



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 1260 OF 2007

(Formerly Nairobi HCCC No. 1266 of 2003)

**VIRGINIA NGENDO KAMAU (Suing as the administratrix of the estate of
KAMAU WANGI DECEASED).....PLAINTIFF**

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

JOSEPH MWANGI MWEHA.....2ND DEFENDANT

JUDGEMENT

By a Plaint dated the 21st November, 2003 the Plaintiff prays for judgement against the Defendants jointly and severally for:

- a. General damages.
- b. A declaration that the Plaintiff as the legal representative of KAMAU WANGI is the rightful owner of all parcel of land title No. NAIROBI/ BLOCK 110/888.
- c. An order directed to the Chief Land's Registrar directing him to rectify the register in respect of title No. NAIROBI/ BLOCK 110/888 by cancelling the fraudulent registration to the 2nd Defendant and restoring the same to the Plaintiff as the deceased's legal representative.
- d. A permanent injunction against the 2nd Defendant against trespass on the said suit premises.
- e. Costs and interest thereon.

The 2nd Defendant filed his Defence where he admitted only the descriptive section of the Plaint. He stated that he is the registered proprietor of the suit property. He denied the allegations of fraud. He contended that the suit is fatally defective as there is no substantive suit for trial. He further stated that there is a similar suit pending in the High Court Nairobi being Case number 658 of 2000.

Evidence of the Plaintiff

The Plaintiff is the widow and administratrix to the estate of Kamau Wangi (deceased) who was the proprietor of the suit land Nairobi Block 110/888 which is now registered in the name of the 2nd Defendant. The deceased acquired the suit land through a society. Further, the land was vacant but when she discovered it had been registered in the 2nd Defendant's name through a fraudulent Transfer dated 8th April, 1998, after she conducted a search on 15th June, 1991, she proceeded to fence it. The deceased was alive when he discovered the suit land had been registered in the 2nd Defendant's name and he lodged a complaint with the Land's Office but died soon thereafter. The Plaintiff denied knowledge of the Defendant nor ever seeing him. She produced the following documents: Copy of Title Deed for Nairobi Block 110/888; copy of Certificate of Official Search dated the 15th June, 1999; copy of Certificate for Confirmation of Grant dated the 15th October, 2003; copy of Letter from the District Land Registrar dated 29th June, 1999; Copy of Letter from Kamau Wangi dated 1st September, 1999; Copy of Letter from the District Land Registrar dated 6th September, 1999; Copy of Letter from Assistant Director Investigations dated the 7th September, 1999; and copy of Letter from Assistant Director Investigations dated 10th December, 1999 as her exhibits.

Evidence of the Defendants

The 1st Defendant never entered appearance nor filed a defense.

The 2nd Defendant as DW1 testified that he entered into a Sale Agreement with Kamau Wangi on 27th March, 1998 in respect to the suit land for a consideration of Kshs. 1, 300,000/=. He contended that the said vendor executed the Sale Agreement prepared by his advocates messrs Violet Barasa. Upon signing the Sale Agreement he paid Kshs. 500,000/= as deposit and on 5th May, 1998 he paid a further deposit of Kshs. 500,000 to the firm of messrs Mwaura & Mwaura Waihiga & Company Advocates. He confirmed making a final payment of Kshs. 800,000/= to his lawyers messrs Mwaura & Mwaura Waihiga & Company Advocates. It was his testimony that his lawyers forwarded the purchase price to the vendor's lawyers. Further, that he received all the documents from his lawyers Mwaura & Mwaura Waihiga & Company Advocates. He further received the title deed in his name which he collected from the said lawyer's office. He insists he is the genuine owner and has never been told of any illegality in respect to his title. During cross-examination he explained that he met somebody whom he believed was an agent of the vendor but he never met the vendor personally at the time of executing the Sale Agreement. He further confirmed that he never saw the vendor signing the Sale Agreement. It was his testimony that he introduced the Agent to his Advocate whom he allowed to handle the transaction on his behalf. It was his contention that the first Kshs. 500,000 was paid to Violet Barasa Advocate and a receipt issued to that effect. The second instalment was paid by cheque. Further, he did not have a copy of the bank statement confirming he withdrew the money to settle the purchase price. He was not aware of a Letter dated the 29th June, 1999 from the Ministry of Land addressed to Ms. Violet Barasa and copied to the Plaintiff including himself although the address therein was his. He insisted no one had asked him to produce any documents and all the documents to prove payment to Kamau Wangi were with his lawyer. He explained that the land was vacant and he last visited in May, 2017. In reexamination, he further confirmed that he was not dealing with the seller directly but with his advocates. Further, that the seller also had an advocate Violet Barasa. He believed his lawyer transferred monies to the seller. He produced the following documents; Copy of title deed dated 29th August, 1990 in the name of Kamau Wangi; Sale Agreement dated 27th March, 1998; Receipts of payment dated 27th March, 1998; Copy of Transfer Form dated 9th April, 1998; Title deed in respect to Nairobi Block 110/888 registered in the name of the 2nd Defendant dated 20th April, 1998; Letters accompanying payment dated 5th May, 1998 and 13th May, 1998 respectively; Certified copy of receipt for payment dated 5th May, 1998; Certified Copy of Bank Statement dated 14th May, 1998; Receipt for Clearance Certificate dated 23rd June, 1999 and Certificate of Official Search dated 15th June, 1999 as his exhibits.

