



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 249 OF 2012

ESTHER KABUGI NJUGUNA.....PLAINTIFF

VERSUS

MARTHA CHEBET.....1ST DEFENDANT

LAND REGISTRAR NAKURU.....2ND DEFENDANT

THE ATTORNEY GENERAL OF KENYA.....3RD DEFENDANT

POSTAL CORPORATION OF KENYA.....4TH DEFENDANT

J U D G M E N T

1. The initial plaintiff Francis Kabugi Njuguna (who has since died) filed the present suit on 13th August 2009 vide a plaint of even date. Upon his death, the plaintiff was substituted by his wife Esther Kabugi Njuguna. By the plaint which was amended on 31st October 2012 and further amended on 11th April 2018 the plaintiff stated that he entered into a sale agreement with the 1st defendant dated 3rd March 1999 where he agreed to sell to the 1st defendant land parcel **Nakuru/Ol'ongai Phase 11/244** for the consideration of KShs.600,000/=. The plaintiff however averred that the 1st defendant failed to honour the terms of the agreement and specifically did not pay the consideration as provided but fraudulently and in collusion with the 2nd defendant caused the plaintiff's land parcel Nakuru/Ol'ongai Phase 11/244 to be transferred to her name.

2. The plaintiff prays for judgment against the defendants severally for:-

(a) A permanent injunction restraining the 1st Defendant by herself, her agents/servants and all those persons allied to the 1st Defendant from transferring, entering, remaining, taking up, repossessing, selling, leasing out and/or interfering with the plaintiff's quiet use, enjoyment, possession and occupation of the suit property known as parcel No.Nakuru/Ol'ongai Phase 11/244.

(b) A Declaration that parcel No.Nakuru/Ol'ongai Phase 11/244 measuring 2.1 Ha belongs to the plaintiff and the 1st Defendant holds title fraudulently.

(c) An order for rectification of the Register and Cancellation of Title Deed issued to the 1st Defendant for land Parcel Nakuru/Ol'ongai Phase11/244 and issuance of title for the said land to the Plaintiff free from any charges, restrictions, inhibitions and any other encumbrances whatsoever.

(d) Costs and interests at court rates.

(e) Any other or further relief that this honourable court may deem fit to grant.

3. The 1st defendant filed a statement of defence dated 3rd May 2018 which she subsequently amended to introduce a counterclaim dated 28th October 2018 though the same is shown to have been filed on 25th October 2018. By the amended defence and counterclaim the 1st defendant averred that she was the legally and validly registered owner of land parcel Nakuru /Olongai Phase 11/244 after acquisition of the same for valuable consideration. She denied the allegations of fraud attributed to her by the plaintiff and stated the plaintiff was fully paid the purchase price in terms of the sale agreement. The 1st defendant averred that it was the plaintiff who had refused to yield vacant possession of the suit property. By the counterclaim the 1st defendant inter alia prayed that:-

- a. The Plaintiff's suit against the 1st Defendant be dismissed with costs.
- b. A declaration that parcel No.Nakuru/Ol'ongai Phase 11/244 measuring 2.1 Ha belongs to the 1st Defendant and she legally holds the title.
- c. An order for payment of rent by the Plaintiff to the 1st Defendant as from May 1999.
- d. An order for compensation by the plaintiff to the 1st Defendant for improper unfair and misuse of the land.
- e. A permanent injunction restraining the Plaintiff by herself, her agents, servants and all those persons allied to her from transferring with the 1st defendant's quite use, enjoyment, possession and/or occupation of the suit property known as parcel of land no. Nakuru/Ol'ongai Phase11/244 measuring 2.1 Ha.
- f. Costs of this suit together with interest thereon for such period and as such rate as this Hounable court may deem appropriate.
- g. Any other relief that the honourable court may deem just and fit to grant.

4. The 2nd defendant, Land Registrar Nakuru filed a statement of defence through the Attorney General. He denied the particulars of fraud alleged against him and averred he effected the transfer of the suit land in the normal cause of his duties and in exercise of the mandate conferred upon the office by statute.

