



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 824 OF 2015 (OS)

SANJAY VARMA & 2 OTHERS.....PLAINTIFFS

VERSUS

JACKSON ESHIWANI LIKOYE & 7 OTHERS.....DEFENDANTS

JUDGMENT

The Plaintiffs filed an Amended Originating Summons on 20th February 2017 seeking the following determinations:

- a) That the Plaintiffs be registered as the registered owners of undivided half share of land reference number KISUMU MUNICIPALITY/ BLOCK 7/331 measuring 0.0697 Ha or thereabouts.
- b) That the title issued to the Defendants be revoked and or annulled and or cancelled altogether.
- c) That the Respondents be condemned to meet costs of this suit.
- d) That the Deputy Registrar Kisumu to sign documents for the purposes of conveyance for the Plaintiffs or their nominee(s) on behalf of the Defendants.

The Originating Summons is founded on the grounds that the Plaintiffs interest in the suit property was transferred without consideration and/or authority. That the purported power of attorney was not signed by the Plaintiffs and the signatures appearing on the power of attorney dated 17th July 2004 purporting to donate power to one Jackson Eshiwani Likoye do not belong to the Plaintiffs.

That the power of attorney which is shown to have been donated by Shankutala Devi Magon, Anjiana Patel and Manoharlata Verma is pure fraud and forgery. That the power of attorney is invalid and null and void *ab initio* as a basis of transfer of the suit property. That the whole transaction in the suit property is unlawful, fraudulent, and criminal in nature and void *ab initio*.

That the original Plaintiff and her sisters have been away and were away when it is alleged that they appended their signatures to donate power of attorney to Jackson Eshiwani Likoye or anybody else to do anything in respect of their legal in respect of the suit property. That the whole transaction of transfer of the suit property is null and void *ab initio* in that:

- a) The transfer purports to transfer rights of other co-owners who did not even execute the power of attorney in favour of the alleged donee.
- b) The donee and donor of the subject power of attorney did not appear before an Advocate or any competent person authorized by the law to attest the same.
- c) The power of authority does not explicitly or otherwise put forth its authority.
- d) The power of attorney is invalid for all purposes as the transaction was not ratified and it is full of ambiguity on face value.
- e) The transaction leading to the transfer was done without consideration.

The Originating Summons is also founded on the Supporting Affidavit of Sanjay Varma, the 1st Plaintiff, dated 15th November 2016 and the Supporting Affidavit of Shakuntala Devi Magon, the original 1st Plaintiff, dated 18th October 2007.

In her Supporting Affidavit, the original 1st Plaintiff deposed that vide a grant of probate of written will issued by the court in her favour on 17th September 2003 and confirmed on 8th July 2004, she was the executrix of the estate of the late Kaushalya Devi Kohli, wife of the late Vikram Jit Kohli and mother of the original 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff.

That upon the death of their father Vikram Jit Kohli, Kaushalya Devi Kohli took over running of the deceased's estate upon grant of probate of written will on 26th July 1995. That upon confirmation of the grant, Kaushalya Devi Kohli's interest was duly registered as a co-sharer of Kisumu Municipality Block 7/331 (the suit property) on 24th April 1996 under presentation book number 206/1996.

That under the grant of probate of written will of 17th September 2003, the original 1st Plaintiff together with the 2nd and 3rd Plaintiffs were to share equally the estate of the late Kaushalya Devi Kohli which included the suit property. That they were registered as joint owners of Kaushalya Devi Kohli's share of the suit property on 18th August 2004. The original 1st Plaintiff annexed a copy of the green card to the suit property and Kaushalya Devi Kohli's will to the affidavit.

That in February 2007 she received a call from one of their tenants enquiring if they had sold the building as some people were claiming to be the new owners and demanding that the rent be remitted to them through their Advocates. That prior to the fraudulent change of ownership, the firm of M/S Kohli Patel & Raichura Advocates were to some extent managing the property and on several occasions prepared leases on their behalf.

