



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1033 OF 2013

**LUCY MUTHONI MURANGA (Suing as the Administrator of the estate of
ALEXANDER PETER MURANGA).....PLAINTIFF**

VERSUS

ANTHONY NJENGA NYAKIO.....1ST DEFENDANT

BENJAMIN WAWERU NGETHE.....2ND DEFENDANT

MUMBI NGETHE WAWERU.....3RD DEFENDANT

DISTRICT LAND REGISTRAR, KIAMBU.....4TH DEFENDANT

JUDGMENT

At all material times, all that parcel of land known as Kikuyu/Kikuyu Block 1/918 (hereinafter referred to as “the suit property”) was owned by one, Alexander Peter Muranga, deceased (hereinafter referred to only as “the deceased”). The deceased acquired the suit property on 6th January, 2000. The deceased was at all material times residing in the United Kingdom (U.K) with his family. The plaintiff is the wife and administrator of the estate of the deceased who died in the U.K on 13th July, 2003 while the 1st defendant is the deceased’s brother and the plaintiff’s brother in law. The 1st defendant was at all material times residing in Kenya.

The plaintiff brought this suit on 27th August, 2013 against the defendants seeking several reliefs in relation to the suit property. In her plaint dated 20th March, 2013, the plaintiff averred that after the deceased acquired the suit property, he left the title deed for the same in the custody of the 1st defendant who neither returned it to the deceased nor to the administrator of the deceased’s estate. The plaintiff averred that after the death of the deceased, she was issued with a grant of letters of administration in respect of his estate on 23rd February, 2009 which grant was confirmed on 29th June, 2011. The plaintiff averred that while the deceased was out of the country, the 1st defendant who had in his custody the title deed for the suit property fraudulently transferred the suit property to the 2nd and 3rd defendants on 10th March, 2003. The plaintiff averred that the deceased did not appoint the 1st defendant or anyone else to act for him in the said transaction. The plaintiff pleaded several particulars of fraud against the 1st defendant. The plaintiff sought judgment against the defendants for:

1. A declaration that the transfer of the suit property to the 2nd and 3rd defendants be set aside and the property be transferred to the plaintiff at the defendants’ expense.
2. A declaration that the 1st defendant had no authority from the deceased to deal with the suit property.
3. Damages as against the 1st defendant.
4. Any other or further consequential orders as may be deemed appropriate.

The 1st defendant filed a statement of defence on 18th November, 2013. The 1st defendant admitted that the suit property was at all material times registered in the name of the deceased and that the same was subsequently sold to the 2nd and 3rd defendants. The 1st defendant averred that the suit property was sold with the consent and knowledge of the deceased. The 1st defendant averred that prior to the sale and transfer of the suit property to the 1st and 2nd defendants, the deceased donated a power of attorney in favour of the 1st defendant which

authorised him to dispose of the suit property. The 1st defendant averred that the deceased left the title deed of the suit property in his custody in furtherance of his intention to sell the property which he actualised by giving the 1st defendant a power of attorney aforesaid which he used to sell the property on behalf of the deceased.

The 1st defendant averred that when the deceased instructed him to sell the suit property on his behalf, the deceased had separated with the plaintiff and they were not in good terms. The 1st defendant averred that it was not in order for the plaintiff to attempt to challenge the express instructions of the deceased by imputing fraud on the part of the 1st defendant. The 1st defendant denied that he was involved in any act of fraud in relation to the sale of the suit property to the 2nd and 3rd defendants.

The 2nd and 3rd defendants filed a joint statement of defence on 18th November, 2013. The 2nd and 3rd defendants admitted that the suit property was registered in the name of the deceased and that the same was sold and transferred to them. The 2nd and 3rd defendants averred that the suit property was transferred to them for valuable consideration and denied being involved in any act of fraud. The 2nd and 3rd defendants averred that the deceased donated a power of attorney to the 1st defendant through which the suit property was sold and transferred to the 2nd and 3rd defendants while the deceased was still alive. The 2nd and 3rd defendants averred that they acquired the suit property in good faith and that no act of fraud or forgery was involved.

