



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 276 OF 2011**

**ELIZABETH WANJIRU KAMAU.....1<sup>ST</sup> PLAINTIFF**

**EUNICE NJAMBI GITAU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JAMES MUBIA GITUNDU.....1<sup>ST</sup> DEFENDANT**

**NANCY WAIRIGIA ADVOCATES.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiffs brought the application dated 26/7/2019 seeking to be represented by new advocates and to have the consent dated 26/1/2017 set aside so that this suit can be heard and determined on its own merit. The consent apportioned 65% of land reference number (L.R. No.) 9363/7 (“the Suit Property”) to the 1<sup>st</sup> Defendant while 35% went to the Plaintiffs. The application was premised on the grounds that at the time the consent was signed, the court file was missing and the Plaintiffs’ advocates misadvised them to sign the consent proposed by the 1<sup>st</sup> Defendant to settle the matter out of court. They claimed that this was on the fraudulent misrepresentation that they stood to lose the whole parcel of land following the disappearance of the court file.

The application was supported by the 1<sup>st</sup> Plaintiff’s affidavit sworn on 26/7/2019 in which she deponed that her previous advocate advised her to sign the consent proposed by the 1<sup>st</sup> Defendant for fear that with the disappearance of the court file she stood to lose the whole Suit Property. She averred that the court file resurfaced after the consent had been signed. She urged that her new advocate advised her that the consent was obtained by the fraudulent misrepresentation of facts by her previous advocate that she stood to lose the whole land due to the disappearance of the court file. She added that there was total failure of consideration when the contract was rescinded, deposits forfeited and yet the 1<sup>st</sup> Defendant as purchaser took 65% of the Suit Property under the terms of the consent. She contended that the 1<sup>st</sup> Defendant had placed a caveat against the Suit Property and also filed an application to have the land registered in his own name. The 1<sup>st</sup> Plaintiff averred that she stood to suffer prejudice if the consent was not set aside.

The Defendant opposed the application through the grounds filed in court on 14/2/2020 urging that the application was devoid of merit and did not demonstrate any grounds to merit the setting aside of the judgement entered by consent of the parties.

Parties made oral submissions. Mr. Mwangi Ndegwa submitted that there was fraud and misrepresentation by the Plaintiffs’ previous advocate who informed the Plaintiffs that the court file had disappeared when she implored them to enter into the consent. Mr. Kibera Maina submitted for the 1<sup>st</sup> Defendant that to set aside a consent judgement one must prove fraud, collusion, misapprehension of material facts or that the agreement was contrary to the policy of the court or other sufficient reasons. He submitted that the Plaintiffs had not proved any of these grounds and contended that the Plaintiffs gave instructions to the advocate who acted for them at the time to enter into the consent.

Looking at the documents in the court file, Carol Mburugu advocate of Kituo Cha Sheria filed the application dated 16/12/2014 seeking to reconstruct the court file on the grounds that the file had been missing since June 2014. An order for the reconstruction of the file was made on 19/12/2014. Sylvester Kibera Maina swore a replying affidavit which was filed in court on 20/7/2015 confirming that the court file had been missing since July 2014 while supporting the reconstruction of the court file. He annexed additional documents for the reconstruction of the court file which the Plaintiffs’ advocates had omitted from the bundle. Mr. Kibera attached the skeletal submissions filed by the 2<sup>nd</sup> Defendant which analysed the evidence given by the 1<sup>st</sup> Plaintiff as PW1 and PW2; that of the 2<sup>nd</sup> Defendant as DW1, DW2 and the 1<sup>st</sup> Defendant as DW3. This proves that the suit proceeded to hearing at some point. Mr. Kibera also attached a copy of the ruling of Nyamweya J. delivered on 28/3/2012 vide which she directed the 2<sup>nd</sup> Defendant to release the title over L.R. No. 9363/7 to the Registrar of the High Court for safe keeping pending the determination of this suit.

There is also an application on record filed by Bemih Kanyonge Advocate on 17/12/2015 on behalf of the Plaintiffs seeking an early hearing date for the suit while claiming that the suit had been heard and concluded in 2014 and was awaiting the delivery of the judgement when the court file disappeared.

From the record of the proceedings, it is apparent that the case came up in court on several occasions in 2015 when the Plaintiff's advocate attended court. The hearing of the suit proceeded on 11/11/2015 when the 1<sup>st</sup> Plaintiff gave evidence. The matter came up on different dates in 2016 and on 19/12/2016 the advocates informed the court that they were negotiating the matter and needed time to prepare a consent. A consent executed by the advocates for all the parties was filed in court on 3/2/2017. The advocates appeared before Obaga J on 29/5/2017 and requested the court to adopt the consent as an order of the court, which was done. The decree was issued on 16/6/2017.

The terms of the consent were that the parties agreed to apportion L.R. No. 9363/7 measuring 19.99 hectares in the ratio of 65:35 in favour of the 1<sup>st</sup> Defendant. The Plaintiffs and 1<sup>st</sup> Defendant were to sell the land jointly at an agreed price and share out the sale proceeds in the ratio 65:35. The certificate of title was to be deposited in the bank for safekeeping pending the sale of the land.

The question for determination is, have the Plaintiffs satisfied the court that it ought to set aside the consent judgement filed in court on 3/2/2017? The Plaintiffs needed to show that the consent they seek to set aside was obtained by fraud, or was contrary to the policy of the court, or that it was given without sufficient material facts or in misapprehension or ignorance of facts in general, or for such reasons which would enable the court set it aside.

It is useful to look at the nature of the dispute. In the plaint filed on 10/6/2011, the Plaintiffs claimed that on 27/3/2009 they entered into an agreement with the 1<sup>st</sup> Defendant for the sale of L.R. No. 9363/7 at Kshs. 7,920,000/=. The 2<sup>nd</sup> Defendant acted for both parties in the sale transaction and the title deed was deposited with these advocates. The 1<sup>st</sup> Defendant was to pay a deposit of Kshs. 2,000,000/= on execution of the agreement and the balance either within 90 days of the agreement or seven days after the registration of the transfer, less the sums paid by the 1<sup>st</sup> Defendant on account of land rent, rates and other outgoings. The Plaintiffs claimed that the 1<sup>st</sup> Defendant failed to pay the balance of the purchase price as agreed and they rescinded the contract but the 2<sup>nd</sup> Defendant released the title over the land to the 1<sup>st</sup> Defendant.

The 1<sup>st</sup> Defendant filed a defence and counterclaim on 3/8/2011 denying the Plaintiffs' claim. He averred that he had paid the sum of Kshs. 3,200,000/= to the Plaintiffs leaving a balance of Kshs. 364,910/= which his advocates forwarded to the Plaintiffs' advocates. He urged the court to dismiss the Plaintiffs' claim and order that the Plaintiffs deliver the completion documents and effect a transfer to him failing which the Deputy Registrar of the Court was to execute the documents necessary to effect the transfer to his name.

The facts set out above confirm that the court file went missing and had to be reconstructed. The Plaintiffs claimed their advocate made a fraudulent misrepresentation that they stood to lose the whole land following the disappearance of the court file. They did not give any evidence of the correspondence they exchanged with their former advocates on the negotiations before the consent was recorded in court or how the representation that they stood to lose their land was communicated to them by their advocate. The 1<sup>st</sup> Plaintiff applied to peruse the court file on 5/3/2019 which was almost two years after the consent was filed in court. She indicated in the letter that perusing the file would greatly assist her in finalising the matter. The court can only deduce that the Plaintiffs advocates failed to inform them of the steps taken in the case which prompted the 1<sup>st</sup> Plaintiff to come to court personally and seek to peruse the court file. The Plaintiffs ought to have moved with alacrity and not waited for more than two years to apply to set aside the consent recorded on 26/7/2019.

It is also necessary to look at the proceedings that took place after the consent was recorded in court. Macharia Nderitu Advocates wrote to the court on 22/8/2017 seeking to have the original title over the Suit Property released to them. Carol Mburugu Advocate and S. Kibera Maina Advocate co-signed the letters dated 2/8/2017 and 9/11/2017 requesting the Deputy Registrar to release the original certificate of title over the Suit Property to them. Kibera and Associates wrote a similar letter to the Deputy Registrar on 1/9/2017. The 1<sup>st</sup> Plaintiff wrote to court on 5/3/2019 seeking to peruse the court file. Manasses Mwangi and Associates filed a notice of change of advocates on 20/3/2019 indicating that they had been appointed to act for the Plaintiffs in this suit. They did not file any documents in court. The 1<sup>st</sup> Defendant filed the application dated 18/6/2019 seeking to have the application dated 3/12/2018 heard. That application sought to have the Plaintiffs compelled to execute the transfer for the Suit Property failing which the Deputy Registrar was to execute the transfer documents.

In the court's view, these events did not give effect to the terms of the consent recorded in court.

What the Plaintiffs contend is that their previous advocate fraudulently misrepresented to them that with the disappearance of the court file, they stood to lose the Suit Property and it was therefore prudent to agree to sign the consent proposed by the 1<sup>st</sup> Defendant and salvage at the very least 35% interest in the Suit Property.

Fraudulent misrepresentation is defined in the Black's Law Dictionary, 10<sup>th</sup> Edition, as a false statement that is known to be false made recklessly without knowing or caring whether it is true or false. Fraud is defined as a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. It is also defined as a reckless misrepresentation made without justified belief in its truth to induce another person to act.

The loss of a court file cannot lead a proprietor of land to lose his land. The record shows that the Plaintiffs' previous advocate applied successfully in the past for the reconstruction of the court file when it went missing in 2014 and knew very well that a court file can be reconstructed when the original file cannot be traced. The misrepresentation by the Plaintiffs' previous advocate that they stood to lose the whole parcel of land induced the Plaintiffs to agree to the terms of the consent proposed by the 1<sup>st</sup> Defendant which were essentially to the Plaintiffs' detriment as they would only get 35% of the value of the Suit Property.

The Plaintiffs have demonstrated that the consent dated 26/1/2017 was obtained through fraud and that it should therefore be set aside. The application dated 26/7/2019 is allowed. Each party will bear its own costs.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of May 2020**

**K.BOR**

**JUDGE**

**In the presence of:-**

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiffs and the Defendants