



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 160 OF 2016

ESTHER NANJALA NDALILA.....PLAINTIFF

VERSUS

PATRICK WAFULA KATI1ST DEFENDANT

JOSEPH WAFULA KATI2ND DEFENDANT

J U D G M E N T

By a plaint dated 16th December 2016 and filed herein on the same day, **ESTHER NANJALA NDALILA** (the plaintiff herein) sought Judgment against **PATRICK WAFULA KATI** and **JOSEPH WAFULA KATI** (the 1st and 2nd defendants respectively) in the following terms with respect to the **Plot No 7 SIKUSI MARKET** (the suit plot: -

- (a) An eviction order**
- (b) Costs and interest**
- (c) Any other relief that this Honourable Court may deem fit to grant.**

The basis of the plaintiff's suit is that he is the bona fide registered owner of the suit plot having purchased it on 18th December 2011 from one **NICHOLAS KATI** (now deceased). That he has been in possession of the suit plot since 2012 when the defendant invaded and started developing it. That inspite notice of intention to sue, the defendants have refused to vacate hence this suit.

The case had previously proceeded ex – parte after the defendants failed to file a defence and a Judgment was entered against them on 10th January 2018. However, that Judgment was set aside vide a ruling delivered on 30th May 2019 and the defendants were granted leave to file their defence.

The defendants subsequently filed a defence and Counter – Claim through the firm of **WAMALWA SIMIYU & COMPANY ADVOCATES**, who later withdrew from acting for them.

In the defence, the defendants denied in toto the pleading that the plaintiff is the registered proprietor of the suit plot having purchased it from the deceased. They pleaded that they have been in occupation of the suit plot since the year 2007 and have extensively developed it and therefore the plaintiff is not entitled to the orders sought in her plaint.

In their Counter – Claim, the defendants pleaded that they are sons to the deceased who, prior to his demise, had allocated to them the suit plot. They denied that the deceased had sold the suit plot to the plaintiff adding that it is infact their step–mother **ANN KITUYI KATTI** who signed the sale agreement. They added that the sale agreement was procured through fraud and deceit particulars of which were pleaded in paragraph 16 thereof as follows: -

- 1. Illegally including the name of the deceased on the sale agreement yet the same was signed by ANN KITUYI KATTI.**
- 2. Colluding with ANN KITUYI KATTI to defraud the Estate of the deceased.**
- 3. Purporting to buy the said plot when it belonged to the defendants.**
- 4. Fraudulently changing the ownership of the said plot at the County Office using an illegal agreement.**

The defendants therefore sought Judgment against the plaintiff in the following terms: -

1. **A declaration that the purported sale agreement entered into between the plaintiff and ANN KITUYI KATTI is a nullity.**
2. **An order directing the County Government Officer Land and Urban Planning to cancel the name of the plaintiff as owner of the suit plot and the same to revert to the name of NICHOLAS KATTI.**
3. **Dismissal of the plaintiff's suit.**
4. **Costs and interest.**

Together with the plaint, the plaintiff filed her statement dated 16th December 2016 and subsequently, that of her witness **ANN KITUYI KATTI (PW 2)** dated 2nd October 2020. She also filed as her documentary evidence, the following documents: -

1. **Sale agreement dated 18th December 2011 between NICHOLAS KATTI SULULU and ESTHER NANJALA NDALILA with respect to the suit plot.**
2. **Sale agreement dated 3rd December 2012 between ANN KATTI/DENNIS SIMIYU KATTI and ESTHER NANJALA NDALILI in respect to the suit plot.**
3. **Demand Notice for payment of rates addressed to the plaintiff.**
4. **Receipt for Kshs. 3,000/= being for plot clearance certificate in the names of NICHOLAS KATTI.**
5. **Interest Memo from County Government dated 27th October 2014.**
6. **Letter dated 29th February 2016 from Department of Lands Urban Development and Physical Planning.**
7. **Letter from Chief Kabuchai dated 28th July 2014.**
8. **Letter from Chief Kabuchai dated 28th September 2016.**
9. **Development approval plan fee.**
10. **Clearance Certificate No 49914.**
11. **Demand letter from GEDION RAGIRA ADVOCATES.**

In her statement dated 16th December 2016, the plaintiff confirms that on 18th December 2011, she bought the suit plot measuring 0.06 Ha from the deceased at a consideration of Kshs. 115,000/= which he paid and the same was transferred to him. At the time of the sale agreement, the 1st defendant was tilling the suit plot but was advised by his father the deceased herein to vacate. However, in total disregard of that advise, the 1st defendant went ahead to develop the suit plot even after the Chief had summoned him and asked him to vacate.

