



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 120 OF 2013

(FORMERLY HCCC No. 133 OF 2009)

**MARGARET WAMBUI KAMAU (Suing as the legal representative
of the estate of JOHN KAMAU KIBUE).....PLAINTIFF**

VERSUS

JANE NGENDO MWAURA.....1ST DEFENDANT

MISHECK KAIRUTHI NJOGU.....2ND DEFENDANT

JUDGMENT

1. This suit was filed in the High Court on 13th May 2009 by John Kamau Kibue (deceased) who later passed away on 25th June 2011 and was substituted with Margaret Wambui Kamau, his widow who holds letters of administration *ad litem* in respect of his estate. At its filing, the suit had five defendants including Land Registrar Nakuru, Commissioner of Lands and Attorney General but the claim against those three was later withdrawn thus leaving only the current two defendants. The suit was transferred to this court in the year 2013. Prior to the transfer, an amended plaint was filed on 23rd May 2012 by the widow. She averred that sometime around the year 1999, she gave the title deed for the parcel of land known as Miti Mingi/Mbaruk Block 6/198 (Mwariki) to the 1st defendant for safekeeping. She demanded it back between the years 2000 and 2006 but the 1st defendant did not return it. She conducted a search on or about 24th June 2008 and discovered that the 1st defendant had fraudulently transferred the property to her name without any sale agreement, any signed transfer document or consent of the Land Control Board. She therefore seeks judgment against the defendants for:

(a) An order that the title deed for Miti Mingi/Mbaruk Block 6/198 (Mwariki) issued to the 1st defendant be cancelled and annulled and a fresh one be issued to the plaintiff.

(b) A permanent injunction restraining the defendants, their agents or servants from entering, trespassing, dealing, selling, alienating, damaging or in any way interfering with the plaintiff's quiet enjoyment of title No. Miti Mingi/Mbaruk Block 6/198 (Mwariki).

(c) Costs of the suit.

2. The 1st defendant filed statement of defence in which she denied the plaintiff's allegations and averred that the deceased deposited the title, signed transfer and application for consent of the Land Control Board with her following his failure to pay for goods worth KShs 343,000 which he had taken from her. She therefore urged the court to dismiss the case with costs.

3. On her part, the 2nd defendant also filed statement of defence in which he generally denied the plaintiff's allegations. He averred that he is an innocent purchaser for value without notice and further that he is the registered proprietor of the suit property. He equally urged the court to dismiss the case with costs.

4. It is acknowledged in the plaint that the 2nd defendant herein filed Nakuru CMCC No. 397 of 2009 against the deceased. The only parties to the suit were the 2nd defendant herein as plaintiff and the deceased as defendant. The said suit was filed on 16th April 2009. The deceased later filed Notice of Motion dated 28th May 2009 in which he urged the High Court to transfer CMCC No. 397 of 2009 to itself so that all issues between the parties would be disposed together. The record herein shows that a consent was recorded on 19th June 2009 transferring the suit to the High Court for trial and disposal and consolidating it with this suit. In the plaint, the 2nd defendant averred that he is the registered proprietor of Miti Mingi/Mbaruk Block 6/198 (Mwariki). That the deceased invaded and occupied the property and refused to vacate despite a demand to do so. He therefore sought judgment against the deceased for an order that the deceased vacates. He also prayed

for costs.