That they discovered that the Defendants had fraudulently had themselves registered as the owners of the suit property on 19th September 2006. That their former Advocates M/S Kohli Patel & Raichura Advocates wrote to her on 12th July 2004 and 23rd December 2004 informing her that the grant of probate was allowed and of the transfer of the half share interest in the suit property to the Plaintiffs was effected yet the Power of Attorney dated 17th July 2004 purported that the Plaintiffs had donated power to one Jackson Eshiwani Likoye, and therefore was clearly fraudulent.

That the Defendants had the property transferred to themselves without involving the other Plaintiffs who own individual half share of the property and who did not sign transfer documents in favour of the Defendants. That in the interests of justice the registration of the transfer in favour of the Defendants should be cancelled, revoked or annulled and the registration of the Plaintiffs' interest restored.

Sanjay Varma, 1st Plaintiff, averred that the original 1st Plaintiff, Shakuntala Devi Magon, passed away while domiciled in Scotland and a grant of probate of her estate was issued in Scotland and resealed in Kenya pursuant to the provisions of the Law of Succession Act.

Walter Juma Absaloms, the 6th Defendant, filed an amended replying affidavit for himself and on the authority of the 2nd to 8th Defendants, who referred to themselves as the Group. The Defendants averred that the suit property was sold to the Group on 19th September 2006 by the 1st Defendant acting for the registered owners pursuant to a registered power of attorney dated 17th July 2004.

That the 1st Defendant had informed the Group of the availability of the suit property which, according to him, was placed on the market by Jaykrishan Morzeria of Kohli Patel & Raichura Advocates in Kisumu from whom he had instructions to find a ready and willing purchaser.

That having previously dealt with the 1st Defendant and Jaykrishan Morzeria of Kohli Patel & Raichura Advocates in other land acquisitions, the Group had no reason to doubt the integrity of the intended transaction. That the 1st Defendant had informed them that Jaykrishan Morzeria was the custodian of the title documents for the suit property and would avail them for purposes of the intended transfer, and that a duly registered power of attorney would be employed for the execution of the necessary documents.

That all reasonable steps were taken by the group to investigate the title, the registry entries relating thereto and the validity of the power of attorney donated to the 1st Defendant by the proprietors.

The Defendant noted that although Jaykrishan Morzeria had played a crucial role in the transactions involving the suit property, he had not been made a party; no criminal claim of fraud had been made by the Plaintiffs; and that the Plaintiffs' claim was purportedly for one half of the undivided share of the title to the property yet the register showed no division of interest.

That for a proper forensic investigation to be facilitated, Jaykrishan Morzeria should be joined as a Defendant in the suit. That the Group were innocent and bona fide purchasers for value and therefore not affected by any allegation of fraud. That the Plaintiffs did not have capacity to institute the suit as they lacked letters of administration to act on behalf of the late Shakuntala Devi Magon.

Plaintiff's Case

The 1st Plaintiff testified as PW1. He fully adopted the contents of his witness statement. He stated that their grandfather had built the property and retained undivided ownership with his brother. He denied that his side of the family had sold their share of the suit property to the 2nd to 8th Defendants. That they only learnt of the transfer in February 2007. That the title had been given to their Advocates who had been acting for them since their grandfather's days.

PW1 insisted that the sale was done fraudulently and all the documents used had not been signed by the Plaintiffs or the other family. That at the alleged time of sale, the three Plaintiffs were not in Kenya to sign the power of attorney. That the alleged agent Lukoye had not been picked by the Plaintiffs and never had any contact with the family.

PW1 faulted the receipts exhibited by the Defendants of Kshs. 6,500,000/= for being unsigned and not tallying with the stamp duty paid

which showed the value as being Kshs. 5,500,000/=. That the payment appeared to have been made four months after the transfer of 19th September 2006, yet ordinarily transfer is done before full payment. That the Defendants could not have been bona fide purchasers for value as there was a discrepancy in the value, they were dealing in cash showing they did not want the transaction traced, and they never obtained consent from the registered proprietors in common.

