



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 86 OF 2015

ATANAS B. A. LUBANDI.....PLAINTIFF

VERSUS

JOHN GATHUU KARANJA.....1ST DEFENDANT

PASCHAL MANYURU JUMA.....2ND DEFENDANT

JOSEPHINE NERIMA MANYURU.....3RD DEFENDANT

J U D G E M E N T

1. The plaintiff brought the suit against the 3 defendants vide a plaint dated 5th August 2015. The plaintiff pleaded that he is the registered owner of L.R. No. South Teso/Angorom/120 measuring 1.3Ha on 3rd September 1997 which is currently valued at Kshs.20million. That the 1st defendant through fraud and misrepresentation got registered as proprietor on 19th September 2012 while the 2nd and 3rd defendants acquired their registration from the 1st defendant.

2. The plaintiff pleaded the following particulars of fraud and misrepresentation;

- (i) *Misrepresenting to the Land Registrar that I had Power of Attorney to BWIRE PRISCILLA WANGIRA.*
- (ii) *Fraudulently appending a forged signature on the Power of Attorney.*
- (iii) *Fraudulently appending a forged signature on Application for Consent for Land Control Board.*
- (iv) *Fraudulently uttering a forged signature on transfer form.*
- (v) *Fraudulently uttering that I am the holder of passport No. A8918646.*
- (vi) *Fraudulently alleging that I was before Commissioner of Oaths on 10th January 2008.*

3. The plaintiff urged the court to enter judgment for him against the defendants jointly and severally for an order that;

(i) Entries made on the Land Register SOUTH TESO/ANGOROM/120 on 19th September, 2012 and 10th December, 2014 be annulled and/or revoked.

(ii) Costs of the suit.

4. The suit was defended via a statement of defence by the 2nd and 3rd defendants filed on 2nd November 2015 and the 1st defendant's defence filed on 22nd April 2016. The 1st defendant pleaded that the plaintiff offered for sale and he accepted to buy the whole land South Teso/Angorom/120 at a price of Kshs.5 million. That he duly paid the agreed sum and was acknowledged. The 1st defendant stated that he was issued with a title deed on 21/9/2012 after complying with all the procedural and legal requirements.

5. The 1st defendant pleaded that on a willing buyer-seller basis, he sold to and transferred the suit land to the 2nd and 3rd defendants on 10/12/2014. He denied all the particulars of fraud levelled against him and put the plaintiff to strict proof. Instead, the 1st defendant alleged

fraud against the plaintiff as follows;

- (i) *Attempting to disown transaction he was fully part of.*
- (ii) *Failing to make full disclosure of material facts.*
- (iii) *Bringing this suit immediately after the death of his sister-in-law Priscilla Bwire Wangira, who most of the time was his agent.*
- (iv) *The plaintiff is driven by greed.*
- (v) *Misrepresenting his passport number.*
- (vi) *Changing his signatures/signs.*
- (vii) *Being fraudulent perse.*

6. The 1st defendant averred that the plaintiff's suit is incurable defective and bad in law. He urged the court to dismiss and or strike it out with costs.

7. The 2nd and 3rd defendants on their part denied that the transfer of the suit land to them was fraudulent as alleged by the plaintiff and they put the plaintiff to strict proof. They pleaded further that they are innocent purchasers for value without notice. It is their plea that their ownership is incapable of being annulled or revoked. The 2nd and 3rd defendants prayed that the plaintiff's suit be dismissed with costs.

8. Each of the parties called the evidence of a single witness. The plaintiff's representative gave evidence on 30/10/2018. Mr. John Charles Magana stated that he has known the plaintiff for over 40 years. That the plaintiff gave him a power of attorney on 26/8/2015 to represent him in this case. The Power of Attorney was produced as **Pex 1**. The witness continued that the plaintiff made a statement dated 5/8/2015 and filed a list of documents which he adopted as part of his evidence. He produced a copy of the title registered in the plaintiff's name and a later one bearing the 1st defendant's name as **Pex 2(a) and (b)**.

