



Rap Construction Company Limited v Hussein Fakhruddin Mohamedbhai t/a Niessuh Properties LLC & 2 others; Rashida Mansurali Rajabali Virani t/a Lady In White (Counter Claimer); Hussein Fakhruddin Mohamedbhai t/a Niessuh Properties LLC & another (Defendant to the Counterclaim); Chief Land Registrar (Third party) (Environment & Land Case 1 of 2023) [2023] KEELC 20685 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20685 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1 OF 2023**

**JO MBOYA, J
OCTOBER 5, 2023**

BETWEEN

RAP CONSTRUCTION COMPANY LIMITED PLAINTIFF

AND

**HUSSEIN FAKHRUDDIN MOHAMEDBHAH T/A NIESSUH PROPERTIES
LLC 1ST DEFENDANT**

**RASHIDA MANSURALI RAJABALI VIRANI T/A LADY IN
WHITE 2ND DEFENDANT**

CHIEF LAND REGISTRAR 3RD DEFENDANT

AND

**RASHIDA MANSURALI RAJABALI VIRANI T/A LADY IN
WHITE COUNTER CLAIMER**

AND

**HUSSEIN FAKHRUDDIN MOHAMEDBHAH T/A NIESSUH PROPERTIES
LLC DEFENDANT TO THE COUNTERCLAIM**

**RAP CONSTRUCTION COMPANY LIMITED DEFENDANT TO THE
COUNTERCLAIM**

AND

CHIEF LAND REGISTRAR THIRD PARTY



JUDGMENT

Introduction and Background

1. The Instant suit was filed and or commenced by the Plaintiff herein who sought to be declared as the lawful and legitimate proprietor of all that property known as Apartment B09, erected on LR No. 1870/V/35/9; situate within the City of Nairobi, (hereinafter referred to as the “suit property”).
2. Following the filing and service of the instant suit, the 2nd Defendant/Counter claimer duly entered appearance and thereafter filed a Statement of Defence and Counter claim wherein same sought for various reliefs inter-alia;-
 - a. The Plaintiff’s suit against the 2nd Defendant be dismissed with costs to the 2nd Defendant.
 - b. The court allows the cross-claim/counter claim against the 1st Defendant and do find and decree as hereunder.
 - i. The Certificate of Lease issued to the 1st Defendant is null and void for being fraudulently registered.
 - ii. The Title over the suit property validly rests and remains with the 2nd Defendant.
 - c. The court compels the Chief Land Registrar to cancel the Certificate of Lease issued to the 1st Defendant and subsequently to the Plaintiff pursuant to Section 26 (1), (a) of the [Land Registration Act](#), Number 3 of 2012.
 - d. General damages be awarded to the 2nd Defendant against the 1st Defendant on account of fraudulent misrepresentation, forgery and falsification of documents.
 - e. The 2nd Defendant be awarded costs of the counter-claim together with interest thereon at such rate as the court may deem fit to order.
 - f. Any such other or further relief as the court may deem appropriate to make.
3. Though the 1st Defendant to the counter claim, as well as the Plaintiff to the main suit were duly served with the counter claim, same neither responded thereto nor filed any Statement of defence.
4. On the other hand, the Counter claimer herein thereafter sought for and obtained leave to issue and serve Third Party Notice. Consequently and in this respect, the counter claim proceeded to and indeed extracted and served the Third Party Notice upon the Chief Land Registrar.
5. Instructively, the Counter claimer contended that the fraudulent certificate of title which had previously been issued in favour of the 1st Defendant and thereafter transferred to and registered in the name of the Plaintiff/ Second Defendant to the Counter-claim, could not have been issued and or processed, without the participation and involvement of the Chief Land Registrar.
6. It is important to underscore that upon being served with the Third Party Notice, the Chief Land Registrar duly entered appearance, but however failed to file any Response. In this regard, the matter thereafter proceeded for hearing, without the Third Party filing any pleadings and/or documents.
7. Other than the foregoing, it is also imperative to observe that before the matter could proceed for hearing, the Plaintiff indicated that same was no longer staking and/or laying a claim to ownership to



and in respect of the suit property. In this regard, the Plaintiff sought to abandon her claim against the 2nd Defendant/Counter claimer.

8. Furthermore, the Plaintiff indicated that the same was keen to pursue and procure Judgment against the 1st Defendant, who had hitherto sold the suit property unto her. For good measure, the Plaintiff thereafter proceeded to and obtained Judgment on account of refund of the purchase price that was paid to the 1st Defendant in terms of the default Judgment entered and endorsed on the court record on the 13th July 2023.
9. Arising from the foregoing, the Counter claim herein thus proceeded as against the 1st Defendant to the Counter claim and the Third Party only.

