



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 68 OF 2018

SILVIA WANJIKU KIMANI.....1ST PLAINTIFF

JACKSON MUIRURI KIMANI.....2ND PLAINTIFF

VS

KIMANI MUIRURI MACHUGU.....1ST DEFENDANT

KIMANI NDUU.....2ND DEFENDANT

THE DISTRICT LAND REGISTRAR MURANGA....3RD DEFENDANT

JUDGMENT

1. The Plaintiffs are the biological children of the 1st Defendant. They accuse their father of fraudulently and illegally selling LOC6/GIKARANGU/2857 (suit land) to the 2nd Defendant whilst they were minors and at a time that their mother did not have the financial means to object to the sale and that by then she had left her matrimonial home due to the domestic disputes she had with their father, the 1st Defendant. They contend that the suit land is ancestral land held in trust by the 1st Defendant for them. They blame the 2nd Defendant for buying land well knowing that this was the only piece of land their parents had. That the 1st and 2nd Defendants colluded to dispose the suit land without consulting the family.
2. The Plaintiffs sought orders declaring the sale and transfer of the suit land null and void, cancellation of title and an order to compel the 3rd Defendant to revert the original title to the 1st Defendant.
3. The 1st Plaintiff in her witness statement averred that the suit land is family land as well as matrimonial property. That at the time of the sale of the land she was in college and was not consulted. She stated that the delay in filing suit was because she and her brother the 2nd Plaintiff were young and in school/college and their mother did not have money to pursue the recovery of the land. That they learnt of the sale from another person in the area. That the 2nd Defendant fraudulently acquired the property knowing too well that it was the only piece of land they had.
4. She stated that the 1st Defendant is their father and her mother Beatrice Wangari Kimani though alive is not interested in pursuing the case. She confirmed that the suit land was sold by her father to the 2nd Defendant for the sum of Kshs 1 million which was paid in full in 2008. That the 2nd Defendant has been in possession of the suit land since 2008.
5. Further she led evidence that the property was their matrimonial home. That she did not have authority to litigate on behalf of the parents who are alive. That her mother is not interested in the case. That she has no evidence of any protest against the sale by her mother. That by the time the land was sold she was 21 years old and therefore mature to have challenged the sale but she did not. That the land is ancestral although she did not explain the root of the title. That her mothers' consent was not obtained and therefore she concludes that the transaction was fraudulent.
6. The 2nd Plaintiff reiterated the evidence of the 1st Plaintiff in toto. He confirmed and pointed out the 1st Defendant who was present in Court and introduced him as his father. He too confirmed that the suit land was sold by his father in 2008 and was paid in full as per the agreement of sale and that the 2nd Defendant has been in possession ever since. That as he was born in 1992 and therefore was a minor when the land was sold to the 2nd Defendant by his father. He informed the Court that his father being a person of sound mind sold the land out of his own volition as the absolute owner of the land. That the fact that the land was sold without the knowledge of his family amounts to fraud.
7. The Plaintiffs withdrew the suit against the 1st Defendant on the 25/11/19.

8. The 2nd Defendant filed a statement of defence and denied the Plaintiff's claims and raised a preliminary objection to wit; the Plaintiffs' claims are time barred; abuse of the process of the Court; Plaintiffs are non-suited against the 2nd Defendant; the suit as it relates to the 3rd Defendant is incompetent and offends the law.

9. The 2nd Defendant avers that he is the registered owner of the suit land having acquired for valuable consideration in 2008. That he has been in exclusive possession of the suit land which he has developed since acquisition to date. That the Plaintiffs have filed suit in connivance of the 1st Defendant and thus amounts to an abuse of the process of the Court.

10. In his counterclaim the 2nd Defendant sought orders for a declaration that the 2nd Defendant is the legal owner of the suit land and the Plaintiffs be permanently restrained from interfering with the quiet possession of the land by the 2nd Defendant.

11. The 2nd Defendant led evidence and stated that he acquired the suit land through purchase from the 1st Defendant in 2008 and paid the full purchase price. He was immediately put in possession and he has developed the suit land since. That the land control board consent was obtained. That the 1st Defendant's wife did not raise any objections at all. That earlier, he had acquired the adjacent land where he has built his house. That the seller has not raised any concerns about the transaction to date. That the 1st Defendant and the Plaintiffs have been trespassing onto the suit land which actions he terms illegal, wanton and reckless. That the 1st Defendant is colluding with his children, the Plaintiffs to file the suit as a way to vex him.