In her statement dated 2nd October 2020, **ANN KITUYI KATTI (PW 2)** who is the widow to the deceased confirms that the plaintiff purchased the suit plot from the deceased on 18th December 2011 at a consideration of Kshs. 115,000/=. That the deceased was paid the sum of Kshs. 100,000/= at the execution of the agreement and the balance of Kshs. 15,000/= was paid to the witness on 3rd December 2012 and was utilized to pay school fees for their daughter at **ST PATRICK KIMUKUNGI SECONDARY SCHOOL**. Part of the purchase price was also utilized in paying the out-standing land rates which were due to the then **COUNTY COUNCIL OF BUNGOMA** which was threatening to repossess the suit plot. The balance was used to pay medical fees for the deceased and their children. That the suit property was thereafter transferred to the plaintiff. That the defendants have illegally occupied the suit plot and erected semi-permanent structures thereon and the plaintiff's claim should be allowed.

The defendants did not file any witness statements or list of documents with their defence and Counter – Claim. Nonetheless, **MR MURUNGA** had no problem with them giving their oral testimony during the plenary hearing.

The plaintiffs filed a reply to the defence and a defence to the Counter – Claim. They denied the defendant's averments in their entirety and reiterated that the plaintiff is the owner of the suit plot having purchased it from the deceased at a consideration of Kshs. 115,000/= of which the sum of Kshs. 100,000/= was paid to the deceased upon execution of the sale agreement and Kshs. 15,000/= was paid to **ANN KATTI** and **DENIS SIMIYU KATTI**. That the defendants are therefore not the owners of the suit plot.

In her defence to the defendants' Counter – Claim, the plaintiff reiterated the above and denied all the allegations of fraud levelled against her. She added that the sale transaction was done above board without any fraud and the defendants lack the locus standi to bring this Counter – Claim as they are purporting to do so on behalf of the Estate of the deceased yet they have no Letters of Administration. She therefore pleaded that the defendants' Counter – Claim be dismissed with costs and Judgment be entered for her as sought in the plaint.

The trial commenced on 27th May 2021 when the plaintiff and her witness **ANN KITUYI KATTI (PW 2)** testified and adopted as their evidence the statements whose contents I have already referred to above. She also produced as her documentary evidence the list of documents dated 16th December 2016 and which I have already mentioned above.

PATRICK WAFULA KATTI the 1st defendant testified and stated that he together and his brother **JOSEPH WAFULA KATTI (DW 2)** were given the suit plot by their father the deceased herein. That they shared the suit plot but his brother sold his portion. That he developed his portion by putting up a building thereon. That in 2012, the County Council gave him a rates waiver and he paid the outstanding balance of Kshs. 18,000/=. That the plaintiff also paid the balance of the outstanding rates. He produced as his documentary evidence the following documents: -

1. **Letter of waiver on land rates.**
2. **Demand notice dated 24th September 2012.**
3. **Letter dated 5th May 2016 from the Chief Lands Officer.**
4. **Letter dated 4th October 2016 addressed to the Office of the Ward Administrator.**

In his testimony, the 2nd defendant **JOSEPH WAFULA KATTI (DW 2)** confirmed that what the plaintiff has stated in her testimony is true.

At the end of the trial, the parties elected not to file any submissions and urged the Court to deliver its Judgment on the basis of their respective evidence.

I have considered the evidence by both parties.

It is not in dispute that the suit plot was allocated to the deceased. He then transferred his interest therein to the plaintiff with the blessing of the **COUNTY GOVERNMENT OF BUNGOMA**. The contents of the Internal Memo dated 27th October 2014 by the said **COUNTY GOVERNMENT OF BUNGOMA** are relevant. I shall therefore reproduce it in full.

“27.10.2014

INTERNAL MEMO

FROM: COUNTY REVENUE OFFICER

TO: CHIEF OFFICER – LANDS & URBAN PLANNING

RE: TRANSFER OF OWNERSHIP – PLOT NO 7 SIKUSI MARKET.

