



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT THIKA**

**ELC 260 OF 2018**

**(FORMERLY MILIMANI ELC 103 OF 2001)**

**NGOINGWA COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**DORCAS WANJIKU IKINU.....DEFENDANT**

**JUDGMENT**

1. The plaint herein was filed as Nairobi H.C.C.C No. 103 of 2001 on 24<sup>th</sup> January 2001, where the following orders have been sought;

**I. A declaration that the transfer of THIKA MUNICIPALITY/BLOCK 20/202 to defendant was fraudulent.**

**II. Re-transfer of the suit premises into the plaintiffs' name**

**III. An order directing the defendant to execute and sign all transfer documents in favor of the plaintiff and in default the deputy Registrar of the court to do so on her behalf**

**IV. Costs of this suit.**

2. The defence side had filed a statement of defence and counter claim on 23.3.2001. However, no statements of witnesses or documents to be relied on were ever filed for the defendant. Further, there was no appearance for defendant on the date of hearing on 13.12.2018.

3. The plaintiff is identified as a limited liability company, which was the registered owner of the suit land prior to 18.5.1994. It is pleaded that defendant deceived the directors of the plaintiff company to sign blank transfer forms, and misrepresented to the directors that she was an employee of the Co-operative bank, and was in a position to assist the plaintiff company to get a loan. Defendant then caused the suit premises to be registered in her name without obtaining the necessary consent and without following the rightful and lawful procedure and without any consideration at all.

4. **PW1 DAMARIS NJOKI** testified and adopted her statement dated 2<sup>nd</sup> June 2011 as her evidence. She avers that she is one of the founder members of the plaintiff company. Some other members have since passed on.

5. The plaintiff company had taken a loan from Kenya Commercial Bank. Sometime in 1993 Kenya Commercial Bank demanded their loan balance from the Plaintiff Company. In a state of panic of losing their properties, the members sought for assistance from any quarters, including politicians and administrators. One of their directors, Rachel Wanja introduced to them the idea of seeking help from the defendant.

6. Defendant promised to help them clear their loan balance by selling the suit land for Kshs. 3,000,000 on condition that it was transferred to her. She also promised to have the loan paid by the president and followed up by saying that she had made many visits to state house and she was about to succeed. In return, defendant demanded that the Plaintiff Company make her children and other relatives shareholders of the company as reward for this assistance. The plaintiff complied and they gave plots to defendant's husband, defendant herself, her mother, sister and brother.

7. Thereafter, the defendant introduced them to Co-operative Bank where she worked and insisted that they convert their shareholdings into Ngoingwa Farmers Co-operative Society Limited to qualify for a loan. The defendant further insisted that they should use the loan for other purposes other than Paying the Kenya Commercial Bank Loan. They refused and the defendant complained to the Thika District Commissioner who heard the dispute and resolved that the Co-operative Bank loan be repaid and the Kenya Commercial Bank Account be maintained as the only company account.

8. Defendant had apparently requested for the transfer of the suit land THIKA/MUNICIPALITY/20/202 into her name to enable her to sell it. She neither accounted for the plots nor the proceeds thereof. When the plaintiff company refused to operate as a co-operative society the defendant turned against them and claimed that the land was hers.

9. **PW2 JANE WAITHIRA** is a daughter of another director of Plaintiffs Company, Rachel Wanja who died during the pendency of the suit on 29.10.2017. The court was urged to admit the statement of Rachel Wanja as part of the evidence. That application was allowed. The contents there in are more or less similar to what is contained in the statement of PW1.

10. In their submissions the plaintiffs argued that the land was fraudulently transferred to the defendant. The defendant deceived Penninah Wanjiru Gathenya and Damaris Njoki Kamau to sign blank transfer forms and causing the suit property to be registered in her name. They argued that the defendants claim that the suit land was a settlement for consultancy services was not supported by any evidence. The plaintiffs paid her by giving her 7 plots, of which she availed names of her relatives to benefit there from as the proprietors. That the plaintiffs directors, who were elderly and apprehensive that they would lose their land to their financiers were misled and taken advantage of by the defendant due to their plight. The defendant misled them to believe that the suit land could only be bought by willing buyers only when it was registered in her name.

11. Further, it is submitted that there was no consent from the land control board yet the land was agricultural land by then. On this point reference was made to the cases of **James Muthuri Mungania vs. Margaret Karema (2014) eKLR** and **Civil Appeal No. 26 of 1979 Kariuki vs. Kariuki (1982) eKLR**.