The 2nd and 3rd defendants averred they were innocent purchasers of the suit property for value without notice. The 2nd and 3rd defendants averred that the plaintiff's suit was brought 10 years after they had purchased and developed the suit property. The 2nd and 3rd defendants averred that if the plaintiff had any interest in the suit property, she could have raised the same earlier before the defendants developed and settled on the suit property. The 2nd and 3rd defendants urged the court to dismiss the plaintiff's suit with costs.

At the trial the plaintiff and the 1st and 3rd defendants gave evidence. The 2nd defendant had died as at the time of the hearing of the suit and was not substituted while the 4th defendant did not enter appearance. The plaintiff told the court that when she conducted a search on the title of the suit property, she found that the same was registered in the names of the 2nd and 3rd defendants. She stated that upon making inquiries, she learnt that the property was sold to the 2nd and 3rd defendants by the 1st defendant. The plaintiff stated that the suit property was all along registered in the name of her deceased husband, Alexander Peter Muranga (the deceased) who died on 13th July, 2003.

She stated that the 1st defendant admitted selling the property to the 2nd and 3rd defendants allegedly on the strength of a power of attorney that was purportedly donated to him by the deceased. The plaintiff stated that the sale and transfer of the suit property to the 2nd and 3rd defendants was fraudulent. The plaintiff stated that the deceased did not sign the power of attorney that was used by the 1st defendant to transfer the suit property to the 2nd and 3rd defendants and that the Notary Public who was alleged to have witnessed the said power of attorney did not exist in the United Kingdom. She stated that the Notary Public was from the United States of America, Commonwealth of Massachusetts where the deceased had never travelled.

The plaintiff stated that the deceased could have informed her if he intended to sell the suit property. The plaintiff stated that she reported the fraudulent sale of the suit property to the police on 28th March, 2014 and that no action was taken by the police in the matter. The plaintiff produced as exhibits the documents attached to her list of documents dated 20th March, 2013 and supplementary list of documents dated 9th April, 2014.

The 1st defendant adopted his witness statement dated 18th November, 2013 as his evidence in chief and produced the documents attached to his list of documents dated 14th November, 2013 as exhibits. In his statement, the 1st defendant (DW 1) stated how the deceased acquired and subsequently sold the suit property. DW 1 stated that in 2003 the deceased who had separated from the plaintiff due to frosty relationship and who at the time was suffering from many illnesses and had nobody to take care of him asked him to look for a purchaser for the suit property to enable him get money for treatment and general upkeep. He stated that it was following this instruction that the 2nd and 3rd defendants showed interest in the suit property and agreed to purchase the same.

DW 1 stated that to enable him act for the deceased who was the registered owner of the suit property, he had a power of attorney prepared and forwarded to the deceased in the United Kingdom for execution. He stated that the deceased executed the power of attorney and returned the same to him. He thereafter registered the power of attorney on the strength of which he acted on behalf of the deceased in the sale and transfer of the suit property to the 2nd and 3rd defendants. DW 1 stated that he disbursed the proceeds of sale in accordance with the instructions of the deceased. He stated that due process was followed in the sale of the suit property to the 2nd and 3rd defendants and that he acted in good faith on the instructions of the deceased and that it was dishonest for the plaintiff to allege that he acted fraudulently in the sale of the property. DW 1 stated that the suit property was sold during the lifetime of the deceased and that this suit was brought by the plaintiff for ulterior motives.

The 3rd defendant was the last to give evidence. The 3rd defendant (DW 2) told the court that she purchased the suit property together with the 2nd defendant who was her deceased husband at a consideration of Kshs. 700,000/= from Alexander Peter Muranga (deceased). She stated that they dealt with the 1st defendant who acted as the deceased's attorney in the transaction. She stated that the deceased had donated a power of attorney to the 1st defendant to enable him conduct the transaction on his behalf. DW 2 stated that they entered into an agreement for sale that was signed by them and the 1st defendant on behalf of the deceased. She stated that after the agreement for sale, they applied for and obtained consent of the Land Control Board after which the suit property was transferred to them. She stated that after purchasing the suit property, they developed the same by putting up there on their residential home and rental houses. DW 2 told the court that the suit property was fully developed and that she was residing on the property. She denied that they acquired the suit property fraudulently. She urged the court to dismiss the plaintiff's suit.

After the end of evidence, the parties made closing submissions in writing. The plaintiff filed her submissions on 14th June, 2019 while the

1st, 2nd and 3rd defendants filed their submissions on 1st October, 2019. In her submissions, the plaintiff reiterated that the deceased did not sign the power of attorney on the strength of which the suit property was sold to the 2nd and 3rd defendants. The plaintiff averred that since the 1st defendant did not have a valid power of attorney from the deceased, he could not pass a valid title to the 2nd and 3rd defendants. The plaintiff also submitted that her consent as the deceased's wife was not obtained as required by the law before the property was sold to the 2nd and 3rd defendants. The plaintiff submitted in conclusion that she had established a prima facie case against the defendants and that even if the balance of convenience was considered, the same tilted in her favour.

On his part, the 1st defendant cited R. G. Patel v Lalji Makanji [1957] E. A. 314 and Central Bank of Kenya Ltd. v Trust Bank Ltd. & 4 Others [1996] eKLR and submitted that allegations of fraud must be strictly proved to a standard not beyond reasonable doubt but beyond a mere balance of probabilities and that vague and general allegations of fraud without proof cannot suffice. The 1st defendant averred that it was not sufficient to plead and particularise fraud. The 1st defendant submitted that the same must be proved with evidence. The 1st defendant averred that the plaintiff had failed to prove the fraud alleged against the defendants. On the plaintiff's attack on the power of attorney that was donated to the 1st defendant by the deceased, the 1st defendant submitted that the plaintiff did not prove that the deceased did not sign the power of attorney and that the Notary Public who witnessed the power of attorney was non-existent.

On the part of the 2nd and 3rd defendants, 3rd defendant submitted that they acquired a valid title to the suit property. The 3rd defendant submitted that there was no allegation of fraud leveled against them by the plaintiff in her pleadings and in the evidence that she tendered in court. The 3rd defendant averred that they were innocent purchasers of the suit property for value without notice and as such should not be deprived of their livelihood by the plaintiff. The 3rd defendant averred that they acquired the suit property lawfully after following due process and as such their title should not be interfered with.

I have considered the pleadings and the evidence tendered by the plaintiff and the defendants. I have also considered the submissions by the parties' respective advocates together with the authorities cited in support thereof. The following in my view are the issues that arise for determination of this suit;

1. Whether the sale and transfer of the suit property to the 2nd and 3rd defendants was fraudulent.
2. Whether the plaintiff is entitled to the reliefs sought in the plaint.
3. Who is liable for the costs of the suit?

Whether the sale and transfer of the suit property to the 2nd and 3rd defendants was fraudulent:

The interest that the deceased had in the suit property and which was transferred to the 2nd and 3rd defendants was leasehold. The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Section 27(b) of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) provides that:

“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 and expressed agreements, liabilities and incidents of the lease.”

Section 28 of the same Act provides that:

“The rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act.....”

Section 143 (1) and (2) of the same Act provides as follows:

“(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to effect the title of a proprietor who is in possession and acquired the land, lease, charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

The transaction between the deceased and the 2nd and 3rd defendants which is denied by the plaintiff took place in 2003 before the enactment of the Land Act, 2012 and the Land Registration Act, 2012. The applicable law was the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) under which the suit property was registered. The plaintiff has sought the cancellation of the registration of the 2nd and 3rd defendants as proprietors of the suit property so that the property reverts to the name of the deceased on the ground that the suit property was transferred to the 2nd and 3rd defendants fraudulently. Sections 143(1) and (2) of the Registered Land Act give the court power to make the order sought provided that plaintiff establishes the fraud pleaded against the 1st defendant and also demonstrates that the 2nd and 3rd defendants had knowledge of the fraud or caused or contributed to the same.

As was held in the case of R. G. Patel v Lalji Makanji (supra), allegations of fraud must be proved strictly. The onus of proof was upon the plaintiff. The particulars of fraud pleaded against the 1st defendant in the plaint were that; he had transferred the title of the suit property to the 2nd and 3rd defendants, he had infringed the plaintiff's right to the property, he had collaborated with the Land Registrar to change the ownership of the suit property to himself and that he had made a false promise to the plaintiff that the title of the suit property was safely in the custody of his mother when he had already transferred the property to third parties.

