



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO

ELC. CASE NO. 843 OF 2017

(Formerly Nairobi ELC 180 of 2016)

PATRICK KIVAI NDUVAPLAINTIFF

VERSUS

NOAH MONERIA OLE KURRARRU.....1ST DEFENDANT

CO-OPERATIVE BANK OF KENYA LTD...2ND DEFENDANT

JAMES MAINA MBURU.....3RD DEFENDANT

JUDGEMENT

By a Plaintiff dated 26th February, 2016 which was amended on 27th September, 2017, the Plaintiff prays for judgment against the Defendants jointly and severally for:

- a. A declaration that the transfer of property Title No. Kajiado /Kitengela /17105 was fraudulent;
- b. A declaration that all subsequent dealings with the property including the charge by the 2nd Defendant is null and void;
- c. A declaration that the Plaintiff is the lawful owner of property Title No. Kajiado/ Kitengela /17105 and entitled to possession and all the rental proceeds thereof;
- d. An order that the Defendants do forthwith re-transfer and surrender the property Kajiado/Kitengela/17105 to the Plaintiff;
- e. The sum of Kshs.8,330,000/= on account of rent for the months of December 2014-December 2015;
- f. Against the 1st and 3rd Defendants for the sum of Kshs.24,850,000/= made pursuant to their misrepresentation and fraud.
- g. An injunction restraining the 2nd Defendant by itself, its supervisor or agents or otherwise from advertising for sale by auction or private treaty or in any way disposing of the property Kajiado/Kitengela/17105;
- h. Costs of the suit.

The 1st and 3rd Defendants though served, entered appearance, but failed to file their respective Statements of Defence to controvert the Plaintiff's averments.

The 2nd Defendant filed a Statement of Defence dated 19th December, 2017, where it denied the Plaintiff's averments and sought for the suit to be dismissed with costs. It contended that it advanced a loan of Kshs.50,000,000/= to the 1st Defendant using land parcel number Kajiado/Kitengela/17105 hereinafter referred to as the 'suit property' as a security and created a charge in its favour on 5th February, 2015 over the same. It insisted that it conducted due diligence which revealed that the 1st Defendant was the absolute registered proprietor of the suit property as from 27th November, 2014 and there were no encumbrances endorsed on it before the loan facility was advanced to the 1st Defendant. Further, the 2nd Defendant upon acceptance of the 1st Defendant's loan facility application, offered him a term loan of Kshs.45,909,381/= and overdraft of Ksh.4,000,000. It denied fraudulently colluding with the 1st Defendant to advance the loan facility as it

was not aware of the fraudulent transfer of the suit property from the Plaintiff to the 1st Defendant. It explained that the registration of Charge over the suit property was done upon disbursement of the loan monies to the 1st Defendant and denied knowledge of any criminal charges instituted in Kajiado Law Court against the 1st Defendant by the Plaintiff on obtaining property by false pretense nor was it aware that the Plaintiff had lost any income due to the alleged fraud. It confirmed knowing of the existence of the fraudulent transfer of the suit property when it was served with court proceedings on 1st March, 2016. It claimed the 1st Defendant defaulted in repaying the loan advanced to him, culminating in their issuance to him with a demand letter on 24th December, 2015 to pay the outstanding amount of Kshs.56,271,104.50/= within 30 days, failure of which it proceeded to exercise its statutory right of sale on 18th February, 2016.

Evidence of the Plaintiff

The Plaintiff Patrick Kivai Nduva as PW1 testified that he is the registered owner of the suit property in which he developed thirty five (35) apartments for residential use. It was his testimony that the 3rd Defendant who was personally known to him, introduced the 1st Defendant to him during a meeting held on 29th September, 2014 at Galleria Mall. Further, that he informed him that the 1st Defendant who had several properties wanted to sell them in cash and in kind. PW1 testified that they agreed that the properties shall be sold for value in the following manner: KAJIADO/LOODARIAK/140 measuring two hundred and fifty Six Hectares (256.0ha) valued at Ksh.180,000,000/=; KEKONYOIKE/ILKISUMET/98 measuring One hundred and Thirty Four Decimal Five Two hectares (134.52ha) valued at Ksh.47,800,000/=; KEKONYOIKE /ILKISUMET /450, measuring one Hundred and One Decimal Five Three Hectares (101.53ha) and KEKONYOIKE/ILKISUMET/152, measuring one Hundred and One Decimal Five Three Hectares (101.53ha) valued at Ksh.54,000,000/=; KEKONYOIKE/ILKISUMET/361, measuring one hundred and Thirty-Four Decimal Five Three Hectares (134.52ha) valued at Ksh.16,000,000/=.