12. The 3rd Defendant did not enter appearance nor file any statement of defence.

13. As to whether the sale, transfer and registration was null and void, the Plaintiffs submitted that the Defendants colluded to dispose of the land fraudulently to deprive them of their interest in land. That the title is tainted with irregularities and illegality and therefore the 2nd Defendant did not receive a good title and as a result the 2nd Defendant cannot claim to be a bonafide purchaser for value.

14. The 2nd Defendant argues that the suit is time barred as the sale agreement was entered into in 2008. Section 4 of the Limitations of Actions Act provides that the life of a contract is 6 years. That no leave was sought before filing the suit out of time.

15. Further that the Plaintiffs have no locus standi to file the suit. That going by the pleadings and the prayers sought the suit was instituted by the 1st Defendant through the Plaintiffs as his proxies. The Plaintiffs are not parties and not privy to the agreement of sale. On that account the suit is frivolous and vexatious. That having removed the 1st Defendant who was proximate to the transaction, the Plaintiffs are left with no sustainable case because there would be no legal basis to challenge the transaction.

16. Having considered the pleadings the evidence adduced at the hearing and the submissions the issues that crystalize for my determination are;

- a. Whether the suit is time barred
- b. Whether the Plaintiffs have locus to institute this suit.
- c. Whether the Plaintiffs have proved fraud and illegality on the part of the 2nd Defendant.
- d. Whether the land was matrimonial land
- e. Whether the suit land was ancestral land and or held by the 1st Defendant in trust
- f. Whether the 2nd Defendant is a bonafide purchaser for value without notice.

17. It is not in doubt that the 2nd Defendant is the registered owner of the suit land having acquired through purchase. This evidence was admitted by the Plaintiffs. The agreement of sale dated 14/3/2008 was adduced in evidence. It is not in dispute that the 2nd Defendant took possession of the suit land immediately and is still in occupation to date. The copy of title issued in the name of the 2nd Defendant dated the 11/9/2008 was adduced in evidence.

18. It is commonly accepted and admitted that the Plaintiffs are the children of the 1st Defendant. The 2nd Defendant has argued that the suit is a proxy case by the 1st Defendant through his children to repossess the land from him. There is no evidence that was laid before the Court to prove this. It remains an unproven allegation.

19. The case of the Plaintiffs is that the sale was fraudulent and illegal; the suit land was ancestral land; the land was matrimonial property; the title should be cancelled and reverted to the 1st Defendant.

20. As to whether the suit is time barred, the Court notes that the agreement of sale was entered into in 2008 and under section 4 of the Limitations of Actions Act, limitation of time in respect to a claim under contract is 6 years. 6 years period therefore lapsed in 2014 and the suit having been filed in 2018 was filed out of time. There was no evidence that leave was sought and obtained to file the suit out of time.

21. In the case of **Divecon Vs Samani [1995-1998] 1 EA 48 at page 54** in which the Appellate Court rendered itself thus;

“No one shall have the right to power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no Court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract.”

22. It is the finding of the Court that this suit is therefore time barred.

23. Whereas it is trite that the Court must give effect to the contractual terms of a contract that had been executed by parties, the law is also clear that the contract creates obligations that bind the parties to contract. Further that the independent parties cannot claim or recover under a contract. According to the agreement of sale on record the parties to the contract are the 1st Defendant and the 2nd Defendant. The Plaintiffs are strangers to the contract and therefore they are not entitled to any benefits of the said contract.

24. This Court takes cognizance of Art 258 of the Constitution that allows any person with a reasonable cause of action and/or whose rights have been aggrieved eligible to have audience in Court. The Court did pronounce itself on the issue of locus in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] Eklr** when the Court noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or the Constitution in general.

25. That said the Plaintiffs must establish a cause of action and proceed to proof the same on a balance of probabilities.

26. The Plaintiffs case is anchored on fraud and illegality however they failed to plead the particulars of fraud and or illegality. This suit therefore offends Order 2 Rule 10 which provides as follows;

“(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing —

(a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies”.

