



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.76 OF 2018

MARY NJERI NGUGI.....PLAINTIFF

VERSUS

FEDERAL INVESTMENT LIMITED.....DEFENDANT

JUDGMENT

(Plaintiff having purchased the suit land and developing it; plaintiff residing in the USA; suit land somehow transferred to defendant while plaintiff was in the USA; defendant claiming that plaintiff took out a loan with the defendant; no charge registered against the property if at all it was a loan; at the time the loan is said to have been taken, plaintiff was not in the country; ID card and photographs displayed by the defendant not being those of the plaintiff; no explanation as to why the property was transferred to defendant if its interest was that of chargee; apparent that title was fraudulently transferred to the defendant; title of the defendant cancelled and restored to the plaintiff)

1. Through a plaint filed on 15 February 2018, the plaintiff averred that she is the registered owner of the land parcel Nakuru Municipality Block 28/279. She averred that on 5 February 2018, she was informed of an advertisement offering her property for sale by way of public auction where it was indicated that she had taken a loan from the defendant and used the suit property as collateral. This prompted her to do a search which revealed that the title to the suit property is in the name of the defendant. It is the contention of the plaintiff that the registration of the defendant as proprietor of the suit land was done fraudulently. In the suit, she has sought orders to have the register rectified so as to reflect her as the rightful proprietor of the suit property.

2. The defendant filed a statement of defence vide which she pleaded that the plaintiff, on 19 October 2017, borrowed the sum of Kshs.14,640,000/= which money was to be repaid in twelve equal monthly instalments of Kshs.1,220,000/=. It is pleaded that the property was charged and that the plaintiff defaulted in paying the loan. The defendant annexed various documents alongside her pleadings including a loan agreement, copies of an ID card and photograph said to be of the plaintiff.

3. The defendant did not however appear during the hearing of the case despite her counsel being duly served.

4. PW-1 was one Joseph Mwangi Kibuu. He testified inter alia that the plaintiff resides in the United States of America and that it was him who found the suit property for the plaintiff to purchase. He also assisted the plaintiff develop 24 rental units on the suit property. He testified that on 5 February 2018, he read the newspaper and found the suit property advertised for sale. He notified the plaintiff who informed him that she has never taken out any loan and he was advised to report to the police station which he duly did. The officials of the defendant were arrested but no further action seems to have taken place. He did a search which showed that the property had been transferred to the defendant. He stated that the original title deed has been in his custody and he had the same in court and wondered how the defendant obtained registration in her name.

5. The plaintiff testified as PW-2. She stated that she resides in the United States of America (USA) and that she purchased the suit land in the year 2008 after which she developed some rental apartments in the year 2016. She mentioned the report where she was informed that the suit property had been offered for sale by the defendant. She stated that she has never heard of the defendant, never had any dealings with the defendant, and has never taken any loan from her. She testified that it could not have been possible for her to take out a loan with the defendant in the year 2017 as she was in the USA. She denied signing the loan agreement displayed by the defendant and disputed the signature therein. She referred to the ID Card that was used to transfer the title to the defendant and pointed out that the photograph therein was not of her. She stated that she has never surrendered her title deed for purposes of taking out a loan and reiterated that the original was with PW-1. She asserted that the purported transfer of the property to the defendant was done fraudulently.

6. With the above evidence, the plaintiff closed her case.

7. I have gone through the evidence tendered. It is clear to me that the suit property was initially registered in the name of the plaintiff and

the plaintiff still holds the original title deed which was displayed in court during the hearing of the case. Despite not offering any evidence, it is apparent that the position of the defendant is that the plaintiff took a loan using the suit property as collateral. In its list of documents, the defendant displayed a loan agreement purporting to have been prepared on 19 October 2017, but this cannot be, because the plaintiff tabled her passport showing that she was not in the country on this day, but was in the USA. The plaintiff also demonstrated that the photographs displayed by the defendant purporting to be of her image do not refer to her. Even assuming that the suit land was used as collateral, I fail to understand how the suit land got transferred to the defendant, for the defendant would only be a chargee and what would be registered would be a charge and not a transfer. The defendant has not come to court to explain how this happened.

8. I am persuaded on a balance of probabilities that the plaintiff never executed the purported loan agreement as alleged by the defendant and never executed any instruments transferring the suit land to the defendant. The documents said to have been used by the defendant to transfer the title have all been shown to be fraudulent.

9. I therefore have no doubt in my mind that the defendant became the registered proprietor of the suit property by way of fraud. I am further persuaded that the defendant was party to the fraud, and I have already pointed out that the defendant has not explained how it came to be registered as proprietor of the suit property, if at all its interest was that of chargee. The title of the defendant was thus procured by way of fraud which the defendant was a party. Such title cannot be protected and is liable to be cancelled pursuant to the provisions of Section 26 of the Land Registration Act, 2012, which provides as follows :-

Certificate of title to be held as conclusive evidence of proprietorship

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—

(1) 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, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

10. It will be noted that where a title has been procured by way of fraud or misrepresentation, to which the person is proved to be a party, cannot be protected. I have found that the plaintiff has proved that the title of the defendant was procured through fraud and I have found that the defendant must have been a party to the fraud. I therefore proceed to cancel the title of the defendant and order the Land Registrar, Nakuru, to rectify the title by cancelling out the purported transfer to the defendant and restoring the plaintiff as the registered proprietor of the land parcel Nakuru Municipality/Block 28/279.

11. The defendant will shoulder the costs of this suit.

12. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 1st day of October 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Cheruto holding brief for Mr. Githui for the plaintiff.

No appearance on the part of M/s C. M. Ongoto & Co. for the defendant.

Court Assistants: Nancy Bor & Alfred Cheronno

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU