



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL CASE NO. 99 OF 2010

LUCY WANGUI MWAURA.....PLAINTIFF

-VERSUS-

LINET ACHIENG AMALA.....DEFENDANT

JUDGMENT

1. The dispute between the plaintiff and the Defendant is ownership of **Plot No.4** a subdivision of **Nakuru Municipality/Block 20/40**, now known as **Nakuru Municipality/Block 20/63**. It is registered in the Defendant's names by a certificate of lease registered on the 2nd December 2000 and issued on the 12th May 2000 by the District Land Registrar.

2. The plaintiff in his statement of claim by a plaint dated 21st April 2010 and filed on the 22nd April 2010 states that on or about November 1993 by a duly executed sale agreement, she bought the subject plot at a cost of Kshs.115,000/= from the then owners **James Miruiruri Wangai, Francis Ngeere Githui, and Francis Kamau**, and that a new parcel number was issued but before she could be registered as the lawful proprietor, the defendant unlawfully and fraudulently caused herself to be registered as the proprietor and a certificate of lease issued to her on the 12th May 2000 without her consent and authority. Particulars of the defendants alleged fraud are stated.

3. In her defence filed on the 25th May 2010, the defendant denied having obtained registration of the suit plot fraudulently and avers that she is a *bonafide* purchaser for value of Kshs.280,000/= from the 1st registered owners named above vide a sale agreement dated 15th January 2000, and therefore, as a *bonafide* purchaser without notice, her title to the suit plot cannot be cancelled or revoked as sought by the plaintiff.

4. The court has been shown only one sale agreement in respect of the suit plot. It is dated 11th November 1993 between Lucy Wangui Mwaura (plaintiff) as the purchaser and James Muiruri Wangai, Francis Ngeere Githui and Francis Kamau as the vendors.

It was drawn by the law firm of Sheth & Waithigo Advocates acting for both the vendors and the purchaser.

5. The plaintiff sought declarations that

- a) **She is the lawful owner of the suit plot Nakuru Municipality/Block 20/63.**
- b) **Cancellation and revocation of certificate of lease of the suit plot registered in the defendant's names.**
- c) **Costs of the suit.**

6. I have considered the parties evidence exhibits and submissions filed by the parties advocates in support of their respective pleadings.

It is trite that for a sale of land to be valid, provisions of **Section 3(3) of the Law of Contract Act** must be complied with. It states:

“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 and

b. the signature of each a party signing has been attested by a witness who is present when the contract was signed by such party.

7. I have perused the Sale Agreement dated 11th November 1993 – PExt I. The Vendor is shown as the three partners James Muiruri Wangai, Francis Ngeene Gichui and Francis Kamau. The purchaser is the plaintiff, Lucy Wangui Mwaura. The sale is in respect of plot 4 out of subdivision of Nakuru Municipality/block 20/40, after which subdivision **plot 4 was allocated parcel No. Nakuru Municipality/Block 20/63**. These Facts are not in contestation between the parties.

8. There is evidence that the plaintiff pursuant to the sale agreement paid the total consideration by production of the payment receipts PExt 2A, B, C, D, E, F.

The sale agreement is signed by the three vendors and the purchaser and attested to by J.G. Waithigo Advocate.

By all legal standards therefore, there was compliance with the provisions of **Section 3(3) Law of Contract Act** by the plaintiff.

9. On the other hand, the defendant failed to produce any sale agreement executed by herself as the purchaser and the three persons stated above as the vendors. The only documents produced were DExt (b) and (c) being copies of Bankers cheques drawn from Barclays Bank in favour of Francis Kamau for a sum of Kshs.200,000/=. Without supporting documents, like a sale agreement, or memorandum in writing or any clear explanation as to who and for what purpose the cheques were drawn and issued, it cannot be taken at face value, nor would it be assumed that they were paid in respect of a sale of a plot or property. These payments were made in January, February and May 2000.

10. Issues for determination

1. Whether the defendant's title to the suit plot was obtained through fraud and illegality.

2. Whether the defendant was a bonafide purchaser for value without notice.

3. Whether plaintiff is entitled to the declarations and reliefs sought in the plaint.

11. There is no doubt that the defendant made some payments to one Francis Kamau, but purpose not stated nor proved by any cogent or credible evidence as no sale agreement or any memorandum or any document in writing was produced by the defendant to the court to support the contract of sale contrary to the defendant's counsel submission that a sale agreement was executed between the vendors and the defendant as the purchaser.

