



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 633 OF 2011

MIRAFLORES APARTMENTS LIMITED.....PLAINTIFF

VERSUS

CALEB AKWERA also known as CALEB HABILSON AKWERA.....1ST DEFENDANT

CHARLES AMULI AKWERA.....2ND DEFENDANT

JUDGMENT

The plaintiff brought this suit against the defendants on 11th November, 2011 seeking;

- a) A declaration that the plaintiff is the sole, bona fide and lawful owner of the property known as L.R No. 2/344(Original No. 2/45b/2/3/3) (hereinafter referred to only as “the suit property”).
- b) A declaration that the registration of the 2nd defendant as the owner of the suit property in the register as Volume N92 Folio 58/1 File No. 26555 is illegal, null and void.
- c) A permanent injunction restraining the 2nd defendant from advertising for sale, selling, disposing of, transferring, alienating, entering, constructing on, damaging, wasting or in any manner whatsoever dealing or interfering with the suit property.
- d) A mandatory injunction compelling the 2nd defendant to deliver up to the Land Registrar for cancellation the Indenture of Conveyance dated 22nd December, 2010 between the 1st and 2nd defendants registered as Volume N 92 Folio 58/1 File No. 26555 within such time as this Honourable Court shall deem fit and in default the Land Registrar be authorized to cancel the registration of the 2nd defendant as the owner of the suit property.
- e) Any other relief that this Honourable Court may deem fit and just to grant.
- f) Costs of the suit.

In its plaint dated 11th November, 2011, the plaintiff averred that through an Indenture of Conveyance dated 31st December, 1990, the 1st defendant transferred to it all his right, interest and title in the suit property. The plaintiff averred that it took possession of the suit property soon after purchasing the same and had remained in possession. The plaintiff averred that as the registered owner of the suit property he had over the years been paying land rates to the City Council of Nairobi. The plaintiff averred that in October, 2011, it discovered that the records relating to the suit property at the City Council of Nairobi had been changed and the 2nd defendant indicated as the owner of the suit property instead of the plaintiff.

The plaintiff averred that upon making inquiry, it discovered that through an Indenture of Conveyance dated 22nd December, 2010 registered as Volume N92 Folio 58/1 File No. 26555, the 1st defendant purported to transfer the suit property to the 2nd defendant who was his son. The plaintiff averred that the said conveyance between the 1st and 2nd defendants was fraudulent and illegal in that the 1st defendant who had transferred his interest in the suit property to the plaintiff had nothing left in the property to transfer to the 2nd defendant.

The defendants filed a joint statement of defence and counter-claim on 21st February, 2012. The defendants denied that on 31st December, 1990 or at any other time, the 1st defendant executed an Indenture of Conveyance in respect of the suit property in favour of the plaintiff. The defendants denied also that the plaintiff took possession of the suit property on 31st December, 1990 and that it was still in possession

thereof. The defendants denied further that the plaintiff had been paying land rates for the suit property to the City Council of Nairobi. The defendants averred that the transfer of the suit property by the 1st defendant to the 2nd defendant was lawful in that as at 22nd December, 2010, the 1st defendant was registered as the proprietor of the suit property and had a right to deal with the same. The defendants denied that the transfer of the suit property by the 1st defendant to the 2nd defendant was fraudulent.

In their counter-claim, the defendants reiterated the contents of their defence and averred that the transfer of the suit property by the 1st defendant to the 2nd defendant was lawful. The defendants sought; a declaration that the transfer of the suit property by the 1st defendant to the 2nd defendant was lawful and regular, a declaration that the 2nd defendant was the lawful and bona fide registered owner of the suit property and costs of the suit.

At the trial, the plaintiff called two (2) witnesses, Jacob M. Oduor (PW1) and Hardev Singh Juttla (PW2). PW1 was a document examiner. He was called by the plaintiff to confirm whether the Agreement for Sale between the 1st defendant and Hardev Singh Juttla dated 21st June, 1990 in respect of the suit property and the Indenture of Conveyance between the plaintiff and the 1st defendant dated 31st December, 1990 in respect of the same property were signed by the 1st defendant. PW1 told the court that after comparing the signatures in the two documents with the known signatures of the 1st defendant contained in the affidavits of the 1st defendant filed herein and in the Indenture of Conveyance dated 22nd October, 2010 between the 1st and 2nd defendants, his conclusion was that the signatures were all made by the same person. PW1 confirmed basically that the 1st defendant signed the Agreement for Sale between the 1st defendant and Hardev Singh Juttla dated 21st June, 1990 and the Indenture of Conveyance between the plaintiff and the 1st defendant dated 31st December, 1990 in respect of the suit property. PW2's report dated 21st January, 2014 that was made pursuant to the order of this court made on 18th November, 2013 was filed in court on 30th January, 2014.

PW2 on the other hand narrated to the court how he purchased the suit property from the 1st defendant and had the transfer in respect thereof effected by the 1st defendant in favour of the plaintiff. In summary, PW2 told the court that he was introduced to the 1st defendant by one, Dereck John Carter, deceased, who was the 1st defendant's tenant in a property known as L.R No. 2/343. PW2 stated that he entered into an agreement for sale with the 1st defendant in respect of the suit property. The purchase price was agreed at Kshs. 1,400,000/-. A portion of the purchase price in the sum of Kshs. 800,000/- was to be used to offset a loan that was owed by the 1st defendant to East African Building Society. The loan had been advanced by East African Building Society to the 1st defendant on the security of the 1st defendant's parcel of land known as L.R No. 2/343 which is not the subject of this suit. The balance of the purchase price in the sum of Kshs. 600,000/- was either to be utilised as the 1st defendant's contribution to a joint venture project which the 1st defendant was to enter into with PW2 through a limited liability company that was to be formed or to be paid to the 1st defendant.

PW2 stated that since the 1st defendant was heavily in debt; he could not participate in the joint venture agreement. He stated that in the circumstances, it was agreed that the balance of the purchase price be paid to the 1st defendant. PW2 stated that out of the purchase price of Kshs. 1,400,000/-, Kshs. 921,333.80 was used to offset the loan that was owed by the 1st defendant as aforesaid, Kshs. 385, 837.70 was paid to the 1st defendant and the balance was used to clear the disbursements that were payable by the 1st defendant under the agreement for sale between the parties. PW2 produced a statement of account showing how the said sum of Kshs. 1,400,000/- was disbursed. PW2 stated that the agreement for sale between him and the 1st defendant allowed him to nominate a third party to whom the property could be transferred. He stated that after paying the full purchase price as aforesaid, the suit property was transferred by the 1st defendant to the plaintiff on his instructions. PW2 stated that in 2007, the plaintiff charged the suit property to CFC Stanbic Bank Limited to secure a loan of Kshs. 15,000,000/- that was advanced to the plaintiff by the said bank. PW2 stated that the suit property was still registered in the name of the plaintiff and that the 1st defendant having transferred the suit property to the plaintiff had no interest in the property that he could transfer to the 2nd defendant through the Indenture of Conveyance dated 22nd December, 2010. PW2 produced as exhibits two bundles of documents containing correspondence and other material to substantiate his testimony.

For the defence, the 1st defendant gave evidence while the 2nd defendant's witness statement dated 21st February, 2012 was admitted in evidence by consent as his testimony without him attending court. The 1st defendant adopted his witness statement dated 21st February, 2012 as his evidence in chief. He also produced the documents attached to the defendants' bundle of documents dated 21st February, 2012 as exhibits. The 1st defendant told the court that Dereck John Carter was an architect who was running a business under the name Mathew Covell Partnership. He stated that Dereck John Carter was his tenant on L.R No. 2/343. He stated that Dereck John Carter approached him with a proposal that they enter into a joint venture agreement for the development of the suit property which was vacant. The 1st defendant stated that Dereck John Carter told him that he owned apartments in Spain registered in the name Miraflores and that he intended to register a company under the same name in Kenya which they were to use as a vehicle to develop the suit property under the joint venture.

The 1st defendant stated that he had borrowed money from East African Building Society on the security of L.R No. 2/343 that was rented to Dereck John Carter and that there was a balance of Kshs. 800,000/- that was payable to the said lender to discharge the debt. The 1st defendant stated that Dereck John Carter offered to clear the said loan balance that was due to East African Building Society so that the 1st defendant was not in debt when they commenced the joint venture. The 1st defendant stated that the limited liability company that they were to use as a vehicle to develop the suit property was formed without his knowledge with Dereck John Carter, Hardev Singh Juttla and a Miss Chege as directors of the company. He stated that the said limited liability company is the plaintiff herein.

The 1st defendant stated that he met PW2 for the first time at the office of Shapley Barret & Company Advocates where he was asked to go by Dereck John Carter so that arrangement could be made to settle his debt with East African Building Society. He stated that PW2 was a contractor and that he met him as a representative of Dereck John Carter. He stated that PW2 was the one who was to build the structures which were to be put up under the joint venture agreement aforesaid. The 1st defendant stated that at the office of Shapley Barret & Company Advocates, an agreement for sale of the suit property was prepared which he was asked to sign. He stated that according to the agreement, the suit property was to be transferred to the limited liability company that was to be used as a vehicle by him and Dereck John Carter for the

joint venture project. The 1st defendant stated that after he signed the agreement, Dereck John Carter disappeared and he never heard anything again about the joint venture. He stated that he later learnt that Dereck John Carter had passed away in Brazil.