5. At the hearing the plaintiff testified as the sole witness in support of her case. She stated that she is the widow of John Kamau Kibue (deceased) and that she was issued with letters of administration *ad litem* in respect of his estate on 1st November 2011 (PExb 1). She added that since 1978, she has resided on the parcel of land known as Miti Mingi/Mbaruk Block 6/198 (Mwariki) (the suit property). She further stated that she has known the 1st defendant herein since 1997 as a close friend and a church lady. That the 1st defendant used to sell clothes and motor vehicles at Shabab area in Nakuru. She was a close friend and a church lady. That the registered proprietor of the suit property was the deceased pursuant to a title deed dated 28th March 1995 (PExb 3). She added that in 1997 during the tribal clashes, she requested the 1st defendant to keep for her a log book for her lorry and the title deed for the suit property. She gave those two documents to the 1st defendant to keep for her since she (the plaintiff) had to cross a river so as to reach safety. That upon crossing, about two months passed before she met the 1st defendant near the Municipal Council offices. She asked her for the documents but the 1st defendant said that they were with Mirugi Kariuki, Advocate. She added that the next time she met the 1st defendant, she said the documents had been stolen. The plaintiff therefore informed the deceased who advised that they wait a bit before reporting to police. Later on, the plaintiff went to see the 1st defendant at Section 58 in Nakuru and found her mother who told her that the 1st defendant was away in Mombasa and was sick. Later in the year 2008, strangers went to the suit property and claimed that it did not belong to the plaintiff and the deceased. Consequently, the plaintiff sent her son to conduct a search at the land registry. The certificate of search dated 30th July 2008 (PExb 4) showed that the 1st defendant became the registered owner of the suit property on 15th August 1997. Owing to that revelation, the deceased an advocate who prepared a caution form and lodged it for registration on 24th June 2008 (PExb 5). The plaintiff further stated that she and the deceased never sold the suit property to the 1st defendant, that they did not go to any lawyer to prepare a sale agreement, that they never sought any consent of land control board to sell the plot to the 1st defendant and that they never transferred it to the 1st defendant. She concluded her evidence in chief by stating that they never received any money from the 1st defendant as purchase price and that it was illegal for the 1st defendant to transfer the plot to herself.

6. Under both cross-examination and re-examination, she stated that the deceased was not a businessman, had no dealings with the 1st defendant and did not owe her any money. She added that when she and the deceased discovered in the year 2008 that the land had been transferred to the 1st defendant, they decided not to report to police at that point. She also stated that the 2nd defendant ploughed the land using a tractor and planted and that she was not aware that the 2nd defendant filed any case against the deceased in regard to the suit property.

7. The plaintiff's case was then closed. Parties agreed to later call the Land Registrar to testify as a common witness after close of the defence case. As will be apparent later in this judgment, the registrar never testified and instead, by consent, parties produced the certified copy of green card for the suit property which the registrar was meant to produce.

8. It was next the defence's turn. Just like the plaintiff, only the defendants testified as the sole witnesses in support of their respective cases. The 1st defendant testified as DW1 and stated that she lives in Mombasa where she works as a preacher. Before relocating to Mombasa, she used to live in Nakuru where she was a wholesaler of second hand clothes and motor vehicles until 1997. She added that she knew the deceased and that on 2nd March 1995 he went to her to buy 2nd hand clothes in wholesale. She sold to him clothes worth KShs 343,500 on credit since he did not have money and in return, he deposited the title for the suit property as security. She produced a copy of a receipt (DEXb2). She further stated that on 22nd June 1995 the deceased went back to her and told her that he went at a loss. Since she did not know the value of the suit property, they did a valuation through Munyoki & Associates (DEXb 3) who put the value at KShs 250,000.

9. She further testified that since the suit property could not cover the amount owed to her, the deceased gave her a log book of a motor vehicle as additional security and that on 1st August 1997, the deceased took to her transfer forms for the property and suggested that the title be transferred. Since she was travelling, she gave the deceased her supporting documents and left him with her worker to follow up the transfer. On return, she found that transfer had been registered in her name. She took the new title which was issued in her name on 15th August 1997 (DEXb 4) to her house and left the file for the transaction in her office. She further stated that there was theft in her office on 3rd March 1998 at which all her things were stolen including file which had all the documents for the transfer except the title. She reported the incident to CID and was issued with a letter dated 3rd March 1998 (DEXb 5). She added that the deceased showed her the suit property when she went with the valuer to do the valuation. At that time, the deceased was living there with his family and told her that they were to relocate to Pipeline which they did. She went back to the plot in June 2008 and found it vacant. She sold it to the 2nd defendant. Upon conducting a search she discovered that there was a caution registered by the deceased. The caution was later removed after the registrar wrote to the deceased. She added that it is not true that she stole the plot and that she would not have had it for 11 years if she stole it.

