



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 564 OF 2017

JAMES MWANGI MUGURO.....1ST PLAINTIFF

JOSEPHINE WANGUI MWANGI.....2ND PLAINTIFF

VERSUS

JORETH LIMITED.....DEFENDANT

JUDGEMENT

1. By a plaint dated 17th August 2017 the plaintiff seeks judgment against the defendant for:-

(a) Kshs.50,000,000/- plus interest at market rates until payment in full.

(b) Costs of this suit.

(c) Interest on (a) and (b) above at court rates.

(d) Any other remedy that this honourable court may deem fit.

2. Upon being served with copies of plaint and summons to enter appearance, the defendant entered appearance through the firm of M/S Nyiha Mukoma & Company Advocates. It also filed a statement of defence dated 23rd October 2017.

3. PW1, Josephine Wangui Mwangi, the 2nd plaintiff, adopted her witness statement dated 17th August 2017. She also adopted the list of documents dated 4th August 2017. She told the court that she and the 1st plaintiff agreed to purchase the suit property from the defendant. The purchase price was Kshs.1.5 million. A transfer was duly effected and the plaintiffs were issued with a certificate of title. When they started developing the suit property they realized the same had been sold to Richard Kariuki in 1974. The said Richard Kariuki bought from Thome Farmers No 5 Company who had bought from the defendant. The said Richard Kariuki instituted ELC 174 of 2009 in which he was declared the owner of the suit property. It is the plaintiff's case that the defendant was aware of the existence of the said Richard Kariuki on the suit property.

4. She told the court that she seeks compensation in terms of the current market value of the suit property. The suit property is now valued at Kshs.50 million. She wrote a demand letter to the defendant seeking compensation for loss of the suit property. She also seeks costs of the suit and interest.

5. PW2, James Mwangi Muguro, the 1st plaintiff in this case, also adopted his witness statement dated 17th August 2017. He confirmed that in 2007, he bought a plot from the defendant. The sale agreement was produced as exhibit P1 and the transfer as exhibit P2. A title was executed in his favour. It was produced as exhibit P3 and the deed plan exhibit P4.

6. He took possession but someone claimed the land as his. He produced a certificate of official search as exhibit P5. The said Richard Kariuki filed a suit against them and the defendant herein being ELC 174 of 2009 (OS). The judgment was produced as exhibit P6. The effect of that judgment is that the title issued to the plaintiffs was cancelled. He then claimed a refund of the purchase price from the defendant. He produced the demand letter as exhibit P7 (a) and (b) respectively. He prays for the refund of the purchase price plus costs of the suit.

7. PW3, Albert Obuto, a land valuer told the court that he did valuation in respect of LR NO 13330/57. The report is dated 28th February 2018. He produced the report as exhibit P9 and his practicing certificate as exhibit P8. He valued the land at Kshs.50 million. He produced

receipt for his fees as exhibits P10, b, c for Kshs. 55,000/-.

8. DW1 Robertson Nderitu, Operations Manager of the defendant, adopted his witness statement dated 23rd October 2017. He told the court that LR No 13330 belongs to the defendant. He said he was aware that LR 13330/57 was sold to the plaintiffs. That the plaintiffs were aware there were plantations belonging to Richard Kariuki on the suit land. That the plaintiffs participated in ELC 174 of 2009 (O.S) as the 2nd and 3rd defendants. He stated that the plaintiffs purchased the suit property knowing there was a plantation on the suit property. That it is not justifiable for the plaintiff to claim Kshs.50 million as refund. He prays that the suit be dismissed with costs.

9. At the close of the oral testimonies parties tendered written submissions.

The Plaintiffs' Submissions

10. They are dated 27th April 2020. They raise three issues for determination:-

(a) Whether the sale of the suit land by the defendant to the plaintiffs was fraudulent.

(b) Whether the plaintiffs are bonafide purchasers for value without notice.

(c) Whether the plaintiffs are entitled to the reliefs sought.

11. The plaintiffs claim against the defendant is anchored on fraud. They have put forward the case of **Railal Gordhanbhai Patel vs Lalji Makanji [1957] 314**. The plaintiffs have demonstrated fraud as against the defendant and are entitled to the reliefs sought. The plaintiffs were issued with a certificate of title after successful transfer of the suit property. They have put forward the cases of **Crispus Thuku Kinene vs Teresia Waithira Machua [2017] eKLR; Zebak Ltd vs Nadem Enterprises Ltd [2016] eKLR**.