9. Mr. Magana continued further in his evidence by producing a copy of the plaintiff's ID as **Pex 3**. The ID is No.16062933 and his passport (**Pex 4**) as well as the green card as **Pex 5**. He also produced as **Pex 6** certified copy of a power of attorney registered at the lands office. He further produced documents of transfer from the plaintiff to 1st defendant and later to the 2nd and 3rd defendants as **Pex 7 – 8**. It is the plaintiff's contention that he never donated a power of attorney to anyone else. He prayed that the land revert back to him.

10. In cross-examination, Mr. Magana said that he does not recall when the plaintiff came to Kenya or when he went back to America. But that he travelled back after giving him the power of attorney. Shown a copy of a power of attorney to Priscilla, the witness said the document bore no stamp. That the signature on the verifying affidavit and witness statement of plaintiff was not similar to the signature on the Power of Attorney donated to him. That Priscilla Wangila was a sister-in-law and caretaker of the land in dispute and other properties of the plaintiff who lives in the United States of America.

11. The witness was not aware if the caretaker's role was put in writing. **PW1** was aware one time the plaintiff wanted to sell the suit land in order to buy a house in Nairobi. That he appointed somebody to look for a buyer and he sent the title deed to Priscilla for the prospective buyer to confirm. **PW1** was not aware if other documents were also sent. He denied that Priscilla was given a power of attorney; that the power of attorney to Priscilla is a forgery. That the plaintiff went to United States of America in 2008 but he had an account in Kenya with Standard Chartered Bank and Barclays bank. The witness was shown an application for funds transfer by Priscilla Wangila (Equity Bank) to Standard Chartered Bank for the sum of Kshs.2,000,000 and the transaction indicated as plot purchase. That there was another transfer of Kshs.500,000 but for a different transaction.

12. **PW1** said he knew the 1st defendant and that he had used the suit land for 4 – 5 years. That the 2nd defendant never told him when he bought the land. He denied that they are greedy. On further cross-examination by J. V. Juma advocate for 2nd and 3rd defendants, the witness said they were caretakers together with Priscilla. That the plaintiff expressed interest to sell the suit property in the year 2010 while **PW1** was using the land. He stopped using it and later on he saw the 1st defendant fencing it in the year 2012. That when he asked, the 1st defendant told him Priscilla had sold him the land. He confirmed this from the lands office. That the transfer to the 2nd and 3rd defendants was fraudulent because the transfer to the 1st defendant was also fraudulent.

13. In re-examination, **PW1** said the plaintiff has been in United States of America for 10 years now. That he may not sign exactly the same way and he has not denied the power of attorney produced as **Pex 1**. That the plaintiff never gave any power of attorney to Priscilla. He only told Priscilla to look for a buyer. This marked the close of the plaintiff's case.

14. The 1st defendant testified on 10th February 2020. He stated that he is a businessman running a hardware in Busia town. He adopted his witness statement dated 27/3/2017 as part of his evidence in chief. That he bought the suit land from the plaintiff through Priscilla Wangila Bwire. That Priscilla had a power of attorney registered at the lands office, original title deed, ID of the plaintiff and his passport photographs. **DW1** continued further that Bwire also signed for him application for consent and transfer forms.

15. That he paid Kshs.5 million and he is aware that the plaintiff received the funds as Priscilla gave him copies of bank transfer to the plaintiff for Kshs.2.5 million. That the title was in his name for 2½ years before he sold the land to the 2nd and 3rd defendants. The 1st

defendant added that for the two years he owned the land, he planted potatoes on it. That Priscilla died after he had sold the land. That the current holder of the power of attorney was the person farming the land before **DW1** purchased the same and he asked him to leave. Thus the plaintiff's witness was aware of sale of the land to him. According to the witness, the plaintiff is dishonest to say he got the land through fraud.

