



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 76 OF 2010

SAMUEL MUSAU WAMBUA.....PLAINTIFF

VERSUS

SAMUEL KISIGEI LASOI.....1ST DEFENDANT

BARCLAYS BANK OF KENYA.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

CONSOLIDATED WITH

ELC NO. 174 OF 2010

SAMUEL KIPSIGEI LASOI.....PLAINTIFF

VERSUS

DAVID MUSAU WAMBUA.....DEFENDANT

JUDGEMENT

1. The plaintiff in ELC 76 of 2010, David Musau Wambua has filed this suit against the defendants jointly and severally seeking:-

(a) An order directing the registrar, lands office Nairobi to rectify the register to reflect David Musau Wambua as the legally registered proprietor of Nairobi/Block/97/524.

(b) An order directing the Registrar of Lands Office Nairobi to nullify and or cancel the charge effected upon land known as Nairobi/Block 97/524 by the 1st defendant Samuel Kipsigei Lasoi to the 2nd defendant Barclays Bank of Kenya Ltd.

(c) A declaration that the plaintiff is the owner and entitled to possession of property known as Nairobi/block/97/524.

(d) General damages.

(e) Costs of this suit.

(f) Any other or further relief this honourable court may deem just.

2. Upon being served with copies of plaint and summons to enter appearance the 1st and 2nd defendants entered appearance through the firm of M/S Miller & Co. Advocates, on the 28th April 2010. They also filed a defence and counterclaim dated 13th May 2010.

3. The 3rd defendant the Honourable Attorney General entered appearance on 21st April 2010.

4. In paragraph 6 of the plaint, the particulars of fraud of the 1st and 3rd defendants are given as follows:-

(a) Causing the said property to be transferred to him without fully ascertaining the true owner of the said property.

(b) Colluding with officials at the Land Registry to deprive the plaintiff of his rights to his property.

(c) Fraudulently causing the said property to be charged to the 2nd defendant knowing very well that the title he had obtained was not legal but one obtained illegally and hence a nullity.

(d) Deceiving and fraudulently acquiring a loan from the 2nd defendant by not disclosing to them that the said parcel of land was not free of any encumbrances when he actually knew of the plaintiff's right over the property.

(e) Specific knowledge in the 1st defendant that the plaintiff was the registered owner and entitled to possession of the said property.

5. The 1st defendant in the defence and counterclaim dated 13th May 2010 in paragraph 6 gives the particulars of fraud and illegality on the part of the plaintiff as follows-

(a) Obtaining title documents in respect of the 1st defendant's suit land when he knew or ought to have known that the same belongs to the 1st defendant.

(b) Purporting to evict the 1st defendant from the suit land when he knew and/or ought to have known that the 1st defendant is the lawful owner of the suit land.

(c) Uttering an illegal title in purported claim over the 1st defendant's suit land.

(d) Trespassing onto the 1st defendant's suit land herein.

6. In the counterclaim, the 1st and 2nd defendant prays that the plaintiff's suit be dismissed and that judgment be entered in favour of the 1st defendant for:-

(a) An order of permanent injunction do issue to restrain the plaintiff by himself, his servants, workmen, agents or otherwise howsoever from dealing with the suit land by purporting to sell, charge, mortgage or entering, accessing, remaining onto, getting ingress into or trespassing into the plaintiff's land Title No. Nairobi/Block 97/524 and/or from destroying or otherwise injuring the hedge or fence on the boundaries thereof, or from erecting or causing to be erected any structure thereon whether temporary or permanent in nature or from in any way interfering with the 1st defendant's peaceful possession and enjoyment of the said property.

(b) A declaration that any title held by the plaintiff herein purporting to be in respect of the suit land is illegal and ought to be recalled by the land registrar for cancellation.

(c) An order that the plaintiff do surrender to the Land Registrar any Title held by him purporting to be in respect of the suit land for immediate cancellation.

(d) General damages for trespass.

(e) Costs of the suit.

(f) Any other relief the court deems fit to grant.