12. The plaintiffs have a certificate of title having purchased the suit property in good faith for valuable consideration with no knowledge of fraud. They are *bonafide* purchasers for value without notice and therefore entitled to protection of the law as such. They have put forward the case of **David Peterson Kiengo & 2 Others vs Kariuki Thuo [2012] eKLR**. Due to the fault on the part of the Defendant, who did not even bother to call witnesses in ELC 174 of 2009 (O.S), the certificate of title was cancelled and the suit property registered in favour of Richard Kariuki.

13. The plaintiffs have been deprived of their constitutional right to property under Article 40 of the Constitution. They have put forward the case of **Francis Kinyanjui Mwangi vs Mugo Gitari alias Julius Mutugi Muchemi & 3 Others [2019] eKLR; Zebak Ltd vs Nadem Enterprises Ltd (Supra)**. The plaintiffs are entitled to the reliefs sought. The valuation report produced as exhibit P 9 has not been challenged. The same is correct and uncontested. The plaintiffs are entitled to compensation for the loss of property. They also pray for Kshs.55,000/- as per the receipts exhibit P10 b and Kshs.5,000 as P10 c. They also seek costs of the suit and interest.

The Defendant's Submissions

14. They are dated 22nd April 2021 LR NO 13330/57 "the suit property" is a sub division of LR NO 13330. The suit property was sold to the plaintiffs. Prior to the sale agreement, the plaintiffs conducted a site visit and observed that there were plantations belonging to Richard Kariuki Joel Gichu on the land. The plaintiffs were made aware of the pending suit ELC 174 of 2009 (OS). Despite the said material disclosure the plaintiffs willingly entered into a sale agreement in respect of the said property. The plaintiffs vehemently defended the suit, ELC 174 of 2009 (O.S).

15. They raise three issues for determination:-

(i) Whether the plaintiffs are bonafide purchasers for value without notice of the suit property.

(ii) Whether the sale of the suit property by the defendant to the plaintiffs was fraudulent.

(iii) Whether the plaintiffs are entitled to the reliefs.

16. It is not in dispute that vide a judgment delivered on 7th October 2013 by Justice P. Nyamweya in ELC 174 of 2009 (O.S), the title of the suit property in respect of the plaintiffs was ordered cancelled and the same acquired by adverse possession by Richard Kariuki Joel Gichu.

17. The said material disclosure by the defendant to the plaintiffs notwithstanding, the plaintiffs acquiesced to proceed with the purchase of the suit property. They even conducted a search in respect of the suit property which revealed the defendant as the registered owner of the suit property.

18. The plaintiffs cannot be heard to mislead this court that the suit land was vacant during their site visit. They were fully aware of the existence of the napier grass belonging to Richard Kariuki Joel Gichu and the existence of ELC 174 of 2009 (OS). The plaintiffs cannot qualify as *bona fide* purchasers for value without notice of the suit land. It has put forward the case of **M'Nyeri M'rimunya vs Beth Kaari & 2 Others [2018] eKLR**. The plaintiffs were not *bonafide* purchasers without value of Richard Kariuki Joel Gichu's claim and or existence of plantations purportedly belonging to him and being thereon.

19. The sale of the suit land by the defendants was not fraudulent in any way. The plaintiffs have not proved any fraud against the defendant. The ownership of the suit land only changed pursuant to the judgment of 7th October 2013 in ELC 174 of 2009 (O.S) wherein Richard Kariuki was rendered the registered owner of the suit property by dint of adverse possession. The plaintiffs have failed to prove that the sale of the suit land by the defendant to the plaintiff's was fraudulent. It has put forward the case of **R. G. Patel vs Lalji Makanji** cited in the case of **Gladys Wanjiru Ngacha vs Theresa Chepsaat & 4 Others [2013] eKLR**.

20. The plaintiffs' claim for the current market value of the suit land cannot stand. They are only entitled to a refund of Kshs.1.5 million. It has put forward the case of **Lilian Wairumu Kimotho vs Samuel Njoga Kimotho & Another [2020] eKLR**.

21. The plaintiffs have failed to prove fraud on the part of the defendant in respect of the sale of the suit land. They are only entitled to refund of the purchase price.

22. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf for the parties and the authorities cited. The issues for determination are:-

(i) Whether the sale of the suit land by the defendant to the plaintiff was fraudulent.

(ii) Whether the plaintiffs are bonafide purchasers for value without notice.