5. The 4th Defendant, the Postal Corporation of Kenya were enjoined to the suit on the application of the plaintiff as they held a charge over the property. Though the 4th Defendant appeared and appointed counsel, they neither filed a defence nor participate at the trial. During the trial the plaintiff Esther Kabugi Njuguna, testified as the sole witness in support of the plaintiff's case. Likewise the 1st and the 3rd defendant testified as the sole witnesses in support of their respective cases.

EVIDENCE BY THE PARTIES

6. The plaintiff testified that she was the legal administrator of her late husband's estate and was substituted to proceed with present suit on behalf of her deceased husbands' estate. She placed reliance on her witness statement made on 11th April 2018 and the bundle of documents annexed to the further amended plaint which were collectively admitted in evidence as listed as "**PEX1 to 10**". It was the plaintiff's evidence that her late husband had entered into a sale agreement to sell land parcel Nakuru/Ol'ongai Phase 11/244 to the 1st defendant for Kshs.600,000/= . She stated the 1st defendant never paid the amount but she somehow got the land transferred to her name. The plaintiff stated her husband never attended the Land Control Board and never signed a transfer in favour of the 1st defendant .

7. The plaintiff stated two of her children who were dead were buried on this land and that also her husband who died in 2010 was buried on the same land. The witness explained that she had a 3 bedroomed residential permanent house on the land. She stated her late husband never pursued the completion of the sale agreement dated 3rd March 1999 and explained that her husband had been imprisoned for 5 years from 2000 until 2005 when he was released . The witness further stated that the 1st defendant had never occupied and/or gone to the land even though as per the records, the title was transferred to her name on 6th April 1999.

8. In cross examination the witness admitted her husband had informed her that he wanted to sell the land and she accompanied him to the lawyer's office (Chesire advocate) who prepared the sale agreement. She stated her husband left the land title with the advocate who was to proceed with the transaction after the 1st defendant paid the purchase price. She maintained no money was paid to her husband towards the purchase price by the 1st defendant and/or Chesire advocate. She stated the 1st defendant was to be financed in the purchase transaction by the 4th defendant who were her employers. The witness explained that in 2006 her and her husband bought one (1) acre of land in Kinangop after he left prison from sale of proceeds of a plot they sold at Pipeline estate.

9. The 1st defendant Martha Chebet testified as DW1 and she relied on her witness statement and the bundle of documents filed by her. She testified that she used to work with the Postal Corporation of Kenya and it was her evidence that her employer financed her to purchase the suit property through a mortgage/charge. She stated she identified the property and approached the plaintiff to sell the land to her and that following agreement they had a sale agreement prepared by Chesire advocate of Chesire & Co. Advocates. The 1st defendant stated that although the purchase price payable to the plaintiff was Kshs.600,000/=,the agreement for sale she submitted to postal corporation indicated the consideration was Kshs.1,000,000/=. It was the 1st defendant's evidence that the Postal Corporation processed the mortgage and released a cheque for Kshs.800,000/= to Chesire & Co. Advocates after the mortgage transaction was completed. She affirmed a charge was registered in favour of the Postal Corporation before the money was released to the advocates.

10. Under cross examination by Mr. Kanyi advocate for the plaintiff, the 1st defendant affirmed the sale agreement was made on 3rd March 1999 at the law firm of Chesire & Co. Advocates who the 1st defendant confirmed were in the panel of advocates for Kenya Post and Telecommunications and therefore the Postal Corporation had no problem with the firm acting for her. The 1st defendant stated she was entitled to a loan of Kshs.800,000/= and that she submitted to the corporation a sale agreement for Kshs 1,000,000/=. She confirmed the title was retained by Mr. Chesire since he was to prepare the charge for the Postal Corporation. She further affirmed as per the sale agreement the purchase price was to be paid within 30 days from the date the agreement was executed but stated there was a delay in completion.

11. The 1st defendant admitted the land title was transferred to her in April 1999 before the purchase price was paid. She stated the charge

was prepared in February 2000 and that Chesire advocate was paid Kshs. 800,000/= vide a cheque in March 2000. She stated Postal Corporation could not have paid the money to an individual and that explained why the money was released to the lawyer.

12. The 1st defendant further stated the plaintiff and his family were residing on the suit land at the time of purchase but left the land after she purchased the same. The plaintiff however came back to the land in 2002 and she allowed them to reside on the land since she was not staying on the land. She stated the plaintiff had purchased land in Kinangop but opted to come back as it was too cold there.

13. The land Registrar testified as DW2 and it was his evidence that land parcel Nakuru/Ol'rongai Phase II/244 was first registered in the name of Francis Kabugi Njuguna on 4th August 1993. A charge over the land in favour of Barclays Bank of Kenya Ltd registered on 29th December 1994 was discharged on 13th April 1999. The Land Registrar further testified that the land was transferred to Martha Chebet the 1st defendant on 6th April 1999. He stated there was an application made to the Land Control Board for transfer and a letter of consent to transfer was issued on 18th March 1999. The land was subsequently charged to Postal Corporation to secure Kshs.800,000/= on 1st February 2000. The Land Registrar stated that on the basis of the documents presented at the Lands office, the transfer in favour of the 1st defendant was validly effected.

14. In cross examination the Land Registrar stated there was no copy of the signed transfer amongst the documents they held and he could therefore not affirm whether the transfer was presented for registration. He further noted the land board application form did not have any endorsement of the Land Control Board and neither were any minutes of the Land Control Board available. He stated there was no copy of the letter of consent of the Land Board for the charge in favour of postal Corporation.

15. The Land Registrar however explained that once they have a letter of consent from the land control board they treat the same as authentic and proceed to effectuate the transaction in support of which the consent was given.

16. After close of the trial the plaintiff and the 1st defendant filed their final written submissions. The 2nd and 3rd defendants elected not to file any final submissions. The 4th defendant did not participate in the hearing and filed no submissions. After reviewing the pleadings, the evidence and having considered the submissions filed by the parties, the following issues arise for determination.

1. Whether there was a valid agreement of sale between Francis Kabugi Njuguna (the original plaintiff) and the 1st defendant, and if so, whether the terms of the agreement were fulfilled by the 1st defendant?

2. Whether the transfer of the suit property from the plaintiff to the 1st defendant was validly obtained/procured?

3. Whether the plaintiff is entitled to the reliefs sought in the plaint or it is the 1st defendant who is entitled to the reliefs sought in the counterclaim ?

17. The issues in this matter revolve around an agreement of sale of the suit property dated 3rd March 1999 entered into between Francis Kabugi Njuguna (deceased as the vendor and the 1st defendant as the purchaser. According to the 1st defendant although the sale was for Kshs.600,000/= and she and the deceased signed an agreement for this amount, she testified she submitted to her employer, the 4th defendant an agreement showing she was purchasing the land for Kshs1,000,000/=. No evidence was led to show the deceased signed two agreements, one for Kshs600,000/= and the other for Kshs1,000,000/=. The pleadings and the evidence by the plaintiff only acknowledged the agreement where the consideration was Kshs600,000/=. This was the agreement that the plaintiff tendered in evidence. The sale agreement for the consideration of Kshs.1,000,000/= was not proved to have been executed by the deceased and in my view must have been manufactured by the 1st defendant to meet her own designs. I have examined the sale agreement produced in evidence by the plaintiff indicating the consideration of Ksh600,000/= and the sale agreement exhibited by the 1st defendant indicating the consideration of Kshs.1,000,000/= and it is apparent the first page of the sale agreement for the consideration of Kshs.1,000,000/= was substituted while the executed page two of the sale agreement signed by the deceased was retained. The format and the font of the first page of the sale agreement where the consideration is shown as Kshsh1,000,000/= is to naked eye different from that of the first page of the agreement acknowledged by the plaintiff where the consideration was Kshs.600,000/=. If indeed the two agreement were made at the same time there would have been no such variations.

18. On the issue however whether the plaintiff and the 1st defendant had a valid sale agreement and whether the 1st defendant fulfilled the terms of that agreement, there is undisputed evidence that the deceased plaintiff entered into the sale agreement dated 3rd March 1999 to sell the suit property to the 1st defendant for the consideration of Kshs.600,000/=. The wife of the deceased who was substituted as the plaintiff following the death of her husband acknowledged this agreement. The 1st defendant admits the sale agreement. Accordingly the court holds and finds the plaintiff and the 1st defendant had entered into a valid sale agreement dated 3rd March 1999 for the purchase by the 1st defendant of the plaintiff's land parcel Nakuru/Ol'ongai phase 11/244 for the consideration of Kshs.600,000/=.

19. The sale agreement was quite brief and carried 7 clauses which I reproduce hereunder for ease of reference:-

1. That the vendor is the registered owner of all that pieces of land known as Nakuru/Ol'ongai Phase 11/244 comprising of 2.1 hectares with permanent structure self-contained house 3 bedroomed or thereabouts.

2. That the vendor hereby agrees with the purchaser for the sale to the purchaser of all his rights and title over the said plot.

3. The total purchasing price is Kenya shillings Six hundred thousand (Kshs.600,000) to be paid in full to the vendor by the purchaser's employers M/s Kenya Posts and Telecommunications within a month's time.

4. *The purchaser has seen the plot being sold to her and she is satisfied with its location and the state of the property.*
5. *The vendor undertakes to sign all relevant documents to facilitate successful transfer of the said property to the purchaser.*
6. *That purchaser take possession of the said plot and developments therein on full payment of the purchase price.*
7. *The purchaser shall be responsible for consent, transfer and agreement expenses.*

20. Under clause 3 of the sale agreement the purchase price of Kshs. 600,000/= was to be paid in full to the vendor within a month's time (30 days) from the date of the agreement. There was no provision that the property the subject of the sale was to be offered as security by the 1st defendant to raise the purchase price. The 1st defendant was to take possession of the land upon full payment of the purchase price. The sale agreement did not provide that Chesire & Company advocates were to act for either of the parties though they drew the agreement and one Mr. C O Chesire advocate witnessed the signatures of both parties. While the drafting of the sale agreement may have left a lot to be desired the court cannot read into the agreement that which was not provided and will to the extent that it was explicit on the terms interpret the same as presented.

21. The plaintiff both in the pleadings and in the evidence stated the 1st defendant did not honour the terms of the agreement and specifically did not pay the purchase price as agreed or at all. The plaintiff denied signing any transfer in favour of the 1st defendant in regard to the suit property. The plaintiff contended that the transfer of the land effected to the 1st defendant on 6th April 1999 could only have been fraudulently procured since the purchase price had not been paid as per the agreement and neither had he signed the transfer. The plaintiff also denied attending the land control board for purposes of obtaining the consent of the board for the transfer. The 1st defendant in her evidence stated that she and the deceased attended the land control board and obtained consent. She stated the plaintiff was paid the purchase price through the advocates office, M/s Chesire & Company Advocates but she produced no evidence to demonstrate that indeed the plaintiff was paid the money by the advocates. All the 1st defendant pointed to was cheque for Ksh.800,000/= that was made out by the Postal Corporation in favor of Chesire & Company Advocates exhibited in the 1st defendant's bundle of documents. There was no acknowledgement by the plaintiff of receipt of the money from the said Advocates. The defendant equally did not explain how or when the money was disbursed by the advocates. The amount paid to the advocates was ksh.800,000/= yet the amount payable to the plaintiff as purchase price was Kshsh.600,000/= . How and when was the money disbursed by the advocate, if at all ?

22. The cheque for Kshs.800, 000/= was remitted to Chesire & Co. Advocates in March 2000 yet the 1st defendant had caused the land to be transferred into her name in April 1999. The plaintiff insisted he never signed a transfer of the land to the 1st defendant and/or indeed any land board forms. Although the 1st defendant exhibited an application to the land board that had allegedly been signed by the deceased plaintiff and a letter of consent form there was no copy of the signed and registered transfer form. The Land Registrar who testified as DW2 stated they did not have any copy of the registered transfer in their records. Considering the plaintiff had pleaded he had not been paid the purchase price and had not signed the transfer and/or the land board application forms, it was incumbent on the 1st defendant to adduce evidence of payment of the purchase price and execution of the transfer and land board application forms. As regards payment, evidence of disbursement of the purchase price from M/s Chesire & Company Advocates to the plaintiff was crucial. It was not clear why Chesire advocate could not be availed as a witness. As the plaintiff had denied attending the land board with the 1st defendant the minutes of the appropriate meeting of the land board where the application was considered would have been essential. No such minutes were availed in evidence.

23. The burden to prove payment of the purchase price rested on the 1st defendant. In the instant matter there is no dispute that the transfer of the suit property to the 1st defendant was effected before the purchase price was paid to the plaintiff. The transfer could only be valid if the purchase price could be shown to have been paid. If the purchase price was not paid, the transfer would be ineffectual as it would have been effected without any consideration. Given that the transfer of the land was effected to the 1st defendant before she had paid the purchase price to the plaintiff, and the plaintiff contends the transfer was carried out behind his back it was imperative for the 1st defendant to prove that the plaintiff was actually paid the purchase price. I am not satisfied the 1st defendant proved that the purchase price was paid to the plaintiff.

24. Section 107, 108 and 109 of the Evidence Act, Cap 80 Cap of the Laws of Kenya make provision as to who bears the burden of proof and provide as follows:-

107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that 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.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109 . Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided

by any law that the proof of that fact shall lie on any particular person.

25. From the above provisions it is clear that the defendant had the burden to prove that the plaintiff was paid the purchase price. The 1st defendant did not discharge that burden. It was not enough for the 1st defendant to say that the money was released to Chesire & Co. Advocates. There was no proof that Chesire & Company Advocates were acting as agents for the plaintiff. The Agreement of sale was not express that the Advocates were to represent the plaintiff in the transaction. If anything the agreement provided the 1st defendant's employer was to pay the purchase price to the plaintiff within one month from the date of the sale agreement. That did not happen.

26. On the evidence therefore, although I find there was a valid agreement between the original plaintiff, Francis Kabugi Njuguna (now deceased), and the 1st defendant, I nonetheless do not find the 1st defendant fulfilled the terms of the sale agreement dated 3rd March 1999.

27. There was no evidence that the plaintiff was paid the purchase price and consequently there was lack of consideration for the contract. The lack of consideration vitiated the contract and the same was rendered null and void.

28. On the issue whether or not the transfer of the suit property was validly effected to the 1st defendant by the plaintiff there is contestation as to whether the plaintiff actually signed the transfer. The plaintiff denied that he did. That in effect shifted the burden to prove that the plaintiff signed the transfer to the 1st defendant. The instrument of transfer alleged to have been signed by the plaintiff was not tendered in evidence. It was not indicated by the 1st defendant when, if at all, the transfer was executed and before whom since a transfer relating to a disposition of land required that the signatures of the persons signing be witnessed and attested as provided under the law. Under the repealed Registered Land Act, Cap 300 Laws of Kenya Sections 109 and 110 provided in what manner such a transfer required to be executed. Section 110 (1) and (2) of the Registered Land Act provided as follows:-

110 (1) Subject to subsection (3), a person executing an instrument shall appear before the Registrar or such public officer or other person as is prescribed and, unless he is known to the Registrar or the public officer or other person, shall be accompanied by a credible witness for the purpose of establishing his identity.

(2) The Registrar or public officer or other person shall satisfy himself as to the identity of the person appearing before him and ascertain whether he freely and voluntarily executed the instrument and shall complete thereon a certificate to that effect.

29. The 1st defendant did not explain how the transfer was executed. In the face of the denial by the plaintiff that he did not sign a transfer, it was incumbent upon the 1st defendant to lead evidence as to how the transfer was executed, and if need be, call as a witness the person who witnessed the execution. The burden of the 1st defendant was not made any lighter when the Land Registrar testified. The Land Registrar affirmed they did not hold in their records a copy of the instrument of transfer that was registered putting to question whether in fact there was one or if it was there, whether the same had been signed by the plaintiff. The Land Registrar is the custodian of all land records and is expected to have custody of all copies of registered instruments and when any such instruments are not available questions of complicity on the part of the office are bound to arise.

30. The transfer in the instant matter without doubt was effected before the purchase price was paid and that raises the question whether the plaintiff could have willingly have executed the transfer without being paid and/or without a firm undertaking that he would be paid. There is no evidence that the 1st defendant's employer, the postal corporation had as at the time the transfer was effected to the 1st defendant given commitment to pay any money to the plaintiff either directly or through any agent. In conveyancing parlance, the normal practice where a person is being financed and the subject matter of the transaction is to be taken as security, is for the advocates of the financier to give a professional undertaking on behalf of the financier to the vendor's advocates for the payment. In the present matter no correspondence to such effect was exhibited.

31. At the time the postal Corporation charged the property in February 2000 the 1st defendant had already been registered as the owner of the suit property. There was nothing to link the charging of the property to the sale transaction as there was no communication between the plaintiff and the 4th defendant.

32. According to the plaintiff after the expiry of 30 days he assumed the transaction had aborted and only discovered much later that the 1st defendant had somehow caused the transfer of the land to her name. That precipitated the filing of the present suit. I find no evidence upon which I can hold the plaintiff executed the transfer registered in favour of the 1st defendant.

33. Having found and held that there was no proof of payment of the purchase price to the plaintiff and/or that the plaintiff had signed the transfer of the suit land in favour of the 1st defendant, it follows that the sale transaction was voidable on account of lack of consideration and that the transfer effected in favour of the 1st defendant was ineffectual and could not confer any interest to the 1st defendant. There was no evidence that M/s Chesire & company Advocates were agents of the plaintiff. If anything the firm appears to have acted in concert with the 1st defendant to defraud the plaintiff. There is no evidence that the firm was involved in drawing the transfer but at least there is evidence that a cheque for Kshs800,000/= was made out in favour of the firm by the 1st defendant's employers. The 1st defendant had a stake in this money since the plaintiff was only entitled to kshs600,000/= and hence the 1st defendant must have been interested in how the money was disbursed. At the time the money was paid by Postal Corporation there is evidence that the plaintiff was facing several criminal cases in court which eventually resulted in his conviction and imprisonment and could have been disoriented and the 1st defendant could have taken advantage.

34. On a balance of probabilities I find the evidence of the plaintiff more likely to be true as opposed to that of the 1st defendant. It is noteworthy this was a case where the court was faced with choosing either to believe the evidence of the plaintiff or the 1st defendant. There were glaring gaps in the 1st defendant's evidence which militated against the same being believable. Why for instance was the transfer

registered separately without the charge when the two could be registered simultaneously? Who drew the transfer and who attested the execution, and if it was a lawyer, why wasn't such lawyer called as witness?. And why wasn't the executed instrument of transfer available and/or any payment receipts for the registration of the transfer at the Lands office?

35. The net result is that I have come to the conclusion that the transfer in favour of the 1st defendant was irregularly procured and was not effectual. Further I find and hold that no consideration was paid by the 1st defendant for the land and that vitiated the contract of sale.

36. In the circumstances I hold that the plaintiff has proved her case on a balance of probabilities and is entitled to judgment. The 1st defendant's counterclaim is not proved and I dismiss the same.

37. I therefore enter judgment for the plaintiff and make the following final orders:-

1. A declaration is hereby issued that land parcel Nakuru/Ol'ongai phase II/244 belongs to Francis Kabugi Njuguna (deceased).

2. The Land Registrar Nakuru is directed to cancel the registration of Martha Chebet as owner of land parcel Nakuru/Ol'ongai Phase 11/244 and to revert ownership to Francis Kabugi Njuguna(deceased).

3. The Kenya Postal Corporation of Kenya is directed to unconditionally discharge the charge registered on 1st February 2000 against the title Nakuru /Ol'ongai/phase 11/244.

4. The plaintiff is awarded the costs of the suit and the counterclaim.

Judgment dated signed and delivered at Nakuru virtually this 24th day of September 2020.

J M MUTUNGI

JUDGE