7. The plaintiff has also filed a reply to defence and counterclaim dated 27th May 2010.

8. In ELC 174/2010, the plaintiff Samuel Kisigei Lasoi has sued the defendant, David Musau, Wambua, vide a plaint dated 14th April 2010 seeking:-

(a) An order of permanent injunction do issue to restrain the defendant by himself, his servants, workmen, agents or otherwise howsoever from dealing with the suit land by purporting to sell, charge, mortgage or entering, accessing, remaining onto, getting ingress into a trespassing into the plaintiff's land Title No. Nairobi/Block 97/524 and/or or from destroying or otherwise injury the hedge or fence on the boundaries thereof, or from erecting or causing to be erected any structure thereon whether temporary or permanent in nature or from in any way interfering with the plaintiff's peaceful possession and enjoyment of the said property.

(b) A declaration that any Title held by the defendant purporting to be in respect of the suit land is illegal and ought to be recalled by the land registrar for cancellation.

(c) An order that the defendant do surrender to the Land Registrar any Title held by him purporting to be in respect of the suit land for immediate cancellation.

(d) General damages for trespass.

(e) Costs of the suit.

(f) Any other relief the court deems fit to grant.

9. The defendant, David Musau Wambua filed a statement of defence dated 25th June 2010 seeking that the plaintiff's suit be dismissed with costs and judgment be entered for the defendant as prayed (in ELC 76 of 2010) with costs.

10. By an order of Honourable L. J. M. Koome dated 17th September 2010 the two matters ELC 76 of 2010 and ELC 774 of 2010 were consolidated, the lead file being ELC 76 of 2010.

11. PW1 David Musau Wambua told the court that he does not know the 1st defendant Samuel Kipsigei Lasoi. He adopted his witness statement dated 14th February 2013. That in 1989 he worked with Kenya Breweries Limited and resided in Donholm estate. He received a letter of offer to buy the land known as Tassia Block/97/524 hereinafter referred to as ("the suit property"). He produced the letter dated 7th December 1989 that was in respect of Plot 524 as exhibit P1. The purchase price was Kshs.180,000/-. He produced the lease issued to him dated 26th January 1990 as exhibit P2. He also produced the receipt of Kshs.50,000 as exhibit p3. Tysons Limited who were the sellers acknowledged receipt vide a letter dated 8th December 1989. It was produced as exhibit p4. The receipt for payment of Kshs.130,000 was produced as exhibit P5. He also produced a letter dated 22nd December 1989 from M/S Warihui & Muite Advocates who represented Tysons Limited as exhibit p6. He thereafter got his certificate of lease which he produced as exhibit P7. He also produced rates demand note and a letter from Nairobi City Council as exhibits p8 and p9 respectively. He also produced the property rates payment dated 8th June 2009 as exhibit p10.

12. He stated that thereafter the property remained undeveloped as he was at home in Machakos but he asked his neighbours Francis Karanja, to look after it. In 2009, he got a message from Karanja asking him if he had sold the plot. He then travelled to Nairobi and decided to fence the plot. On 9th January 2009, he went to the said plot and found the 1st defendant who introduced himself as Samuel Laosi and claimed the plot to be his. He claimed to have bought from one David Musau Wambua. The said Samuel Laosi had documents. They made a report to DCIO Embakasi. That they were accompanied by a police officer to the lands registry. The records at the Lands Registry showed a photograph of somebody else.

13. He did not sign any of the documents neither did he know any advocate by the name Kefa Nyanyuki. The said advocates purports to have witnessed his signature. He recorded a statement with the police dated 12th January 2009. He produced it as exhibit p11. The 1st defendant's statement is produced as exhibit p12. He further stated that he did not surrender the original title to the Lands Registry. He prays that the title being held by the 1st defendant be cancelled.

14. PW2 Francis Karanja Kinyanjui told the court that he resides at Embakasi, Tassia. He adopted his witness statement. He stated that the plaintiff's plot neighbours his and they share a fence, that he would put construction materials on the plaintiff's plot. He told the court in 2009, he was passing by the plaintiff's plot when he saw some people there. They were preparing to start construction. He then called the plaintiff informing him of what was going on in the suit plot. The plaintiff went to the plot on 8th January 2009 and fenced part of the plot. The plaintiff (Wambua) told him he had not sold the plot. He further told the court that Mr. Mwangi a caretaker appointed by the plaintiff is on the plot. He stated that he has no interest in the suit plot as the plaintiff (Wambua) had earlier refused to sell to him.

15. DW1, Samuel Kipsigei Lasoi adopted his witness statement dated 11th October 2013. He told the court that he is the registered owner of LR No. Nairobi/Block 97/524. He also relied on the list of documents dated 11th October 2013. The documents in the list were produced as exhibits D1 and D15 respectively. He said he bought the plot from David Musau Wambua. He stated that in 2005-2006 he was looking for a plot. His friend told him about the said plot. He saw it and he was referred to the vendor's lawyers. He told the court that the said property was vacant when he took possession.

16. DW2 Linda Gildaen Muriuki the Land Registrar attached to the Chief Land Registrar's office Ardhi House, told the court that Land Parcel Number Nairobi/Block 97/524 was transferred to Samuel Kipsigei Lasoi by David Musau Wambua of P. O. Box 236 Embu, ID No. 1872326. The transfer was properly executed. He traced the file and found the relevant documents were missing. She said only a court order is in the file. She further stated that the transferor's photograph is not clear. She could not identify the person in court. She said from the green card the title deed was issued on 22nd February 1990. Further that the title held by the plaintiff is genuine and the one held by the 1st defendant is not genuine.

17. At the close of the testimonies the parties tendered written submissions.

The Plaintiff's submissions

18. They are dated 9th October 2019 and filed on 14th October 2019. The plaintiff has outlined two issues for determination:-

(i) Whether the plaintiff is the registered owner of the suit property.

(ii) Whether he sold the suit property to the 1st defendant.

The plaintiff produced a certificate of lease issued to Tassia Coffee Estate Limited dated 29th September 1983 and another certificate of lease issued to him dated 22nd February 1990. He produced letters and receipts of payment from the acquisition of the said property.

19. The evidence of the land registrar (DW2) was that the title that was cancelled was not the genuine title. The signature on the cancelled

title was not the same one on the green card. The 1st defendant, when they met in 2009 could not identify the plaintiff. The plaintiff is the registered owner of the suit property and his title is the genuine one.

20. The issue is whether there was a collusion between the 1st defendant and the 3rd defendant to transfer the suit property to the 1st defendant. The land registrar's testimony was that the title returned by the 1st defendant was a forgery. Further that most of the documents in regard to the transfer of the suit property could not be traced in the file. It means there was collusion between the 1st defendant and other parties by illegal and unlawful process to deprive the plaintiff of his property. He relied on section 143(1)(2) of the Registered Land Act (repealed) and section 80 of the Land Registration Act, 2012. He put forward the case of **Samuel Odhiambo Oludhe & 2 others vs Jubilee Jumbo Hardware & Another [2018] eKLR; Kibiro Wagoro Makumi vs Francis Nduati Macharia & Another [2018] eKLR.**

21. The title used by the 1st defendant to acquire the second title was a forgery and as such the charge in favour of the 2nd defendant was null and void as it was based on fraudulent documents. He also put forward the case of **Alice Chemutai Too vs Nickson Kipkirui Korir & 2 Others [2015] eKLR.** The onus was on the 2nd defendant to challenge the claim by the plaintiff that the title upon which they advanced the loan was tainted with fraud. It did not discharge that duty. There was no valid title charged to the 2nd defendant capable of conveying a legal interest in the suit property by way of realizable security. The 1st defendant's title and by extension the charge to the 2nd defendant ought to be canceled. He prays that the prayers in the plaint be allowed.

The 1st and 2nd defendant's submissions:-

22. They are dated 29th January 2020 and filed on 30th January 2020. They have outlined two issues for determination, one is;

- (i) Whether the parties have discharged their respective burdens of proof as per sections 107, 108 and 109 of the Evidence Act.

The plaintiff adduced evidence showing that he acquired a leasehold interest in the suit property in 1990. The plaintiff when cross examined admitted that the identity card number used to transfer the suit property was the same as his. He did not give any explanation on this. The plaintiff has not proved any fraud or forgery on the part of the 1st and 2nd defendants. He did not call any witness to corroborate his testimony that his signature was forged when the certificate of lease was cancelled. The only witness who commented on the forgery is the land registrar.

23. DW2 the said land registrar confirmed that the identification number of the transferor matched with that of the plaintiff being 1872326. When cross examined, she indicated that she could not tell if Samuel Kipsigei Lasoi forged title document. There was no proof of collusion on the part of 1st and 2nd defendants with the officers from the land registry to effect the forgery. No handwriting expert was called to compare the signatures appearing on the alleged documents and provide an expert opinion on whether the signatures belonged to one and the same person.

