



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 16 OF 2015

SALOME WAMBUI WACHIRA.....PLAINTIFF/APPLICANT

VERSUS

1. GOLDEN TEA TRADERS LIMITED

2. NIC BANK LIMITED

3. JOSEPH SHIUNDU LUTTA

4. LILY K. MUSINGA

5. THE LAND REGISTRAR KILIFI.....DEFENDANTS/RESPONDENTS

JUDGMENT

BACKGROUND

1. By a Plaintiff dated 9th February 2015, Salome Wambui Wachira (the Plaintiff) prays for Judgment against the five Defendants jointly and severally for:-

a) A permanent injunction restraining the Defendants, their Servants, employees and/or agents from exercising any right/interest/benefit (if any) purportedly conferred by the Charge against all that parcel (of land) known as Kilifi/Kijipwa/132;

b) An order directing the 4th Defendant to cancel the Charge dated 23rd September 2014 registered against all that parcel known as Kilifi/Kijipwa/132 and to nullify the same;

c) A declaration that the purported Charge dated 23rd September 2014 against all that parcel known as Kilifi/Kijipwa/132 is fraudulent, illegal, null and void;

d) Damages for loss of user from the date of registration of the Charge at the prevailing Commercial rates of the suit parcel(sic); and

e) Costs of the suit and interests.

2. Those prayers arise from the Plaintiff's contention that at all times material, she was the bona fide owner of the said property situated in Kilifi County and measuring approximately 0.938 Ha. On or about 23rd October 2014, the Plaintiff who resides abroad visited the offices of the Land Registrar Kilifi (the 5th Defendant) to enquire on the status of the suit property only to discover that the same bore an encumbrance registered vide a Charge dated 23rd September 2014 for Kshs 4,200,000/- in favour of Golden Tea Traders Ltd and NIC Bank Ltd (the 1st and 2nd Defendants respectively).

3. The Plaintiff avers that as at the time the purported Charge was executed, she was outside the Country and could not have presented herself before Joseph Shiundu Lutta Advocate (the 3rd Defendant) for witnessing as stated in the Charge document. It is her case that she is not a shareholder and/or director of the 1st Defendant and that she did not present any documents for execution in relation to the Charge.

4. The Plaintiff accuses the Defendants of wrongfully and fraudulently colluding with each other to dispossess her of her property by

exposing her to the risk of paying the principal amount and/or interest for a facility she has never sanctioned or taken from the 2nd Defendant Bank.

5. The 1st Defendant neither entered appearance nor filed a Statement of Defence.

6. In its Statement of Defence dated 3rd July 2015, the 2nd Defendant Bank avers that:-

a) It advanced an overdraft facility of Kshs 4,200,000/- to the 1st Defendant vide a Letter of offer dated 10/9/2014 over the suit property;

b) It instructed the 3rd Defendant and Lilly K. Musinga (the 4th Defendant) through the Law Firm Musinga & Company Advocates to perfect the security documents including the legal Charge dated 23/9/2014;

c) Acting on its instructions, the 3rd and 4th Defendants

i) Obtained the necessary consents;

ii) Drew the Legal Charge and deed of guarantee and indemnity dated 23/9/2014 and had the documents executed by the Plaintiff and the 1st Defendant and witnessed; and

iii) The security documents were lodged for registration and payment of stamp duty at the Kilifi Land Registry on 24/9/2014.

7. As a result the 2nd Defendant denies that the Plaintiff was not within Kenya to execute the Charge as set out in the Plaint. The 2nd Defendant further denies that the Plaintiff's signature on the Charge and Guarantee were forged and/or illegally registered as alleged by the Plaintiff or at all and invites the Plaintiff to strict proof of the allegations.