### **ANALYSIS AND DETERMINATION**

12. I have carefully analyzed the pleadings, the evidence and the submissions advanced herein and the issue arising for determination is; **whether the registration of the defendant as the owner of the suit property was procured through fraud?**

13. Section 26 of Land Registration Act 2012 states as follows;

**“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme”.**

14. It is clear from the above that the law is not in favour of fraudulent transactions. In the case of **Davy...Vs...Garrette (1878) 7 ch.473** at Pg 489, the Court held that:-

**“In the common law courts, no rule was more clearly settled than that fraud must be distinctly proved and that it was not allowable to leave fraud to be inferred from the facts...”**

15. Further in the case of **R. G. Patel v. Lalji Makanji [1957] EA 314** the former Court of Appeal for Eastern Africa stated thus:

**“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”**

16. In **Munyua Maina –Vs- Hiram Gathiha Maina, Court of Appeal Civil Appeal No. 239 of 2009 (unreported)**, the court stated that,

**“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove how he acquire the title and show that the acquisition was legal.....”**

17. In this case, the plaintiff company alleged that they relied on the defendant for assistance and she took advantage of their trust. That they did not enter into a consultancy agreement with the defendant who fraudulently transferred the property to herself.

18. Section 3 of the Law of Contract Cap 23 states as follows;

**“No suit shall be brought upon a contract for the disposition of an interest in land unless—**

**(a) The contract upon which the suit is founded—**

**(i) is in writing;**

**(ii) is signed by all the parties thereto; and**

**(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party”.**

19. The agreement herein was for the sale of the suit property for monetary value not a transfer to the defendant as compensation. Therefore, this shows that there was no meeting of the minds thus no agreement by the parties.

20. It was the Plaintiffs Company's argument that certain properties were transferred to the defendant's relatives as per the list she provided and this was meant to act as the defendant's compensation. Therefore it can be concluded that no consideration passed to the Plaintiff Company.

21. Further, there is no indication that there was consent obtained from the land control board in respect of the transfer of the land from plaintiff to defendants.

22. In the case of **Macfoy Vs United Africa Limited (1961) 3 ALL ER 1169** Lord Denning expressed himself as follows.

**“If an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.**

23. In the case of **Rose Naswa Masinde vs. Lilian Nekesa Simiyu Mukopi, ELC NO. 985 OF 2012 (formerly H.C.C no. 151/2011) ELDORET**, it was stated that;

**“The defendant did not in any way demonstrate that she contributed a cent towards the purchase of the suit land. I am inclined to believe the version of the plaintiff that the suit land was to be held by the defendant, on the understanding that she will later transfer the same to her sister in law....”.**

24. Likewise in the present case, it is clear that defendant was not purchasing the suit land. She only offered to assist the plaintiffs to get a buyer for the land. Defendant ended up getting many plots for herself and her relatives as a reward for the “assistance”. But apparently, defendant did not keep her promise and she ended up with the title of the suit land. In the case of **James Muthuri Mungania vs. Margret Karema Court of Appeal Case No. 10 of 2012 Nyeri** (cited by plaintiff), the court took into consideration acts done in an alleged relationship of trust. The court had even cited the story of **“The Ginger bread Man”**, where a sly fox offered to assist a boy to cross a river, and they actually crossed the river, but on arrival at the other side of the river, the fox swallowed the boy!

25. It has emerged that defendant never took over possession of the Suitland. This gives credence to plaintiffs assertions that defendant was not meant to own the suit land.

26. I am inclined to find that Plaintiffs have proved their case on a balance of probability. I proceed to grant the following orders:

- 1) It is hereby declared that the Title deed THIKA MINICIPALITY/BLOCK 20/202 issued in favour of Dorcas Wanjiku Ikinu is null and void.**
- 2) The Land Registrar is hereby ordered to cancel title deed THIKA MUNICIPALITY/BLOCK 20/202 in the name of Dorcas Wanjiku Ikinu and instead NGOINGWA COMPANY LIMITED (the plaintiff) be registered as the owner.**
- 3) The deputy Registrar of this court is hereby authorized to sign all requisite documents to give effect to the implementation of this Judgment.**
- 4) Any orders of inhibition, injunction, restriction or caution that may be subsisting in respect of parcel THIKA MINICIPALITY/BLOCK 20/202 are hereby discharged in order to facilitate the aforementioned re-transfer of the land.**
- 5) The consent of land control board is dispensed with in the implementation of this judgment.**
- 6) Defendant is condemned to pay costs of the suit.**

**Dated, signed and delivered at Thika this 2<sup>nd</sup> day of May, 2019.**

**MBUGUA LUCY**

**JUDGE**

**2/5/2019**

In the presence of

Court Assistant: M/s Diana

M/s Vundi H/B for Mrs. Gichuhi for Plaintiff

Mr. Siagi for Defendant

Plaintiff: Absent

Defendant: Absent