Evidence by the Parties:

a. Counter claimer's case

10. The Counter claimer's case revolves and gravitates around the Evidence of one witness, namely, Rashida Mansurali Rajabali Virani, who testified as CW1. It was the evidence of the witness that the suit property herein belongs to and is registered in her name. In this regard, the witness tendered and produced before the court a copy of the certificate of title confirming that indeed the suit property belongs to and is registered in her name.
11. Additionally the witness testified that same is conversant and familiar with the 1st Defendant herein whom same (the witness) had leased and/or rented the suit apartment to, on the basis of the Tenancy Agreement entered into and executed on the 21st March 2022.
12. Nevertheless the witness averred that despite being a tenant in the suit apartment, the 1st Defendant to the counter claim purported to be the owner thereof and thereafter forged documents, culminating into (sic) the transfer and registration of the apartment in his name.
13. Furthermore it was the testimony of the witness that after the 1st Defendant had fraudulently caused the suit apartment to be transferred and registered in his name, same thereafter purported to sell and transfer the suit apartment to the Plaintiff, though without the knowledge, consent and/or authorization of the witness.
14. On the other hand, the witness averred that same came to know of the fictitious and fraudulent dealings between the 1st Defendant and the Plaintiff when she (witness) was called by an Advocate working with the firm of MMC Africa LLP, who indicated that same were conducting due diligence on behalf of a client who was keen to purchase and/or acquire the suit property from the 1st Defendant.
15. It was the testimony of the witness that upon receipt of the said telephone call, same made arrangements and thereafter met the Advocate, culminating into her (witness) obtaining the information touching on or affecting the suit property. However, the witness added that at no point in time did she authorize the 1st Defendant to sell and/or dispose of the suit property on her behalf or at all.
16. Finally, the witness averred that the transactions carried out and/or undertaken by the 1st Defendant, commencing with the offensive transfer and registration of the apartment in the name of the 1st Defendant; and thereafter the attempted sale and transfer thereof to the Plaintiff, were wrought with fraud and illegality.



17. Based on the foregoing, the witness implored the court to find and hold that she is the lawful and legitimate proprietor of the suit apartment and thereafter the court to cancel/revoke the fraudulent title in the name of the 1st Defendant as well as the one in the name of the Plaintiff herein.

b. 1st Defendant's to the Counter claim

18. Though served with the statement of defence and counter claim, the 1st Defendant to the counter claim neither entered appearance nor filed any statement of defence. In this regard, the case proceeded on the basis of formal proof as against the 1st Defendant to the counter claim.

c. 3rd Party's case

19. Upon being served with the Third Party Notice pursuant to and in terms of Order 1, Rule 15 of the Civil Procedure Rules, the Third Party herein, namely, the Chief Land Registrar, duly entered appearance but thereafter failed to file any responses.

20. Similarly, the Counter claim's case as against the Third Party also proceeded on the basis of formal proof.

Parties' Submissions:

21. Upon the close of the counter claimers' case, Learned counsel for the Counter claimer intimated to the Court that same was not filing any written submissions. Further and in any event, Learned Counsel contended that the evidence tendered by and on behalf of the Counter claimer had not been controverted.

22. Arising from the foregoing, Learned Counsel for the Counter claimer thereafter invited the Honourable court to adopt the evidence tendered by and on behalf of the Counter claimer and thereafter to make a finding that the Counter claimer was the lawful and legitimate proprietor of the suit property. Furthermore, Learned Counsel invited the court to proceed and revoke the fraudulent certificate of title issued to and in favour of the 1st Defendant as well as the Plaintiff herein.

23. Similarly, Learned Counsel for the Third Party also intimated to the court that same was neither making nor filing any written submissions. In this respect, learned counsel for the Third Party also left the matter to be determined by the court.

Issues for Determination :

24. Having reviewed the counter claim filed by and on behalf of the counter claimer, and upon consideration of the Evidence (both oral and documentary) tendered, the following issues do emerge and are thus worthy of determination.

- i. Whether the transfer and registration of the suit property in favour of the 1st Defendant and thereafter in favour of the Plaintiff, was fraudulent.
- ii. Whether the Plaintiff is the lawful proprietor of the suit property and if so, whether the Plaintiff is entitled to the reliefs sought.



Analysis And Determination

Issue Number 1

i. Whether the transfer and registration of the suit property in favour of the 1st Defendant and thereafter in favour of the Plaintiff, was fraudulent.