8. Similarly in their Statement of Defence dated and filed herein on 28th April 2015, the 3rd and 4th Defendants deny the allegations and particulars of fraud as set out in the Plaint. It is their case that they exercised due diligence and in particular went through the documents availed to them by the 2nd Defendant whereupon they confirmed that:-

a) The Plaintiff had applied for a financial facility from the 2nd Defendant;

b) That to secure the said loan the Plaintiff had provided the subject property to secure the loan advanced to the borrower;

c) The Plaintiff executed the relevant documents willingly and without any coercion or undue influence by either of the Defendants and upon presenting her identification documents which were checked and confirmed by the 3rd Defendant to bear the name of the Plaintiffs; and

d) The Charge document was executed by the Plaintiff and after all the primary documents had been duly executed by the Plaintiff and the 2nd Defendant.

9. The 3rd and 4th Defendants thus maintain that their participation in the preparation and execution of the Charge was based on the primary documents presented to them which documents were duly executed by the Plaintiff.

10. The 5th Defendant equally denies any wrong doing. In a Statement of Defence dated 20th September 2016, the 5th Defendant states that the Charge document was presented to its offices for registration by Musinga & Company Advocates on 23rd September 2014 and it effected the same as it met all requirements and was deemed fit for registration.

11. The 5th Defendant denies that it was aware of or party to any fraud and/or irregularities as particularized in the Plaint and invites the Plaintiff to strict proof.

The Plaintiff's Case

12. The Plaintiff testified as the sole witness in support of her case. She told the Court that she is a citizen and resident of Sweden where she works.

13. The Plaintiff testified that she had sued the Defendants herein because the 1st Defendant obtained a loan from the 2nd Defendant purporting the same to have been guaranteed by herself. She testified that she could not have guaranteed the loan as she was out of the country during that period from January 2012 and only re-entered the country on 20th October 2014. The Plaintiff told the Court that she re-entered the country using her new Passport that had been issued to her in Sweden on 3rd June 2014.

14. The Plaintiff further testified that she had her original copy of the Title for the suit property and that she had never given it to anyone to use as a collateral for a loan. Her title issued to her on 3rd June 1992 had no other interests listed thereon.

15. The Plaintiff told the Court that she wanted to develop the suit property when she came back in October 2014 and that was why she went to the 5th Defendant's office to enquire on the status of the land. When she did a search on 23/10/2014 she was told that she had guaranteed the 1st Defendant a loan using the property. She reported the matter immediately to Mtwapa Police Station before asking her Advocates to do a demand letter to all the Defendants herein. None of them responded to the Demand Letters.

16. The Plaintiff told the Court that she has never seen the original Charge or Deed of Guarantee from the 2nd Defendant Bank and that the signatures on the documents were not her own. The Identify Card Number shown on the title and the Pin Number used to secure the loan were also different from her own.

17. The Plaintiff urged the Court to order the removal of the endorsement on her title as she did not guarantee the alleged loan.

The Defence Case

18. The 2nd Defendant Bank called one witness in support of its case.

19. DW1-Keziah Nzimani Mwanzia was a Legal Officer at the Bank. She told the Court that on 10th September 2014, the Bank offered to advance an overdraft facility to the 1st Defendant. The offer letter dated the same day required the 1st Defendant to accept the offer within 30 days. The 1st Defendant accepted the offer through its Directors on 16th September 2014.

20. DW1 told the Court that the overdraft facility of Kshs 4,200,000/- was to be secured through:-

a) A legal Charge over the suit property registered in the Plaintiff's name;

b) Directors personal guarantee of Kshs 4.2 Million;

c) Property Owners guarantee of Kshs 4.2 Million;

d) Board Resolution authorizing the entire borrowing.

21. DW1 testified that after valuing the property, the Bank instructed Musinga & Company Advocates to perfect the security documents and obtain the requisite documents from the Plaintiff and the 1st Defendant. In compliance with the terms and conditions of the offer, the 1st Defendant presented all the necessary documents including a spousal consent dated 9th September 2014.

22. DW1 further told the Court that on 23rd September 2014, the Plaintiff and directors of the 1st Defendant executed a Legal Charge in favour of the 2nd Defendant for Kshs 4,200,000/- in the presence of the 3rd Defendant. The Plaintiff also executed a Deed of Guarantee and Indemnity. Thereafter, the Bank proceeded to advance the sum of Kshs 4,200,000/- to the 1st Defendant's account. Since then the Bank has continued to hold the Original Title of the suit property to secure its interests as a Chargee. Those interests were registered on the title on 23rd September 2014.

