



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 203 OF 2015**

**MOHAMMED SHABIR KASSAM.....PLAINTIFF**

**VERSUS**

**HAFEEZ ABDUL MAJEED alias ABDIL HAFEEZ alias**

**ABDULA MAJID alias ABDUL MAJEED.....1ST DEFENDANT**

**ALBERT KUBAI MBOGORI.....2<sup>ND</sup> DEFENDANT**

**COCO APARTMENT LIMITED.....3<sup>RD</sup> DEFENDANT**

**REGISTRAR OF TITLES MOMBASA.....4<sup>TH</sup> DEFENDANTS**

**JUDGEMENT**

1. The plaintiff commenced this suit by the plaint dated 2<sup>nd</sup> September,2015 and filed in court on 3<sup>rd</sup> September,2015 seeking the following reliefs:

a) A declaration that the transfer of the suit property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant and the transfer of the suit property from the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> Defendant (herein after “the transfers of the suit property”) and all other transactions related to the said transfers of the suit property subsequently to the transfer to the plaintiff are fraudulently illegal and therefore null and void for all intents and purposes.

b) A declaration that the Plaintiff is the legal and indefeasible proprietor to the suit property.

c) An order directing at the 4th Defendant to delete and/or cancel all the transfers of the suit property and their subsequent registrations thereto after the transfer and registration of the suit property into the plaintiff’s name and restore the title back to the name of the plaintiff and/or transfer the same to the Plaintiff.

d) A temporary injunction restraining the 1<sup>st</sup>,2<sup>nd</sup> and 3<sup>rd</sup> Defendants or their agents or servants and/or any another person from selling, transferring, disposing, changing, leasing or in any manner dealing with the suit property.

e) A permanent injunction restraining the 1<sup>st</sup>,2<sup>nd</sup> and 3<sup>rd</sup> Defendants or their agents or servants and any other person from selling transferring disposing, changing, leasing or in any manner dealing with the suit property.

f) An order for costs of the suit in favour of the Plaintiff

g) Any other relief that this Court may deem appropriate.

2. The plaintiff in his plaint avers that at all material times to this suit, he was the legal, equitable and registered proprietor as lessee from the Government of Kenya vide a grant of parcel of Land L.R Number MN/1/3234 comprised in a grant registered as C.R Number 15906/1 (hereinafter “the suit property”) while the 1<sup>st</sup> Defendant is the one who originally held the suit property as a beneficial proprietor and duly transferred the aforesaid leasehold interest of the suit property to the plaintiff. The Plaintiff avers that the 1<sup>st</sup> defendant and one Abdul Waheed are partners in East African Construction company.

3. The plaintiff avers that on 28<sup>th</sup> August 2007, the 1<sup>st</sup> defendant and the said Abdul Waheed entered into an agreement with the plaintiff for the sale of the suit property to the plaintiff on terms inter alia, that the consideration for the sale was Kshs. 3,000,000/= which amount was to be offset against fuel supplied to the 1<sup>st</sup> Defendant by the plaintiff. The plaintiff avers that he duly settled the said amount in full by delivering fuel which the 1<sup>st</sup> defendant and his partner Abdul Waheed acknowledged vide a letter dated 30<sup>th</sup> January 2008.

4. The plaintiff avers that the transfer of the suit property to the plaintiff was not done immediately as the 1<sup>st</sup> defendant claimed that the title document of the property was lost and that he was initiating the process of being issued with a new one. The plaintiff contends that upon completing payment of the consideration, a constructive trust arose between the 1<sup>st</sup> defendant and the plaintiff and that the former legally owes the duty to transfer the suit property to the latter and to ensure that the plaintiff obtains an indefeasible title thereof.

5. The plaintiff avers that on the 1<sup>st</sup> defendant's accord, he took possession of the suit property and upon obtaining requisite approvals from relevant authorities with the 1<sup>st</sup> defendant as he was still the registered proprietor of the suit property, the plaintiff undertook developments on the suit property.