The 1st defendant stated that in 2006, he carried out a search on the suit property and found that the suit property was still registered in his name. He stated that in 2011, he transferred the suit property to the 2nd defendant because he was unable to develop the same due to old age. The 1st defendant admitted that his loan with East African Building Society was cleared and that he was given a sum of Kshs. 400,000/- from the proceeds of sale of the suit property. The 1st defendant stated that the suit property was never transferred to any person and that he never dealt with the plaintiff in relation to the property. The 1st defendant stated that his purported signature in the indenture of conveyance of the suit property to the plaintiff is a forgery and that he had made a report to the police over the same. In his witness statement dated 21st February, 2012 that was adopted as his evidence, the 2nd defendant stated that the suit property belonged to the 1st defendant who was his father and who transferred the same to him on 22nd December, 2010 in consideration of love and affection.

The defendants called a document examiner, Antipas Nyanjwa (DW2) as their witness. DW2 told the court that he examined the 1st defendant's disputed signature in the agreement for sale dated 21st June, 1990 between the 1st defendant and PW2 and his known signatures and concluded that the said agreement for sale was not signed by the 1st defendant. He termed the 1st defendant's signature in the said agreement for sale a forgery. DW2 produced his report dated 1st June, 2015 as an exhibit.

After the conclusion of evidence, the parties made closing submissions in writing. The plaintiff filed its submissions on 30th August, 2019 while the defendants filed their submissions on 27th November, 2019. I have considered the evidence tendered by the parties in support of their respective cases and the submissions of counsels. In my view the issues arising for determination in this suit are the following;

1. Whether the plaintiff is the lawful proprietor of the suit property.
2. Whether the registration of the 2nd defendant as the proprietor of the suit property was lawful.
3. Whether the plaintiff is entitled to the reliefs sought in the plaint.
4. Whether the defendants are entitled to the reliefs sought in their counter-claim.
5. Who is liable for the costs of the suit?

Whether the plaintiff is the lawful proprietor of the suit property.

I am satisfied from the evidence placed before the court by the plaintiff that the PW2 purchased the suit property from the 1st defendant on a willing buyer willing seller basis. The plaintiff produced in evidence an agreement for sale dated 21st June, 1990 between Hardev Singh Juttla (PW2) and the 1st defendant in respect of the suit property. Under the agreement, PW2 and/or his nominee purchased the suit property from the 1st defendant at a price of Kshs. 1,400,000/- of which a sum of Kshs. 400,000/- had already been paid to the firm of Shapley Barret & Company Advocates as stakeholder. The firm of Shapley Barret & Company Advocates acted for both parties in the transaction. The plaintiff placed before the court evidence showing that the full purchase price was paid to and/or on account of the 1st defendant. The largest part of the purchase price amounting to Kshs. 921,333.80 was utilised to offset the debt that the 1st defendant owed to East African Building Society. The settlement of this account was made through Jubilee Insurance Company Limited. A sum of Kshs. 385,837.70 was paid to the 1st defendant directly. The balance of the purchase price in the sum of Kshs. 92,828.50 was used to meet the obligations that the 1st defendant had under the agreement for sale. The 1st defendant did not dispute that the full purchase price that was agreed upon in the agreement for sale between him and PW2 was paid.

The 1st defendant had contended that although he received the full purchase price, he did not transfer the suit property to the plaintiff with which he had no dealings. The 1st defendant claimed that the suit property was to be transferred to a limited liability company which was to be used as a vehicle for the joint venture agreement in which company he was to be a shareholder. The 1st defendant contended that after Dereck John Carter left the scene, he did not receive any further information on the said company that was to be formed. The agreement for sale was between the 1st defendant and PW2 and/or his nominee. The agreement did not mention the joint venture agreement that the 1st defendant allegedly entered into with Dereck John Carter. The agreement did not also mention the formation of any limited liability company to which the suit property was to be transferred. I am satisfied from the evidence on record that during the initial discussion between the parties, the 1st defendant was given an option of either being paid the balance of the purchase price after the clearance of the loan he had with East African Building Society or having the same used as his contribution in a development company that the parties had intended to form. The evidence on record shows that the 1st defendant chose to be paid the balance of the purchase price and the same was paid to him.