The above stated plot has changed ownership through willing buyer/seller arrangement between the late NICHOLAS KATI the seller and ESTHER NANJALA NDALILA the buyer as per attached documents.

I wish to confirm that all charges in respect of the plot are fully paid and therefore, it is recommended that change of ownership in County Records be effected. Relevant documents are attached for your ease of reference.

REUBEN W. WANYAMA

DEPUTY COUNTY REVENUE OFFICER.”

In support of her claim that the deceased sold the suit plot to her in 2011, the plaintiff produced a sale agreement dated 18th December 2011 signed by the deceased and bearing his Identity Card No 0127945. The agreement shows that the deceased had transferred his interest in the suit plot to the plaintiff at a consideration of Kshs. 115,000/= of which a sum of Kshs. 100,000/= was paid at the time of executing the sale agreement. The sale agreement is witnessed both by the deceased's widow **ANN KITUYI KATTI** and **DENIS SIMIYU KATTI**. And although the plaintiff also proved as her documentary evidence another sale agreement dated 3rd December 2012 between her and **ESTHER NANJALA NDALILA**, that sale agreement is in fact simply an acknowledgment by the said **ANN KITUYI KATTI** and **DENIS SIMIYU KATTI** that they had received the sum of Kshs. 15,000/= from the plaintiff being the balance of the purchase price. Indeed, in paragraph 4 of the said agreement, it is stated thus: -

“Being payment of last balance of Kshs. 15,000/= fifteen thousand only.”

In another letter dated 29th February 2016 from the County Government of Bungoma and produced both by the plaintiff and the defendants, it is stated as follows: -

“RE: TRANSFER PLOT NO 7 SIKUSI MARKET

The above matter refers:

Records held in this office indicate that all dues to this County Government in respect of are (sic) rates other changes have been paid upto and including 31st December 2015 and a clearance certificate for 2015 issued.

Please amend all Revenue Records to read ESTHER NANJALA NDALILA of ID No 20224240 and inform this office of the changes.

R.J SIMIYU - CHIEF OFFICER LANDS,

URBAN AND PHYSICAL PLANNING.”

The ownership of the suit plot is not therefore in dispute. When he was cross-examined by **MR MURUNGA** Counsel for the plaintiff, this is what the 1st defendant stated: -

“It is true that my late father was the allottee of the plot in dispute. It is true that he sold it to the plaintiff when there was a building. The building had been constructed by my father.”

The plaintiff’s case was also supported by the 2nd defendant whose oral testimony was very brief. This is what he said: -

“I am the 2nd defendant. What the plaintiff has said is true. I have no interest in the plot.”

And when he was cross-examined by the 1st defendant, he said: -

“You took the plot by force”

The 2nd defendant then went on to add that he had in fact pulled out from the suit plot.

In support of the defendant’s case, the 1st defendant produced as part of the defendants’ documentary a letter written by the defendants to **THE CHIEF OFFICER, LANDS URBAN AND PHYSICAL PLANNING** and dated 5th May 2016 with respect to the suit plot. In the said letter, the defendants write as follows: -

“Dear Sir

REF: TRANSFER PLOT NO 7 SIKUSI MARKET

We PATRICK WAFULA KATTI and JOSEPH WAMALWA KATTI are the true administrators of Plot No 7 Sikusi Market which was given to us by the late NICOLAS KATTI SULUHU who is our father.

Therefore, we urge your office to amend the revenue records to read PATRICK WAFULA KATTI and JOSEPH WAMWALWA KATTI respectively and not ESTHER NANJALA NDALILA as indicated in your letter.

Yours faithfully

PATRICK W. KATTI

JOSEPH W. KATTI.”

Clearly, the contents of that letter cannot be correct for the following reasons. Firstly, there is no evidence that the defendants were appointed as the Administrators of the Estate of the deceased. Secondly, there is no evidence that prior to his demise, the deceased had transferred the suit plot to the defendants. The defendants also produced another letter written by the Chairman of their clan one **P. M. WAFULA MUINDI** and addressed to the **OFFICE OF THE WARD ADMINISTRATOR** seeking **“to revoke”** the sale agreement between the plaintiff and the deceased. It is not known whether the said **WARD ADMINISTRATOR** acted on that letter. His response was not produced. It is obvious however that neither the **WARD ADMINISTRATOR** nor any other person had the power to purport to revoke the sale agreement between the plaintiff and the deceased dated 18th December 2011 with regard to the suit plot.