6. The plaintiff further avers that the 1<sup>st</sup> defendant obtained a provisional certificate of title that was gazetted in Gazette Notice Number 8436 of 14<sup>th</sup> August 2009 and that the same was registered against the title on 24<sup>th</sup> July, 2009. That thereafter, the 1<sup>st</sup> defendant duly effected the transfer of the suit property to the plaintiff which transfer was registered on 7<sup>th</sup> June, 2010 hence the plaintiff became the registered proprietor thereon. The plaintiff avers that the 1<sup>st</sup> defendant, upon effecting the aforesaid transfer, in collusion with officers at the Coast Land Registry working under the 4<sup>th</sup> defendant, fraudulently caused the deed file to the suit property to vanish from the land Registry. That the 1<sup>st</sup> defendant then went to the High court at Nairobi and obtained Letters of Administration in Succession Cause No.410 of 2011 upon representing himself as the beneficiary of the estate of his late father who died in the year 1980 and further representing that the suit property was part of his deceased father's estate. The plaintiff avers that the 1<sup>st</sup> defendant concealed the fact that he had already transferred his beneficial interest in the suit property and proceeded to fraudulently transfer the same to himself. The plaintiff further avers that vide a Deed of indemnity dated 20<sup>th</sup> September, 2012, and in further collusion with the 4<sup>th</sup> defendant, the 1<sup>st</sup> defendant caused a new deed file to be reconstructed with the first entry thereon being a registration of the Letters of Administration obtained and subsequently a registration vide an assent of transfer of the suit property to himself. The plaintiff accuses the 1<sup>st</sup> defendant for executing fraudulent acts in collusion with officers of the 4<sup>th</sup> defendant.

7. The plaintiff avers that upon the illegal transfer and registration in his name, the 1<sup>st</sup> defendant immediately sold and transferred the suit property to the 2<sup>nd</sup> defendant who went on to transfer the same to the 3<sup>rd</sup> defendant, who in turn caused the suit property to be charged as security to a bank. It is the plaintiff's contention that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had constructive notice that the plaintiff was in possession of the property, and accuse them of carelessness and/or negligence in attaining their respective interests in the suit property. The plaintiff has enumerated particulars of fraud, negligence, abuse of office, breach of duty of care and carelessness against the defendants, and contends that the first transfer effected in favour of the 1<sup>st</sup> defendant and the subsequent transactions were illegal and deprived the plaintiff of his rights as the legal and genuine proprietor of the suit property.

8. In his evidence the plaintiff relied and adopted on his witness statement dated 3<sup>rd</sup> September, 2015 in which he reiterated the contents of the plaint. The plaintiff also produced the documents listed on the plaintiffs' list of documents dated 3<sup>rd</sup> September, 2015 as exhibits. He was cross-examined and re-examined.

### **1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> DEFENDANTS' CASE**

9. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants did not enter appearance nor file defence within the stipulated time. The plaintiff requested for judgement against them and the request was allowed by the court. The matter proceeded by way of formal proof against the said defendants.

### **3<sup>RD</sup> DEFENDANTS'S CASE**

10. The 3<sup>RD</sup> DEFENDANT filed its Statement of Defence on 10<sup>th</sup> June, 2019 in which it contends that it is a bonafide purchaser for value and the registered owner of the suit property. The 3<sup>rd</sup> defendant called two witnesses, SAMUEL ELISHA MANGI and ISHAK MOHAMED KASSIM HAJI IBRAHIM who were cross-examined and re-examined.

11. SAMUEL ELISHA MANGI testified as DW1 and adopted his witness statement dated 21<sup>st</sup> June, 2021. His evidence was that he was an employee of the 3<sup>rd</sup> defendant working as a caretaker on the suit property. He confirmed that the property is fenced off with permanent structures having been put and developed by the 3<sup>rd</sup> defendant upon its purchase in the year 2013. He testified that he has lived on the property for over seven (7) years in continuous, active and actual physical possession of the property, and that no one other than the Directors of the 3<sup>rd</sup> defendant has ever been to the property claiming any rights of ownership over it. He confirmed that the suit property was empty from the time he took possession.

12. DW2 was ISHAK MOHAMED KASSIM HAJI IBRAHIM, the 3<sup>rd</sup> defendant's director. He adopted his witness statement dated 24<sup>th</sup> July, 2019 as his evidence-in-chief and produced the 3<sup>rd</sup> defendant's list and copies of documents dated 10<sup>th</sup> June, 2019 as exhibits. He testified that on 2<sup>nd</sup> August, 2013, the 2<sup>nd</sup> defendant offered the 3<sup>rd</sup> defendant through its sister company Texas Alarms Limited the suit property at an agreed purchase price of Kshs. 33,000,000/=. That the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant executed an Agreement for sale dated 2<sup>nd</sup> August, 2013. His evidence was that prior to executing the Agreement for sale, the 3<sup>rd</sup> Defendant conducted an independent search at the Mombasa Land Registry in order to establish the ownership of the suit property. He produced a certificate of official search which indicated that at the time of purchase, the registered owner of the suit property was the 2<sup>nd</sup> defendant. DW2 confirmed that the suit property

was completely vacant at the time of purchase and that the 3<sup>rd</sup> defendant upon taking possession immediately commenced construction thereon whereby it fenced the same and erected a permanent house which he says is occupied by its employee, DW1.

13. Upon the close of the case, the plaintiff and the 3<sup>rd</sup> defendant through their respective advocates requested for time to file their written submissions. Those submissions were subsequently filed on 10<sup>th</sup> September, 2021.