I am in agreement with the plaintiff that after being paid the full purchase price, the 1st defendant cannot turn around and claim that he was still supposed to be a shareholder in a development company that was to be formed through which the suit property was to be developed. It is my finding that the 1st defendant got full consideration for the suit property and that he transferred the property to the plaintiff. The evidence before the court shows that PW2 nominated the plaintiff as transferee of the suit property. Under the agreement for sale between the 1st defendant and PW2, PW2 had a right to nominate a person to whom the suit property was to be transferred. I am convinced from the evidence by PW1 and PW2 that the 1st defendant signed the Indenture of Conveyance dated 21st December, 1990 in favour of the plaintiff having received the full purchase price.

Due to the foregoing, it is my finding that the plaintiff acquired the suit property lawfully and that it is the lawful proprietor of the suit

property.

Whether the registration of the 2nd defendant as the proprietor of the suit property was lawful.

I am in agreement with the plaintiff that when the 1st defendant purported to transfer the suit property to the 2nd defendant on 22nd December, 2010, the property was registered in the name of the plaintiff as the proprietor thereof. In the circumstances, the 1st defendant had no interest legal or equitable in the suit property that he could convey or transfer to the 2nd defendant. It is basic law that one can only give what he has. This position was made clear in African Line Transport Co. Ltd. v The Hon. Attorney General, Mombasa HCCC No. 276 of 2003, where the court stated as follows:

“On the contrary, by a letter dated 30th June, 2006, the Commissioner of Lands states that there was no proof in her record that this allocation was authorized by the President. In the absence of such proof, one can draw only one conclusion-that the grant to Mr. Omari was null and void for not having been executed by the President. And if the grant to Mr. Omari was null and void ab initio, it conferred no interest in Mr.Omari. By extension of the principle of nemo dat quod non habet, if Mr. Omari acquired no interest in the property, then he had no interest to transfer to the plaintiff. And that is the plaintiff’s lot. There was a gross irregularity which went to the very root of the title to the suit property, and the plaintiff acquired no interest out of it.”

Due to the foregoing, it is my finding that the registration of the 2nd defendant as the owner of the suit property on 19th January, 2011 pursuant to the said Indenture of Conveyance dated 22nd December, 2010 was illegal and fraudulent. As at the time the 2nd defendant was registered as the owner of the suit property, the property was registered in the name of the plaintiff which had charged it to CFC Stanbic Bank Limited to secure a loan of Kshs. 15,000,000/-. The charge was still in place as at the time of the hearing of this suit. The transfer by the 1st defendant to the 2nd defendant of a parcel of land that was registered in the name of the plaintiff and charged to a bank could only have taken place through acts of fraud. A fraudulent title however innocently acquired is not protected by law. The purported title held by the 2nd defendant to the suit property is in the circumstances illegal, null and void.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

The plaintiff has proved that it is the lawful proprietor of the suit property and that the purported title held by the 2nd defendant is illegal, null and void. The plaintiff has in the circumstances proved its case against the defendants on a balance of probabilities and as such entitled to the declaratory and injunctive reliefs sought in the plaint.

Whether the defendants are entitled to the reliefs sought in their counter-claim.

I have dealt with this issue above. The defendants have not established that they have a valid claim over the suit property. The reliefs sought by them in the defence and counter-claim dated 21st February, 2012 are therefore not for granting.

Who is liable for the costs of the suit?

As a general rule, costs follow the event. The plaintiff has succeeded in its claim against the defendants. In the absence of any reason to warrant a departure from the general rule on costs, the plaintiff shall have the costs of the suit and the counter-claim.

Conclusion:

In conclusion, I hereby make the following orders;

1. Judgment is entered for the plaintiff against the defendants in terms of prayers (a), (b), (c) and (d) in the plaint dated 11th November, 2011.
2. The 2nd defendant shall deliver up to the Chief Land Registrar the Indenture of Conveyance dated 22nd December, 2010 registered in Vol N. 92 Folio 58/1 File No. 26555 held by him for cancellation within 30 days.
3. The Chief Land Registrar shall cancel the registration of the 2nd defendant as the owner of L.R No. 2/344(Original No. 2/45b/2/3/3) in Vol N 92 Folio 58/1 File No. 26555.
4. The defendants’ counter-claim is dismissed.
5. The plaintiff shall have the costs of the suit and the counter-claim.

Delivered and Dated at Nairobi this 4th Day of June 2020

S. OKONG’O

JUDGE

Judgment read through Microsoft Teams video conferencing platform in in the presence of;

Ms. Fexi h/b for Mr. Burugu for the Plaintiffs

N/A for the Defendants

Ms. C. Nyokabi-Court Assistant