23. The 3rd and the 4th Defendants also called one witness in support of their case during the trial.

24. DW3- Joseph Shiundu Lutta is the 3rd Defendant herein. He told the Court that the 4th Defendant is his employer at Musinga & Company Advocates where he is an associate.

25. DW3 testified that on 27th August 2014, the Law Firm received a Letter of instructions from the 2nd Defendant to register a Legal Charge to secure a facility of Kshs 4.2 Million over the property known as Kilifi/Kijipwa/132 registered in the name of Salome Wambui Wachira. The Charge was prepared and when they got in touch with the borrower's directors, they were informed that the Chargor was on tight schedule and was scheduled to fly out of the Country.

26. DW3 testified further that shortly afterwards a director of the 1st Defendant Ezekiel Besa and the Chargor called their offices on 8th September 2014 seeking to execute the Charge documents. The said director introduced the Chargor who promptly produced the original Title Deed and her Identify Card. The two then signed the documents in DW3's presence.

27. The 5th Defendant also called one witness in support of their case.

28. DW4 Joseph Taura Bao was the Land Registrar-Kilifi. He testified that according to their records, the suit property was first registered under the Settlement Fund Trustees (SFT) on 8th August 1990. On 3rd June 1992, the parcel was allocated to Salome Wambui Wachira through transfer by Settlement Fund Trustees and a discharge of Charge was registered.

29. DW4 further told the Court that on 23rd September 2014, a Charge document was presented for registration on the title by Musinga & Company Advocates, Mombasa. The Charge document had all the necessary attachments. Upon perusal thereof the Charge was found fit for registration and was effected.

Analysis and Determination

30. I have perused and considered the pleadings filed herein, the oral testimonies of the witnesses as well as the evidence adduced by the parties. I have equally carefully considered the written submissions and the List of Authorities filed herein by the Learned Advocates for the parties.

31. The Plaintiff avers that she is the bona fide registered proprietor of all that parcel of land known as Kilifi/Kijipwa/132 measuring approximately 0.938 Ha (the Suit Property). It is the Plaintiff's case that she acquired the Suit Property on or about 3rd June 1992 from the Settlement Fund Trustees (SFT) and was issued with a title therefor which she retains in her possession to-date.

32. Having since become a Citizen of the Kingdom of Sweden, the Plaintiff told the Court that she resides abroad and only visits her country of birth on holiday. In that regard, the Plaintiff testified that she was out of Kenya from January 2012 until 20th October 2014. On her return and intent on developing the suit property, she proceeded to the Kilifi Land Registry on 23rd October 2014 whereupon she carried out an official search on the status of her parcel of land.

33. To her utter shock and dismay, the Plaintiff discovered that the suit property had a restriction in terms of a Charge dated a month earlier on 24th September 2014 in favour of the NIC Bank Ltd (the 2nd Respondent). Upon enquiry, the Plaintiff came to learn that an entity known as Golden Tea Traders Ltd (the 1st Defendant) had purportedly used the property to secure an overdraft facility in the sum of Kshs 4,200,000/- from the 2nd Defendant Bank.

34. The Charge document shown to be executed by the Plaintiff and the directors of the 1st Defendant was prepared by two lawyers from Messrs Musinga & Company Advocates (the 3rd and 4th Defendants herein) before being registered at the Kilifi Land Registrar's Office (the 5th Defendant). It is the Plaintiff's case that she neither applied for the facility nor did she execute any document before the said Advocates as at the time she is said to have executed the same, she was far away in Sweden.

35. While the 1st Defendant neither entered appearance nor filed a Statement of Defence, the 2nd Defendant Bank insists that the Plaintiff was not only in the Country at the material time but that she also, together with the directors of the 1st Defendant, executed a legal Charge in favour of the Bank for the said Kshs 4,200,000/-. According to the Bank, the said Legal Charge was executed by the 3rd Defendant Advocate after Messrs Musinga & Company Advocates perfected the security documents and obtained other requisite documents from the Plaintiff and the 1st Defendant.