### **ANALYSIS AND DETERMINATION**

14. The court has carefully considered the evidence on record, the submissions made and the applicable Laws. From the pleadings and the aforesaid evidence on record, the issues that call for determination in my view are:

### **ISSUE FOR DETERMINATION**

- i. Whether the suit land was sold to the plaintiff;
- ii. Whether the sale agreement is enforceable;
- iii. Whether the plaintiff has proved his case to the required standard;
- iv. Whether the plaintiff is entitled to the orders sought;
- v. Whether the 3<sup>rd</sup> defendant is a bonafide purchaser for value.

### **Whether the suit land was sold to the plaintiff.**

15. The plaintiff's case is premised on the claim that the land in dispute was sold to him by the 1<sup>st</sup> defendant and one Abdul Waheed on 28<sup>th</sup> August 2007. The plaintiff produced the sale agreement as an exhibit. The 3<sup>rd</sup> defendant has averred that he is a stranger to the agreement between the plaintiff, the 1<sup>st</sup> defendant and the said Abdul Waheed. The 3<sup>rd</sup> defendant has also denied that the plaintiff ever took possession of the suit property. As already stated, the 1<sup>st</sup> defendant did not enter appearance nor file defence in this matter.

16. Whether or not the sale agreement produced by the plaintiff was actually entered into between the plaintiff, the 1<sup>st</sup> defendant and one Abdul Waheed is a question of fact that I will need to determine based on the evidence on record. The plaintiff has produced the said agreement dated 28<sup>th</sup> August 2007. The 1<sup>st</sup> defendant has not controverted the evidence that has been adduced by the plaintiff. It is therefore my finding that there was an agreement entered into between the plaintiff and the 1<sup>st</sup> defendant and one ABDUL WAHEED. I am also persuaded that the plaintiff, the 1<sup>st</sup> defendant and the said ABDUL WAHEED did sign the sale agreement of 28<sup>th</sup> August, 2007.

### **Whether the sale Agreement of 28<sup>th</sup> August 2007 was enforceable.**

17. As to whether the said agreement is enforceable is no doubt a question of Law. Section 3 (3) of the Law of Contract Act provides as follows:

3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

a) the contract upon which the suit is founded-

i. is in writing;

ii. is signed by all the parties thereto; and

b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party: provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers' Act (Cap .526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

18. It will thus be seen that the Law requires contracts for the disposition of an interest in Land to be in writing and that such contracts be attested. The court has carefully perused the said sale agreement produced as an exhibit by the plaintiff. I note that whereas the agreement is in writing and is signed by the parties, the same is not attested. Indeed, the space that has been reserved for the witness(es) signature is not signed. The said sale agreement has therefore not met the requirement of section 3 (3) of the Law of Contract Act. The said sale agreement is clearly an invalid agreement which is not enforceable by the parties.

19. A further look at the said agreement reveals that the same was signed by two people as seller, ABDUL WAHEED and ABDUL HAFEEZ, the latter presumably being the 1<sup>st</sup> defendant herein. The said agreement further indicates that the purchase price of Kshs. 3,000,000/= was to be offset against fuel supplied to the seller by the buyer. I have perused the receipts that were produced by the plaintiff as exhibits to show consideration was made as per the sale agreement. The court has however noted that the said receipts were issued by an entity known as Eastern African Construction Company. There was no evidence confirming that the said entity and the sellers in the sale

agreement dated 28<sup>th</sup> August, 2007 were one and the same thing, neither was there evidence of their relationship. The court has further noted that ABDUL WAHEED, one of the sellers who appended his signature to the sale agreement as well as the entity known as Eastern African Construction Company have not been made parties to this suit. Apart from this, the court has also noted that the said agreement was reached without prejudice. I wonder why the plaintiff is now seeking to enforce an agreement that was made on a without prejudice basis, and against only one of the sellers when there were two sellers. If there was a violation of the contractual obligation by the sellers by non-performance or by repudiation and failing to transfer the property to the plaintiff as a buyer, one would have expected all the parties in breach to be joined in the suit, including the alleged recipient of the purchase price in form of fuel.

**Whether the plaintiff has proved his case to required standard or whether the 3<sup>rd</sup> defendant is a bona fide purchase for value.**

20. The plaintiff avers that upon the illegal transfer and registration in the 1<sup>st</sup> defendant name he immediately sold and transferred the suit property to the 2<sup>nd</sup> defendant who went on to transfer the same to the 3<sup>rd</sup> defendant who in turn caused the suit property to be charged as security to a bank. It is the plaintiff's contention that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had constructive notice that the plaintiff was in possession of the property, and accuse them of fraud/carelessness and/or negligence in attaining their respective interests in the suit property

21. 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 13<sup>th</sup> Edition quoting with approval the cases of Wallingford 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. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulently conduct must be distinctly alleged and as distinctly proved. General allegations, however strong may be words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.”***

22. Locally, the above principles have been stated in HCCC No. 135 of 1998 Insurance company of East Africa vs The Attorney General & 3 others as thus whether there was fraud is, however, a matter of evidence.

