



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO 739 OF 2017

JANE NYOKABI MUNORU.....PLAINTIFF

=VERSUS=

UWEZO MICROFINANCE BANK LIMITED..... 1ST DEFENDANT

ATTORNEY GENERAL OF KENYA.....2ND DEFENDANT

JUDGMENT

1. The plaintiff initiated this suit through a plaint dated 11/9/2017. It was her case that she was at all material times the registered proprietor of **Land Parcel Number Limuru/Kamirithu/4617 [the suit property]**. On or about 31/12/2016, she entered into a land sale agreement with a third party in respect of the suit property. On or about 27/1/2017, the third party applied for an official search for the purpose of applying for the consent of the Land Control Board. To the shock of the plaintiff, the search revealed that the suit property had, on 29/11/2016, been charged to the 1st defendant to secure a loan of **Kshs 5,000,000** lent to an unknown person. On visiting the 1st defendant's offices to demand discharge of the charge, the 1st defendant was unco-operative.

2. Consequently, she reported the matter to the Directorate of Criminal Investigations (the CID) and the CID initiated **Kiambu CMC Misc Application No 53 of 2017** in which they obtained an order enabling them to obtain from the 1st defendant original documents relating to the impugned charge. Police investigations subsequently revealed that the charge was fraudulently procured and registered against her title. She itemized various particulars of fraud and illegality on part of the defendants and contended that the charge was null and void for all purposes.

3. She sought the following reliefs against the defendants jointly and severally:

a) A declaration that the loan guarantee executed on 4/11/2016 and charge and/or restriction registered as Entry No 1 on 29/11/2016 in the encumbrance section against title deed No Limuru /Kamirithu/4617 in favour of the 1st defendant, Uwezo Microfinance Bank Limited is null and void.

b) The District Land Registrar, Kiambu, be and is hereby ordered to cancel, remove and/or discharge forthwith, the charge and/or restriction entered as Entry No 1 on 29/11/2016 in the encumbrances section against title deed No Limuru/ Kamirithu/4617 in favour of the 1st defendant, Uwezo Microfinance Bank Limited

c) Damages for unlawful charge and or restriction entered as Entry No 1 on 29/11/2016 in the encumbrances section against title deed No Limuru /Kamirithu/4617.

d) Costs and interest of the suit. [sic]

e) Such other and further reliefs as the court may deem fit.

4. The 1st defendant filed a statement of defence dated 21/3/2018, in which it denied the substantive allegations made in the plaint. It denied that there was a conclusion made by the CID regarding the impugned charge. It contended that the plaintiff provided the title to the suit property as security for the loan taken by the principal borrower, **Lillian Wanjiru Kamau**. It expressed its intention to apply for the joinder of Lillian Wanjiru Kamau as a defendant and/or third party in the suit. It averred that the plaintiff wilfully provided the title to the suit property and executed all documents required to give effect to the charge and that it was only upon default by the principal borrower that the plaintiff filed the suit to frustrate its recovery of the loan. It denied fraud and illegality as pleaded by the plaintiff. It urged the court to dismiss the suit.

5. The 2nd defendant filed a statement of defence dated 10/10/2017. He denied fraud and illegality on the part of the Land Registrar and averred that if any charge was registered against the suit property, the same was done procedurally and legally. He faulted the plaintiff for initiating the suit without serving a statutory notice on him under Section 13A of the **Government Proceedings Act**. He stated that he was a

stranger to the averments made in the plaint. He urged the court to dismiss the suit.

6. At the hearing, the plaintiff testified as PW1. She adopted her witness statements dated 11/9/2017 as part of her sworn evidence-in-chief. She produced the 9 documents contained in her bundle dated 11/9/2017. Among the documents produced was the report of the CID Documents Examiner dated 25/4/2017. She reiterated her case as summarized above. She added that she had never guaranteed any one for a loan and she had never used her title as a loan security. She further testified that she did not know the person who took the loan from the 1st defendant using a title document in her name.

7. In her evidence during cross-examination, she reiterated that she had her original title with her in court and she had never used it as security or given it as security or given it to anyone to use it as security. She added that she had never lost her original title. She reiterated that she did not know the person who took a loan from the 1st defendant using a title in her name and she did not know the advocate who attested to the signatures on the charge instrument and on the loan guarantee form. It was her evidence that she had not executed any charge in favour of the 1st defendant. She stated that when she learnt about the encumbrance, she reported the matter to the CID. She gave her original title to the CID and the 1st defendant similarly gave to the CID

the title they were holding as security, for forensic examination by the CID.