10. Under both cross-examination and re-examination, she stated that she had a written agreement with the deceased which stated that the deceased owed her money and that the title was deposited with her as security which would be released once she was paid. She added that the agreement was stolen during the theft in her office and that she did not go to land registry to obtain a copy of the transfer once her copy was lost. Further, that she did not attend any Land Control Board for the transaction between her and the deceased. She added that the 2nd defendant lived in Mombasa and that the transaction between her and him was executed on 9th June 2008 in the presence of a lawyer in Mombasa. That the consent in respect of the transaction between her and the 2nd defendant was given on 26th June 2008, after the sale agreement while the transfer to him was registered in 2009, more than 6 months after the consent was issued. She further stated that after 18th August 1997 when she returned from abroad and found the title in her office, the deceased never went to her to ask about the plot or why the title was in her name.

11. The 1st defendant then closed her case.

12. Next on the stand was the 2nd defendant who testified as DW2. He stated that he resides in Mombasa where he works as a trader at Kongowea market. That he has known the 1st defendant since his childhood and that on 9th June 2008 he and the 1st defendant entered into a written sale agreement (DEXb 7) in respect of the suit property. That he viewed the plot prior to execution of the agreement and that after

paying deposit, he and the 1st defendant discovered that a caution had been registered against the plot by the deceased. The land registrar removed the caution in February 2009 after issuing notices to the deceased. He added that he and the 1st defendant then went to the Land Control Board and sought consent which was given on 26th June 2008 (DExb 8). That after valuation for purposes of stamp duty was done he paid stamp duty, transfer was registered in his favour and title deed (DExb 13) issued to him on 25th March 2009. He further testified that the title deed and other documents were burnt in a fire incident at his place of work in the year 2010 and that he was issued with a police abstract (DExb 14A) after he reported the loss at Nyali Police Station. That after reporting the loss to the land registrar a Gazette Notice dated 19th November 2010 (DExb 18) was published in the Kenya Gazette and a new title deed (DExb 19) was re-issued to him on 3rd February 2011. He added that he also obtained a certified copy of green card. He did not produce it since according to him, the land registrar was to produce it later. DW2 further testified that when he realized that the deceased had registered a caution against the title, he filed a case being Nakuru CMCC No. 397 of 2009 against him. He added that he does not agree that his title be cancelled since according to him, he lawfully acquired the suit property after doing due diligence which included conducting a search and obtaining a certificate of search (DExb 21) which showed that the 1st defendant was the registered owner.

13. Under cross-examination and re-examination, he stated that he and the 1st defendant and I went together to obtain consent of the land control board in Nakuru and that it was issued later on 26th June 2008. That the transfer between him and the 1st defendant is dated 20th March 2009 which is about 9 months after the consent was issued. He explained that the delay was due to the caution which had been registered. With that, the 2nd defendant's case was closed.

14. It will be recalled that parties had agreed to call the Land Registrar to testify as a common witness after close of the defence case to produce the green card for the suit property and any other records. After some adjournments were granted to procure the attendance of the Land Registrar, parties produced the certified copy of green card (DExb 20) for the suit property by consent. Parties thereafter filed and exchanged written submissions.

15. It is argued on behalf of the plaintiff that the title for the suit property could not be lawfully transferred to the 1st defendant even if it was deposited with the 1st defendant as security since sections 78 and 90 of the land act do not sanction transfer of security to chargee in the event of a default. Further, citing section 109 of the Evidence Act, it is argued that since the 1st defendant asserted that the deceased gave her a duly executed transfer and an application for consent of the Land Control Board, it was upon her to prove those facts, a burden that she failed to discharge. Arguing that transfer and consent of the Land Control Board would readily be available from the land registry if they existed, the plaintiff urged the court rely on section 112 of the Evidence Act to construe the 1st defendant's failure to produce those documents against her by holding that the transfer to the 1st defendant was illegal and unprocedural. It is further argued in regard to the 2nd defendant's position as the current registered proprietor of the suit property that in view of the fact that no transfer and consent of the Land Control Board was produced in respect of the transfer from the deceased to the 1st defendant, the transfer was illegal, unprocedural and procured through corrupt means. Further, that the 2nd defendant is not a *bona fide* purchaser without notice and that his title cannot stand even if he did not participate in the fraud. Reliance is placed in the cases of **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR** and **Samuel Odhiambo Oludhe & 2 others v Jubilee Jumbo Hardware Limited & another [2018] eKLR**.