23. Based on the decision in the case of R.G Patel vs Lalji MJakani cited in the case of Gladys Wanjiru Ngacha vs Theresa Chepsaat & 4 others (2013) eKLR where the court of Appeal held that *allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require a proof beyond reasonable doubt, something more than mere balance of probabilities is required and that it is not enough for the appellant to have pleaded fraud. The appellant ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court”.*

24. In **Central Bank of Kenya Limited v Trust Bank Limited & 4 others (1996) eKLR** proof of fraud was held as being beyond that of a balance of probabilities. In that appeal, the court 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 the ordinary civil case.”***

25. In this instant case, in my view the plaintiff has not substantiated his allegations of fraud by the defendants and he has not persuaded this court on a balance of probabilities.

26. Blacks Law Dictionary 8<sup>th</sup> Edition defines bona fide purchaser as

***“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects on or infirmities, claims or equities against the seller's title: one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”***

27. On the part of the 3<sup>rd</sup> defendant he has claimed that he is a bonafide purchaser of the suit property without any notice of any defect in title and relied on the case of Eunice Grace Njambi Kamall and Another vs The Hon.Attorney General and 5 others Civil Suit No.976 of 2012 where the court cited the case of Fletcher vs. Peck 10 U.S 87 (1810) to illustrate how other jurisdictions have handled the issue of sanctity of title and the plight of innocent third parties. In the said Fletcher Vs. Peck case Marshall J had this to say: -

***“If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of the third persons who are purchasers without notice, for a valuable consideration cannot be disregarded. Titles, which according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be, any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice that concealed defect cannot be set up against him.”***

28. In the case of **KATENDE V HARIDAR & COMPANY LIMITED (2008) 2 E.A.173** the Court of Appeal in Uganda held that:

***“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine,***

*(he) must prove that:*

- a) He holds a certificate of title,*
- c) He purchased the property in good faith*
- d) He had no knowledge of the fraud*
- e) He purchased for valuable consideration*
- f) The vendors had apparent valid title,*
- g) He purchased without notice of any fraud*
- h) He was not party to any fraud.”*

b) On the definition of a bonafide purchaser for value, in the case of **Lawrence Mukiri & 4 others (2013) eKLR** the court stated what amounts to bonafide purchaser for value, thus:

**“...a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to a successfully rely on the bona fide doctrine, he must prove the following:**

- i) He holds a certificate of title.*
- j) He purchased the property in good faith;*
- k) He had no knowledge of the fraud*
- l) The vendors had apparent valid title;*
- m) He purchased without notice of any fraud;*
- n) He was not party to any fraud”*

29. A bona fide purchaser of a suit property without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.

30. In this case, the evidence on record indicate that the 3<sup>rd</sup> defendant acquired the suit property from the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant has adduced evidence showing that prior to executing the Agreement for sale, the 3<sup>rd</sup> defendant conducted due diligence by carrying out a search at the Mombasa Land Registry in order to establish the ownership of the suit property. A certificate of official search was produced as an exhibit, and the same indicated that at the time of purchase, the registered owner of the property was the 2<sup>nd</sup> defendant. DW2 also testified and confirmed that the suit property was completely vacant at the time of purchase. That upon acquiring the property, the 3<sup>rd</sup> defendant immediately took possession and commenced development of the property where it fenced the entire property and erected a permanent house thereon which is occupied todate by its employee who testified as DW1.

31. From the evidence on record, and having taken into consideration the above decided cases, I am convinced that the 3<sup>rd</sup> defendant is an innocent purchaser for value. I find that the plaintiff has failed to prove his case against the defendants on a balance of probabilities.

32. The upshot is that the plaintiff’s suit is dismissed with costs to the 3<sup>rd</sup> defendant.

Dated, signed and delivered virtually at Chuka this 3<sup>rd</sup> **day of December, 2021** in the presence of:

CA: Ndegwa

Ms. Takah for 3<sup>rd</sup> Defendant

Ms. Ali for Plaintiff

**C. K. YANO,**

**JUDGE.**

**Court**

Judgment delivered virtually in the presence of Ms. Ali for the Plaintiff and Ms. Takah for the 3<sup>rd</sup> Defendant and in the absence of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants.

**C. K. YANO – JUDGE**

**3.12.2021**