



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 1126 OF 2015**

**PATRICK CHEGE GITHUKA.....PLAINTIFF**

**- VERSUS -**

**PETER MAINA KANENE.....1<sup>ST</sup> DEFENDANT**

**NANCY NJERI KANENE.....2<sup>ND</sup> DEFENDANT**

**EQUITY BANK LIMITED.....3<sup>RD</sup> DEFENDANT**

**THE LAND REGISTRAR THIKA DISTRICT.....4<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**RULING**

The plaintiff brought this suit on 5<sup>th</sup> November, 2015 against the defendants seeking the following reliefs:

- i. A declaration that the plaintiff was the registered proprietor of all that parcel of land known as Thika Municipality Block 24/1298 (“the suit property”).
- ii. A declaration that the charge registered against the suit property was illegal and fraudulent.
- iii. An order directing the 4<sup>th</sup> defendant to cancel the charge registered against the suit property in favour of the 3<sup>rd</sup> defendant.
- iv. An order restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants from interfering with the suit property in any manner whatsoever.

The plaintiff averred that at all material times, he was the registered proprietor of the suit property. The plaintiff averred that he moved to the United States of America in 1987 and left the 1<sup>st</sup> defendant who was his nephew to look after his economic interests in Kenya which included various investments. The plaintiff averred that the 1<sup>st</sup> defendant handled on his behalf the transaction through which he acquired the suit property and for that reason the 1<sup>st</sup> defendant had in his possession the title deed for the suit property.

The plaintiff averred that he came back to Kenya in 2015 and wanted to sell the suit property. The plaintiff averred that when he carried out a search on the title of the suit property at the Land Registry, he discovered that the suit property had been charged to the 3<sup>rd</sup> defendant to secure a sum of Kshs. 1,406,25/= that was lent to the 2<sup>nd</sup> defendant by the 3<sup>rd</sup> defendant. The plaintiff averred that the act of charging the suit property in favour of the 3<sup>rd</sup> defendant to secure the 2<sup>nd</sup> defendant’s indebtedness was illegal and fraudulent in that the 2<sup>nd</sup> defendant was not the owner of the suit property and the plaintiff did not consent to the charge.

Together with the plaint, the plaintiff brought an application by way of Notice of Motion dated 5<sup>th</sup> November, 2015 seeking among others, a temporary injunction to restrain the defendants from selling, disposing of or in any manner interfering with the suit property pending the hearing and determination of the suit. The 3<sup>rd</sup> defendant responded to the application through a replying affidavit sworn on 10<sup>th</sup> March, 2017 by its Credit Manager, Njenga Ndung’u. The 3<sup>rd</sup> defendant averred that it advanced a loan facility of Kshs. 4,500,000/= to the 2<sup>nd</sup> defendant which was secured by among others, a charge over the suit property and a personal guarantee and indemnity of the plaintiff. The 3<sup>rd</sup> defendant annexed to its affidavit a copy of a charge over the suit property dated 5<sup>th</sup> February, 2015 and a copy of a deed of guarantee and Indemnity of the same date said to have been executed by the plaintiff in favour of the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> defendant averred that it acted

in the transaction in good faith and that the 2<sup>nd</sup> defendant had agreed to provide it with an alternative security after which it would discharge the charge over the suit property.

The 2<sup>nd</sup> defendant responded to the application through a replying affidavit sworn on 9<sup>th</sup> February, 2017. The 2<sup>nd</sup> defendant contended that the plaintiff's claim was baseless because the plaintiff was his uncle and had voluntarily given the 1<sup>st</sup> defendant who was her brother the title deed for the suit property. The 2<sup>nd</sup> defendant averred that the title deed for the suit property was handed over to the plaintiff's advocates on 21<sup>st</sup> April, 2016 and as such the plaintiff's application for injunction had been overtaken by events.

When the matter came up on 17<sup>th</sup> December, 2018, the parties informed the court that they had compromised the suit and that the only issue that was outstanding and on which the parties could not agree was that of costs of the suit. The court marked the suit as having been compromised save for costs and directed the parties to address the court on the issue of costs to enable the court determine the same. The parties were directed to file written submissions on the issue. Only the advocates for the plaintiff filed submissions pursuant to the said court order.

I have considered the plaintiff's submissions dated 27<sup>th</sup> February, 2020 on the issue of costs. Under section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, the costs of and incidental to a suit is at the discretion of the court. I have at the beginning of this ruling set out the plaintiff's case and the defendants' response to the same. It is not disputed by the defendants that the suit property was at all material times owned by the plaintiff and that the same was charged to the 3<sup>rd</sup> defendant on 5<sup>th</sup> February, 2015 to secure a loan that was advanced to the 2<sup>nd</sup> defendant. It is also not disputed that the property was charged to the 3<sup>rd</sup> defendant while the plaintiff was out of the country and without his consent. It follows therefore that the charge and personal guarantee and indemnity that was purportedly given by the plaintiff to the 3<sup>rd</sup> defendant to secure the loan advanced to the 2<sup>nd</sup> defendant were forged.

This explains why the charge was discharged and the title for the suit property returned to the plaintiff soon after the suit herein was filed. The suit was therefore brought as a result of the 1<sup>st</sup> and 2<sup>nd</sup> defendants' acts of fraud and forgery. In the circumstances, justice would demand that the 1<sup>st</sup> and 2<sup>nd</sup> defendants pay the plaintiff's costs of the suit; the 1<sup>st</sup> defendant as the person in whose custody the plaintiff had entrusted the title for the suit property and the 2<sup>nd</sup> defendant as the beneficiary of the fraudulent charge over the suit property in favour of the 3<sup>rd</sup> defendant.

I have noted that none of the defendants filed a defence and that the suit was compromised early in the proceedings even before the application for interlocutory injunction was heard. Due to the foregoing, I will assess the costs payable to the plaintiff by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Taking all factors into account including the nature of the claim and the fact that the suit was settled by the parties out of court, I have assessed the costs payable by the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally to the plaintiff at Kenya Shillings Fifty Thousand (Kshs. 50,000/=) all inclusive. The said amount shall be paid within 45 days from the date hereof in default of which the plaintiff shall be at liberty to apply for execution for the recovery thereof.

**DELIVERED AND DATED AT NAIROBI THIS 15<sup>TH</sup> DAY OF APRIL, 2021**

**S. OKONG'O**

**JUDGE**

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

N/A for the Plaintiff

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

N/A for the 3<sup>rd</sup> Defendant

Ms. C. Nyokabi-Court Assistant