



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO.429 OF 2008

DECAS LIMITED (suing as nominees of Unique

DISTRIBUTORS (K) LTD.....1ST PLAINTIFF

VERSUS

THE HONORABLE ATTORNEY GENERAL.....1ST DEFENDANT

BENSON MBENI KIBETU.....2ND DEFENDANT

JOHN WILLY KARIUKI KANYI.....3RD DEFENDANT

JOSEPH MISATI GESORE.....4TH DEFENDANT

J U D G M E N T

INTRODUCTION

The Plaintiff herein filed this suit against the 1st Defendant in his capacity as legal advisor and representative of Registrar of Companies. The Plaintiff allege following fraud/misrepresentation or wrong information in the entry made in the file of Kiseph Limited by official in Registrar of Companies Registry, to the effect that the 2nd and 3rd Defendants were Directors of Kiseph Limited, Plaintiff was misled into entering a sale agreement in respect of LR NO. 209/9725 with the 2nd and 3rd Defendants who later turned out to be imposters.

As a result of the misrepresentation, the Plaintiff paid Kshs. 15,509,576 to the 2nd and 3rd believing that they were Directors of Kiseph Limited. The 4th Defendant acted as the agent of the 2nd and 3rd Defendants. The Plaintiff also claims general damages for having lost an opportunity to own a parcel of land whose approximated value has risen to about 250 million now. Plaintiff also seeks for costs in HCC ELC No.1030 of 2007.

The 2nd, 3rd and 4th Defendants failed to enter appearance and file defence.

The 1st Defendant failed to attend Court on 12th June 2017 when the matter was scheduled for hearing. The case proceeded for hearing exparte. On 18th September 2017 the 1st Defendant had filed application dated 13th September 2017 seeking to set aside the exparte proceedings. The application was heard and ruling delivered on 17th November 2017 reopening the case and the 1st Defendant granted an opportunity to participate in the proceedings. Defendant was also allowed to amend defence as per the draft defence attached to the application. The orders were granted on condition that the 1st Defendant pays thrown away costs of Kshs. 30,000 within 30 days failure to which the case to proceed from where it had reached. The 1st Defendant failed to comply with the conditions given and failed to attend Court on 17th January 2018 when the matter was scheduled for hearing despite being served with a hearing notice.

The 1st Defendant failed to attend Court for highlight of submissions on 14th March 2018 despite being served with notice. Counsel for Plaintiff proceeded to highlight written submission and judgment fixed for 11th May 2018.

PLAINTIFF'S EVIDENCE

Plaintiff availed 4 witnesses. Pw1 a Director and shareholder of the Plaintiff Company adopted his witness statement dated 4th April 2017 and documents filed as evidence. He testified that sometimes in March 2007, he read an advertisement in newspapers for sale of land L. R.

No. 209/9725 situated in Nairobi along, Mombasa Road. He called the telephone line provided in the advertisement and the 4th Defendant answered and informed him that he is the one who put up the advertisement for the sale of land herein. They agreed to meet and the 4th Defendant gave Pw1 the title deed showing that the land was owned by Kiseph Limited. Pw1 did a search at the Registrar of Companies'

Registry and found that the 2nd and 3rd Defendants were the Directors of Kiseph Limited. He also obtained a search from Ministry of Lands indicating that the land was owned by Kiseph Limited. He produced documents to confirm the two searches.

Pw1 viewed the property and proceeded to put his offer in writing. He said that on 23rd March 2007 the 4th Defendant called for a meeting at Grand Regency Hotel where he met the 2nd Defendant and discussed the price of the suit property and agreed at Kshs. 16.5 million. He said that he paid the 4th Defendant Kshs. 350,000 as commission. The agreement was then drawn by the 2nd and 3rd Defendant's Lawyer and passed to the Plaintiff's Lawyers for execution. Plaintiff drew a cheque for Kshs. 4,950,000 from his Barclays account dated 4th April 2007. They agreed that part of the deposit was to be utilized in paying rent and rates and the balance was to be paid after submission of completion documents. There was delay in release of submission documents. Later Pw1 realized that rates had not been made. His Advocates advised him to pay and deduct from the balance of the purchase price.

On 15th June 2007 the Plaintiff's Lawyer received clearance certificate from Lands Registry and lodged transfer documents. He said after lodging transfer documents the 2nd, 3rd and 4th Defendant started pressurizing him to pay balance of purchase price.

The Plaintiff's Lawyer made enquiries at the Land Registry and was told that transfer was being processed. Pw1 said that after confirming that the transfer was in progress, the Plaintiff's Lawyer advised the Plaintiff to release the balance by cheque no.274506 for Kshs. 10,559,977 in favour of Kiseph Limited. He said Kiseph Lawyers confirmed receipt. He said their Lawyer was released from professional undertaking and Plaintiff was now entitled to vacant possession of the property. He said when the Plaintiff's Lawyer went to check the finalization of transfer, he was informed that the title was fake.

Pw1 wrote to the Registrar of Companies asking for confirmation of Directors and he received confirmation that it was the 2nd and 3rd Defendants who held 70% and 30% respectively. He asked for Certificate of Incorporation and Articles of Association from Registrar of Companies, Statement of Nominal Capital. On 25th July 2007, he received certified copies confirming that the 2nd and 3rd Defendant were Directors of Kiseph Limited. On 3rd August 2007 the Plaintiff's Lawyer received a letter confirming that the original title was being held by Pelikan Signs Ltd. He reported to Criminal Investigation Department for investigation and it turned out that the information he was giving to the effect that the 2nd and 3rd Defendant were Directors was not genuine. He learnt that the original owners had responded to KACC who had advertised for land to buy. He said that KACC were given different information on Directors when they conducted search. He said the vendor's Lawyer was arrested on 30th August 2007 and he refunded 4 Million shillings. He said thereafter the 2nd, 3rd and 4th Defendants were arrested and charged in Kibera Court. The 2nd Defendant pleaded guilty for fraud and charges against 3rd and 4th Defendants were later withdrawn under unclear circumstances. He said officials of the 1st Defendant gave him information knowing that it was false. He said if he was given the correct information he would not have entered in to the agreement. He said Decas Limited was his nominee to be registered as the owner of the property.

He said that Plaintiff has suffered immense loss as a result of the fraud. He prayed for judgment to be entered jointly and severally against the Defendants.

Pw2 Rodger Ngoo Shaka Advocate testified that he was engaged by the Plaintiff to act on its behalf in purchase of property. He confirmed that he paid deposit on behalf of Plaintiff upon receiving sale agreement. He confirmed that they did search at Lands Office and the Plaintiff did a search at Registrar of Company to confirm who Directors of Kiseph are. He confirmed that 30% deposit being 4,950,000 was paid and later the balance of Kshs. 10,559,977 was made after receipt of completion documents. He testified that registration of transfer delay and finally they learnt from the Registrar of Land that the title was a forgery and that real documents were with Pelican Signs Limited. He said that CR12 forms issued by the Registry of Companies confirmed that the 2nd and 3rd were Directors of Kiseph Limited. He blamed the officials of Land and Company Registry for colluding to give wrong information on Directors and fake title.

Pw3 a Criminal Investigation Officer confirmed that he received complaint from Pw1 of being defrauded Kshs. 16.5 Million. He testified that they went to do a search at Registrar of Companies' registry where he learnt from the Registrar one Mrs. Jane Joram that the file in respect of Kiseph Limited had been interfered with by inserting a copy of foolscap on the part with names of Directors to replace the original Directors. He said that the Memorandum and Articles of Association were also replaced. He said one of the returns for the year 2014 was not replaced enabling them to know the genuine Directors. He confirmed that the genuine owners had offered the land for sale to Kenya Anti-corruption Commission who did search on 15/7/2007 and got notification of genuine Directors on 19/7/2007 whereas the Plaintiff got confirmation of his search with contrary results on 18/7/2007. He said the Company Registry gave the KACC genuine information around the same time meaning there was collusion to defraud the Plaintiff. He confirmed that Plaintiff did 2 searches. He said Pw1 received CR12 and in addition certified copy of the file.

Pw4 approximated market value the property herein at Kshs. 280 million and forced value of Kshs. 210 million. He said it is an ideal commercial property located 7 km from Nairobi General Post Office and is along the main road; has a large frontage and is measuring 1.86 acres. He said price per acre in the area is 70 to 80 million.