The court ruled that the six powers of attorney that PW1 had presented and marked for identification could not be produced as exhibits for their lack of being registered in Kenya.

On cross-examination, PW1 insisted that the power of attorney had been donated to him by the original 1st Plaintiff and her children. That he had obtained powers of attorney from two of the four children of the original 1st Plaintiff who were the legal administrators or executors, even though they had children of their own who could pursue the matter. That he came into the proceedings on 16th April 2012 and thereafter the original Plaintiff died on 11th November 2012.

PW1 stated that to him, the suit property was valued at Kshs. 22,000,000/= and the fact that it was sold at Kshs. 6,500,000/= pointed to fraud. PW1 agreed that he was not involved in taking the title documents of the suit property to the firm of Kohli Patel & Raichura Advocates and therefore may not have known of the instructions given to the firm. That he was not there when the original Plaintiff lodged her complaint with Mr Somaia and could not tell whether the matter was ever reported to the police.

PW1 agreed that he had no way of knowing whether the Advocates they had given the title decided to collude with Somaia not to act on the complaint, and that the 2nd to 8th Defendants would not have known either.

PW1 agreed that the 9th Defendant is the one who prepared the power of attorney denounced by the original 1st Plaintiff and that the 9th Defendant knew when they were filing the suit, and that the 9th Defendant was enjoined through the efforts of the 2nd to 8th Defendants. That the 9th Defendant had custody of the title and was collecting rent from the suit property. That they never asked their advocate in writing to tell them where the title they had entrusted to him was.

PW1 agreed that they had not reported the Defendants to the police and that he could not confirm whether the signatures attributed to the original 1st Plaintiff were hers or not. That he had no evidence to show the manner in which the 2nd to 8th Defendants acted fraudulently in obtaining the suit property.

PW1 stated that Entry No .6 in the green card to the suit property seemed to have left out the interest of Lalchand Kohli in Entry No. 3 but he did not know whether those registered under Entry No. 6 knew this.

On re-examination PW1 stated that he was officially enjoined as the 1st Plaintiff to replace Shakuntala following his application of 19th March 2013 which was allowed by consent. That he was authorised by the four beneficiaries of the Shakuntala estate to participate in the suit. That they decided to pursue the civil rather than criminal route to get their property back.

PW1 asserted that the family never got any explanation from the 9th Defendant on why and how he allowed the property to be sold without instructions from them. That the 9th Defendant declined to respond to the inquiries made by the original 1st Plaintiff. That the interest of Lalchand Kohli should have been carried over in Entries 5 and 6 of the green card.

Ramesh Chandra Rana testified as PW2 and wholly adopted his witness statement. He stated that he was given power of attorney registered on 23rd June 2011 to represent Lalchand Kohli. That Lalchand Kohli and his family did not deal with or give consent to the Defendants. That the succession cause brought by the original 1st Plaintiff did not include the portion owned by the Lalchand Kohli family.

On cross-examination, PW2 stated that the power of attorney was not dated and that when he obtained the power of attorney he did not know who the registered owner of the suit property was.

George Orwaru Nyangweso, the County Land Registration Officer Kisumu, testified as PW3. He charted the history of the suit property up until the Kisumu Succession Cause No. 294 of 2003 upon which the original Plaintiffs were registered as proprietors, being successors of the estate of Kaushalya Devi Kohli and issued with a lease on 18th August 2004. That the share of Lalchand Kohli was not indicated in the register. That a transfer was done on 19th September 2006 to the current registered owners and later a restriction placed pending determination of this suit.

PW3 stated that when a tenant in common sells his share, the co-tenant has to consent and should be in the document of transfer. That the family of Lalchand Kohli were left out.

