



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 88 OF 2016

AMICHAND NARSHI SHAH.....1ST PLAINTIFF

SUSHILA AMICHAND SHAH.....2ND PLAINTIFF

PARITA SUMARIA.....3RD PLAINTIFF

VERSUS

ALEXANDER JAMES PRIVATE

INVESTIGATION LIMITED.....DEFENDANT

JUDGMENT

The plaintiffs' case

The plaintiffs brought this suit by way of a plaint dated 22nd December, 2015 filed in court on 3rd February, 2016. The plaintiffs averred that at all material times the plaintiffs were jointly registered as lessees of all that property known as Flat No. A4 within Block A on L.R No. 209/3/10 situated in Parklands within Nairobi County (hereinafter referred to as "the suit property"). The plaintiffs averred that on or about the 15th of April, 2014, the defendant in collusion with one, Sachin Patel misrepresented to the 1st plaintiff that the defendant was in a position to advance a friendly loan of Kshs. 10 Million to the plaintiffs a fact that the defendant knew to be false. The plaintiffs averred that by trick and deceit, the defendant and the said Sachin Patel caused the 1st and 2nd plaintiffs to sign a purported loan agreement notwithstanding the fact that the 3rd plaintiff was out of the country and did not appear before the defendant's advocate, Eliakim Owala Advocate to sign the agreement.

The plaintiffs averred that Sachin Patel obtained the title documents for the suit property from the 1st plaintiff by trickery at the behest of the defendant and handed over the same to the defendant. The plaintiffs averred that the defendant obtained the said documents of title by fraud and failed to remit the said sum of Kshs. 10 Million being the loan amount to the plaintiffs. The plaintiffs averred that the defendant purported to pay the said sum of Kshs. 10 Million to the said Sachin Patel on behalf of the plaintiffs notwithstanding the fact that Sachin Patel had no authority express or otherwise to receive the said payment on behalf of the plaintiffs.

The plaintiffs averred that none of them signed the instrument of transfer conveying the plaintiffs' interest in the suit property to the defendant. The plaintiffs averred that they had reported the fraud committed by the defendant and the said Sachin Patel to the police for investigations. The plaintiffs sought judgment against the defendant for:

- a) A declaration that the plaintiffs are the duly registered owners of the property known as L.R No.209/3/10, I.R 78108.
- b) A permanent injunction to restrain the defendant either by itself or its agents from selling, transferring or in any way dealing with the suit property.
- c) The return and restoration of the original title documents for L.R No. 209/3/10, I.R 78108.
- d) Costs.
- e) Any other relief this honourable court deems fit just to grant.

The defendant's case:

The defendant filed its statement of defence on 17th March, 2016. The defendant denied the allegations of trickery, collusion and misrepresentation made against it by the plaintiffs. The defendant averred that the plaintiffs entered into a loan agreement with it on 15th April, 2014 with full knowledge of what it entailed. The defendant averred that no complaint had been made against it for the alleged forgery neither had its officials been convicted of such offence. The defendant averred that in the statement that the 1st plaintiff made to the police under inquiry, the 1st plaintiff stated that; he handed over his title documents to one, Kumar; gave out 10 post-dated cheques for a sum of Kshs. 999,999/- each to the said Kumar and that he had no complaint against Sachin Patel who was trying to help him. The defendant averred that the plaintiffs' averments in the plaint contradicted what the 1st plaintiff told the police in his statement particularly the allegations of collusion between the defendant and Sachin Patel.

The defendant averred that the loan agreement between the plaintiffs and the defendant was valid and binding on the parties. The defendant averred that the plaintiffs voluntarily executed the instrument of transfer of the suit property to secure the loan that they received from the defendant. The defendant urged the court to dismiss the plaintiffs' suit with cost.

The plaintiffs filed a reply to defence on 29th April, 2016 in which they joined issue with the defendant in its statement of defence save where the same consisted mainly of admissions.