36. The 3rd and 4th Defendants reiterate the position taken by the 2nd Defendant Bank and assert that the Plaintiff was introduced to them by a director of the 1st Defendant-one Ezekiel Besa before she executed the documents that were then witnessed by the 3rd Defendant. Those documents, including the Charge were then presented to the Land Registrar Kilifi (the 5th Defendant) who being satisfied therewith proceeded to register the restriction on the Plaintiff's title.

37. According to the Plaintiff, she only saw the Charge document said to have been executed by herself before the 3rd and 4th Defendants, for the first time after she sued the Defendants. In support of her contention that she could not have executed the Charge on 23rd September 2014, the Plaintiff produced as Exhibit 1 a copy of her Swedish Passport No.[...] issued to her on 3rd June 2014. She told the Court that when she first went to Sweden in May 1996, she had used her Kenyan Passport. She however surrendered the Kenyan Passport when she was issued with the Swedish one. Thereafter she had visited Kenya in the years 2000, 2007 and 2012.

38. A perusal of the Plaintiff's said Passport reveals that she used the same to enter the Country on 20th October 2014. That would be about one month after she is said to have executed a number of documents leading to the registration of the Charge on the suit property on 23rd September 2014.

39. At the trial herein, the Plaintiff was put under intense cross-examination by each and everyone of the Defendants to prove that she was not in the Country on or prior to 23rd September 2014. She maintained that she was out of the country and that she had surrendered her previous passport on being issued with the new one on 3rd June 2014. This Court had the chance to look at the Passport. There was no exit or entry stamps on the Swedish Passport between the date of its issue until the 20th October 2014 when the Plaintiff came to Kenya.

40. In my mind, having stated that she was out of the Country and produced a Copy of her Passport in support of that position, the evidential burden shifted upon the Defendants who wanted this Court to believe that she was in the Country on the said dates to prove that she was actually in the Country and that she signed the Charge and other documents.

41. The key witnesses for the Defence in this regard was Joseph Shiundu Lutta Advocate who testified herein as DW3. Testifying before this Court, DW3 referred the Court to his Statement filed herein on 13th March 2017 which Statement he adopted as his evidence-in-chief. He asserts in that Statement that their Law Firm Messrs Musinga & Company Advocates received instructions from the 2nd Defendant Bank to register a Legal Charge to secure a facility of Kshs 4.2 Million over the suit property on 27th August 2014.

42. DW3 further states that when they got in touch with the borrowers, they were informed that the Plaintiff was on a tight schedule and was scheduled to fly out of the country. Shortly thereafter on 8th September 2014 a director of the 1st Defendant by the name Ezekiel Besa called their offices seeking to execute the Charge documents. The said Director went to their offices and introduced to him the Plaintiff. On introduction, the Plaintiff promptly produced the Original Title Deed and her Identity Card. The two then signed the documents in the presence of DW3.

43. According to the 2nd Defendant Bank's Legal Officer Keziah Nzimani Mwanzia(DW1) their Advocates having perfected the documents proceeded to register a Charge over the suit property on 23rd September 2014. Since then the Bank retains the original copy of the title deed

received from the Plaintiff to secure its interests as a Chargee.

44. As it were, however, the Plaintiff produced herein in Court a Copy of her original title deed for the suit property. That can only mean that she never surrendered the same for registration and that the title being held by the 2nd Defendant Bank is not the title that had been issued to the Plaintiff on 3rd June 1992.

45. When shown the Plaintiff's original title in Court, DW3 conceded that there was a slight difference in the Plaintiff's Identify Card Number shown on the title held by the Bank and that still retained by the Plaintiff. While the title in possession of the Plaintiff (Pexh 3) had the Identity Card Number shown as 2261740/65, the one held by the Bank had the Number shown as 2261740.

46. From the Green Card produced by the Land Registrar Kilifi-Joseph Taura Bao (DW4), the number in the Plaintiff's title is the one appearing in the proprietorship Section of the Green Card. DW4 explained that as opposed to the new generation cards the first generation Identity Cards had the stroke which was shown on their records in this regard as stroke 65. It was his evidence that the details on the Green Card should be the same as what is in the title deed.