The plaintiff contended in her evidence that the deceased did not appoint the 1st defendant to act for him in the sale of the suit property to the 2nd and 3rd defendant and that the power of attorney on the strength of which the suit property was transferred to the 2nd and 3rd defendants was a forgery. The onus was upon the plaintiff to prove these allegations. I am not satisfied that the plaintiff discharged this burden of the standard required by law. The plaintiff had contended that the signature in the power of attorney was not that of the deceased. The plaintiff did not place any evidence before the court to prove that the signature was not of the deceased. The plaintiff was not a handwriting expert or a forensic documents examiner. The court cannot without more rely on her evidence that the signature on the power of attorney was a forgery. Forgery is a criminal offence. The plaintiff should have reported the alleged forgery to the police for investigation and appropriate action. The police have the expertise to determine whether the signature in the document is forgery or not. Although the plaintiff stated in her evidence that she reported the incident to the police after the filing of this suit and that the police took no action, no evidence was placed before the court of any follow up that the plaintiff undertook after the said report.

The plaintiff had also contended that the signature and stamp of the Notary Public on the power of attorney were forged since no such Notary Public existed in the United Kingdom. The plaintiff did not produce in court credible evidence showing that the Notary Public who was said to have witnessed the signature of the deceased in the power of attorney did not exist. What the plaintiff placed before the court were emails she exchanged with the registry of companies in the United Kingdom regarding Meghan C. Thomas Notary Public and emails exchanged with the office of the Archbishop of Canterbury on Meghan C Thomas Notary Public. There is nothing in these emails which show that the Notary Public did not exist. It is also worth noting that these inquiries were being made after the filing of the suit and 10 years after the execution of the power of attorney. I am not satisfied that the plaintiff proved that the Notary Public who attested the power of attorney dated 25th February, 2003 was non-existent. In any event, the 1st defendant led evidence that the power of attorney was forwarded to the deceased for execution in the United Kingdom and was returned by him duly executed and attested. I am of the view that if the deceased executed the power of attorney before a fictitious Notary Public, the plaintiff who is the administrator of the deceased's estate cannot be allowed to take advantage of the deceased own wrong doing to the prejudice of the defendants.

The evidence that was adduced by the 1st and 3rd defendants shows that the suit property was sold to the 2nd and 3rd defendants lawfully and that due process was followed. I am not persuaded that the 1st defendant fraudulently sold the suit property to the 2nd and 3rd defendants. In the circumstances, I have to answer the first issue in the negative.

Whether the plaintiff is entitled to the reliefs sought in the plaint:

I have held above that the 1st defendant did not transfer the suit property to the 2nd and 3rd defendants fraudulently. The plaintiff did not also prove that the 2nd and 3rd defendants were involved in the alleged fraud that has not been substantiated or that they were aware of the same. In the circumstances, there is no basis upon which the 3rd defendant who is in possession of the suit property and who has developed the same should have her title to the suit property cancelled. The court has also noted that the plaintiff brought this suit 10 year after the alleged fraud and 9 years after the alleged fraud came to her knowledge. I am of the view that since the claim is based on fraud, the action ought to have been brought within 3 years of the date when the plaintiff became aware of the fraud which according to the plaintiff's witness statement dated 20th March, 2013 was in 2004. The suit was brought 9 years after the plaintiff became aware of the alleged fraud and after the 2nd and 3rd defendants had taken possession of the suit property and developed the same. The 1st defendant's contention that the suit was bought for ulterior motives is in the circumstances not far-fetched. In view of the findings I have made above, there is no basis upon which the reliefs sought by the plaintiff can be granted. The second issue is answered in the negative.

Who is liable for the costs of the suit?

Costs follow the event. The plaintiff has lost the suit. No reason has been given on the basis of which the court can depart from the general rule on costs. The plaintiff will therefore bear the costs of the suit but limited to the costs of the 3rd defendant since the plaintiff and the 1st defendant are relatives and the suit herein appears have come about as a result of a misunderstanding in the family.

Conclusion:

In conclusion, I find the plaintiff's suit not proved. The suit is accordingly dismissed with costs to the 3rd defendant.

Dated and Delivered this 5th Day of May 2020

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

N/A for the Plaintiff

N/A for the 1st to 3rd Defendants

N/A for the 4th Defendant

Ms. C. Nyokabi-Court Assistant