25. The Counter claimer testified before the court and intimated to the court that same is the lawful and legitimate proprietor over and in respect of the suit property, namely, B09, erected on LR No. 1870/V/35/9 (otherwise referred to as the suit property).
26. Furthermore, the Counter claimer testified that she entered into a Tenancy Agreement with the 1st Defendant whereupon same leased and/or rented the suit apartment to the 1st Defendant. For clarity, the Counter Claimer tendered and produced before the court a copy of the Tenancy Agreement duly executed between herself and the 1st Defendant herein.
27. However, despite being a tenant in the suit property, the 1st Defendant herein, without the permission and/or consent of the Counter Claimer proceeded to and caused the suit property to be transferred and registered in his name. Instructively, the transfer instruments which facilitated the transfer and ultimate registration of the suit property in favour of the 1st Defendant, were neither sanctioned by nor executed by the Counter claimer.
28. In any event, it is not lost on the court that despite having been served with the counter claim, the 1st Defendant herein neither entered appearance nor contested the reliefs sought at the foot of the counter claim.
29. Premised on the basis that the testimony by the Counter claimer was neither challenged nor contradicted, this court finds and holds that indeed the impugned transfer and ultimate registration of the suit property in favour of the 1st Defendant, was indeed fraudulent and illegal.
30. To the extent that the 1st Defendant did not own the suit property, same therefore was divested of any lawful rights and/or interests over the suit property. In this regard, it suffices to point out that the 1st Defendant therefore had no title capable of being transferred to and in favour of the Plaintiff, whatsoever. For good measure, the Doctrine of Nemo dat Quod non-habet applies to and vitiates the transactions by the First Defendant herein.
31. In view of the foregoing, it is evident and apparent that both the 1st Defendant and the Plaintiff/ Second Defendant to the Counter-claim were involved in a fraudulent dealing touching and or concerning the suit property, albeit without the knowledge and involvement of the lawful owner.
32. In a nutshell, I find and hold that the actions and/or omissions of the 1st Defendant, who is the one who purported to own the property before attempting to transfer same to the Plaintiff, were illegal and unlawful. Consequently, neither the 1st Defendant nor the Plaintiff procured any lawful title over the suit property.
33. To surmise, my answer to issue number one is to the effect that the actions or activities by and on behalf of the 1st Defendant were fraudulent, illegal and unlawful. Consequently, the 1st Defendant neither procured nor obtained any lawful title to the suit property or at all.



Issue Number 2

ii Whether the Plaintiff is the lawful Proprietor of the suit property and if so, whether the Plaintiff is entitled to the reliefs sought

34. During and in the course her testimony before the court, the Counter claimer adduced evidence, including a copy of the certificate of title in respect of the suit property, which confirmed that indeed she is the lawful and legitimate proprietor of the suit property.
35. On the other hand, the Counter claimer also intimated to the court that the only relationship that she had with the 1st Defendant was one of a tenant and landlady, whereupon she demised the suit apartment to the 1st Defendant.
36. There is no gainsaying that as a tenant, the 1st Defendant did not have the legal rights and/or mandate to transfer and register the suit property in his name. Nevertheless, despite the impugned actions by the 1st Defendant, the Counter claimer herein, remained with the original certificate of title which underscored her rights to and in respect of the suit property.
37. To my mind, given that the Counter claimer was and remains the lawful owner of the suit property, her rights to and in respect thereof, can only be affected through a lawful and legitimate process, carried out and undertaken with her knowledge, consent and involvement.
38. However, in respect of the subject matter, the Counter claimer did not sanction the impugned alienation, sale and/or transfer of the suit property, neither to the 1st Defendant nor the Plaintiff. At any rate, while discussing issue number 1, the court has since found and held that the impugned transaction was fraudulent.
39. In so far as the Counter claimer holds and is the registered proprietor of the suit property, same is therefore conferred and vested with the requisite mandate and/or rights over and in respect of the suit property. For good measure, the extent and scope of the counter claimer's right to the suit property are underpinned by the provisions of Sections 24 and 25 of the *Land Registration Act*, 2012, which inter-alia, provides that the registered owner of Land is vested with absolute and exclusive Rights and privileges thereto.
40. Instructively, the rights that inheres in the Counter claimer include the right to occupation, possession and use of the suit property, to the exclusion of all and sundry the 1st Defendant not excepted.
41. Arising from the foregoing, it is therefore common ground that the counter claimer, by virtue of being the registered owner/proprietor of the suit property is entitled to the protection of the law, as pertains to the ownership of the property. Consequently, it suffices to point out that any parallel title that may have been issued with or without the involvement of the Third Party, over the suit property, is therefore illegal and ought to be revoked.
42. To buttress the extent and nature of the rights of a title holder, it suffices to cite and reiterate the dictum of the Court of Appeal in the case of Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR, where the court stated and held as hereunder;-

“If a certificate of lease duly issued by the Registrar is prima facie evidence of ownership and if the owner is proved to have exercised due diligence at the point of acquisition, on what basis could the appellants' petition for protection under Article 40 be defeated?”