ANALYSIS

I have considered evidence adduced and find the following as issues for consideration:-

1. *Whether the Plaintiff and or his Advocate carried out due diligence,*

2. Whether the Company official misrepresented to the Plaintiff identity of Directors of Kiseph Limited,

3. Is Plaintiff entitled to money paid out as purchase price and general damages?

Whether the Plaintiff and or his Advocate carried out due diligence

Pw1 testified that before executing the sale agreement he did a search both at the land registry to confirm the owners of the land. After finding that it was owned by Kiseph limited he carried out a search to confirm the Directors of the Company. He produced CR12 forms to confirm Directors. This he repeated when he was informed that the title deed was fake and got the same information. This was confirmed Plaintiff's Advocate. Who authorized release of the balance of purchase price upon receiving completion documents. It is evident that Pw1 and Pw2 did due diligence before dealing with 2nd and 3rd Defendants. Conviction of 2nd Defendant is confirmation that he defrauded the Plaintiff. Plaintiff's evidence was corroborated by Pw3, an Investigation Officer who carried investigation upon receiving complain from Pw1. Their evidence was not controverted I have no reason to doubt them.

Whether the Company official misrepresented to the Plaintiff identity of Directors of Kiseph Limited

The 4th Defendant carried out an advert in a newspaper of national circulation. He acted as agent of 2nd and 3rd Defendant. The 2nd Defendant was convicted by Kibera Court for forging the title deed and obtaining by false pretence. He was fined Kshs. 100,000 or 12 months imprisonment in default. This confirms the 2nd Defendant forged the Title Deed and made Pw1 believe it was genuine. The fraud was sealed by alteration of records at the Registrar of Companies' office to reflect 2nd and 3rd Defendants as Directors. This was confirmed by Pw3 who carried out investigation at the companies' registry.

Is Plaintiff entitled to money paid out as purchase price and general damages?

Section 99 of the Land Act protects a purchaser for value without notice. Section 99(4) provide as follows:-jn

“A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have remedy in damages against the person exercising the power.

Uganda Court of Appeal in the case of **KATENDE V HARIDAR & COMPANY LTD** cited with authority the **KENYA HIGH COURT CASE OF LAWRENCE MUKIRI V ATTORNEY & 4 OTHERS (2013) EKLK** on what amount to bonafide purchaser for value as:-

“... 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 bonafide doctrine, he must prove the following:-

- (a) He holds a certificate of title***
- (b) He purchased the property in good faith***
- (c) He had no knowledge of the fraud***
- (d) The vendor had apparent valid title***
- (e) He purchased without notice of any fraud***
- (f) He was not a party to ant fraud.***

In the instant case, at the time the balance of purchase price was released, his Advocates had received completion documents which he believed were genuine as they were not rejected at the Land Registry. After waiting for long for registration to be completed he was informed that the title deed was fake. It is evident the Plaintiff was made to believe that the title was genuine. There is no evidence to the effect that the Plaintiff played any role in the fraud nor had prior knowledge of the fraud.

No evidence was adduced to controvert Plaintiff's evidence, from the foregoing I find that the 2nd, 3rd and 4th Defendant plus the officials at Registrar of Companies and land colluded to defrauding the Plaintiff and are to blame for the loss occasioned to the Plaintiff. Plaintiff is entitled to money paid out as purchase price and damages failure to own the property herein as a result of Defendant's acts of fraud.

No evidence was adduced as concern costs of HCCC ELC No. 1030 of 2007.

FINAL ORDERS

Judgment entered for Plaintiff against the Defendants jointly and severally for the following:-

1. Refund of Kshs. 15,005,576.
2. General damages of Kshs. 10,000,000.

3. Interest on 1 above from time of filing suit and interest on general damages from today's date.

4. Costs of this suit.

Judgment dated, signed, and delivered at Nairobi this 11th day of May 2018.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

CATHERINE: **COURT ASSISTANT**

ONGEGU: **COUNSEL FOR THE PLAINTIFF**

NO APPEARANCE: **COUNSEL FOR THE 1ST DEFENDANT**

NO APPEARANCE: **COUNSEL FOR 2ND, 3RD & 4TH DEFENDANTS**