Both the Plaintiff and 2nd Defendant filed their respective submissions.

Analysis and Determination

Upon consideration of the pleadings filed herein including witness testimonies, exhibits and submissions, the only issue for determination is whether the 2nd Defendant acquired a valid title in respect to the suit land.

The Plaintiff contended that the 2nd Defendant fraudulently acquired the suit land when her husband was still alive. In her submissions she reiterated her claim and relied on the case of **Arthi Highway Developers Limited V West End Butchery Limited & 6 others (2015) eKLR and Ugandan Court of Appeal decision of Katende V Haridar and Company Limited cited in the case of Lawrence Mukiri V Attorney General & 4 Others (2013) eKLR** to buttress her arguments. The 2nd Defendant in his submissions insisted that the transfer of the suit property was legally effected after successful execution of the Sale Agreement dated the 27th March, 1998. Further, that the 2nd Defendant is the legal owner of the suit land and insists that the alleged former title deed is irrelevant and should be ignored as he is an innocent buyer who cannot be faulted. The 2nd Defendant relied on the case of **Behange V School Outfitters (U) Ltd Case No. 53 of 1999 EALR (2000) 1 EA 20 (CAU)** to support his arguments.

PW1 in her testimony explained that after they discovered that the suit land had been transferred to the 2nd Defendant while he had the original document in his custody, her husband reported the issue to the Ministry of Lands and Settlement; Kasarani Police Station and the Kenya Anti-Corruption Authority. The husband unfortunately died before the issue was resolved. According to the Certificate of Official Search dated the 10th June, 1999, the 2nd Defendant was registered as owner of suit land on 20th April, 1998. Further, in a letter dated the 29th June, 1999 from the District Land Registrar Nairobi addressed to messrs Violet Barasa Advocate and copied to the vendor and the deceased, the said Land Registrar indicated in the said letter that they had addressed the said Advocate as the lawyer for the vendor and the purchaser. From the evidence it emerged that despite the transfer to the 2nd Defendant, the deceased had the original title in his custody. The 2nd Defendant in his evidence intimated that his lawyers were messrs Mwaura & Mwaura Waihiga & Company Advocates. Further, that he never met the vendor nor saw him sign the documents but was dealing with his agent. During cross-examination he confirmed that he met somebody whom he believed was an agent of the vendor but he never met the vendor at the time of executing the Sale Agreement. He further confirmed that he introduced the Agent to his Advocate whom he allowed to handle the transaction on his behalf. I note DW1 never provided the name of the vendor's agent nor whether the said Agent had provided him with an Agency Agreement to sell the suit land as required by law on his behalf. DW1 failed to provide evidence to prove that the lawyer Violet Barasa was indeed acting for the deceased and if indeed the deceased received the purchase price. The 2nd Defendant insists that he acquired a good title and is a purchaser for value. I note he never pleaded the same in his Defence. He submitted that the Court should disregard the original title, which is still in the Plaintiff's custody. DW1 admitted that the address in the correspondence produced by the Plaintiff which were copied to him was his but denied receiving any of the letters. Which brings me to the question as to how a transfer was effected while the vendor retained the original title. I opine that transfer of land is a process involving a willing buyer and willing seller and once the suit land is transferred to the purchaser, it is trite law that the original title deed has to be surrendered to the Land Registrar for cancellation. In the letter dated the 6th September, 1999 by the District Land Registrar which was copied to the 2nd Defendant, the Land Registrar directed the deceased to report matter to CID as he suspected a forgery.

Blacks Law Dictionary 10th Edition defines an agent as ‘**someone who is authorized to act for or in place of another..**’

From this definition, there is a requirement that an agent has to act with the consent of the principal. In the current case, the 2nd Defendant

intimated that he was dealing with the deceased agent. However, he never produced any authority to this effect nor was this indicated in the Sale Agreement that was executed.