Although the defendants pleaded fraud in the manner in which the suit plot was transferred to the plaintiff, no evidence of such fraud was adduced when they testified in support of their case. The onus was on the defendants to prove the allegations of fraud to the required standard. In **VIJAY MORJARIA .V. NANSINGH MADHUSINGH DARDAR & ANOTHER 2000 eKLR, TUNOI JA** stated as follows: -

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face

of the pleadings. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

In **CENTRAL BANK OF KENYA LTD & OTHERS .V. TRUST BANK LTD 1996 KLR eKLR**, the Court of Appeal rendered itself as follows: -

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

In this case, the defendants pleaded allegations of fraud on the part of the plaintiff in paragraph 16 of their defence and Counter – Claim. They included that the plaintiff colluded with **ANN KITUYI KATTI** to include the name of the deceased in the sale agreement yet the same was signed by **ANN KITUYI KATTI** and that there was also collusion to defraud the Estate of the deceased. Further, that the suit plot belonged to the defendants. Apart from the fact that no direct or circumstantial evidence, was led by the defendants to prove those very serious allegations, there was evidence adduced by the plaintiff, **ANN KITUYI KATTI (PW 2)** and indeed supported by the 2nd defendant, that infact the deceased sold the suit plot to the plaintiff. All that **ANN KITUYI KATTI** signed for was the acknowledgment of receipt of the Kshs. 15,000/= on 3rd December 2012 being the balance of the purchase price. The initial sale agreement was signed on 16th December 2011 between the deceased and the plaintiff when the deposit of Kshs. 100,000/= was paid. There was no evidence placed before this Court to show that the suit plot belonged to the defendants or that the deceased held it in trust for them. In the circumstances, the defendants’ Counter – Claim can only be for dismissal since there is no credible evidence upon which this Court can make a finding that indeed there was fraud in the transaction leading to the transfer of the suit plot to the plaintiff. That transaction has infact been given a seal of approval by the **COUNTY GOVERNMENT OF BUNGOMA** as is now clear from the letters produced as evidence herein.

On the other hand, the deceased having transferred the suit plot to the plaintiff, the defendants have no right to continue trespassing on it. The plaintiff’s ownership was done above board. It has been endorsed by the **COUNTY GOVERNMENT OF BUNGOMA** which is collecting rates from the plaintiff. It has also been confirmed not only by the deceased’s widow **ANN KITUYI KATTI (PW 2)** but also by the 2nd defendant who has accused the 1st defendant of taking the suit plot *“by force.”* Given those very strong words used by the 2nd defendant during his oral testimony, it is doubtful if he indeed authorized the 1st defendant to sign the verifying affidavit on his behalf. What is clear however is that the 2nd defendant recognizes the plaintiff’s right to the suit plot. The plaintiff has established her claim as required in law and is entitled to the orders sought in her plaint.

With regard to costs, it is clear to me that it is the 1st defendant, and not the 2nd defendant, who necessitated the filing of this suit. I am persuaded to believe that the 2nd defendant was not consulted when the defence and Counter – Claim were filed notwithstanding the fact that the 1st defendant alleges to have signed the verifying affidavit with the consent of the 2nd defendant. The 1st defendant shall solely bear the plaintiff’s costs.

Ultimately therefore, and having considered all the evidence herein, there shall be Judgment for the plaintiff as follows: -

1. The defendants’ Counter – Claim is dismissed.

2. Judgment is entered for the plaintiff as against the defendants in the following terms: -

(a) The defendants shall vacate from the suit plot and remove all their structures thereon within three (3) months of this Judgment.

(b) In default of (a) above, the defendants shall be evicted from the suit plot.

(c) The 1st defendant shall meet the plaintiff’s costs as well as the costs of the dismissed Counter – Claim.

Right of Appeal.

Boaz N. Olao.

J U D G E

21st July 2021.

Judgment dated, signed and delivered to the plaintiff at **BUNGOMA** this 21st day of July 2021 by way of electronic mail as the defendants have now availed a telephone contact, they be advised to pick a copy of the Judgment from the Deputy Registrar to-day.

Boaz N. Olao.

J U D G E

21st July 2021.