On cross-examination PW3 conceded that the registrar made a grave omission. That Entry No. 1 indicated a lease of 99 years from 1937 and there was no explanation in the record of the transactions between that entry and the first title that was issued on 11th December 1976.

On re-examination, PW3 stated that there was no complaint from the original lessee

Defendants' Case

Walter Juma Absaloms, the 6th Defendant, testified as DW1 and adopted his witness statement as evidence. DW1 went through the correspondences and documents leading to their acquiring the suit property.

On cross-examination DW1 stated that they dealt with the 1st Defendant throughout and not the 9th Defendant. That they did due diligence in terms of official search but did not bother to check the green card. That he did not have any evidence that the 1st Defendant was the appointed agent in the sale and that he had a power of attorney but it was not in court. DW1 stated that he was a retired civil servant having worked for the Department of Survey and risen to the position of Director of Survey before retiring in 1996. DW1 insisted that they had done due diligence through conducting an official search but did not bother to check the green card. That he dealt with the 1st Defendant as the agent of the registered owners on the strength of a letter indicating that they were offering the property for sale. That he did not have any evidence that the 1st Defendant was appointed as agent. DW1 stated that he had a power of attorney but it was not in court. DW1 insisted that the power of attorney was registered.

DW1 stated that the sale agreement was processed by Rayola O. Olel Advocate and that the agreement did not mention that the 9th Defendant represented the interests of the Plaintiffs. That the agreement was signed by the 1st Defendant as the agent. That 10% the purchase price they paid was received by and paid through Olel Advocate and the rest paid through bank transfers. DW1 admitted that he did not have evidence of receipt of the money by the owners save a receipt of Kshs. 6.5 million by the 9th Defendant which was only marked for identification and not produced as an exhibit.

On re-examination, DW1 stated that the transaction was done in Mr Olel's office

Francis Rayola Olel Advocate testified as DW2 and he confirmed witnessing all the signatures on the sale agreement as signed by the 1st Defendant and the Defendant purchasers. DW2 stated that he had satisfied himself that the property belonged to the vendors and that there were no red flags in the transaction.

On cross-examination, DW2 stated that there was a power of attorney and original lease which came from the 9th Defendant and that he had no doubt of the 9th Defendant authority to transact. That the purchase price was paid after the transfer and that no amount was paid on 28th August 2006.

Plaintiffs' Submissions

Counsel for the Plaintiffs submitted that the green card indicated that the suit parcel on 28th September 1975 had Vikram Jit Kohli and Lalchand Kohli as tenants in common in equal share. That the successors in title of the estate of Vikram Jit Kohli are the 1st to 3rd Plaintiffs while Lalchand Kohli and Ravinder Kohli donated power of attorney to the 4th Plaintiff.

Counsel submitted that Section 91 (6) of the repealed Registered Land Act stated that no tenant in common shall deal with their undivided share without obtaining written consent of the remaining tenants.

That the Registrar of Lands Kisumu had admitted that there was an error in the register in the registration of 18th August 2004 which purported to transfer the entire interest to the Plaintiffs, excluding the share of the Lalchand Kohli. That the Plaintiffs were barred by law from disposing their legitimate half share without the consent of Lalchand Kohli or through a court order if consent was denied.

Counsel submitted that the absence of such a consent, as read with Sections 91 (5) and (6) and Section 96 of the repealed Registered Land Act, automatically voided the transaction between the 1st to 3rd Plaintiffs and the 2nd to 8th Defendants in respect of the whole property.

Counsel submitted that the power of attorney was not produced as an exhibit while the donee of the document, the 1st Defendant, did not testify. That the power of attorney filed in the Defendants documents was dated 17th July 2004 and registered two years later on 29th August 2006. That the power of attorney offended the provisions of the Registration of Documents Act for want of registration within two months of execution. That the document was registered a day after the sale agreement signed on 28th August 2006, hence the purported sale agreement was null and void *ab initio*.