16. In cross-examination by Mr. Jumba counsel for the plaintiff, **DW1** said he never received any complaint during his possession of the land. In cross-examination by Mr. J. V. Juma counsel for the 2nd and 3rd defendants, **DW1** said he had never met the plaintiff before filing of the case. That **Dex-1** was signed by Priscilla on behalf of the plaintiff. **Dex 3** and **5** application for consent and transfer was signed by the plaintiff. That the forms were sent to America for Lubandi (Plaintiff) to sign. **DW1** added that the power of attorney produced as **Dex-9** was registered at the lands office. That he had evidence that the whole amount of Kshs.5 million was paid to the plaintiff.

17. Pascal Manyuru Juma gave evidence on behalf of himself and the 3rd defendant who he said is his wife. **DW2** stated that while looking for a piece of land to buy in 2014, he learnt that the 1st defendant had land he was selling. He conducted a search at the lands office and found no encumbrance registered on the title. Therefore they entered into a sale agreement. He continued that after buying, he took possession and also registered themselves as owners thereof. The witness said he had filed a claim against co-defendant to protect his interest in the event the plaintiff's suit is successful.

18. In cross-examination, **DW2** said he only did due diligence between him and the 1st defendant. He did not go back to previous transactions. This marked the close of the defence case.

19. Counsels filed their closing submissions. In his submission filed on 5th May 2020, the plaintiff raised two questions for determination;

1) *Did the plaintiff donate power of attorney to Priscilla Wangila in order to facilitate the sale on 19/9/2012?*

2) *Can the defendants be regarded as innocent purchaser for value?*

20. They submitted that his ID and passport numbers (*Pex 3* and *Pex 4*) does not tally with the entries in the power of attorney dated 10/1/2008 to Priscilla. That this power of attorney was never registered. That *Dex 8* and *9* is purportedly signed by the plaintiff instead of Priscilla Wangila. That it is openly agreed that the plaintiff and 1st defendant never physically met and the advocate who executed the power of attorney was never called to testify. He relied on the Case of **Francis Mwangi Mugo Vs David Kamau (2017) eKLR** where the Court stated thus,

“The power of attorney here falls under the purview of capacity, for one cannot act for another without 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 is involving immovable property, then he must register that power of attorney before he can allege to have capacity to act.”

21. The 1st defendant filed his submissions on 12th May 2020. Mr. Bogonko advocate submits that the plaintiff's suit being hinged on the power of attorney to Priscilla Wangila is incurably defective for failure to join the said Priscilla or her estate. He continued that the plaintiff did not also prove allegations of fraud levelled against the 1st defendant. According to the 1st defendant, the identity card number on the impugned power of attorney and sale agreement of the suit property is the same as those produced by the plaintiff. He contends that he is the one who has proved fraud against the plaintiff. The 1st defendant relied on the following decisions to support his case;

(i) **M'bita Ntaro Vs Mbale Mwiricha & Ano (2018) eKLR** where it was stated thus at paragraph;

“8. The respondent proffered one authority. It is the Case of Evans Otieno Nyakwana (Appellant) and Cleophas Bwana Ongaro (Respondent) – Homa Bay High Court Civil Appeal No. 7 of 2014 eKLR. It is a good authority of the principle that he who makes a claim has a duty to prove it.”

“20. (1) Whoever desires any court to give judgement as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

(3) The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.”

(ii) **John Mbogua Getao Vs Simon Parkoyet Mokare & 4 others (2017) eKLR** the Court stated thus;

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without undue regard to procedural technicalities, Article 159 does not allow the respondents to totally ignore the rules of evidence.”

22. The 2nd and 3rd defendants submitted that the plaintiff's evidence confirms that he left Priscilla Wangila not only with the original title to the suit property but also instructions to find a buyer of the same before he went to United States of America in 2008. That if the plaintiff wanted to sell this property to buy another in Nairobi, would he have remained silent from 2008 to 2015? He submitted that when they

bought this land, there was no encumbrance on the title. He urged the court to dismiss the suit but if the court finds for the plaintiff, the notice of claim against co-defendant dated 22/2/2017 be allowed.

23. The plaintiff's claim against the defendants is that they acquired registration of land title No. South Teso/Angoromo/120 through fraud and misrepresentation. The misrepresentation is that he had not donated a power of attorney to Priscilla Wangila Bwire to sell the suit land. He further accused them of appending a forged signature on the power of attorney, application for Land Control Board consent and transfer form. According to the plaintiff's pleadings, it is these defendants who forged his signature on the mentioned documents. Therefore the law of evidence imposed a burden on him to prove the allegations he levelled against the defendants as stated in the Case of **John Mbogua Getao supra**.

24. In support of his case, he produced documents amongst them was the power of attorney dated 10/1/2008 in favour of Priscilla Wangila Bwire as **Pex 6**. On the face of this document which was certified true copy of the original by the Land Registrar, shows it was presented for registration at the lands office on 9/8/2008 and it got registered on 10/8/2008 after payment was made vide receipt number 443643 and registration number 850/2/2008. The ID of the donor (plaintiff) is given as 16062933 and passport No.A8913646 of P.O. Box 68237 Nairobi.

25. The plaintiff's witness in his evidence stated that this power of attorney was not registered at the lands office. Yet he still proceeded to produce a certified copy by the Land Registrar. The witness also confirmed that the plaintiff had instructed Priscilla Wangila to get a buyer for the suit land and he proceeded to send the original title documents to the said Priscilla. The plaintiff is challenging his signature on the power of attorney, the transfer form and application for consent. However he did not present evidence of an expert witness to corroborate his evidence that these were indeed not his signatures. As rightly submitted, the identity card number 16062933 given in all the three impugned documents is the same ID number in the plaintiff's copy of ID produced as Pex 3.

26. Secondly, the document was registered in 2008 before the 1st defendant purchased the land in the year 2012. The plaintiff was under a duty to show the nexus between the 1st defendant and the alleged forged Power of Attorney to Priscilla Wangila. The 1st defendant stated that the application for consent and transfer forms were sent to the plaintiff in United States of America to sign. The plaintiff did not contravert/challenge this line of evidence during cross-examination.

27. The plaintiff must have been aware of the 1st defendant's activities on the land. First, because the person who he donated to the Power of Attorney to give evidence on his behalf was the one who used to till the land. The witness said he was asked to live farming the land by the 1st defendant on account of having purchased the same. The witness said he was also a caretaker of the land alongside Priscilla Wangila. Why did this witness not inform his boss (plaintiff) of the changes?

28. Secondly, there is produced in evidence a transfer of funds form showing Kshs.2.5million was transferred by Priscilla from her account to the plaintiff's account held at Standard Chartered Bank (K) Limited, Koinange Street Branch. The purpose of the transfer is given as part payment for plot purchase. The transfer of funds is dated 8/8/2012. This was around the same time the 1st defendant was buying the suit land since the agreement of sale is dated 4/8/2012. The plaintiff did not lead evidence that he had instructed the plaintiff to sell other parcels of land beside the suit land. The disputed power of attorney dated 10/1/2008⁷ was specific to the land title L.R South Teso/Angoromo/120. The plaintiff therefore needed to justify why he was receiving Kshs.2.5million from Priscilla Wangila as part payment of purchase of plot if indeed it is true he had not donated any power for her to sell the suit land.

29. In light of the foregoing, the court is not satisfied that the allegations of fraud have been proved against the defendants. Consequently, no basis has been laid to have the entries made on L.R No. South Teso/Angorom/120 on 19/9/2012 and 10/12/2014 which bestowed ownership to the 1st defendant and later the 2nd and 3rd defendants being annulled and or revoked. The plaintiff's suit is hereby dismissed for want of proof. Costs of the suit is awarded to the defendants.

Judgment dated, signed and delivered at BUSIA this 21st day of July, 2020.

A. OMOLLO

JUDGE