In the case of Case of **Arthi Highway Developers Limited V West End Butchery Limited & 6 others (2015) eKLR** the Court of Appeal dealt exhaustively with the issue of bona fide purchaser for value without notice and held that a party cannot invoke indefeasibility of title where the process of acquisition of the title is irregular. Further in the Uganda Court of Appeal Case of **Katende V Haridar & Company Ltd** cited with approval in the Kenya High Court the case of **Lawrence Mukiri V Attorney General & 4 others ELC 169 of 2008**, on what amounts to bona fide purchaser for value thus: '...a **bonafide 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 successfully rely on the bona fide doctrine, he must prove the following:**

- a. **He holds a certificate of Title**
- b. **He purchased the Property in good faith;**
- c. **He has no knowledge of the fraud;**
- d. **The vendors had apparent valid title;**
- e. **He purchased without notice of any fraud;**
- f. **He was not party to any fraud.**

A bona fide purchase of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.'

In applying these decisions to the case at hand, I note the 2nd Defendant never tendered evidence to prove he indeed executed the Sale Agreement with the Plaintiff's husband who was the vendor. Further, he admitted that he never met the Plaintiff's husband and the transaction between them was handled by their respective lawyers. He further failed to furnish court with the name of the Agent he was dealing with but admitted he is the one who introduced the Agent to his lawyers. I note the Bank Statements produced did not clearly indicate that the monies paid by the 2nd Defendant were to the vendor. Further, despite the Land Registrar seeking clarity in respect to the transaction herein from the firm of Violet Barasa Advocate, she failed to respond. Insofar as the Defendant produced a Sale Agreement, receipts to confirm paying the purchase price to his lawyers and a title deed in his name, I opine that a transaction devoid of the presence of the vendor nor agency agreement confirming vendor consented to the same while the vendor still held the original title deed in his custody is quite irregular; a clear pointer that the transaction was not above board, and reeks of fraud.. Based on the evidence before me which I have analysed above, I opine that the 2nd Defendant has failed to prove he acquired a good title from the said unnamed 'agent' of the vendor. I note the transaction herein which culminated in the 2nd Defendant acquiring the title was undertaken in 1998 when the Registered Land Act was still in place and in the circumstances will make reference to section 143 of the said repealed Act governing rectification of register which provided thus: **(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.'**

The aforementioned provisions are similar to Section 80 of the Land Registration Act which provides that: **'(1) 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 was obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.'**

Insofar as the 2nd Defendant insisted the transaction was above board and he is the registered proprietor of the suit land, but in relying on the case of **Arthi Highway Developers Limited V West End Butchery Limited & 6 others (2015) eKLR** where the Court of Appeal held that a party cannot invoke indefeasibility of title where the process of acquisition of the title is irregular. I am satisfied that the 2nd Defendant's registration was obtained by fraud as he was only dealing with an unnamed agent hence was aware of the fraud. Insofar as the 2nd Defendant submitted that he is a purchaser for value but from the evidence before court, I cannot deem him so. In the circumstance I find that the register to the suit land should hence be rectified and his title cancelled.

The Plaintiff sought for general damages and it was PW1's testimony that she had actually fenced off the suit land when she realized that it was transferred to the 2nd Defendant. Further, to date the said land is vacant. The 2nd Defendant also confirmed that the suit land was vacant when he last visited it in May 2017. PW1 in her testimony failed to adduce evidence on how the registration of the 2nd Defendant on the suit land interfered with her. In the circumstance, I am unable to award the said general damages to her.

On the issue of costs, since it normally follows the outcome of a cause, I will award the same to the Plaintiff.

It is against the foregoing that I find that the Plaintiff has proved her case on a balance of probability and will proceed to make the following final orders:

1. A declaration be and is hereby issued that the Plaintiff as the legal representative of KAMAU WANGI is the rightful owner of all parcel of land title No. NAIROBI/ BLOCK 110/888.
2. An order be and is hereby issued directing the Chief Land's Registrar to rectify the register in respect to title No. NAIROBI/ BLOCK 110/888 by cancelling the fraudulent registration to the 2nd Defendant JOSEPH MWANGI MWEHA and restoring the same to the Plaintiff VIRGINIA NGENDO KAMAU as the deceased's legal representative.
3. A permanent injunction be and is hereby issued restraining the 2nd Defendant against trespass on the said suit land NAIROBI/ BLOCK 110/888.
4. Costs of the suit is awarded to the Plaintiff.

Dated and Delivered in Kajiado this 11th day of December, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Mocha holding brief for Omolo for the plaintiff

No appearance for the defendants

Court assistant- Mpoye