12. In a similar situation where no sale agreement was executed by the parties, the **Environment and Land Court in Daudi Ledama Morintant -vs- Mary Christine Kiarie & 2 Others (2017) e KLR**, citing the case **Patrick Tarzan Matu & Another -vs- Nassim Shariff Abdulla & 2 Others (2009) e KLR, Azangalala J** (as he then was) rendered, inter alia that

“--- The applicant in this case has satisfied me that there is no agreement between her and the plaintiffs in terms of the provisions of Section 3(3) of the Law of Contract Act which the plaintiffs can enforce against her --- the claims are made pursuant to an agreement that is contra statute or at the very least does not comply with the law. So, the very foundation of their claim is untenable.”

13. Mutungi J in the **David Ledama Morintant** case (**Supra**) further rendered that provisions of **Section 3(3) Law of Contract Act** are couched in mandatory terms and that failure to comply thereto renders a suit defective and it must fail.

14. In addition to the above, **PW2** a co-owner of the suit plot testified that the transfer of the suit plot to the defendant was contrary to the partners agreement and denounced the purported sale by Francis Kamau, to whom the defendant purportedly paid the purchase price as having been unauthorised. The defendant failed to call evidence that she met all the co-owners of the suit plot who agreed to sell the plot to her. No such agreement was demonstrated.

15. It is trite that for a transfer of land to be valid, it must be preceeded by a sale agreement and a transfer document executed by the parties and by the Land Registrar, and upon which assessment of stamp duty and registration fees are made and duly paid. Failure would automatically be evidence that the transfer and registration was obtained illegally and unprocedurally. These are the necessary documents that perfect a sale transaction if in the first place there exists a valid sale agreement that complies with provisions of **Section 3(3) of the Law of Contract Act**.

16. The defendant was hard pressed in her evidence to confirm whether or not she executed any document after payment of the purported consideration to one of the co-owners of the plot, Francis Kamau.

Indeed, no transfer document nor stamp duty and registration fees receipts were produced to the court to confirm compliance with procedural requirements that must precede registration and issuance of a certificate of lease.

17. How then was the registration of the suit plot effected to the defendants names?

The defendant testified that it is the said **Francis Kamau** who did everything for her including procuring the certificate of lease on her behalf. She confirmed that the transfer instrument had no stamp duty assessment nor stamped by the Land Registrar.

There is therefore reasonable presumption that the defendant and the said Francis Kamau used unlawful and unprocedural methods to achieve registration. The land registrar and illegal cannot be absorbed from this irregular and illegal registration.

18. **Section 26 of the Land Registration Act** provides that a title issued by the Land Registrar upon transfer may be challenged on the following grounds

a) fraud or misrepresentation to which the person is proved to be a party.

b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

19. The plaintiff pleaded fraud in the manner of the acquisition of the title by the defendant.

The allegations of illegality and fraud stated by the plaintiff cannot be said to be without reasonable grounds.

These are clearly exhibited by one of the co-owners (**PW2**) denial that one of them Francis Kamau had no authority to sale or transfer the suit plot to a 3rd party save to the plaintiff, and failure for the defendant to demonstrate how registration in her favour was achieved. See **Central Bank of Kenya -vs- Trust Bank Ltd 4 Others (1996) e KLR**.

20. **Was the defendant then a *bonafide* purchaser for value without notice?**

It was the defendant's evidence that she conducted an official search on the suit plot, and confirmed ownership by the three persons. Having that knowledge, it is not sufficiently explained why she paid the purchase price to one party and without executing a sale agreement. The co-owners (vendors) were real estate agents. They no doubt knew conveyancing procedures. This is ably demonstrated by having a sale agreement drawn and executed by and in the presence of their advocates in the case of the plaintiff.

21. The defendant in her evidence testified that she had never gone to the advocate's law firm but dealt with Francis Kamau whom she knew before the purported sale but by the time of hearing of this suit, he had died.

The defendant did not call the other two co-owners to testify to how she acquired the suit plot. However **PW2 Francis Gichui** testified that the plaintiff paid the full purchase price for the plot and that all the subdivision titles were processed through their lawyer Sheth Waithigo advocate.

22. It was his evidence that upon completion, he gave the plot documents to his partner Francis Kamau who sold the plot to a 3rd party the Defendant contrary to their agreement with the plaintiff, after which he (Francis Kamau) was prosecuted but died before conclusion of the criminal case.

23. It is evident that the said Francis Kamau a co-owner of the suit plot engaged in unlawful and illegal methods and in my view, with participation of the defendant to register title to the suit plot in her favour. She was an active participant in the illegality, irregularity and the fraud in the illegal acquisition of the plot. This grand fraudulent scheme could not have succeeded without active participation of the land registrar who registered the transfer without the legally acceptable instruments of transfer.

