



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC NO. 100 OF 2017

MARGARET NJOKI NJOROGE.....PLAINTIFF

VERSUS

ELIZABETH WAIRIMU KINUTHIA.....1ST DEFENDANT

FAULU MICRO FINANCE BANK LIMITED.....2ND DEFENDANT

JUDGMENT

1. By plaint filed on 9th March 2017, the plaintiff stated that she bought the parcel of land known as Nakuru Municipality Block 22/728 from Peter Rutinu Kuria, was registered as the owner on 31st July 1996 and a title deed issued to her. That she gave the title deed to her mother for safe keeping since she resides in Switzerland and that she also built permanent houses on the suit property. She further averred that in October 2014, the 1st defendant who is her niece unlawfully took the title deed from her mother, prepared an application for consent of the Land Control Board and a transfer of Land Form, forged her signatures then transferred the suit property to her name. That the 1st defendant proceeded to charge the suit property in favour of the 2nd defendant, obtained a loan facility of KShs 3,350,000 then neglected to repay back the loan. The plaintiff averred that the defendants acted fraudulently.

2. The plaintiff therefore prayed for judgement against the defendants for:

a) *A declaration that the transfer of Title Number Nakuru Municipality Block 22/728 from the name of the plaintiff into the name of the 1st defendant was fraudulent and that the plaintiff is the lawful owner of title number Nakuru Municipality Block 22/728.*

b) *An order of injunction restraining the 2nd defendant from releasing the original copy of the title deed for title number Nakuru Municipality Block 22/728 and the discharge of charge thereof to the 1st defendant.*

c) *An order that the district land registrar, Nakuru rectifies the register for title number Nakuru Municipality Block 22/728 by cancelling the 1st defendant as the registered owner thereof and replacing her with the plaintiff herein.*

d) *Any other or further relief that this honourable court may deem fit to grant.*

e) *Costs of this suit be granted to the plaintiff.*

3. The 1st defendant neither filed a defence nor participated in the proceedings.

4. The 2nd defendant filed its statement of defence in which it averred that it granted a loan to the 1st defendant which was secured by a charge over the suit property, that the 1st defendant defaulted in repayment and therefore its statutory power of sale arose. It then denied all the other allegations in the plaint and urged the court to dismiss the suit with costs. The case against the 2nd defendant was later discontinued by consent with no order as to costs.

5. The plaintiff testified and adopted her witness statement. She stated that the 1st defendant is her niece. She purchased the parcel of land known as Title Number Nakuru Municipality Block 22/728 in July 1996 and became the registered owner on 31st July 1996. She added that she gave the custody of her Title Deed to the 1st defendant who resides in Nakuru while she ordinarily resides and works in Switzerland. That she developed a permanent residential house on the suit property. That in or about October 2014, the 1st defendant filled an application for consent of the Land Control Board to transfer the suit property to herself, prepared a forged transfer form and transferred the suit property

to herself using her forged signature. She stated that she never signed the application for consent or even the transfer and that she never appeared before an advocate by the name Serling Joyce on 18th September 2014 for the execution of the transfer. That she was in Switzerland on that day.

6. The plaintiff further stated that upon transferring the suit property to herself, the 1st defendant charged it to the 2nd defendant to secure a loan facility of KShs 3,350,000. That the 1st defendant failed to service the loan as a result of which the 2nd defendant commenced the process of realizing the security through sale by issuing a statutory notice. That she repaid the loan to redeem the property since her mother resides on it and since she had constructed rental houses on it. Among other documents, she produced copies of title deed in her name, application for consent of the Land Control Board, transfer form, her passport, charge instrument and a certified copy of the green card. With that, she closed her case.

7. The plaintiff then filed her submissions in which it was argued on her behalf that she has proved fraud against the 1st defendant by virtue of the various exhibits she produced in court that included a certified copy of the green card to prove that she was the registered owner of the suit property on 31st July 1996 and her passport which shows that she arrived in the country on 22nd February 2014 and exited on 19th March 2014 and that her next arrival date was 13th February 2015 and she exited on 7th March 2015. That the transfer of the suit land to the 1st defendant was fraudulent and that she should be granted all the prayers sought in the plaint.

8. I have considered the pleadings, the evidence and the submissions in this matter. The plaintiff's case has not been challenged at all. No contrary evidence has been offered. The issues that arise for determination are whether the plaintiff has established fraud and whether the plaintiff is entitled to the reliefs sought.

9. The plaintiff's case revolves around the allegation that the 1st defendant acquired the suit property fraudulently. It is not in dispute that the suit property was initially registered in the name of the plaintiff as is confirmed by the copy of the title deed dated 31st July 1997. It is also not in dispute that the land is now registered in the name of the 1st defendant as is demonstrated by the green card that was produced.

10. Under **Section 26** of the **Land Registration Act** the title of a registered proprietor can be nullified if it is shown that it was acquired illegally, unprocedurally or through a corrupt scheme. The section provides:

26. Certificate of title to be held as conclusive evidence of proprietorship

(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, 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.

11. The 1st defendant's title is challenged on the ground of fraud. The Court of Appeal stated in the case of **Arthi Highway Developers Limited Vs. West End Butchery Limited & 6 Others** [2015] eKLR thus:

It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

‘Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Walingford vs Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune v Occident [1989] 1 Lloyd's Rep. 305, 308) ...

12. Regarding the claim that the 1st defendant forged the plaintiff's signature on the application for consent of the land control board and the transfer of land, I note that both documents are dated 18th September 2014. The transfer was registered on 29th October 2014. The plaintiff has demonstrated through her passport that she was not in Kenya during that period. Neither the 1st defendant nor the advocate who allegedly attested the plaintiff's signature testified to assert that the plaintiff signed the documents. I am satisfied that the plaintiff has demonstrated that the 1st defendant acquired the suit property fraudulently. In the circumstances, the 1st defendant's title is impeachable and I will order its cancellation as is sought. All of the 1st defendant's subsequent actions on the suit property including charging it in favour of the 2nd defendant were clouded by the fraud.

13. The plaintiff also sought an injunction restraining the 2nd defendant from releasing the original copy of the title deed of the suit land and a discharge of charge to the 1st defendant. I have opted not to grant that prayer since the suit against the 2nd defendant was withdrawn. Nevertheless, in view of the orders that I will grant below, there should be no doubt in the mind of the 2nd defendant that it should only deal with the plaintiff and not the 1st defendant in so far as matters of the suit property are concerned.

14. The plaintiff has thus established her case and is entitled to the reliefs sought, save as stated at paragraph 13 above.

15. I therefore make the following orders:

a) A declaration is hereby issued that the transfer of Title Number Nakuru Municipality Block 22/728 from the name of the plaintiff into the name of the 1st defendant was fraudulent.

b) As between the plaintiff and the defendants herein, it is hereby declared that the plaintiff is the lawful owner of title number Nakuru Municipality Block 22/728.

c) The District Land Registrar Nakuru is hereby ordered to rectify the register for title number Nakuru Municipality Block 22/728 by cancelling the 1st defendant as the registered owner thereof and replacing her with the plaintiff herein.

d) Costs of the suit are awarded to the plaintiff and shall be borne by the 1st defendant.

Dated, signed and delivered at Nakuru this 20th day of May 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Mutonyi for the plaintiff

No appearance for the 1st defendant

No appearance for the 2nd defendant

Court Assistants: B. Jelimo & J. Lotkomoi