8. The 1st defendant did not lead evidence. Similarly, the 2nd defendant did not lead evidence.

9. The plaintiff filed written submissions dated 16/11/2021, through the firm of *M/s Milimo, Muthomi & Co Advocates*. Counsel for the plaintiff identified the following as the three issues falling for determination in the suit: (i) whether the charge and/or restriction were unlawfully and fraudulently registered; (ii) Whether the plaintiff is entitled to the reliefs sought; and (iii) Who is to bear the costs of this suit.

10. On whether the charge and/or restriction were unlawfully and fraudulently registered, counsel submitted that the known signature of the plaintiff and the signature on the charge and on the loan guarantee form had been subjected to forensic examination by the CID Documents Examiner and the CID Documents Examiner had established they were made by different authors. Counsel added that the signature of the Land Registrar [**Florence Akinyi**] and the Land Registry Rubber Stamp had similarly been subjected to forensic examination by the CID Documents Examiner and the results were that the signature and the rubber stamp impression were made by different authors and instruments. Counsel submitted that there was evidence from the plaintiff and from the report of the CID Document Examiner that the loan guarantee form and the charge instrument were forgeries. Counsel blamed the 1st defendant for failing to carry out due diligence to ascertain ownership of the land before accepting the documents presented to it as security.

11. On whether the plaintiff was entitled to the reliefs sought, counsel submitted that since 2017 when the impugned charge and restriction were unlawfully registered against the plaintiff's title, the plaintiff had been deprived of her constitutional rights over the suit property. Counsel urged the court to grant her the orders sought and award her damages in the sum of KShs 1,000,000. Counsel urged the court to award the plaintiff costs of the suit.

12. The 1st defendant filed written submissions dated 8/12/2021, through the firm of *W K Nyagita Advocates*. Counsel submitted that the document produced by the plaintiff as Exhibit No 6 showed that the plaintiff appended her signature on the loan guarantee form before a commissioner for oaths as required by law, hence it was apparent that the plaintiff appeared before the commissioner for oaths and identified herself by way of national identity card before she executed the loan guarantee form. Counsel added that the plaintiff had failed to prove the allegations of fraud against the 1st defendant. Counsel urged the court to dismiss the suit.

13. The 2nd defendant filed written submissions dated 24/11/2021. Counsel for the 2nd defendant identified the following as the two issues falling for determination in the suit: (i) Whether there was fraud on part of the 2nd defendant; and (ii) Whether the 2nd defendant should pay costs of the suit.

14. On whether there was fraud on part of the 2nd defendant, counsel submitted that, in registering the charge, the Land Registrar relied on documents presented by the parties and was satisfied that they met the legal requirements relating to the requisite documentation. Counsel stated that it was not possible for the Land Registrar to tell whether or not the documents presented to her were authentic. On whether the 2nd defendant should pay costs of the suit, counsel submitted that because the plaintiff did not issue the statutory notice to the Land Registrar, she was not entitled to costs of this suit as against the 2nd defendant.

15. I have considered the parties' pleadings, the evidence tendered by the plaintiff; and the parties' written submissions. I have also considered the relevant legal framework and jurisprudence on the key issues falling for determination in this suit. Parties did not frame or agree on a common statement of issues to be determined by the court. Taking into account the pleadings, evidence and submissions presented to the court, the following are the three key issues that fall for determination in this suit: (i) *Whether the charge registered on 29/11/2016 in the encumbrances section of the parcel register relating to Title Number Limuru/Kamirithu/4617 was procured fraudulently and/or illegally without the knowledge and/or involvement of the plaintiff;* (ii) *Whether the Plaintiff is entitled to the substantive reliefs sought in the plaint;* and (iii) *What order should be made in relation to costs of this suit.* I will make brief sequential pronouncements on the three issues in the above order.

