



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 482 OF 2017

(FORMERLY NRB 748 OF 2016)

ALICE WAMBUI NGANGA.....PLANTIFF

VERSUS

JOHN NGURE KAHORO.....1ST DEFENDANT

JOSEPH KIBATHI KAHORO.....2ND DEFENDANT

JUDGMENT

By a Plaint dated 17th June 2016, the Plaintiff herein filed this suit against the Defendants and sought for the following orders;

- a. The 1st and 2nd Defendants transfer back Ruiru/Mugutha Block 1/T.850, or in the alternative pay the Plaintiff a equivalent to the current market value of such a parcel of land within the same area.**
- b. Costs of this suit**
- c. Loss of use from 2012 to date of payment**
- d. Interest thereon**
- e. Any other further relief this Honourable Court might deem fit and just to grant thereon.**

In her statement of Claim, the Plaintiff averred that she lives in the United States of America and in the year 2007, she requested the 1st Defendant to identify a parcel of land that she could buy which he did. That she came to Kenya for a short duration in 2007, as scheduled and bought the suit property. However, she did not manage to complete the transaction as her time in Kenya was limited and hence she had to travel back to the United States. That she authorized the 1st Defendant to follow up on the title deed processing on her behalf and he sent to her a scanned copy of the title deed and she verified that the 1st Defendant processed the title document.

That in 2010, she had financial problems and decided to sell the suit property. That she gave the 1st Defendant a **Power of Attorney** dated 20th September 2010, to sell the suit land. However, before the land could be sold, she orally revoked the **Power of Attorney** and informed the 1st Defendant of her willingness to retain the land. That she did not follow up with the 1st Defendant as to whether or not he sold the suit property as she trusted him. She contended that in 2012, she asked the 1st Defendant to surrender the original title document to her but he failed to do so. That her suspicion was aroused and she conducted a search and realized that the suit property had been registered in the name of the 2nd Defendant, which transfer had been processed on 16th August 2011, almost an year after the power of attorney was issued and revoked. Further that upon tracking the 2nd Defendant, he claimed that he bought the suit property on the basis of the Power of Attorney held by the 1st Defendant.

It was further averred that no evidence of payment was provided and that efforts by the Plaintiff in 2012, to have the 1st Defendant refund her land or money was not fruitful. Therefore, she instituted the instant suit.

The suit is contested and the 1st Defendant filed an undated Defence and denied all the allegations made in the Plaint. He denied that the **Power of Attorney** was orally revoked and that he declined to surrender the original title document. It was his contention that the Plaintiff

was in the picture during the process of the sale and the transfer of the land to the 2nd Defendant.

The 2nd Defendant also filed an undated Defence filed on **1st September 2016**, and denied all the allegations made in the Pleadings. He averred that he purchased the suit property on the strength of the **Power of Attorney** dated **20th September 2010**, which gave the 1st Defendant authority to sell the land to him. He averred that he was a bonafide purchaser for value as he went through the process of transfer including the **Land Control Board** and requisite consent was obtained. That he was later issued with a title deed for the purchased property. It was his contention that he bought the land in good faith in view of the fact that the Plaintiff had not placed a caution or deregistered the **Power of Attorney** at the **Lands Office** in order to protect unsuspecting third parties.

The matter proceeded by way of viva voce evidence, wherein the Plaintiff testified for herself and the Defendants called two witnesses.

PLAINTIFF'S CASE

PW1 Alice Wambui Nganga adopted her witness statement dated **1st July 2016** and produced her list of documents dated **1st July 2016** as exhibit 1 in Court. She testified that she lives in the U.S.A and that she knew the 1st Defendant as she lived with his sister. It was her testimony that in **2010**, she gave the 1st Defendant the **Power of Attorney** to sell her land which she had purchased for **Kshs. 750,000/=**. That the 1st Defendant did not inform her that he had found a buyer. It was her evidence that she later revoked the **Power of Attorney** as she had resolved the financial constraints and did not wish to sell the land anymore.

That she told the 1st Defendant to keep the title document and that by the time she revoked the **Power of Attorney** orally, a purchaser had not been found. Further that the Identity Card Number on the green card was not hers. It was her evidence that the 1st defendant informed her that the suit land had been taken by Thika Road but that she was never compensated. She urged the Court to allow her claim.