16. On the part of the 1st defendant it is argued that there is no dispute that the land was transferred to her in 1997 and that the deceased only took some action in the year 2008 when he registered a caution and later filed a suit almost 12 years after she became owner. That in any case, the land was transferred by the deceased and that he is no longer available to explain how and why the transfer was effected. It is further argued that he who alleges must prove and that the plaintiff has failed to prove her allegations of fraud. Consequently, the 1st defendant urged the court to dismiss the plaintiff's case.

17. For the 2nd defendant, it is argued that the green card which was produced by consent of all parties shows how the suit property was transferred from the deceased and ultimately to the 2nd defendant. It is further argued that the plaintiff has not prayed for cancellation of the 2nd defendant's title and that in view of sections 26 and 80 of the Land Registration Act, the 2nd defendant is an innocent purchaser for value whose title cannot be impeached since the plaintiff did not demonstrate any fraud on his part. It also argued that parties are bound by their pleadings and that the court should find in favour of the 2nd defendant and restrain the plaintiff from interfering with the suit property.

18. I have considered the pleadings, the evidence and the submissions herein. The issues that arise for determination are whether the plaintiff has demonstrated that the suit property was fraudulently transferred to the 1st defendant, whether the 2nd defendant is a bona fide purchaser and finally whether the parties are entitled to the reliefs sought.

19. The plaintiff averred in the plaint that the 1st defendant fraudulently transferred the suit property to herself. Particulars of fraud were pleaded which include transferring the land without consent of the Land Control Board or transfer forms and backdating the transfer to 15th August 1997. Having moved the court, the plaintiff bears the burden of proof. She must prove her case in all respects. In **Wareham t/a A.F. Wareham & 2 Others – v- Kenya Post Office Savings Bank [2004] 2 KLR 91**, the Court of Appeal stated:

... in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.

20. I therefore do not agree with the submission made on behalf of the plaintiff that the 1st defendant should prove that the suit property was properly transferred to herself. In a case such as this where the plaintiff has alleged fraud, she must be aware that the burden of proof facing her is higher than that of balance of probabilities. The Court of Appeal reiterated as much in **John Mbogua Getao v Simon Parkoyiet**

Mokare & 4 others [2017] eKLR:

The standard or burden of proof where fraud is alleged in civil matters has been held in decided cases to be of higher than the ordinary standard of balance of probabilities. (See Kinyanjui Kamau v George Kamau Njoroge (2015) eKLR; Bruce Joseph Bockle v Coquero Ltd (2014) eKLR). ... Indeed, allegations of fraud are of serious nature that may carry with them penal consequences that may further infringe on a person's right to liberty hence the insistence that fraud ought to be specifically pleaded, with particulars thereof, and proved. ... In Emfil Ltd v Registrar of Titles Mombasa (supra), this Court pronounced itself as follows on the issue:-

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without undue regard to procedural technicalities, Article 159 does not allow the respondents to totally ignore the rules of evidence.”

... In the case of Rosemary Wanjiku Murithi v George Maina Ndinwa (2014) eKLR, this Court held that proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud. Even if perchance we were to be swayed by the appellant's arguments and invoke Article 159 of the Constitution so as to determine the appellant's allegation of fraud against the respondents on merit, then we would still find that the claim fails for want of evidence. The appellant's case is simply devoid of evidence showing or imputing fraud or irregularity against the respondents as the trial court correctly found. ...