Counsel submitted that DW1 was a civil servant who rose to the position of Director of Survey in Kenya and therefore conversant with land matters and the fact that proper due diligence ought to be done before purchasing property. That he didn't bother to retrieve the green card which would have established that the property was registered as tenancy in common in undivided shares. That he lied on oath that he paid 10% of the purchase price through Rayola Olel DW2 who was emphatic that the entire consideration was paid at once after the transfer of the suit property five months after the execution of the sale agreement.

Counsel submitted that the 2nd to the Defendants went out of their established mode of transacting which was making payments through Kohli Patel & Raichura Advocates and forwarded to the agent his commission, the Defendants paid to the agent the entire sum rather than the advocates of the principal owners of the property. That the Defendants never bothered to counter check with the tenants as they would have realised part of the Plaintiff's family was residing in the building. That the Defendants failed to produce evidence of receipt if the purchase money by the Plaintiffs or their advocates whom they ordinarily dealt with through cheque.

Counsel urged the court to find the 2nd to 8th Defendants negligent, citing ***Lawrence P. Mungai v AG & 4 others Nairobi Civil Appeal No. 146 of 2014*** where the court held that the 3rd Respondent was negligent in his business transactions. Counsel asserted that the Defendants were not bona fide purchasers in good faith and for value as it seemed they were part of the collusion in fraudulently acquiring the Plaintiffs property. Counsel cited ***Alice Chemutai Too v Nickson Kipkurui Korir & 2 others Kericho ELC No. 51 of 2014 (OS)*** where it was held that a title can be impeached if it is procured through fraud or misrepresentation.

Counsel submitted that the Plaintiffs are entitled to fair and commensurate compensation in terms of lost rents of about Kshs. 150,000 /= per month for the entire period of the suit and costs of travel and advocates' costs.

2nd to 8th Defendants Submissions

Counsel for the Defendants submitted that the Defendants fit within the description of bonafide purchasers for value as elaborated in Lawrence Mukiri v Attorney General & 4 other [2013] eKLR. That the Defendants did due diligence and the title had no defects on the face of it. That the search did not show any encumbrances that could lead the purchasers to investigating further and the Land Registrar conceded that there was an omission when filling the entries in the green card.

Counsel submitted that the Plaintiffs had not proved any fraudulent action on the part of the 2nd to 8th Defendants. That fraud must be specifically pleaded and distinctly proved as per Eunice Grace Njambi Kamau & another v The Hon. Attorney General and 5 others [2000] eKLR.

Counsel submitted that the Land Registrar averred that any third party who was to purchase the property would do so based on the current situation of registration, that is that the Plaintiffs were the proprietors of the entire land, and that there was no document to date challenging the entry in the green card.

Counsel submitted that the powers of attorney produced were not registered as per Section 9 of the Registration of Documents Act, thus the capacity of the 1st Plaintiff to sue was questionable. That PW2 was acting on the strength of a power of attorney that was not dated but registered on 23rd June 2011. That PW3 stated that there can be no registration of a power of attorney that is not dated and signed.

Issues for Determination

1. Capacity of Plaintiffs to Sue

The powers of attorney that the 1st Plaintiff sought to produce were executed in the United Kingdom and not registered in Kenya as required under Section 44 (4) of the Land Registration Act, therefore he lacked the capacity to be enjoined in the suit and the evidence he tendered ought to be disregarded. However, the interests of the original Plaintiffs, their statements and pleadings cannot be ignored, more so given the fact that the 1st Plaintiff was enjoined at a late stage of the suit merely to represent the interests of the beneficiaries of the original Plaintiffs' estates.

With regard to the capacity of PW2, the power of attorney was registered and stamped by the Land Registrar on 23rd June 2011. However, the Defendants attempted to impugn the power of attorney on the basis that it was not dated. Section 114 of the repealed Registered Land Act provides that a power of attorney shall be executed and verified in accordance with sections 109 and 110. Section 109 (2) of the Act provides:

“(2) ... an instrument shall be deemed to have been executed only -

(a) by a natural person, if signed by him...”