DEFENCE CASE

DW1 John Ngure Kahoro testified that the Plaintiff wanted to buy a plot and that he took her to **Mugutha/Ruiru** area wherein she bought a plot which was about 1km from Ruiru. That he was not involved in the purchase and that when the Plaintiff bought the property she requested him to fence for her and left the title deed at the lands office. That he collected the title deed for her and the Plaintiff later called him in the year **2009**, and told him that she wanted to sell the land. That the 1st Defendant advertised the land for sale.

That he subsequently found a buyer with an offer of **Kshs. 1.3 million** which was floated. That the Plaintiff agreed to the price and sent him the documents vide DHL. That on **5th October 2010**, his lawyer facilitated the transfer, the consent was approved by the **Land Control Board** and that the purchaser paid **Kshs.1.3 million**. He further testified that when he asked the Plaintiff for the account number, she asked him to buy another plot which he bought being one (1) acre at Juja. That the Plaintiff went to view the new plot in 2012, and did not complain. That they agreed that he would send her the title deed. However, the Plaintiff later moved from his sister's place and changed her phone numbers. Then after six years, she demanded the plot for **Kshs. 4 million** from him. That he was taken to the Police station and he explained his position but he was not charged with any criminal offences.

He denied that the Plaintiff ever revoked the Power of Attorney. He further testified that the buyer of the previous plot paid all the purchase price and that the 2nd plot has not been transferred to the Plaintiff because there is a succession cause. It was his evidence that he could give the plaintiff **Kshs. 1.3 million** or they could wait for the title deed for the 2nd plot.

That though the agreement was for **Kshs. 1.3 million**, he was given **Kshs. 200,000/=** as commission and the plot that he bought for the Plaintiff has risen in value.

He acknowledged that in his statement dated **11th August 2016**, he did not talk of buying land for the Plaintiff and that when he instructed his Advocate to respond to the demand letter he had received, in 2011, he did not talk about the 2nd land. It was his further evidence that he registered the **Power of Attorney** on **22nd October 2010**, and the sale agreement was drawn on **18th October 2010**, and that he got the consent to transfer the land on **5th October 2010**. That the **Land Control Board** was on **15th October 2010**. It was his testimony that he went to the Board before registering the **Power of Attorney** and got the consent on **5th October 2010**. He further testified that he did not know the Succession Cause issue and that he did not have the sale agreement for the 2nd Purchase.

That if the Court gave him time, he would avail all the documents and that if the Court directs that he gives the Kshs.1.3 million he was ready to give it out.

2nd DEFENDANT'S DEFENCE

DW2 Joseph Kibathi Kamau adopted his witness statement dated **11th August 2016**. It was his testimony that he discussed about the sale of the suit property with the vendor and they agreed that he would buy it at **Kshs.1.5 million** and he decided to take the loan from the bank on **23rd September 2010**. He produced the loan offer as Exhibit 1. He further testified that the title deed was sent from U.S.A in the name of **Alice Wambui Nganga**. That they went to the Land Control Board and he obtained the consent on **5th October 2010**, and the vendor had the **Power of Attorney**, as he was selling it on behalf of the Plaintiff. He produced the Power of Attorney as exhibit 2. that they were granted the consent on **5th October 2010** and produced the consent as Exhibit 3.

Further that he got the loan from the bank and a sale agreement was drawn between him and the 1st Defendant and he paid the purchase price to the vendor. That he was given all the original documents and he filed the transfer forms. He produced the sale agreement as Exhibit

4. He further testified that he then registered the **Power of Attorney** and produced evidence of registration as Exhibit 5. He produced bundle of registration of land as Exhibit 6 to which he ultimately obtained the title deed which was issued on **16th August 2011**. He further produced the title deed as exhibit 7 and that he took possession of the suit property which he uses even now.

That he conducted a search on **30th September 2010** and that he had a search to show the land was now registered in his name. He acknowledged that he did not follow the process which involved conducting a search and then entering into a sale agreement. Further that he went to the Land Control Board with the seller's approval. That he did not follow the right procedure and that he did not verify with the Plaintiff as to whether she was selling the land as he relied on the **Power of Attorney**. That the **Power of Attorney** was registered after a few days as the stamp duty form is dated **19th October 2010**. He further testified that the Plaintiff registered the suit property using her passport and that he used his ID Card. He further testified that he was the one who registered the **Power of Attorney** and that he would not want to surrender the land back to the Plaintiff. That all the documents and process looked normal, but he later learnt of the problem after **5 years**.