27. In the case of **Wilson Kenyenga -Vs- Joel Ombwori, the Civil Appeal No.96 of 1998**, the Court of appeal held that;

“ We are satisfied that trust was not pleaded. No particulars of the trust were pleaded and none was relied upon in compliance with Order 6 rule (8) of the civil Procedure Rules In the absence of a pleading of trust, this claim cannot be permitted to be raised on decree. As a rule, relief not founded on pleadings will not be given and cases must be decided on the issues on record”.

28. It is trite that fraud must be pleaded and proved to the required standard which is beyond the balance of probabilities and slightly below the standard required in criminal cases. Fraud cannot be inferred by the Court. In this case the Plaintiffs failed to plead nor proof fraud. The claim on fraud is therefore reduced to a mere allegation.

29. The Plaintiff confirmed that their father had capacity to sell the land , the search indicates that he was the proprietor prior to the sale and transfer in 2008.The vendor retained exclusive rights over his properties while the Plaintiff's rights to succeed or inherit their father's land could only mature upon the proprietor's death .In the case of **Marigi –vs- Muriuki (2008) 1KLR (G & F) 1073 at 1077/1078**, it was held that the owner of the suit property was still active or alive and it was upon him to decide to subdivide or distribute it according to his own free will.

30. **Further in the case of In Jemutai Tanui vs Juliana Jeptepkeny & 5 Others ELC No. 44 of 2013 (formerly HCC No. 60 of 2012) Eldoret**, the Court dealing with the question as to whether a proprietor who inherited her land from her father automatically held the said land in trust for her children. The Court held that there was no automatic trust arising from that inheritance, and the proprietor was not bound to consult her children when she wanted to sub-divide the land and sell it.

31. The Plaintiffs have claimed that the property was matrimonial property however for a claim of matrimonial property to succeed it must be adverted by a spouse and not children. The Plaintiffs informed the Court that their mother is alive. The 2nd Defendant stated that the mother of the Plaintiffs attended the Land Control Board and obtained the Land Control Board consent and that perhaps is the reason why she has not challenged the sale for all these years.

32. Is the suit land trust or ancestral land. It was the duty of the Plaintiffs to plead particulars of trust as well as prove it. The Plaintiffs claimed in their submissions that the land belonged to their grandfather which was registered in the name of their father, the 1st Defendant upon subdivision. They however failed to adduce evidence in form of a green card or such other evidence to show the root of the title. The Court is unable to hold that the land is ancestral land in the circumstances.

92. Is the 2nd Defendant a bonafide purchaser for value? Black's law Dictionary 8th 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 in 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.” ...

93. For one to successfully rely on the bonafide purchaser doctrine he must prove that he holds the certificate of title ; purchased the property in good faith; he had no knowledge of the fraud; he purchased for valuable consideration; the vendors had apparent valid title; he purchased without notice of any fraud; he was not privy to the fraud. See the case of **Hannington Njuki Vs Willian Nyanzi HCCC No 434 of 1996** quoted with approval in the case of **Katende V Harridas & Company Limited EALR (2008) 2EA.**

33. The Plaintiff adduced evidence that he entered into an agreement for sale with the 1st Defendant in 2008. That he obtained LCB consent and paid the full purchase price.

34. Section 26 of the Land Registration Act provides two circumstances under which a title is impeachable. One is through fraud misrepresentation in which the person is a party to and secondly where the title has been acquired illegally, unprocedurally or through a corrupt scheme. The Plaintiffs have not led any evidence to challenge the title of the 2nd Defendant. In the circumstances, the Court finds no ground to impugn the title of the 2nd Defendant.

35. Final orders;

- a. The Plaintiffs claim fails and is dismissed.
- b. The counterclaim succeeds.
- c. It is hereby declared that the 2nd Defendant Mwangi Ndua is the legal owner of the land parcel LOC6/GIKARANGU/2857.
- d. The Plaintiffs be and are hereby permanently restrained from interfering with the quiet user and possession of the land of the 2nd Defendant.
- e. The costs of the suit and the counterclaim shall be borne by the Plaintiffs in favour of the 2nd Defendant.

36. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 12TH DAY OF MARCH 2020.

J .G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Manyara HB for Mburu Machua for the 1st & 2nd Plaintiffs

1st Defendant – N/A

Ndwiga HB for Kirubi for the 2nd Defendant

3rd Defendant – Absent

Irene and Njeri, Court Assistants