24. **In Civil Appeal No. 5 of 2014 Evanson Wambugu Gatwiri & 2 Others (2014) e KLR**, the court rendered that a transfer that is not preceded by a sale agreement and payment of consideration and land Control Board consent renders the whole transaction fraudulent.

25. The defendant in my view does not present herself as a *bonafide* purchaser without notice. I have given my reasons above.

In the case **Lawrence Mukiri -vs- AG & 4 Others (2013) e KLR**, a *bonafide* purchaser for value was stated as thus

“---- is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.”

26. For a purchaser to successfully rely on the *bonafide* doctrine, it must be proved that

a. He holds a certificate of title

b. He purchased the property in good faith.

c. He had no knowledge of fraud

d. The vendors had apparent valid title.

e. He purchased without notice of fraud

f. He was not party to any fraud

27. The defendant has failed to prove on a balance of probability that she was indeed an innocent purchaser. She purported to pay to one of the co-owners yet she knew from the official search certificate that the property was co-owned by the three persons whom she knew before. This conduct speaks of some scheme of fraudulent activities between the said Francis Kamau and herself.

28. **Section 26 Land Registration Act** provides that a certificate of title is conclusive evidence of ownership and that the title shall not be subject to challenge except

a) on grounds of fraud or misrepresentation

b) where the certificate has been obtained illegally, procedurally or through corrupt scheme.

Article 40 of the Constitution of Kenya 2010 protects an individual's rights to acquire and own property save when such is acquired irregularly or illegally through fraud or misrepresentation.

29. The **Court of Appeals (1984) KLR 580** in **Heptulla -vs- Noor Mohammed, Nyarangi J** rendered that

“No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract to transaction which is illegal, if the illegality is duly brought to the notice of the court and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him.”

30. The plaintiff sought revocation and cancellation of the certificate of Title to the defendant.

In **ELC Case No. 600 (B) of 2012 Elijah Makeri Nyangwae -vs- Stephen Mungai Njuguna (2013) e KLR**, and **ELC No.56 of 2014 Pauline Chemutai Chirchir -vs- Kipyegon Arap San and 3 Others (2015) e KLR** for reason of fraud, illegalities and unlawful registration of title to the defendants, the respective court's ordered and directed cancellation of the titles in the defendants' names and registration of the plaintiffs' names as the lawful proprietors.

31. **Section 80(1) of the Land Act 2012** states:

80(i) “subject to subsection (2) the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration as obtained was made or obtained by fraud or mistake.”

32. In the circumstances of this present suit, it is my considered view that the defendant with the original plot owners hatched a fraudulent scheme to illegally and unprocedurally deprive the plaintiff of her interests in the suit plot.

33. The suit plot is undeveloped and unoccupied by none of the parties.

Consequently, I render my findings and conclusion as herebelow:

1. The defendant's certificate of title in respect of Parcel No. Nakuru Municipality Block 20/63 issued to her on the 12th May 2000 was acquired irregularly and unprocedurally through a fraudulent scheme where the defendant was an active participant in the scheme.

2. That the defendant was not a bonafide purchaser for value without notice.

3. That the plaintiff having paid the full purchase price pursuant to the sale agreement executed by the vendor and herself on the 11th November 1993 in respect of the suit plot, and having made a finding that the said contract for sale of the suit plot was valid

4. The plaintiff is entitled to the declarations and reliefs sought in her plaint dated the 21st April 2010.

34. Accordingly, there shall be judgment entered for the plaintiff against the defendant as follows:

1. A declaration is hereby issued that the plaintiff is the lawful owner of plot known as Nakuru Municipality/Block 20/63 (Formerly Plot No. 4, a subdivision of Nakuru Municipality/Block 20/40).

2. That the Nakuru County Land Registrar is ordered and directed to forthwith revoke and cancel the certificate of lease issued to the defendant Linet Achieng' Amala on the 12th May 2000, and in any event within 60 days of this judgment.

3. That the Nakuru County Land Registrar is further directed that upon compliance with (2) above to cause the names of the plaintiff Lucy Wangui Mwaura to be registered as the proprietor of the suit plot, Nakuru Municipality Block 20/63, but upon payment of all lawful charges and fees as may be demanded by the Land Registrar as well as the Nakuru County dues, if

any.

4. The defendant shall pay costs of the suit to the plaintiff.

Dated, signed and delivered this 16th Day of May 2019.

J.N. MULWA

JUDGE