(iii) Are the plaintiffs entitled to the reliefs sought?

(iv) Who should bear costs of the suit?

23. It is not in dispute that the defendant sold the suit property to the plaintiffs. The sale agreement is dated 19th July 2007 and the transfer is dated 22nd October 2007. They were issued with a Title on 26th February 2008. I have gone through the said sale agreement and I find that it has no default and/or indemnity clause.

24. I have gone through the judgment in ELC 174 of 2009 (OS). The plaintiffs herein participated in that case as the 2nd and 3rd defendants. In that case the Honorable Judge entered judgment for the plaintiff as follows:-

“1 That Richard Kariuki Joel Gichu be and is hereby declared to have acquired title by adverse possession to the suit premises known as LR No 13330/57 situated in Nairobi.

2. That the registration of James Mwangi Muguro and Josephine Wangui Mwangi as proprietors of LR No 13330/57 be cancelled forthwith and the land registrar do rectify the register to enter the name of Richard Kariuki Joel Gichu as registered proprietor of LR No. 13330/57.

3. The 1st defendant, shall meet the plaintiffs, 2nd and 3rd defendants costs of this suit.”

25. In his testimony in ELC 174 of 2009 (OS) PW2 (1st plaintiff) herein confirmed that he found napier grass on the plot. He stated that he did not know how it came to be there and whether the same was planted by Richard Kariuki.

26. In paragraph 7 of the plaint the plaintiffs state:-

“Further unknown to the plaintiffs but known to the defendant herein, Thome No. 5 Company Limited, being the owners of the said suit premises subsequently sold the property to Richard Kariuki Joel Gichu who immediately took possession of the suit property”.

It is very clear from the proceedings in ELC 174 of 2009 (OS) that the defendant never sold the suit property to the said Richard Kariuki Joel Gichu but that he claimed the same through adverse possession.

27. In paragraph 9 of the plaint the plaintiffs state:-

“The defendant failed, refused, ignored and or neglected to inform the plaintiffs of the change of ownership of the suit premises, but fraudulently represented themselves as the registered and/or beneficial owners thereby inducing the plaintiffs to enter into the aforementioned contract of sale and duly paid the purchase price”.

It was the plaintiffs evidence that they conducted a search at the lands registry and confirmed that the defendant was the registered owner of the suit property. It was only after judgment in ELC 174 of 2009 (OS) that the suit property was registered in the name of Richard Kariuki Joel Gichu. The plaintiffs have adduced no evidence to show that the defendant herein fraudulently represented itself to be the registered owner of the suit property.

28. I find that the plaintiffs failed to prove the allegations of fraud on the part of the defendant. The standard of proof required for a party to prove fraud is well laid out by the Court of Appeal in the case of **Dennis Noel Mukhulo Ochwada & Another vs Elizabeth Murungari Njoroge & Another [2018] eKLR** where the court stated as follows:-

“As regards standard of proof of fraud, the law is quite clear. In R. G. Patel vs Lalji Makanji (Supra) the former Court of Appeal for Eastern Africa stated thus:

“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”.

Similarly, in the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR Tunoi JA** stated that:-

“It is well established that fraud must be specifically pleaded and that the particulars of fraud must be specifically pleaded and that the particulars alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the facts”

I find that the plaintiffs have failed to discharge their burden of proving fraud on the part of the defendant.

29. The plaintiffs admit that the defendant did not sell the suit property to Richard Kariuki Joel Gichu. He acquired it through adverse possession.

30. The valuation report produced as exhibit P9 states that the suit property is now worth about Kshs.50 million. The same is dated 5th March 2018. When cross examined, the valuer (PW3) stated that he did not do any valuation of the suit property in 2007. The judgment in ELC 174 of 2009 (O.S) was delivered in 2013. This suit was filed on 17th August 2017. There is no explanation for the delay in bringing this suit. There is no valuation report for the year 2013.

31. All in all, I find that the plaintiffs have failed to prove fraud on the part of the defendant. I find that the plaintiffs are only entitled to a refund of the purchase price of Kshs.1.5 million.

32. Accordingly, judgment is entered for the plaintiffs as against the defendant for

(a) A refund of Kshs.1,500,000/- plus interest at courts rates from the date of filing this suit until payment in full.

(b) Costs of the suit and interest.

It is so ordered.

Dated, signed and delivered in Nairobi on this 29th day of April 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Nzioka for the Plaintiffs

Mr. Banji for the Defendant

Phyllis – Court Assistant