PW1 claimed he discovered that KAJIADO /LOODARIAK /140 and KEKONYOIKE /ILKISUMET /98 were not in the 1st Defendant's name though he assured him he could secure a Power of Attorney with full authority to deal with the said property.

PW1 confirmed he gave the 1st and 3rd Defendants the original title of the suit property together with the necessary documents in good faith on the understanding that he would give PW1 the original title, transfers, consents and copies of ID's and Pin Certificates. He contended that the 1st Defendant fraudulently transferred the suit property to himself and used its title deed as security to obtain a loan from the 2nd Defendant. He further testified that despite various meetings and calls to the 1st Defendant to retransfer the suit property to him, the same has not being successful. He explained that on 18th November, 2015 he held a meeting with his wife and the 1st Defendant where the 1st Defendant offered to re-execute the transfer of the suit property back to him, surrender all the appropriate documents and substitute the security of the suit property but the same was not affected. He later discovered the 1st Defendant was not servicing the loan with the 2nd Defendant but diverting the rental proceeds to his personal account No. 1126695408 at KCB Bank. He further confirmed as at 18th February, 2016, the 1st Defendant's outstanding loan to the 2nd Defendant was Ksh. 58,064,248.59. He reported the matter to Kitengela Police Station for investigation upon which the 1st Defendant was charged with the offence of obtaining property by false pretense at Kajiado Law Courts. He denied ever authorizing the 1st Defendant to register the suit property in his name and given that the 1st Defendant has defaulted in repaying the loan, he risks losing the suit property through sale by public auction. It was his further testimony that although the 2nd Defendant was not a party to the Agreement between the 1st Defendant and himself, it colluded with the 1st Defendant in advancing him a loan using the suit property as security without undertaking due diligence. Further, that he never executed the transfer of the suit property in favor of the 1st Defendant. The Plaintiff produced the following documents as exhibits: Copy of Title Deed No. KAJIADO/KITENGELA/17105; Temporary Agreement dated 29/9/2014; Copy of minutes; Copy of Title Deed No. KAJIADO/LOODARIAK/140; Copy of Title No. KAJIADO/KITENGELA/17105 in the names of Noah Muneria ole Kurrarru; Copy of loan approval; Copy of letter dated 17th November, 2015; Copies of transfer, application to Land Control Board, Identity Card & Pin Certificate; Copy of hand written agreement held on 21/12/2015; Copy of letter dated 18th February, 2016 from Co-operative Bank; Statement dated 11th December, 2015 and Copy of charge sheet.

Evidence of 2nd Defendant

DW1 Sisto G. Macharia testified that he was the 2nd Defendant's Recovery Manager and was authorized by the Board of Directors to testify on its behalf. It was his testimony that by a letter dated 6th December, 2014, the 1st Defendant applied for an overdraft and loan facility of Ksh.49.9 Million from the 2nd Defendant and used the suit property as security for the loan. It was DW2's testimony that the 2nd Defendant accepted the 1st Defendant's loan application and granted him a term loan of Kshs.45,909,381 and overdraft of Ksh.4,000,000 which offer the 1st Defendant duly accepted and signed on 21st January, 2015. DW1 explained that according to Clause 4(a) of the Offer Letter, the 1st Defendant was supposed to repay the term loan within 60 consequent monthly installments of Kshs.765,156.35/= each, excluding the interest and other charges. Further, that on 1st February, 2015, the 2nd Defendant created a Charge over the suit property in its favor. He contended that the 2nd Defendant conducted necessary due diligence over the suit property before duly registering a Charge on 10th February, 2015 and disbursing funds to the 1st Defendant. He further explained that the loan advanced to the 1st Defendant was to be serviced with rental income from the developments on the suit property. He insisted that the 1st Defendant as evident from the title of the suit property presented to the 2nd Defendant, that he was the absolute registered proprietor of the said property and there were no encumbrances or restriction endorsed on it. He stated that the 1st Defendant defaulted in repaying the loan by Kshs.56,217,104.50 which made the 2nd Defendant to issue a demand letter to him on 24th December, 2015 for repayment of the outstanding amount within 30 days from the date of demand. Further, upon the lapse of the 30 days of demand notice, the 2nd Defendant opted to exercise its statutory power of sale by issuing a statutory notice to the 1st Defendant on 18th February, 2016 whose outstanding loan was Kshs.58,197,186. 21. It was his testimony that the 2nd Defendant only became aware of the fraudulent transfer relating to the suit property from the Plaintiff to the 1st Defendant when it was served with the pleadings of this suit. DW1 reiterated that the 2nd Defendant acted in accordance with the law in extending the loan facility to the 1st Defendant and registering a Charge in its favour over the suit property. Further, that the 2nd Defendant should be allowed to exercise its statutory power of sale over the suit property or in the alternative the Charge be transferred to the Plaintiff so as to protect the depositor's money. The 2nd

Defendant produced the following documents as exhibits: Copy of the application letter and form; Copy of the letter of offer and acceptance; Copy of the repayment schedule; Copy of the Charge registered on 10th February, 2015; Copy of the title deed; Copy of the demand letter; Statutory notice; Copy of statement of account and Valuation report.

Plaintiff's submission

The Plaintiff in his submissions reiterated his claim and contended that the 2nd Defendant failed to undertake due diligence before advancing the loan facility to the 1st Defendant. The Plaintiff submitted that failure by the 1st and 3rd Defendant to file their defences is an admission to the allegations made by him. He insisted that the 2nd Defendant should not be protected due to fraud occasioned as a fraudulent title cannot be allowed to stand. He further submitted that there is no doubt that the 1st Defendant obtained the title of the suit property through fraud and therefore the said title is impeachable by Section 26(1)(a) of the Land Registration Act and must be cancelled. Further, that if the title is cancelled, any subsequent transactions is cancelled as well for it was entered into, by a party who had no capacity to do so, as he had no title in the first place. The Plaintiff stated that the 2nd Defendant's argument that he undertook due diligence before charging the suit property should not deprive him of the same. To buttress his averments, he relied on the following decisions: **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR; Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 others (2015) eKLR; Elijah Makeri Nyangwara V Stephen Mungai Njuguna & Another [2013] eKLR; Kibiro Wagoro Makumi v Francis Nduati Macharia & another [2018] eKLR and Vincent Koskei v Benard Koskei [2018] eKLR.**

2nd Defendant's Submissions

The 2nd Defendant submitted that there was no privity of contract between the Plaintiff and itself with respect to the contract with the 1st and 3rd Defendants. Further, that they should be removed from these proceedings and the suit dismissed with costs. It further submitted that at the time of Charging the suit property, the 1st Defendant was registered as its owner. It contended that there was no encumbrance on it, at the time of disbursing the loan. It made reference to the Central Bank of Kenya Prudential Guidelines on Due Diligence and contended that the 1st Defendant was their customer and it was acting as an innocent Chargee without any notice to any defect on the title. It reiterated that the Plaintiff was negligent and highlighted various instances including releasing the original title of the suit property to the 1st Defendant. Further, that the real culprit herein is the 1st Defendant who falsely obtained property from the Plaintiff and got a loan facility from it but failed to service it. To buttress its averments, it relied on the following decisions: **William Muthee Muthoni V Bank of Baroda (2014) eKLR; Aineah Likuyani Njirah V Aga Khan Health Services (2013) eKLR; Savings & Loan (K) Limited V Kanyenje Karangaita Gakombe & Another (2015) eKLR; Kiplangat Shelisheli Mutarakwa V Joseph Rotich Kones (2018) eKLR and Edward Mwangi Irungu V Chief Land Registrar & 3 others (2018) eKLR.**

Analysis and Determination

Upon consideration of the Amended Complaint, 2nd Defendant's Statement of Defence, Testimonies of the Witnesses, Exhibits and rivaling submissions, the following are the issues for determination:

- Whether the 1st Defendant legally acquired the suit property.
- Whether the 2nd Defendant is an innocent chargee without notice to defect in title.
- Whether the Plaintiff is entitled to the orders sought in the Complaint.
- Who should bear the costs of the suit.

As to whether the 1st Defendant legally acquired the suit property.

The Plaintiff claimed he is the registered owner of the suit property and in 2014, the 3rd Defendant introduced him to the 1st Defendant to purchase in cash and in kind, properties allegedly owned by the 1st Defendant upon which they entered into oral Agreement with the 1st Defendant on 29th September, 2014 for sale of various properties. The Plaintiff confirmed that they agreed to exchange KAJIADO/LOODARIAK/140 with the suit property after the 1st Defendant misrepresented to him that he had purchased the said property from one Kishanto Haron Simel. Further, that he was in a position to secure the execution of the transfer from Kishanto Haron Simel to the Plaintiff including producing Consent of the Land Control Board, Passport photographs, PIN as well as copies of National Identity Card of Kishanto Haron Simel. The Plaintiff confirmed surrendering the original Certificate of Title of the suit property to the 3rd Defendant in good faith with instructions to him not to release the same to the 1st Defendant until conditions for transfer were met but the 1st and 3rd Defendants colluded and fraudulently transferred the suit property to the 1st Defendant. It was his testimony that the 1st Defendant after the fraudulent transfer used the suit property as security to obtain a loan from the 2nd Defendant. He sought for the 1st Defendant to transfer the suit property back to him but despite his promises, he failed to do so. Further, he later discovered the 1st Defendant was not servicing loan with the 2nd Defendant but diverting the rental proceeds from the houses on the suit property to his personal account No. 1126695408 at KCB Bank. He further confirmed in court that as at 18th February, 2016, the 1st Defendant's outstanding loan to the 2nd Defendant was Ksh. 58,064,248.59. It was his further testimony that he reported the matter to Kitengela Police Station for investigation upon which the 1st Defendant was charged with the offence of obtaining property by false pretense at Kajiado Law Courts. He denied ever authorizing the 1st Defendant to register the suit property in his name. The 1st and 3rd Defendants though duly served only filed a Memorandum of Appearance but failed to file any Defences to controvert the Plaintiff's averments, hence at this juncture the Plaintiff's evidence on how the 1st Defendant acquired the suit property remains uncontroverted. To my mind, there is no evidence presented by any of the Defendants that the 1st Defendant adhered to the proper legal process to acquire the suit property from the Plaintiff. The 2nd Defendant insists it was not privity to the contract between the Plaintiff and the 1st Defendant. In line with the evidence above, I wish to make reference to section 26 of the Land Registration Act which provides as follows:-

26. (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.

In the case of **Arthi Highway Developers Vs West End Butchery Limited & 6 others (2015) eKLR**, the Court held that: **It is our finding that as between West End and Arthi, no Valid title passed and the one exhibited by Arthi before the trial Court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof...**;

Further in the case of **Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Court of Appeal held that:- **“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”**

Based on the facts before me and the uncontroverted evidence of the Plaintiff by the 1st and 3rd Defendants while relying on the legal provisions cited above as well as associating myself with the decisions I have quoted, I find that the 1st Defendant indeed colluded with the 3rd Defendant to dupe the Plaintiff and acquired the suit property in his name unprocedurally through fraud, misrepresentation and the same is hence not a good title as the root is challenged. I proceed to further hold that this title is hence impeachable and will proceed to rely on section 80 of the Land Registration Act to make an order for rectification of the said title from the 1st Defendant’s name back to the Plaintiff’s name. I further find that the 1st Defendant is entitled to refund to the Plaintiff, of the rental proceeds in the sum of Kshs. 8,330,000/= on account of rent for the months of December 2014 to December 2015 which he took as part of the consideration of the transaction they had entered into with the Plaintiff. Further, the 1st and 3rd Defendants are liable to refund to the Plaintiff the sum of Kshs. 24,850,000/=, made pursuant to their misrepresentation and fraud.

As to whether the 2nd Defendant is an innocent chargee without notice to defect in title.

The 2nd Defendant insists it conducted due diligence at the point of Charging the suit property which revealed that the 1st Defendant was its registered proprietor. Further, that it was not privy to the contract between the Plaintiff and 1st Defendant. It made reference to the Central Bank of Kenya Prudential Guidelines on Due Diligence and insisted the 1st Defendant was their customer and it was acting as an innocent Chargee without any notice to any defect on the title. It made a strong argument that it is the Plaintiff who was negligent by releasing his original title to the 3rd Defendant. In the testimony of DW1, he admitted that since the 1st Defendant was their customer, they never undertook any due diligence from Credit Reference Bureau in respect to his credit worthiness. It further emerged that the Branch Manager for the 2nd Defendant’s Bank at Ongata Rongai could only approve a loan amount of Kshs. 5 million but proceeded to approve a much higher amount, for the 1st Defendant.

In the case **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR** my brother Judge while dealing with a situation almost similar to the case at hand held that:’ **‘It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:-**

“...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. "I stand by the above words and I am unable to put it better that I did in the said dictum.....Having considered all arguments I frankly do not see how the title of the 1st respondent, the star fraudster, can be upheld, and having nothing to charge, I do not see how the charge in favour of the bank can be upheld. It was argued that a decision to cancel the charge would be injurious to the economy. But it is no less, and in fact, it may probably be more injurious, if I am to deny the applicant and the heirs of the estate of the deceased their rightful inheritance, which comprises of the suit property. The charge has to be cancelled and I am afraid that in this instance, the bank will have to pursue the 1st respondent personally to recover its money.’

In rely on the evidence before me and associating myself with the decision cited above, I find that since the 1st Defendant failed to acquire a

good title to Charge to the 2nd Defendant, the 2nd Defendant cannot claim to be an innocent chargee for value without notice to defect in title as it undertook due diligence before registering the said Charge. The 2nd Defendant even admitted in its submissions that it is actually the 1st Defendant to blame. From the testimony of DW1 it is clear someone in the bank was indeed assisting the 1st Defendant whom he confirms was a very good customer of theirs. If so, I opine that they have a remedy to pursue their good customer because at this juncture, I am afraid, I cannot uphold a Charge which was registered using a fraudulently procured title as I have made an order that the said title should revert back to the Plaintiff.

As to whether the Plaintiff is entitled to the orders sought in the Plaintiff.

The Plaintiff sought for various orders which are enumerated above. Based on my findings, I find that the Plaintiff is indeed entitled to the orders sought.

As to who should bear the costs of this suit.

I find that since the Plaintiff is the inconvenienced party, he should be granted the costs of this suit to be borne equally by the 1st and 3rd Defendants.

It is against the foregoing that I find the Plaintiff has proved his case on a balance of probability and will proceed to make the following final orders:

- i. A declaration be and is hereby issued that the transfer of property Title No. Kajiado/Kitengela/17105 was fraudulent;
- ii. A declaration be and is hereby issued that all subsequent dealings with Title No. Kajiado/Kitengela/17105 including the Charge by the 2nd Defendant is null and void;
- iii. A declaration be and is hereby issued that the Plaintiff is the lawful owner of property Title No. Kajiado /Kitengela /17105 and entitled to possession and all the rental proceeds thereof;
- iv. An order be and is hereby issued that the Defendants do forthwith re-transfer and surrender the property Kajiado/Kitengela/17105 to the Plaintiff
- v. The 1st Defendant be and is hereby directed to pay to the Plaintiff the sum of Kshs.8,330,000/= on account of rent for the months of December, 2014 to December 2015 and 1st and 3rd Defendants to jointly pay to the Plaintiff the sum of Ksh.24,850,000/= made pursuant to their misrepresentation and fraud.
- vi. An Order of permanent injunction be and is hereby issued restraining the 2nd Defendant by itself, its supervisor or agents or otherwise from advertising for sale by auction or private treaty or in any way disposing of the property Kajiado/Kitengela/17105;
- vii. Costs of the suit is awarded to the Plaintiff, to be paid by the 1st and 3rd Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2021

CHRISTINE OCHIENG

JUDGE