It was his testimony that the land office would not give them the title deed without the original documents and that they agreed with the 1st Defendant how he was going to purchase the land as they trusted each other. That his brother **William Kibera** was to be his witness, but he came to learn that his brother and the 1st defendant participated in the sale of the suit property to the Plaintiff. Further that the problem is that the Plaintiff did not receive the purchase price.

After Close of Viva Voce evidence the parties filed written submissions which the Court has now carefully read and considered. The Court has also considered the pleadings by the parties and the evidence adduced and the court finds the issues for determination are;

1. Whether the Sale and subsequent transfer of the suit property to the 2nd Defendant by the 1st Defendant was valid.

2. Whether the Plaintiff is entitled to the orders sought

3. Who should bear the cost of the suit

1. Whether the Sale and subsequent transfer of the suit property to the 2nd Defendant by the 1st Defendant was valid.

It is not in doubt that the suit property initially belonged to the Plaintiff. That the Plaintiff was facing some financial difficulties and since she lived in the United States of America, she sought the help of the 1st Defendant to sell the suit property on her behalf. Though the Plaintiff has testified that she orally revoked the Power of Attorney that she had bestowed upon the 1st Defendant, there was no evidence of such revocation. It is trite that whoever alleges must prove. In the instant case therefore, the Court therefore finds and hold that there is no evidence that the **Power of Attorney** granted to 1st Defendant by the Plaintiff was ever revoked.

However, it is further not in doubt that the Power of Attorney is dated **20th September 2010**. The sale agreement entered into between the 1st and 2nd Defendants is dated **18th October 2010**. The Defendants have further averred that they went to the Land Control Board and **consent** was granted on **5th October 2010**. It is not in doubt that the Defendants have alleged that the Power of Attorney was registered on **22nd October 2010**. Just prima facie looking at the dates in which the events took place, it is clear that the Defendants went to the Land Control Board and entered into the sale agreement before the Power of Attorney was registered.

Further the Court having perused the documents notes that while Defendants allege that the Power of Attorney was registered on the **22nd of October 2010**, the stamp duty for the Power of Attorney was paid for on **19th October 2010**, and as late as **3rd August 2011**, the said Power of Attorney had not been registered. It is evident that by the time the Defendants were signing the transfer of land dated **15th March 2011**, the Power of Attorney had not been registered.

The Court has seen the letter dated **1st August 2011**, by the 1st Defendant to the Chief Land Registrar referenced "**Application for approval of Power of Attorney**." Further the Court has seen the receipt dated **16th June 2011**, by the 1st Defendant being payment of Power of Attorney. The Court notes that the process through which Power of Attorney is to be registered is that a party first pays for the stamp duty and then pays for registration and then the same is registered. If the 1st Defendant was still seeking to register the power of attorney as late as the year **2011** and the transactions involving the suit property were done in **October 2010**, the questions that begs is whether the sale agreement and subsequent transfer were valid.

Section 4 of the Registration of Documents Act Provides that; :-

"All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed:"

A Power of Attorney being one of the said documents that confers rights, it then follows that as the instant **Power of Attorney** in issue herein was dealing with immovable property, it needed to be registered before it could be used. It is not in doubt from the above that the sale agreement involved in this instant was signed by the 1st Defendant on the strength of the **Power of Attorney** which had not been registered. It is also not in doubt that the 2nd Defendant was well aware of this fact. This court finds that until the **Power of Attorney** was registered, the 1st Defendant did not have any rights nor capacity to sign the sale agreement in issue and subsequent transfer on behalf of the Plaintiff. See the case of **Francis Mwangi Mugo v David Kamau Gachago [2017] eKLR** where the Court held that;

“Powers of Attorney are not specifically mentioned in the above provision of the law as requiring registration. However, all instruments which seek to declare certain rights or limitations over immovable property must be registered. Thus a power of attorney which confers upon the donor a right to deal with immovable property must be registered. Under the repealed Registered Land Act, Section 116 required that powers of attorney "which contain any power to dispose of any interest in land" be registered. There cannot be contention that any power of attorney allowing the donee to deal with land will need to be registered since land is immovable property. But I am not too sure of a power of attorney which is specific to doing certain acts that do not involve immovable property or indeed a power of attorney restricted only to filing a suit must be registered, although of course it is arguable that where the suit involves land, there will be a dealing over immovable property.

If the document is not registered, yet it requires registration, I do not think one can claim any rights under it unless and until it is registered.

I think it cannot be belaboured that Francis Mugo Mwangi ought not to have filed this suit, since it related to rights over immovable property, before registering the power of attorney and paying stamp duty on it. Well, he did not but proceeded to file suit. He has now registered the instrument and has paid stamp duty on it. Should I allow the case to stand ?