24. There was no evidence tendered by the plaintiff to show that his certificate of title is genuine and that of the 1st defendant is forged. No criminal charges were instituted against the 1st and 2nd defendants in relation to the alleged fraud or forgery regarding the suit property. They have put forward the cases of **Dennis Noel Mukhulo Ochwada & Another vs Elizabeth Murungari Njoroge & Another [2018] eKLR; Richard Akwesera Onditi vs Kenya Commercial Finance Company Limited [2010] eKLR.** Under section 143 of the Registered Land Act (Repealed) the plaintiff is required to put before the court evidence to the requisite standard of proof to demonstrate fraud by the 1st defendant in order to be granted the orders sought. He has failed to prove fraud to warrant rectification of the register. They have put forward the case of **Job Muriithi Waweru vs Patrick Mbatia [2008] eKLR.**

25. The 1st defendant was able to prove that he is an innocent purchaser for value as exhibited on the sale agreement dated 26th April 2007, payment receipts evidencing payments for the suit property, rates clearance certificate, consent to transfer, rates demand, transfer of lease documents and certificate of lease as at 13th August 2007, the cancelled certificate of lease in the name of David Musau Wambua. The 1st and 2nd defendants have discharged their burden of proof and pray for the orders sought.

26. It appears no submissions were filed in respect of the 3rd defendant.

27. I have considered the pleadings, the evidence on record, the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

- (i) Whether the plaintiff was the registered owner of the suit property and whether he sold it to the 1st defendant.*
- (ii) Whether there was collusion between the 1st defendant and the 3rd defendant to transfer the suit property to the 1st defendant.*
- (iii) Who should bear costs?*

28. It is not in dispute that the plaintiff was issued with a certificate of lease on 22nd February 1990. He produced a copy as exhibit p7. In his testimony he gave a history of how he acquired the suit property. He produced the documents as exhibit P1 to P12 respectively. He told he did not develop the plot but had requested PW2 a neighbor to watch over it. It is also not in dispute that the 1st defendant has a certificate of lease issued on 13th August 2007. He told the court that he bought the same from David Musau Wambua. It is the plaintiff's case that he did not sell the suit property to the 1st defendant or any one else. That the photograph in the transfer document is not his although the names and identity card number was similar to his. He stated that he saw the 1st defendant for the first time in 2009 when he started excavation on his suit property. PW2 Francis Karanja Kinyanjui told the court that the plaintiff is the owner of the suit property. That he has known the

plaintiff since 2001 as he would check on the plot regularly. PW2 said he is the caretaker of the neighbouring Nairobi/Block 97/525.

29. Dw1 Samuel Kipsigei Lasoi the 1st defendant, has all along maintained that the plaintiff is not the person who sold him the suit property. He also admitted on cross examination that the photograph in the transfer documents does not belong to the plaintiff. He further explained that the advocate by the name Kepha Nyanyuki, acted for the vendor and drew the sale agreement. That Muriu Mungai Advocate acted for him and the 2nd defendant (Barclays Bank Limited). He was later surprised when the plaintiff turned up claiming to be the owner of the suit property.

30. DW2 Linda Gildaen Muruiki a Land Registrar told the court the suit property was purportedly transferred to the 1st defendant by one David Musau Wambua of P. O. Box 236 Embu. His identity card number was given as 1872326. She however told the court that the relevant documents regarding the said transfer were missing from the file in the Land Registry which led her to be suspicious. That the transferor's photograph is not clear and it was hard to identify the person. She confirmed that the title held by the plaintiff is genuine. That the title purportedly handed for cancellation is a forgery. She produced the green card and the court order as exhibits D12 and D13 respectively. From the foregoing it is clear that the plaintiff title is genuine. There is evidence that he did not sell the suit property to the 1st defendant or anyone else. DW2 confirmed that the title that was cancelled was not the genuine title as the signature on the said title was not the same as the one on the green card. Further that if the genuine title had been surrendered, the signature would tally with the one on the green card.

31. It is the 1st and 2nd defendants' submissions that the plaintiff ought to have availed a handwriting expert/document examiner to confirm or disprove that the signatures on the transfer document was not his. In my view the plaintiff, having denied selling the suit property the burden shifted to the 1st and 2nd defendants to prove that the signature on the transfer documents was indeed the plaintiff's. They did not attempt to establish this fact. It therefore means the signature on the transfer document's is not the plaintiff's. The upshot of the matter is that the plaintiff is the registered owner of the suit and he never sold it to the 1st defendant or anyone else.