21. Having accused the 1st defendant of transferring the suit property to herself without consent of the Land Control Board or transfer forms and backdating the transfer to 15th August 1997, the plaintiff had a duty to place sufficient material before the court to prove those allegations on a higher standard than the ordinary standard of balance of probabilities. To the extent that the plaintiff is seeking to have the court nullify the 1st defendant's title, she must sustain her case on the basis of her own evidence. The Court of Appeal confirmed as much in **Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR** when it stated:

87. In our view, a party making a claim for a declaration of title must succeed on the strength of his case and not on the weakness of the defence. ...

22. The plaintiff has not placed any material before the court to show that consent of the Land Control Board or transfer forms do not exist or that transfer to the 1st defendant was backdated to 15th August 1997. She did not tender any evidence from the land registry to support her allegations. Instead, she simply made her allegations and then expects the 1st defendant to disprove her allegations. While at it, she has together with the defendants, produced by consent a certified copy of green card for the suit property which shows that the 1st defendant became registered proprietor on 15th August 1997 and the 2nd defendant on 24th March 2009. In the circumstances, the first issue for determination is answered thus: the plaintiff has failed to demonstrate that the suit property was fraudulently transferred to the 1st defendant.

23. The second issue for determination is whether the 2nd defendant is a bona fide purchaser. To qualify to be a bona fide purchaser, the 2nd defendant would need to satisfy the test in the Ugandan case of **Katende vs. Haridar & Company Limited [2008] 2 E.A.173** cited with approval by our Court of Appeal in **C.O Okere v Esther Nduta Kiiyukia & 2 others [2019] eKLR**:

“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;*
- b) he purchased the property in good faith;*
- c) he had no knowledge of the fraud;*
- d) he purchased for valuable consideration;*
- e) the vendors had apparent valid title;*
- f) he purchased without notice of any fraud;*
- g) he was not party to any fraud.”*

24. There is no dispute that the 2nd defendant is currently the registered proprietor of the suit property. This is borne out by the certified copy of green card for the suit property which was produced by consent and which shows that he became registered proprietor on 24th March 2009. There is evidence that he purchased the suit property for valuable consideration through sale agreement dated 9th June 2008 from the 1st defendant whose title the plaintiff has not demonstrated to be defective. I am therefore satisfied that the 2nd defendant is a bona fide purchaser. That resolves the second issue for determination.

25. The last issue for determination is whether the parties are entitled to the reliefs sought. From the foregoing discussion, it is more than

apparent that the plaintiff has failed to prove her case. There is thus no basis upon which to issue a permanent injunction restraining the defendants or upon which to make an order cancelling “the 1st defendant’s title” since in any case the 1st defendant is no longer the registered proprietor. The plaintiff was well aware from as far back as June 2009 that the 1st defendant was no longer the owner when the 2nd defendant filed his defence and asserted that he was the proprietor. Despite that knowledge, no prayer was made for cancellation of the 2nd defendant’s title.

26. The 2nd defendant prayed in the plaint he filed in Nakuru CMCC No. 397 of 2009, which suit was transferred to the High Court and consolidated with this case, for judgment against the deceased for an order that the deceased vacates the suit property. The order for transfer and consolidation was made on 19th June 2009. Upon the deceased passing away, the plaintiff herein letters of administration *ad litem* in respect of his estate for purposes of prosecuting this case on 1st November 2011. The plaintiff stated in her testimony that she is residing on the suit property. The 2nd defendant having established that he is the registered proprietor, is entitled to the relief which he sought.

27. In view of the foregoing, I make the following orders:

a) The plaintiff’s (Margaret Wambui Kamau’s) case against the defendants is dismissed with costs.

b) The plaintiff (Margaret Wambui Kamau) to vacate the parcel of land known as Miti Mingi/Mbaruk Block 6/198 (Mwariki) and hand vacant possession to Misheck Kairuthi Njogu (the 2nd defendant) within ninety (90) days from the date of delivery of this judgment.

c) The plaintiff (Margaret Wambui Kamau) shall pay Misheck Kairuthi Njogu’s (the 2nd defendant’s) costs of Nakuru CMCC No. 397 of 2009.

28. This judgment is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice’s “Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic” (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 30th day of April, 2020.

D. O. OHUNGO

JUDGE