16. The first issue is whether the impugned encumbrance [charge] was procured fraudulently and/or illegally without the knowledge and/or involvement of the plaintiff. The plaintiff testified as PW1. She was categorical and consistent that she had never used her title as security to guarantee a loan extended to any borrower; she did not know the borrower whom the 1st defendant lent money; she had never lost nor parted with her original title; she had her original title with her in court at the time of giving evidence; she did not execute any documents relating to the encumbrance; she did not know the advocate who witnessed the documents; and she was a total stranger to the loan guarantee form and to the charge document. Her evidence was corroborated by the report of the CID Document Examiner which indicated that the signatures appearing on the loan guarantee form and on the charge document were authored by a different person. The document examiner's report similarly revealed that the Land Registrar's signature appearing on the impugned charge document was not authored by the Land Registrar, Florence Akinyi.

17. The 1st defendant did not lead any evidence to support its defence that the plaintiff gave her title as security and executed the loan guarantee form and the impugned charge document. Both the impugned loan guarantee form and the impugned charge document were attested to by an advocate by the name **Wilkerster Nyangito**. The written submissions filed in this suit on behalf of the 1st defendant were drawn by the firm of *W. K Nyangito & Co Advocates*. If indeed the 1st defendant genuinely believed that the plaintiff executed the impugned documents, they should have tendered evidence by the attesting advocate. Similarly, they should have tendered evidence by their client to demonstrate how she procured the signatures on the impugned documents. They elected not to lead any evidence in this suit.

18. The Court of Appeal in the case of **Kinyanjui Kamau v George Kamau [2015] eKLR** outlined the following principle regarding proof of allegations of fraud;

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

19. In the present case, the plaintiff tendered evidence to the effect that she was not privy to the documents that were used to procure the impugned encumbrance. She also tendered evidence to the effect that she had never parted with nor lost her original title to the suit property. Her evidence was corroborated by the report of the CID Documents Examiner which revealed that the documents used to procure the impugned encumbrance were not authored by the plaintiff. The encumbrance was fraudulently procured by agents of the 1st defendant to secure a loan advanced by the 1st defendant to its customer. The 1st defendant elected not to lead evidence in the suit. In the circumstances, the 1st defendant is liable for the acts of its agents.

20. The totality of the foregoing is that the court is satisfied that the plaintiff has proved fraud and illegality in the procurement of the impugned encumbrance by the 1st defendant to the required standard. The court has, however, not been presented with evidence to suggest that the Land Registrar was privy to the fraud.

21. Consequently, it is the finding of the court that the charge registered on 29/11/2016 as entry number one (1) in the encumbrances section of the land register of **Parcel Number Limuru/Kamirithu/4617** was procured fraudulently and illegally and without the knowledge or involvement of the plaintiff.

22. With the above finding on issue number one (1), it follows that the plaintiff is entitled to the declaration sought in prayer (a) and to an order vacating the fraudulent and illegal encumbrance as sought in prayer number (b).

23. On the plea for general damages, counsel for the plaintiff submitted that since the registration of the impugned encumbrance, the plaintiff had been deprived of her constitutional rights over the suit property. She was unable to sell the suit property to cater for her medical expenses. He asked the court to award the plaintiff damages of Kshs 1,000,000. I have taken into account the duration the encumbrance has been in place and the trouble the plaintiff has gone through to get it vacated, including leaving her hospital bed to come to court on a wheel chair to testify so as to get the encumbrance removed. The 1st defendant elected not to discharge the encumbrance even after they were furnished with the CID Document Examiner's Report. In the circumstances, I will award the plaintiff general damages of Kshs 500,000 with interest from

the date of this judgment.

24. On costs, there is no reason why the general principle in **Section 27** should not be invoked. The 1st defendant will pay the plaintiff costs of this suit.

Disposal Orders

25. In the end, the suit herein is disposed through the following orders:

(a) A declaration is hereby made that the loan guarantee executed on 4/11/2016 and the charge and/or the restriction registered as entry number (1) on 29/11/2016 in the encumbrances section of the land register relating to Title Number Limuru/Kamirithu/4617 in favour of the 1st defendant, Uwezo Microfinance Bank Limited, was procured fraudulently and are therefore null and void.

(b) An order is hereby issued directing the relevant Land Registrar to rectify the Land Register relating to Limuru/Kamirithu/4617 by cancelling/removing the entry relating to the said charge and/or restriction.

(c) The 1st defendant shall pay the plaintiff general damages of Kshs 500,000.

(d) The 1st defendant shall bear the plaintiff's costs of this suit.

(e) There shall be no award of costs in relation to the 2nd defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 3RD DAY OF FEBRUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Mugambi for the 1st defendant

Ms Mwalози for the 2nd defendant

Court Assistant: Lucy Muthoni