At the trial, the 1st plaintiff, Amichand Narshi Shah (PW1) testified as follows: In 2014, he was in need of money. He shared his situation with one, Sachin Patel (hereinafter referred to only as "Sachin" where the context so permits) who was an acquaintance. Sachin told him that he knew someone who could help. Sachin introduced him to one, Kumar who he met with Sachin. Kumar was to arrange for him to get the money that he wanted to borrow. He gave out the original lease for the suit property as security for the loan to Kumar and his lawyer, one, Eliakim Owala. The two in turn gave him a loan agreement dated 15th April, 2014 that he signed. He was to get a loan of Kshs. 10 Million but did not receive the same. He was to receive Kshs. 2 Million on the signing of the agreement which he did not receive. He was thereafter to receive the balance of Ksh 8 Million on or before the 20th April, 2014 which amount was also never disbursed. A part from the original lease, he also gave out an instrument of transfer that was signed by him and his wife. The 3rd plaintiff who is his daughter did not sign any of the documents as she was away. He was not given any notice before the suit property was purportedly transferred to the defendant neither was any valuation done on the property. He did not authorise Sachin or Kumar to receive the loan amount on his behalf from the defendant. He stated that he gave the original lease as security and wanted the same back as he was not given the loan.

In examination by the court, PW1 stated that he wanted Kshs. 10 Million for investment. He stated further that it was after 3 months that he suspected that something was amiss and he could not trace Sachin or Kumar. He stated that he reported the matter to the police on 9th September, 2014. He stated that his complaint to the police was against the defendant. The other plaintiffs did not give evidence.

The defendant's first witness was its director and shareholder, James Kigathi Ndegwa (DW1). He testified as follows: Initially, the defendant was undertaking the business of investigations. As at the time he was giving evidence, the defendant was in the business of developing and selling houses. In addition, the defendant was engaged in the business of money lending. The defendant had a business associate by the name, Sachin Patel who used to manufacture detergents. They used to lend money to the said Sachin Patel. In April, 2014, Sachin Patel approached him and informed him that he had a friend who was in need of money and had sufficient security. He asked one of his associates, Alfred Nazareth to do due diligence on the customer. The said Alfred Nazareth accompanied Sachin Patel to the plaintiffs' premises to confirm if the property that was to be used as security existed. The two returned with a title together with photographs of the owners. He thereafter appointed a lawyer, Mr. Eliakim Owala to draw up a loan agreement between the defendant and the plaintiffs. Under the loan agreement, the defendant was to disburse a loan of Kshs. 10 Million to the plaintiffs that was to be repaid by 15th October, 2014. The defendant disbursed the loan in April, 2014. The plaintiffs provided original title for the suit property as security together with a duly executed instrument of transfer which the defendant was to register in case the loan was not repaid. The 1st plaintiff also gave them cheques which they were to deposit in October 2014. When he banked the cheques, they were returned unpaid with a remark "insufficient funds". He gave the loan amount to Sachin Patel who was acting as an agent of the plaintiffs. Sachin Patel gave him a letter confirming that he had authority to act for the plaintiffs. The defendant's advocate confirmed that the letter was sufficient. Since the plaintiffs wanted the loan to be given to them in cash, he made arrangement to collect the money from the bank in the company of Sachin Patel and Alfred Nazareth. Once he withdrew the cash, he gave the same to Sachin Patel. After the 1st plaintiff's cheques were dishonoured, he asked the defendant's lawyer to transfer the suit property to the defendant. He thereafter appointed an auctioneer to help the defendant to take possession of the suit property. The plaintiffs then filed this suit and obtained orders restraining the defendant from taking possession of the suit property. He urged the court to grant the defendant possession of the suit property which the plaintiffs were occupying free of charge.

In cross-examination by the plaintiffs' advocate, DW1 told the court that the suit property was registered in his name as a director of the defendant and not in the name of the defendant. He confirmed that he had the original title although he did not bring it to court. He stated that he gave the loan amount to Sachin Patel in cash after withdrawing a sum of Kshs. 10 Million from the bank in April 2014. He told the court that the loan agreement was made on 15th April, 2014 but he did not disburse the loan amount on the same day. In examination by the court, DW1 stated that the defendant gave out the loan free of interest and commission because the plaintiff was in bad shape financially. He stated that he withdrew Kshs. 10 Million from ECO Bank Ltd, Valley Arcade Branch.

The defendant's last witness was Eliakim Owala (DW2). DW2 was an advocate of the High Court of Kenya. He testified as follows: On 15th April, 2014, the defendant's chairman, Kigathi Ndegwa called and requested him to accompany three gentlemen namely, Sachin, Nazareth and Mandavia to the plaintiffs' premises. The defendant's said chairman informed him that the defendant was in the process of giving a loan to the plaintiffs and he wanted to verify the title that was being given as security. They went to the plaintiffs' house because the plaintiffs did not want to come to the defendant's office. In the company of the said gentlemen, he went to the house of the plaintiffs at Parklands. When they arrived, the 1st plaintiff introduced them to the other plaintiffs as his wife and daughter. The 1st plaintiff thereafter showed them the original lease for the property that they wanted to use as security for the loan that was to be advanced to them by the defendant a copy of which he gave them. The 1st plaintiff also gave them copies of the plaintiffs' Identity Cards and KRA Personal Identification Number (PIN) Certificates. The 1st plaintiff did not have the passport size photographs ready. He promised to make the same available later. After leaving the plaintiffs' premises, he went to his chambers and prepared a loan agreement and transfer of lease as per the instructions from the defendant's chairman, Kigathi Ndegwa which were confirmed by the 1st plaintiff. When the said documents were ready, he went back to the

1st plaintiff's house at 2.00pm with the loan agreement and transfer of lease which were read and executed by the 1st plaintiff in his presence. He thereafter asked the 1st plaintiff to surrender the original certificate of lease which he did but insisted that the same was to be carried by Sachin. The 1st plaintiff also gave him the photographs of all the plaintiffs. He then went back to his chambers where the directors of the defendant were waiting and they executed their part of the loan agreement together with the transfer of lease. After execution of the documents, he handed over the same to James Kigathi Ndegwa (DW1) in the presence of Sachin Patel, Nazareth and Mandavia. DW1 was to go to the bank to withdraw money that was to be given to Sachin Patel who said that he was an agent of the 1st plaintiff. The 1st plaintiff confirmed that fact when he was in his house. When the plaintiffs failed to repay the loan, defendant instructed him to transfer the suit property to the defendant which he did.

The submissions by the parties:

At the close of trial, the parties were directed to make closing submissions in writing. The plaintiffs filed their submissions on 8th October, 2019 while the defendant filed its submissions on 26th November, 2019. The plaintiffs submitted that they were tricked by the defendant and Sachin Patel into signing the loan agreement and that they never received the loan amount of Kshs.10 Million. They submitted that no consideration passed from the defendant to the them and as such the defendant was illegally holding on to their title document for the suit property. The plaintiffs submitted that Sachin Patel did not have a power of attorney that could have authorised him to act on behalf of the plaintiffs or an express authority to receive money on their behalf. The plaintiffs submitted further that the said Sachin Patel had no capacity to vary terms of the loan agreement. The plaintiffs submitted further that in any event, the defendant did not tender any proof that it withdrew and paid Kshs. 10 Million to Sachin Patel. The plaintiffs submitted that even if it was assumed that DW1 was a director and/or shareholder of the defendant, he had no capacity to transfer the suit property to himself as he was not party to the loan agreement between the defendant and the plaintiffs. The plaintiffs submitted further that no notice was given to the plaintiffs before the suit property was transferred to the defendant neither was a joint valuation carried out as provided in the loan agreement. The plaintiffs urged court to grant the prayers sought in the plaint.

In its submissions dated 18th November, 2019, the defendant addressed three issues. On whether there was a valid loan agreement between the parties, the defendant submitted that in his evidence, the 1st plaintiff did not claim that he was tricked or forced into signing the loan agreement or the instrument of transfer. The defendant submitted that both the loan agreement and the instrument of transfer were valid as no vitiating circumstance had been proved. On whether the loan agreement was breached and by whom, the defendant submitted that the loan amount was released to the plaintiffs through Sachin Patel who was their agent and that money changed hands at Eco Bank Valley Arcade Branch. The defendant submitted further that the issue of breach of the loan agreement was irrelevant to the plaintiffs' case since it was not raised in the plaint. On whether the defendant had given the plaintiffs notice of default and had conducted a joint valuation before the suit property was transferred to the defendant in accordance with clause 5 of the loan agreement, the defendant submitted that the circumstances under which such notice should have been given and a valuation done had not arisen. The defendant contended that the notice of default and a joint valuation was only necessary if the defendant was to transfer the suit property to a third party. The defendant submitted that the default notice and a joint valuation were not condition precedent to the defendant transferring the suit property to itself. On whether there existed an agency relationship between the plaintiffs and Sachin Patel, the defendant submitted that agency can be express or implied. In support of this submission, the defendant cited Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd. & Another [1964]2 QB 480 at 495 that was adopted in Parminder Singh Sagoo & another v Neville Anthony Dourado & another [1983] eKLR. The defendant submitted that at all material times during the loan transaction, Sachin Patel acted as an agent of the plaintiffs. The defendant submitted that Sachin Patel presented a letter dated 15th April, 2014 to the defendant in which he stated that he was acting on behalf of the plaintiffs. The defendant submitted that since Sachin Patel had authority to deliver the title document to the defendants, it must be inferred that he also had authority to receive payment on behalf of the plaintiffs. The defendants submitted that the plaintiffs were estopped from claiming that Sachin Patel was not their agent having presented him as such. The defendant submitted that the plaintiffs had failed to prove the claims of fraud, misrepresentation and illegality pleaded against the defendant. The defendant urged the court to find that the plaintiffs' suit lacks merit.

Determination:

I have considered the evidence that was adduced by the parties and the submissions of counsels. The parties did not agree on the issues for determination by the court. From the pleadings and the evidence tendered by the parties, the following in my view are the issues that arise for determination in this suit;

1. Whether the loan agreement dated 15th April, 2014 between the plaintiffs and the defendant was valid and enforceable.
2. Whether the defendant performed its part of the loan agreement dated 15th April, 2014.
3. Whether the plaintiffs performed their part of the loan agreement dated 15th April, 2014.
4. Whether the suit property was transferred to the defendant if at all in accordance with the terms of the agreement dated 15th April, 2014.
5. Whether the plaintiffs are entitled to the reliefs sought in the plaint.
6. Who is liable for the costs of the suit?

Whether the loan agreement dated 15th April, 2014 between the plaintiffs and the defendant was valid and enforceable.

From the evidence before the court, I am satisfied that the loan agreement dated 15th April, 2014 was entered into by the plaintiffs voluntarily. I am not persuaded by the plaintiffs that any trick or misrepresentation was used to entice the plaintiffs to enter into the said

agreement. I have also not found any evidence in support of the plaintiffs' claim that the defendant in collusion with Sachin Patel fraudulently made them enter into the said agreement. One notable thing is that although the plaintiffs have accused the said Sachin Patel of fraud, they did not find it necessary to make him a party to this suit so that he could respond to the accusations levelled against him. The plaintiffs had claimed that the 3rd plaintiff did not execute the loan agreement because she was out of the country when the agreement was executed by the 1st and 2nd plaintiffs. The plaintiffs did not however place any evidence before the court showing that the 3rd plaintiff was in Zambia where she was alleged to have been on 15th April, 2014. There was also no expert evidence showing that the signature of the 3rd plaintiff in the loan agreement dated 15th April, 2014 was a forgery. The 3rd plaintiff did not give evidence at the trial even after the suit was adjourned to allow her to attend court for that purpose. She was better placed to tell the court how her genuine signature looked like and where she was on 15th April, 2014 when she is alleged to have executed the agreement in contention. I also wonder why the plaintiffs were expecting the performance of the loan agreement dated 15th April, 2014 if indeed it was defective for want of the 3rd plaintiff's signature. For the forgoing reasons, it is my finding that the loan agreement dated 15th April, 2014 between the parties was valid and binding upon the parties.

Whether the defendant performed its part of the loan agreement dated 15th April, 2014.

This is the main issue in contention in this suit. The plaintiffs have contended that even after they executed the loan agreement aforesaid and furnished the defendant with the securities that it required to advance to them a loan of Kshs. 10 Million, the loan was never disbursed to them. The defendant has contended that it gave Sachin Patel on behalf of the plaintiffs the said sum of Kshs. 10 Million. How and when was the payment made? The defendant through its director DW1 told the court that he went with Sachin Patel to Eco Bank, Valley Arcade Branch, withdrew Kshs. 10 Million in cash from the defendant's account and handed over the same to Sachin Patel. He stated that the plaintiffs wanted to be paid in cash. Asked in cross-examination when the payment was made, he stated that it was not made on the same date of the loan agreement but in the same month of April, 2014. Asked whether he bothered to ask Sachin Patel whether he delivered the money to the plaintiffs, the answer was in the negative. There are a lot of issues arising from this narrative by the defendant. First is the issue that has been raised by the plaintiffs namely; who authorised the defendant to release the loan amount to Sachin Patel? The defendant did not place any evidence before the court showing that the plaintiffs or any of them had authorised the defendant to release the loan amount to Sachin Patel on behalf of the plaintiffs. The defendant produced in evidence a letter dated 15th April, 2014 that was addressed to it by Sachin Patel claiming that he had authority from the plaintiffs to receive the loan amount on their behalf. In my view, that letter could not amount to an authorisation by the plaintiffs to the defendant to release the loan amount to Sachin Patel. The letter was not from the plaintiffs. The loan agreement between the parties did not refer to Sachin Patel and had no provision for payment being made to any other person a part from the plaintiffs. The defendant knew the plaintiffs' residence. I can see no reason why the defendant would pay such a large sum of money to Sachin Patel in cash without first confirming with the plaintiffs that they had authorised Sachin Patel to receive the money on their behalf if the defendant could not take the money to the plaintiffs' residence. There is nothing before the court from which the court can infer that Sachin Patel was an agent of the plaintiffs for the purposes of receiving the loan amount. The second issue that arises is proof of payment. In the case of *George Mbiti Kiebia & Another v Isaya Theuri M'lintari & Another* [2014] eKLR the Court of Appeal stated that:

“Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. How the appellant got registered as proprietor of Land Parcel No. 70 is a fact within the knowledge of the appellant and it was incumbent upon the appellant to dislodge the notion that Land Parcel No. 70 was ancestral clan land and refute that he was not registered as proprietor as a representative of the family of the late M'Kiebia.”

The disbursement of the loan amount was allegedly made by the defendant. How, when and to whom the payment was made were facts within the knowledge of the defendant. Section 112 of the Evidence Act placed the burden of proving that the payment was actually made upon the defendant. The defendant was aware soon after the alleged payment was made that the plaintiffs had denied receiving the same. The evidence that was adduced by DW1 was to the effect that he withdrew Kshs. 10 Million in cash from Eco Bank and gave the same to Sachin Patel. The defendant placed before the court no evidence of whatsoever nature showing that on 15th April, 2014 or on any other date it withdrew Kshs. 10 Million from its bank account. The defendant did not place before the court, the withdrawal slip or bank statement showing the withdrawal of the said amount. DW1 could not even say on which date he made the payment of Kshs. 10 Million to Sachin Patel. Having found that the defendant was not authorised by the plaintiffs to release the loan amount to Sachin Patel on their behalf and that there is no evidence that the said sum of Kshs. 10 Million was in fact withdrawn from the defendant's bank account and paid to Sachin Patel, the only conclusion I can make is that the defendant did not pay the loan amount of Kshs. 10 Million to the plaintiffs and as such it did not perform its part of the loan agreement.

Whether the plaintiffs performed their part of the loan agreement dated 15th April, 2014.

The plaintiffs' obligation under the loan agreement was to repay the loan amount of Kshs. 10 Million on or before 15th October, 2014 once disbursed. I have held above that the loan amount was not disbursed to the plaintiffs. In the circumstances, the plaintiffs had no obligation to repay the same. It is therefore my finding that the plaintiffs did not breach the loan agreement.

Whether the suit property was transferred to the defendant if at all in accordance with the terms of the agreement dated 15th April, 2014.

Clause 5 of the loan agreement provided as follows:

“The lender shall be at liberty to transfer the property in its name in case of default by the borrowers on CONDITION that at the time of default and upon the lender giving notice of such default to the borrowers of one (1) month from the date of default, the lender and the borrowers shall carry joint valuation of the property and the lender shall pay to the borrowers such amount that shall be on and above the amount due to the lender as such time of default.”

Clause 5 of the loan agreement is self-explanatory and requires no interpretation. In the event that the plaintiffs defaulted in the repayment of the loan, the defendant was to give them one (1) month notice of the default. If the default continued after the expiry of the notice, the parties were to carry out a joint valuation of the suit property. If according to the valuation, the value of the property was higher than the loan owed by the plaintiffs, the defendant was to pay to the plaintiffs the difference. The defendant was thereafter at liberty to transfer the suit property to its name. DW1 admitted that the defendant neither served a default notice upon the plaintiffs nor carried out a joint valuation of the suit property with the plaintiffs. DW1 also told the court that the suit property was not transferred to the defendant but to him as a director of the defendant. From the foregoing, I find that the suit property was transferred to the defendant or DW1 contrary to the terms of the loan agreement to the extent that the requisite notice of default was not given and a joint valuation was also not carried out. The other irregularity was in the transfer of the property to DW1. The loan agreement provided that the property was to be transferred to the defendant and the instrument of transfer that was given by the plaintiffs to the defendant as part of security for the loan was executed in favour of the defendant. It is not clear how the transfer in favour of the defendant was used to transfer the suit property to DW1. The defendant did not place before the court a stamped and registered copy of the instrument of transfer.

Whether the plaintiffs are entitled to the reliefs sought in the plaint.

From the findings above, I am satisfied that the plaintiffs have proved their case against the defendant on a balance of probabilities. The plaintiffs are therefore entitled to the reliefs sought in the plaint. On the issue of costs, costs as a general rule follow the event. The plaintiffs have succeeded in their claim against the defendant. No reason has been put forward on the basis of which the plaintiffs can be denied the costs of the suit. The plaintiffs are therefore entitled to the costs of the suit.

Conclusion:

In conclusion, I hereby enter judgment for the plaintiffs against the defendant as follows;

1. I declare that the plaintiffs are the owners of all that property known as Flat No. A4 situated in Block A on L.R No. 209/3/10, I.R No. 78108.
2. A permanent injunction is issued restraining the defendant either by itself or through its agents from selling, transferring or in any way dealing with all that property known as Flat No. A4 situated in Block A on L.R No. 209/3/10, I.R No. 78108.
3. The defendant and its director, James Kigathi Ndegwa who is said to be registered on behalf of the defendant as the owner of all that property known as Flat No. A4 situated in Block A on L.R No. 209/3/10, I.R No. 78108 shall within sixty (60) days from the date hereof execute an instrument of transfer in favour of the plaintiffs transferring the said property back to the plaintiffs and shall return to the plaintiffs the original lease for the said property that was handed over to them as security.
4. The plaintiffs shall have the costs of the suit.

Delivered and Dated at Nairobi this 24th Day of September 2020

S. OKONG'O

JUDGE

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

Mr. Wamwayi for the Plaintiffs

Mr. Sudi for the Defendant

Ms. C. Nyokabi - Court Assistant