47. From the evidence availed before me, it was apparent that neither the Bank nor its Legal representatives carried out any reasonable due diligence on the suit property prior to the registration of the Charge. It was telling that while the Bank purported to have conducted a valuation of the suit property, no such valuation report was produced to indicate that its officers went to the ground to authenticate the existence and/or ownership of the suit property. Indeed, the only official Certificate of Search produced by the Bank in their documents is dated 23rd October 2014, some one month after the Charge was registered on the property.

48. Indeed, on the material placed before me, there was no evidence that the 1st Defendant company which failed to enter appearance herein ever sanctioned the alleged loan facility and/or that the Plaintiff was to guarantee and indemnify the 2nd Defendant Bank therefor. A resolution produced by DW1 herein allegedly issued by the 1st Defendant is dated 17th October 2014 long after the Charge document was registered and the same refers to a figure of Kshs 6,200,000/- and not the sum of Kshs 4,200,000/- which the 2nd Defendant purports to have advanced on request to the 1st Defendant. That resolution infact makes no mention whatsoever of the Plaintiff.

49. Even more telling, while the 2nd Defendant Bank purports to have known the 1st Defendant as their customer to whom they advanced a loan, they did not avail any of its directors listed in their documents as Ezekiel Mage Besa and Mary Khavakali. While DW3 purported that the said Ezekiel Mage Besa had introduced to him the Plaintiff when he allegedly witnessed her execute the Charge document, they did not produce the said director to give evidence to confirm that it is the self-same Plaintiff herein whom he had introduced to DW3 on the said date.

50. In the circumstances herein, I was persuaded that the signatures appearing on the Charge document, the Guarantee and Deed of Indemnity and any other documents relied on by the Defendants in registering the Charge over the suit Property were forgeries that could not divest the Plaintiff of her legal interest in the suit Property or create a valid encumbrance over the same against her registered legal interest as the bona fide owner thereof.

51. It is my finding that the Plaintiff's title is protected by Section 26 of the Land Registration Act, 2012 and Article 40 of the Constitution and cannot be defeated by the illegal and fraudulent Charge. In any event, the Bank is not without a remedy if it was not party to the fraud. It can pursue the directors of the 1st Defendant who it claims to be the guarantors of the loan it claims to have advanced to the 1st Defendant. From the testimony of DW1 herein, it was alleged without any evidence that the Bank had already filed a case in Kakamega against the said directors. It therefore goes without saying that they are alive to the fact that there is an existing remedy.

52. The Plaintiff in her prayers has among other things urged this Court to grant her general damages for loss of user of her land from the date of the registration of the Charge. I am persuaded that the Plaintiff was restricted from developing the suit property from the moment the Charge was registered on her property on 23rd September 2014. A number of years have elapsed since and I think an award of Kshs 1 Million per year would suffice as damages for loss of user from the date the Charge was registered.

53. Accordingly Judgment is hereby entered for the Plaintiff as against the Defendants jointly and severally as follows:-

a) A permanent injunction is hereby issued restraining the Defendants, their servants, employees, and/or agents from exercising any right/interest/benefit purportedly conferred by the Charge document dated 23rd September 2014 against all that parcel of land known as Kilifi/Kijipwa/132.

b) An order is hereby issued directing the 5th Defendant to cancel the Charge dated 23rd September 2014 registered against all that parcel of land known as Kilifi/Kijipwa/132 and to nullify the same.

c) A declaration is hereby issued that the purported Charge dated 23rd September 2014 against all that parcel of land known as Kilifi/Kijipwa/132 is fraudulent, illegal, null and void.

d) Damages for loss of user are hereby awarded to the Plaintiff in the sum of Kshs 1 million per year effective 23rd September 2014 until payment in full.

e) The Plaintiff shall have the costs of this suit.

Dated, signed and delivered at Malindi this 28th day of February, 2020.

J.O. OLOLA

JUDGE