32. It appears the 1st defendant fell into the hands of fraudsters who somehow had the plaintiff's details but not the original certificate of lease. I believe the 1st and 2nd defendants failed to do due diligence before engaging in the said transaction. Sadly the advocate who drew the sale agreement and was acting for the vendor has since passed on. The true identity of David Musau Wambua, the vendor will never be known.

33. The plaintiff in paragraph 6 of the plaint dated 9th February 2010 has given the particulars of fraud by the 1st and 3rd defendants. However in his evidence he did not endeavour to show or prove the particulars. No evidence was adduced to show the 1st defendant's collusion with the officials at the Lands Registry. I find that the plaintiff has failed to prove fraud on the part of the 1st defendant and 3rd defendant to the required standard of proof. I believe the 1st defendant was a victim of fraudsters. The standard of proof required for a party to prove fraud and forgery are well laid by the court of appeal in the case of **Dennis Noel Mukhulo Ochwada & Another vs Elizabeth Murungari Njoroge & Another [2018] eKLR** where the court held as follows:-

“As regards standard of proof of fraud, the law is quite clear. In R. G. Patel vs Lalji Makanji (Supra) the former Court of Appeal for Eastern Africa stated thus;

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

Similarly in the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR Tunoi JA** stated that:-

“It is well established that fraud must be specifically pleaded and that the particulars of fraud must be specifically pleaded and that the particulars alleged must be stated on the face of the pleadings. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the facts”

34. I find that the plaintiff has failed to discharge his burden of proving fraud or forgery on the part of the 1st and 2nd defendants. He also failed to prove any collusion on the part of the 1st and 3rd defendants as the identity card used in the transfer of lease document matched that of the plaintiff's. I therefore find that there was no collusion between the 1st and the 3rd defendants. The plaintiff is therefore not entitled to general damages.

35. Nevertheless having found that the plaintiff has proved that he is the registered owner of the suit property and that he did not sell it to the 1st defendant or any other person, he is entitled to an order for rectification of the register to reflect his name as the registered owner.

36. **Section 26(1)** of the Land Registration Act 2012 provides as follows:-

26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

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

In the case of **Elijah Makeri Nyangw'ra vs Stephen Njuguna & Another [2013] eKLR**, Munyao J stated thus:

“First, it needs to be appreciated that for section 26(1) (b) of the Land Registration Act to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are, that title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26(1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent purchaser is impeached so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to the vitiating factors. The purpose of Section 26(1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”.

I am guided by the above authority.

37. Section 80(1) of the Land Registration Act, 2012 provides that:-

1. Subject to sub section (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 who is in possession and had acquired the land lease or charge for valuable consideration 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”

I find that the 1st and 2nd defendant failed to do due diligence before going ahead with the transaction. Had they done so, they would have known that the fraudster calling himself David Museu Wambua was not the plaintiff.

38. It should also be noted that the 1st defendant herein is not in possession. I am guided by the case of **Alice Chemutai Too vs Nickson Kipkirui Korir & 2 Others [2015] eKLR** in finding that the charge registered in favour of the 2nd defendant cannot be said to be valid. Having found that the 1st defendant's title was obtained unprocedurally then by extension the charge in favour of the 2nd defendant ought to be cancelled.

39. In conclusion, I find that the plaintiff has proved his case on a balance of probabilities as against the defendants. The 1st and 2nd defendants counterclaim is dismissed with costs.

40. I enter judgment in his favour as follows:-

(a) That an order is hereby issued directing the registrar lands office Nairobi to rectify the register to reflect David Musau Wambua as the legally registered proprietor of Nairobi/Block 97/524.

(b) That an order is hereby issued directing the Registrar Lands Office Nairobi to nullify and or cancel the charge effected upon land known as Naiobi/Block 97.524 by the 1st defendant Samuel Kipsigei Lasoi to the 2nd defendant Barclays Bank of Kenya Limited.

(c) That a declaration is hereby issued that the plaintiff is the owner and entitled to possession of the property known as Nairobi/block 97/524.

(d) That the plaintiff shall have costs of the suit and interest.

It is so ordered.

Datd, signed and delivered in Nairobi on this 11th day of June 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the plaintiff

No appearance for the defendants

Kajuju – Court Assistant