It has long been accepted beyond debate that the land registration process in Kenya is a product of the Torrens system. This was acknowledged in, among a long line of decided cases, this Court's judgments in *Dr. Joseph Arap Ngok V. Justice Moiyo ole Keiwua & 5 others*, Civil Appeal No. Nai. 60 of 1997 and *Charles Karathe Kiarie & 2 Others V Administrators of Estate of John Wallance Muthare (deceased) & 5 others*, Civil Appeal 225 of 2006."

43. Furthermore, the significance of a Certificate of title and the protection arising therefrom was also underscored in the case of *Waas Enterprises Limited Versus Nairobi City Council* 2014 eKLR, where the court stated thus:-

"As a registered proprietor, the plaintiff is entitled to enjoy all proprietary rights to the exclusion of all others. This includes the right to exclusive possession of the suit land. The rights of a proprietor of land are set out in Sections 24 and 25 of the *Land Registration Act* which provide as follows :-

"24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 1. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 2. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee."

It therefore follows from the above that only the plaintiff is entitled to enjoy proprietary rights over the suit land. The 2nd defendant had no right to the suit land."



44. From the foregoing, there is no gainsaying that by virtue of being the registered proprietor of the suit apartment, the Counter claimer herein is entitled to exclusive and absolute rights over and in respect thereto. Notably, the said rights are exercisable against the whole world, subject only to the overriding interests in terms of Section 28 of the Land Registration Act, 2012.
45. In short, it is my finding and holding that the Counter claimer is therefore entitled to the reliefs sought at the foot of the counter claim. Further and in addition, I beg to add that the Counter claimer would also be entitled to damages on account of the fraudulent transactions undertaken by the 1st Defendant.
46. As pertains to damages for the fraud and the fraudulent actions on the part of the First Defendant, I opine that an award of Kshs.500,000/= only would suffice. In this respect, the dictum in the case of *Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another* [1979]eKLR, is apt and relevant.
47. Finally and to vindicate the legitimate title in the name of the counter claimer, it is appropriate to order and direct that the fraudulent titles, if any, in respect of Apartment B09, erected on LR No. 1870/V/35/9, be revoked.

Final Disposition :

48. From the foregoing discourse, it must have become crystal clear that the Counter claimer has been able to demonstrate that same is the lawful and legitimate proprietor of suit the apartment; and same is therefore entitled to the requisite protection under the law.
49. Additionally, the Counter claimer has also been able to establish that the impugned actions and/ or activities by the 1st Defendant were fraudulent. Consequently, I hereby proceed to enter Judgement in favour of the Counter claimer on the following terms:-
 - i. The Counter- claimer be and is hereby declared as the Lawful and Legitimate proprietor of Apartment B09, erected on LR No. 1870/V/35/9.
 - ii. The Certificate of title of Apartment B09, erected on LR No. 1870/V/35/9, if any, issued to and bearing the name of the 1st Defendant herein be and is hereby revoked.
 - iii. Similarly, the certificate of title of Apartment B09, erected on LR No. 1870/V/35/9, if any, issued to and bearing the name of the Plaintiff herein be and is hereby revoked.
 - iv. Permanent injunction be and is hereby issued to restrain or prohibit the Plaintiff and the 1st Defendant, either by themselves, agents, servants and/or anyone claiming under them from entering upon, remaining on, interfering with and/or in any other manner dealing with the suit property, which lawful belongs to the counter claimer.
 - v. General damages for fraud be and are hereby awarded in favour of the Counter claimer in the sum of Kshs.500,000/= only as against the 1st Defendant.
 - vi. Cost of the suit be and are herein awarded to the Counter claimer as against the 1st Defendant; and same to be agreed upon and/or in default, same to be taxed by the Deputy Registrar of the Environment and Land Court.
50. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER 2023.

OGUTTU MBOYA



JUDGE

In the presence of:

Ms. Wanjiku holding brief for Ms Jan. Mohammed (SC) for the Counter-claimer.

Ms Lynn Ngira for the Third Party.

No appearance for the Plaintiff/ Second Defendant to the Counter-claim.

No appearance for the 1st Defendant.

