the case of Rosemary **Wanjiku Murithi v George Maina Ndinwa (2014) eKLR**, where the Court held that proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud.

46. Equally in the case **Emfil Ltd v Registrar of Titles Mombasa & 2 others [2014] eKLR** this Court pronounced itself as follows on the issue: -

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities....”

47. Lord Denning LJ in a famous dictum in the case of **Lazarus Estates Ltd v Beasley [1956] 1 QB 702, 712** stated that;

“No Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever ...” (emphasis is mine).

48. Impeachment of a title in Kenya is provided for in law. The law as set out in Section 26 of the Land Registration Act in particular mandates all Courts to take a certificate of title issued to a proprietor by the Land Registrar as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to easements restrictions and conditions endorsed on the title. The section provides two instances in which a title may be impugned; on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

49. Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence. The onus was on the Plaintiff to prove fraud on the part of the 1st Defendant. She did not discharge that duty. In the case of **Insurance Company of East Africa vs. The Attorney General & 3 Others Hccc135/1998** it was held that whether there was fraud is, however, a matter of evidence.

50. It is not difficult for the Court to conclude that the Plaintiff failed to discharge the burden of proof required of her in proving her claim. The burden of proof does not shift to the Defendants.

51. I must address the issue of laches in this case. I have noted that the Plaintiff pleaded that she discovered in 2017 that the title had changed hands however the restriction was registered on the title in 2016 to suggest that she may have realized this earlier on.

52. As to whether the 5th Defendant connived with the 1st Defendant to register documents whose status were questionable, the Court found that the Plaintiff neither presented any documents or evidence in support of this claim. For example the documents would have been in form of transfers.

53. The Plaintiff was categorical in her pleadings and it is noted that she did not plead any fraud on the part of the 3rd and 4th Defendants. She stated in evidence that;

“I have not blamed the 3rd and 4th Defendant for fraud. I have sued all of them although I do not know them”.

54. The 3rd and 4th Defendants have pleaded that they are bonafide purchasers without notice. That after due diligence they acquired the land from the 2nd Defendant at the sum of Kshs 8.2 million in 2016. An agreement of sale was adduced in evidence. Another agreement of sale between the 1st Defendant and the 2nd Defendant dated the 17/12/1990 was also adduced in evidence. Further a Land Control Board consent with respect to the change of name of John Gathogo Kiriko to John Richard Gathongo Kiriko was obtained on the 14/4/16 and the said change of name was registered on the 5/7/16.

55. Black’s law Dictionary 8th Edition defines 'bona fide purchaser' as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.” ...

56. For one to successfully rely on the bonafide purchaser doctrine he must prove that he holds the certificate of title; purchased the property in good faith; he had no knowledge of the fraud; he purchased for valuable consideration; the vendors had apparent valid title; he purchased without notice of any fraud; he was not privy to the fraud. See the case of **Hannington Njuki Vs Willian Nyanzi HCCC No 434 of 1996** quoted with approval in the case of **Katende V Harridas & Company Limited EALR (2008) 2EA**.

57. The Uganda case of **Katende Vs Haridas & Company Limited (2008) 2 EA 174** defined a bonafide purchaser as thus;

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

58. After careful review of the evidence on record the Court is satisfied that the Plaintiff has not succeeded in impeaching the title of the 3rd and 4th Defendants. The Court was shown an apparent title held by the 2nd Defendant which was transferred to the 3rd and 4th Defendants. There are no grounds adduced by the Plaintiff to assault this title.

59. In the end I make orders as follows;

- a. The Plaintiffs case fails. It is dismissed.
- b. The 3rd and 4th Defendant’s counterclaim succeeds.
- c. The costs of the suit and the counterclaim shall be borne by the Plaintiff in favour of the 4th -6th Defendants.

60. It so ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 11TH DAY OF MARCH 2021

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Mr. Macharia HB for Mwaniki Warima for the Plaintiff

1st and 2nd Defendants – Absent. No appearance.

Kirubi for the 3rd and 4th Defendants

5th and 6th Absent – AG is absent

Court Assistants, Njeri & Kuyiki