Therefore the bare minimum requirement for proper execution of a power of attorney under the Act is that the instrument is signed by the donor and verified by the Registrar. Both of these requirements were complied with. Therefore, unless the Defendants were alleging that the donee was acting on behalf of the donor before the date it was registered, the lack of a dating the power of attorney is not enough to invalidate it. To that end, PW2 was properly enjoined as a party.

2. Validity of the Sale and Transfer of the Suit Property

Section 114 of the repealed Registered Land Act provides:

“(1) ... no instrument executed by any person as agent for any other person shall be accepted by the Registrar unless the person executing it was authorized in that behalf by a power of attorney executed and verified in accordance with sections 109 and 110.

(2) The original of such power of attorney or, with the consent of the Registrar, a copy thereof certified by the Registrar shall be filed.”

Notwithstanding the grave error made by Land Registrar in failing to note the nature of the suit property as being a tenancy in common which included an undivided half share interest owned by Lalchand Kohli, and the sale and transfer proceeding on the inaccurate conclusion that the original Plaintiffs were the owners of the entire property, the Defendants averred that the transactions proceeded on the strength of a valid and registered power of attorney.

As per Section 107 of the Evidence Act, the burden of proving that the sale and transfer of the suit property was conducted on the strength of a valid and registered power of attorney lied with the Defendants. However, the Defendants failed to produce the original power of attorney or certified copy of the power of attorney that ought to have been filed by the Land Registrar in the course of effecting the transfer of the property from the original Plaintiffs to the 2nd to 8th Defendants.

Having chosen to withhold this evidence that is at the centre of the issue of the validity of the sale and transfer of the suit property, the court can therefore reasonably infer that the power of attorney was either not registered as required under Section 114 of the Registered Land Act or, if registered, would be adverse to the Defendants' case if it was tendered into evidence particularly in terms of not having been registered within the prescribed time and having been registered after the execution of the sale agreement, as alleged by the Plaintiffs.

Matavo J., in *In Estate of Stanley Kori Kiongo Alias Kori Kiongo-Deceased* [2016] eKLR, elaborated on the adverse inference rule as follows:

“The unexplained failure by a party to give evidence or call a witness or tender certain documents may, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party’s case. The failure to call a witness or tender documents can allow evidence that might have been contradicted by such witness or document to be more readily accepted. Further, where an inference is open from the facts proved, the absence of the witness or documents may be taken into account as a circumstance in favour of drawing of the inference... The rule only applies where a party is required to explain or contradict something. What a party is required to explain or contradict depends on the issues in the case as thrown in the pleadings or by the course of the evidence in the case.”

While the Plaintiffs have not sufficiently demonstrated fraud on the part of the 2nd to 8th Defendants in the sale and transfer of the suit property, they have proved on the balance of probabilities that the suit property was acquired illegally and/or unprocedurally and therefore the title in the names of the 2nd to 8th Defendants is challengeable under Section 26 (1) of the Land Registration Act. Therefore, the register should be rectified as provided by Section 80 of the Land Registration Act reverting the original Plaintiffs’ ownership of the undivided half share in the property and also including Lalchand Kohli’s ownership of the other undivided half share.

The upshot of the above is that it is hereby ordered that the Plaintiffs be registered as the owners of undivided half share of land reference number KISUMU MUNICIPALITY/ BLOCK 7/331 measuring 0.0697 Ha or thereabouts. That the title issued to the Defendants is hereby revoked and or annulled and or cancelled altogether. That the Deputy Registrar Kisumu to sign documents for the purposes of conveyance for the Plaintiffs or their nominee(s) on behalf of the Defendants. That the Respondents are condemned to meet costs of this suit.

DATED AND DELIVERED THIS 5TH DAY OF MAY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE