



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 78 OF 2017

THOMAS NGUO NDAMBIRI.....PLAINTIFF

VERSUS

FAITH FIDES KARUANA KAREITHI..... 1ST DEFENDANT

WILFRED MUCHOKI MUNDIA..... 2ND DEFENDANT

JUDGMENT

1. The Plaintiff approached this Honourable Court by way of a Plaint dated and filed on 17th May, 2017 whereby he is seeking the following prayers: -

(a) A declaration that the purported transfer of sale of land and sale agreements executed between the plaintiff and the defendants and dated 22nd February 2017, 4th March 2017 and 8th March 2017 were done under misrepresentation and fraud on part of the defendants and are unlawful and therefore null and void.

(b) A finding that the defendants herein acted in cahoots with the so called 'KATDA officials' to defraud the Plaintiff and as such are not entitled to any refund from the plaintiff.

(c) An order be issued that the defendants do unconditionally return in safe condition to the plaintiff his original Title Documents for land parcels numbers NGARIAMA/LOWER/NAGRIAMA/3885 and NGARIAMA/LOWER/NAGRIAMA/3136.

(d) An order of permanent injunction restraining the defendants either by themselves, agents, servants, employees or otherwise whosoever from harassing, intimidating the plaintiff in whatever way as concerns parcel land number NGARIAMA/LOWER/NAGRIAMA/3885 and NGARIAMA/LOWER/NAGRIAMA/3136.

(e) General and punitive damages for fraud and misrepresentation occasioned to plaintiff.

(f) Costs of this suit together with the interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.

2. The defendants filed their statement of defence on 3rd July, 2017.

3. The plaintiff also filed a reply to the defence on 14th July, 2017.

4. The defendants had sued the plaintiff herein vide different suits being Wang'uru PMCC Nos. 67 of 2017 and 68 of 2017. The said suits were transferred to this Honourable Court on 19th February, 2020 and consolidated with this suit. The defendants' claim in the two suits was deemed as counterclaims against the plaintiff's claim.

5. In the course of the proceedings, the plaintiff herein died and was substituted with his wife Grace Wairimu Nguo.

PLAINTIFF'S CASE

6. The Plaintiff's case is that her deceased husband is the lawful and beneficial owner of all those pieces of land known as Ngariama/Lower/Ngariama/3885 measuring approximately 1.86 Ha and Ngariama/Lower/Ngariama/3136 measuring approximately 2 acres whereby they have established their matrimonial homes.

7. She stated that her deceased husband is also the lawful and beneficial owner of all that piece of land known as Embu/Iriaitune/1961 measuring approximately 11 acres.
8. That sometimes in the month of January 2017 or thereabout, her husband had some financial problems and after consultation with the family, they agreed to sell the said Embu/Iriaitune/1961 measuring approximately 11 acres and they advertised through brokers their intention to dispose of the same.
9. She further stated that her deceased husband received a telephone call from someone claiming that he works with Kenya Tea Development Authority (KTDA), who informed him that KTDA was interested in purchasing the aforesaid parcel of land at Kshs. 250, 000/- per acre making a total of Kshs. 2, 750, 000/- for the 11 acres.
10. She stated that the said KTDA officials later informed her husband that they needed facilitation fees of Kshs. 200,000/- so that the entire Kshs. 2, 750, 000/- can be paid in one lump sum.
11. Since her deceased husband didn't have the said Kshs. 200,000 at the time, the said officials advised him to visit their offices at KTDA where he would be advanced the said amount.
12. The said officials further advised him to carry the title documents in respect of a separate land from the one he was selling.
13. On 22nd February, 2017 together with their son Julius Kinyua, she accompanied her husband to the defendants' offices in Kerugoya Town where they agreed to advance her husband the said amount. They gave him documents to acknowledge receipt by signing and left them with the original title documents of his land parcel No. Ngariama/Lower/Ngariama/3136.
14. He later called the defendants who are also officials of the KTDA who collected the whole amount promising to deposit the entire amount of Kshs. 2, 750, 000/- into his Equity Bank Account within one day.
15. The said officials later called her husband again informing him that a further sum of Kshs. 70, 000/- was required. Since he had no money, they advised him to visit their offices again for an additional loan advance.
16. The plaintiff further stated that on 4th March, 2017 her husband ignorantly executed the transfer and sale agreement of their matrimonial home land parcel number Ngariama/Lower/Ngariama/3885. Instead of advancing the said sum of Kshs 70, 000/-, the defendants advanced him Kshs. 200,000 alleging that they do not advance small money.
17. The said KTDA officials then told him that they required Kshs. 200,000/-. Due to desperation, her Husband gave the defendants the said amount which has never been refunded by them to date. It was then that he realized that he had been duped and the said officials were working together with the Defendants herein.
18. The Plaintiff stated that the defendants immediately began to demand full and immediate payment of the money they had advanced to her husband and on 8th March, 2017 due to intimidation by the defendants, her husband visited the defendants' offices who forced him to execute yet another sale agreement for one million.
19. She stated that her husband believed that the defendants and the KTDA officials did this so as to defraud him of his parcels of land among others by taking advantage of his illiteracy and ignorance.
20. She thus prayed that she be granted the orders sought in her plaint.

1ST DEFENDANT'S CASE

21. The 1st Defendant testified that she was introduced to the Plaintiff by the 2nd Defendant herein who informed her that there was someone who was selling land.
22. She subsequently met with the plaintiff who took her to the suit land and parcel No. Ngariama/Lower/Ngariama/3885 measuring approximately 1.86 Hectares.
23. She stated that the Plaintiff informed her that he wanted to sell one acre and after conducting a search of the said parcel of land on 2nd March, 2017 she asked the 2nd Defendant to tell the Plaintiff and the wife to come with the title deed of the said land.
24. On 4th March, 217 the plaintiff and his wife came with the title deed and they went to Ngigi Gichoya Advocate where they entered into a sale agreement of one acre at Kshs. 400,000/-. She paid the money and signed the sale agreement.
25. Later on 6th March 2017 the plaintiff called her again saying that he wanted to sell another 2 ½ acres and on 08 /03/2017 they went to the firm of Omenya and Co. advocates where they entered into another sale agreement for 2 ½ acres and the plaintiff signed all the statutory documents for the transfer of the land.
26. She testified that she has not worked with KTDA and does not have any offices in Kerugoya and that she does not have any interest in the Embu/Iriaitune/1961.

27. She also testified that she still has the title deeds after talking with the Plaintiff he had agreed to repay the same plus interest, however he didn't and she decided to sue him vide Wangu'ru CC 67 of 2017 which was later consolidated with this suit.

28. She prayed that she be refunded the money paid together with interest or be transferred the land measuring 3.5 acres and that the plaintiff's suit be dismissed with costs.

2ND DEFENDANT'S CASE

29. The 2nd Defendant testified that he is a farmer and that the Plaintiff wanted to sell 2 acres out of Ngariama/Lower/Ngariama/3885 to him and he conducted a search at the Lands office.

30. On 22nd February, 2017 they entered into a sale agreement for a consideration of Kshs. 500,000/- which he paid cash and the plaintiff's wife signed the agreement as a witness.

31. The plaintiff also signed the transfer and all statutory documents to facilitate transfer but failed and/or refused thereby necessitating him to file Wang'uru PMCC No. 68 of 2017.

32. He testified that the Plaintiff had reported him to the DCIO Wang'uru purporting that he was a KTDA officer. He stated that he did not have any interest in land parcel No. Embu/Iriatune/1961.

33. He prayed that he be paid back his money or be given the land and that the plaintiff's suit be dismissed with costs.

PARTIES SUBMISSIONS

34. On 19th July, 2021 the parties through their advocates on record agreed to file submissions. The Plaintiff filed his on 8th September, 2021 while the Defendants filed theirs on 18th August, 2021.

PLAINTIFF'S SUBMISSION

35. The Plaintiff submitted that the defendants were guilty of conspiring, engaging, committing and colluding with the so called KTDA officials in order to defraud him his land and render him and his family destitute.

36. He also submitted that the defendants cunningly took advantage of the plaintiff's financial constraints together with their ignorance and lack of education to attempt to deprive them their matrimonial home.

37. He submitted that the defendants deceitfully wrote agreements of amounts which were never received by the plaintiff.

38. He further submitted that even assuming there was an intended sale, the same is void for lack of consents from the Land Control Board to subdivide and transfer the same. He relied on the cases of *Leonard Njonjo Kariuki Vs Njoroge Kariuki alias Benson Njonjo CA 26 of 1979 and Kariuki Vs Kariuki (1983) KLR 225*.

39. He submitted that no title ever passed to the defendants and that they were unable to prove how much they paid as well as how they paid the alleged amounts to the plaintiff and thus they cannot be awarded the same.

40. He submitted that he be awarded general and punitive damages of fraud and misrepresentation occasioned in the sum of Kshs. 10, 000, 000/- to be paid jointly and severally by the defendants.

DEFENDANTS' SUBMISSIONS

41. The defendants submitted that the plaintiff's narrative on how she decided to give out title deeds for land parcel Nos. Ngariama/Lower/Ngariama/3885 and Ngariama/Lower/Ngariama/3136 to them and his intention to sell land parcel No. Embu/Iriaitune/1961 does not add up.

42. They submitted that the plaintiff came up with that story so as to hoodwink the court for sympathy as they had made it clear that they were not interested in Land Parcel No. Embu/Iriaitune/1961.

43. They submitted and urged the court to find that there is a valid contract between them and that the Plaintiff's case be dismissed and that the Plaintiff do transfer 2.5 Acres of L.R Ngariama/Lower/Ngariama/3885 to the 1st Defendants and the whole of land parcel number Ngariama/Lower/Ngariama/3136 to the 2nd Defendant.

44. They also prayed that costs be awarded to them.

ANALYSIS

45. I have considered the parties rival pleadings and submissions and have deduced the following issues for determination : -

a. Whether the agreements between the parties herein are tainted with fraud.

b. Whether the Defendants are entitled to the transfer of the suit lands or in the alternative, a refund of the purchase price and interest.

c. Who is liable meet the cost of the suit.

WHETHER THE AGREEMENTS BETWEEN THE PARTIES HEREIN ARE TAINTED WITH FRAUD.

46. Fraud has been defined by the *Black's Law Dictionary, Ninth Edition* as follows:

“1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment...
2. A misrepresentation made recklessly without the belief in its truth to induce another person to act...4. unconscionable dealing; esp., in contract law, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain”

47. The Honourable court in the case of *Gichinga Kibutha Vs Caroline Nduku [2018] e KLR* held that: -

“12. With respect to a contract, fraud means and includes any of the acts set out below committed by a party to a contract, or with his connivance or by his agent with the intent to deceive another party thereto or his agent or to induce him to contract: -

a. The suggestion as a fact, of that which is not true by one who does not believe it to be true;

b. the active concealment of a fact by one having knowledge or belief of the fact;

c. a promise made without intention of performing it;

d. any other act fitted to deceive; and

e. any such act or omission or the law declares to be fraudulent.

Equity has exercised a general jurisdiction in case of fraud, sometimes concurrent with and sometimes exclusive of common law courts. Fraud would, therefore, consist of deceitful actions which may be made through either positive assertions or concealment of facts.”

48. The burden of proof for fraud lies with the claimant. It is trite law that whoever alleges must prove. This is enshrined under **Section 107 of the Evidence Act cap 80** which provides that: -

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

49. In the case of *Gichinga Kibutha* (supra) the Honourable Court also held that:

“13. It is settled law 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. At page 427 in *Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition* quoting with approval the cases of *Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308, Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 Ch.D. 473 at 489* it is stated that:-

“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. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (i). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

50. From the above authority, it is evident that for the plaintiff to be successful on a claim for fraud, he needs to prove on a standard above a balance of probabilities but not beyond reasonable doubt.

51. In this matter, the plaintiff has based his claim on fraudulent misrepresentations by some KTDA officials who were to purchase his Land Parcel Embu/Iriaitune/1961. He stated that the said officials required facilitation fees from the Plaintiff and since he did not have the cash, they advised him to take a loan advance from the defendants herein.

52. According to the plaintiff, instead of the defendants entering into loan agreements with him, they cunningly and deceitfully made him execute sale agreements of land parcel Nos. Ngariama/Lower/Ngariama/3885 and Ngariama/Lower/Ngariama/3136 as well as transfer and

statutory documents of the said parcels of land.

53. The defendants on the other hand reiterated that the Plaintiff had intentions of selling land parcels Nos. Ngariama/Lower/Ngariama/3885 and Ngariama/Lower/Ngariama/3136 and indeed executed sale Agreements for the two parcels of land and not land parcel No. EMBU/IRIAITUNE/1961 as alleged.

54. The defendants insisted that the plaintiff acknowledged receipt of the considerations as indicated in the said sale Agreements which was witnessed by the substituted plaintiff herein and attested by Advocates.

55. I am not satisfied that the plaintiff has proved her claim on a standard above a balance of probabilities but not beyond reasonable doubt that indeed he was selling land parcel Embu/Iriaitune/1961 and that the alleged KTDA officials acted in collusion with the defendants herein so as to induce him to enter into the alleged sale agreement.

56. From the materials presented by the plaintiff, it is clear that her late husband was indeed selling the suit properties land parcel Nos. NGARIAMA/LOWER NGARIAMA/3885 and NGARIAMA/LOWER NGARIAMA/3136 to the defendants for a consideration which was witnessed by the substituted plaintiff herein as his wife. The documents produced also indicates that the sale Agreement was attested by Mwangi Kinyua and F. K Omenya Advocates. The two Advocates who are officers of this Honourable court have not been called as witnesses by the plaintiff to

refute the contents of the two sale Agreement. The plaintiff has not proved to the required standard that indeed he was not selling land parcels No. NGARIAMA/LOWER NGARIAMA/3885 and NGARIAMA/LOWER NGARIAMA/3136 and that he was not paid the full purchase price as per the sale Agreement. The plaintiff has not also demonstrated that he was duped to execute the sale Agreements in the presence of a witness who is his wife and attested by an Advocate.

57. He did not also tender any materials before this Honourable Court to prove that indeed he had dealings with the alleged KTDA officials.

58. The identities of the said officials were not established and neither were they joined to this suit as parties.

59. Even assuming that there were dealings with the said officials, the plaintiff ought to have conducted his due diligence by visiting the KTDA offices to establish the genuineness of the offer to purchase his parcel of land.

60. By his own admission, the plaintiff stated that he was lured and excited by the attractive offer by KTDA which led him to participate in the giving of a bribe which has been sugarcoated as 'facilitation fees'.

61. It is thus evident that the plaintiff has approached this Honourable Court with unclean hands and was the author of his own misfortune. Whereas he claims to be illiterate nothing stopped him from actually visiting the KTDA offices to verify the truth. Even if he is illiterate, the plaintiff was represented by Advocates who ought to have advised him accordingly. The plaintiff did not even call any of the advocates as witnesses or worse still, sue them for professional negligence.

62. At paragraph 9 (f) of his reply to 1st and 2nd Defendants' Defence, the plaintiff averred that: -

"... at the appropriate time during the hearing crave leave of this Honourable Court to call and cross examine the said Ngigi Gichoya Advocate and F.K. Omenya Advocate..."

63. The said advocates, though crucial witnesses in this matter were not called to testify. The said advocates would have been necessary to clear the issue of the intention of the parties in entering into the impugned agreements and the contents thereof.

64. In view of the foregoing, the plaintiff's claim of fraud has therefore not been established to the required standard.

WHETHER THE DEFENDANTS ARE ENTITLED TO TRANSFER OF THE SUIT LANDS OR IN THE ALTERNATIVE, A REFUND OF PURCHASE PRICE AND INTEREST

65. The defendants prayed that the plaintiff be compelled to transfer the suit lands to them or in the alternative that they be refunded the consideration together with interest.

66. It has been submitted that the suit lands are agricultural lands. **Section 6 of the Land Control Act Cap 302** provides that:

"(1) Each of the following transactions that is to say — (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area; (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations..... is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

67. **Section 8 of the said Act** further provides that:

"(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land

control board within six months of the making of the agreement for the controlled transaction by any party thereto”

68. The defendants have alleged to have entered into sale agreements with the Plaintiff on diverse dates for valuable consideration. The said agreements were produced as exhibits. All parties were in agreement that the requisite land control board consents were not acquired as mandated by the law.

69. It therefore follows that the said agreements became void for all purposes and thus cannot be enforced so as to transfer the suit lands to the defendants. The defendants are only entitled to a refund of the money paid as provided under **Section 7 of the Land Control Act** which provides that: -

“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”

70. The issue on whether or not the consideration in the said agreements were paid to the Plaintiff is no longer an issue.

71. The Plaintiff claimed that he did not receive the said monies and the same was a plot to defraud him is untenable since the two agreements are self-explanatory that the plaintiff was paid the purchase price in full and final settlement which he acknowledged receipt in the presence of his wife who is the substituted plaintiff herein and an advocate. I have stated and is worth repeating that the two agreements cannot be challenged without calling the advocates who attested the same.

72. The Defendants in their sworn testimony stated that they indeed paid the plaintiff the said amounts as the agreements indicated that he had acknowledged receipt of the same being the final payment.

73. During cross examination the 2nd defendant testified that it is the lawyer who counted the money. Given that the agreements were drawn by Advocates, they ought to have been called to testify and ascertain the veracity of the same.

74. I therefore find that the claim the defendants paid the plaintiff consideration in full is truthful.

75. From the pleadings, it was not in dispute that the Defendants are holding the plaintiff’s original title deeds to the suit lands. Given the finding that the impugned sale agreements were entered into willingly, voluntarily and intentionally, I find that the defendants hold the same as lien for the refund of their monies paid as purchase price for the two disputed parcels of land.

CONCLUSION

76. In view of the foregoing, I enter judgment in the following terms;

(a) The plaintiff’s suit is hereby dismissed.

(b) The defendants counter-claim for the transfer of 2.5 Acres of L.R No. NGARIAMA/LOWER NGARIAMA/3885 to the 1st defendant and the whole of land parcel No. NGARIAMA/LOWER/NGARIAMA/3136 to the 2nd defendant is hereby declined.

(c) In the alternative, the plaintiff shall refund the defendants the purchase price for the two parcels in the sum of Kenya shillings one million (Kshs 1,000,000) and Kenya shillings five hundred thousand (500,000) respectively.

(d) The plaintiff shall bear the costs of this suit and counter-claim.

JUDGMENT READ, DELIVERED IN OPEN COURT AT KERUGOYA AND SIGNED THIS 12TH DAY OF NOVEMBER, 2021.

.....
HON. E.C. CHERONO

ELC JUDGE, KERUGOYA

In the presence of:-

1. Wanjiru for the Defendant
2. Defendant/Advocate - absent
3. Kabuta, Court clerk – present.