19. In my view, I think courts need to be strict on some matters such as whether or not a person has capacity. If one has no capacity, whatever such person files, at the time he/she had no capacity is a nullity. My own view is that Francis Mwangi Mugo had no capacity when he filed this case. The documents filed before he registered the power of attorney are therefore invalid and that includes the plaint.(emphasis mine)

In our case, I think the more fatal omission is not necessarily payment of the stamp duty, important as it is, but the failure to register the power of attorney before filing suit, for to me, it is that act of registration which then vests the donee with capacity to deal with the immovable property claimed by the donor. The power of attorney in this instance, is not similar to a sale agreement or a lease, whose value is only evidentiary. The power of attorney here, falls under the purview of capacity, for one cannot act for another without having the legal capacity to do so. I hold the view, that before a donee of a power of attorney can act, on a matter, at least that involving immovable property, then he must register that power of attorney before he can allege to have capacity to act.

I do not think capacity is a technicality curable under Article 159 of the Constitution. It is either you have it or you do not. You do not gain capacity retrospectively. At the time of filing suit, Francis Mwangi Mugo, in my view did not have capacity because he had not registered the power of attorney. I therefore have no option but to strike out the suit with costs which shall be paid by the said Francis Mwangi Mugo

It is the Court's considered view therefore that the 1st Defendant did not have capacity to enter into the said sale agreement and subsequently sign the transfer documents and further sign documents at the Land Control Board for obtaining consent. The **Law of Contracts under Section 3(3)** requires that all contracts of disposition to land must be in writing. The Court having held and found that the Contract and transfer of the suit property were signed by someone with no capacity, it then follows that the said contract of sale agreement and transfer documents are invalid.

The Court further points out the inconsistencies in the Defendants documents which has also made their evidence more inconsistent. While the sale agreement and the 2nd Defendant alleged that the suit property was sold at Kshs. **1.5 million**, the 1st Defendant alleged that the property was sold at **Kshs. 1.3 million**. Further the Consent at the Land Control Board and the valuation for payment of stamp duty records the consideration at **Kshs. 700,000/=**

2. Whether the Plaintiff is entitled to the orders sought.

The Plaintiff has sought for a transfer of the suit property back to her or an equivalent to the current market value. It is not in doubt that a party holding a certificate of title is the absolute and indefeasible owner of the said property. However, it is also not in doubt that the said certificate of title can be impeached if the Court finds that the same was acquired unprocedurally as per the provisions of **Section 26 (1) of the Land Registration Act**. In this instant case, the Court has already held and found that the sale agreement and subsequent transfer that conferred the title upon the 2nd Defendant were invalid. Therefore, it follows that the title must be impeached.

The 2nd Defendant was registered as the proprietor of the suit property on **16th August 2011**, under **Cap 300 (repealed)**. Rectification of Register under the now repealed Cap 300 is provided for under **section 143(1)** of the said Act. This provision of law is now reiterated in **section 80(1)** of **Land Registration Act** which provides:-

“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.”

From the above provision of Law, the Court has the power to cancel a certificate of title and order for rectification of the **Register**. From the available evidence herein, the court finds that there is sufficient evidence for cancellation of the title certificate herein and rectification of the **Register**. The Plaintiff's prayers are merited.

3. Who should bear the cost of the suit

Section 27 of the Civil Procedure Act gives the Court discretion to grant Costs. However it is also trite that costs usually follow the events and the successful party is always entitled to costs of the suit unless there are exceptional circumstance. In this instant suit, the Court is satisfied that the Plaintiff being the successful party is entitled to the Costs of the suit.

Having now carefully considered the available evidence herein, the cited authorities and relevant provisions of the law and the written submissions, the Court finds that the Plaintiff has proved her case on the required standard of balance of probabilities and therefore her claim is merited.

The upshot of the foregoing is that the court enters judgement for the Plaintiff against the Defendants jointly and severally in terms of prayers no. (a) (b) and (d) of the Plaint dated 17th June 2016.

Judgment accordingly.

Dated, signed and Delivered at Thika this 18th day of June 2020.

L. GACHERU

JUDGE

18/6/2020

Court Assistant - Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of :

Nyambura Munyua & Co. Associates advocates for the Plaintiff

M/s Thuku & Associates Advocates for the Defendants

L. GACHERU

JUDGE

18/6/2020