



COPY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 377 OF 2009

SUSAN WAMBUI NJENGA.....PLAINTIFF

- VERSUS -

JUSTINE JELAGAT BENJAMIN.....1ST DEFENDANT

ERNEST GRAHAM BENJAMIN.....2ND DEFENDANT

JUDGMENT

[1] The plaintiff claim against the defendant is for an order that the defendants be restrained by themselves their servants, agents or anyone else claiming title under them from transferring, alienating, trespassing, damaging, disposing or in any other way interfering with all that piece of land known as Title No. Cr. No. 29883 Subdivision No.9952 (original No. 9617/6 Section 1/Mainland North. That an order do issue to allow the plaintiffs to live on the suit land. Damages and mesne profits plus costs of this suit.

[2] The plaintiff allege that the defendants were jointly registered as owners of the suit land. That by an agreement dated 18th July 2008, the plaintiff and the defendant entered into an agreement for the purchase of the suit land. That the purchase price was Kshs. 7,000,000.00 which the plaintiff allege the plaintiff paid and the said sum was acknowledged by the defendants who released the original documents of the suit land, a duly signed transfer, a copy of the personal identification Number (P.I.N) and the identity card, rates banking slip for Kshs. 54,390/- and land rates invoice for Kshs. 19,282/58. A letter of consent to transfer and a copy of passport.

The plaintiff says she was unable to procure the transfer into her names despite having all the completion documents. That the 1st and 2nd defendants proceeded to re occupy the suit land disregarding the plaintiffs right to occupy the suit land as per agreement dated 18th July, 2008. On 10th February the plaintiff wholly withdrew the suit against the 2nd defendant.

[3] The 1st defendant filed a defence and counter-claim on 17th November, 2009 denying the claim. She alleged that there was fraudulent representations, inducement and coercion and forgery. She denied receiving the Kshs. 7 million purchase price. In her counterclaim the defendant states that the plaintiff and her husband Francis Chappi who were her neighbours, approached the plaintiff saying she had black money they would manufacture into legal tender on payment. She explained how her Kshs. 120,000/- was taken to buy chemicals to 'wash' the black money but she later came to say Kshs.

7,000,000.00 to Kshs. 10,000,000.00 was needed to buy enough chemicals to 'wash' US dollars which would later be Kshs. 50,000,000.00. That on saying she did not have the money they requested anything of value in the form of original Title Deed to secure them a loan from financial institutions. The defendant explained how she took the original title deed without her husband's knowledge which she insisted be transferred into her name and Kshs. 100,000.00 to facilitate the said transfer. That on 18th July 2008 the plaintiff requested for the defendants Identity card and the second respondents identity card. She gave them to the plaintiff and both of them went to the plaintiff's advocate Mr Mulongo. That the 2nd defendant was unavailable and the plaintiff said she would forge his signature. The defendant went to explain how the plaintiff and her husband requested the 1st defendant to leave her house, where the defendant would 'safely' 'make' the Kshs 50,000,000.00 and the plaintiff got the defendant an alternative accommodation at Bamburi for Kshs 8,000 per month. The plaintiff also paid the transport for the plaintiff's household goods from her house to Bamburi. She explains in her counter claim how she was defrauded into signing her house off to the plaintiffs. She prayed that the agreement of 18th July 2008 be declared null and void and that she is the owner CR. 29883 subdivision number 9952 (original no. 9617/6) Section 1 Mainland North.

[4] Susan Wambui Njenga the plaintiff gave evidence that in the year 2008 around 18th July 2008, she wrote a witness statement. which she produced in court. She produced the agreement she entered into with the defendants. She said the title is 29883 subdivision 992 Section 1 Mainland North. She said the property was for borrowing Kshs. 1 million. That it was drawn before Mulongo Busieka & Co. Advocates. She said the purchase price was paid in cash in Kenya shillings. That on signing the agreement, she was given the transfer, acknowledgment letter. She produced the transfer from the 1st owner Job Mwadime Tole to Justine Jelangat Benjamin and Ernest Graham Benjamin, the original deed plan. She said the original title was released to her. She produced demands for City Council rates and Land rates. The plaintiff produced a transfer dated 18th July 2008 signed by Ernest Graham and a lawyer. Also produced was PIN and identity card of Justine Jelagat, copy of PIN and passport of Ernest Benjamin. She said that all these documents were given on the 18th of August . The plaintiff denied they had swindled the 1st defendant of her property. She said she does not have the possession of the house. She said that she registered the order from Anzangalala J on the ruling made on 23rd May 2010. She said the 1st defendant acknowledged the money in her own handwriting. The acknowledgment was produced in court.

[4] On cross-examination the plaintiff said that, when she attended Mulongo Busieka the lawyer, she was with 1st and 2nd defendant. She said she paid the money in cash. She said she had kept the money in the house. She stated that the handwritten document was done in the lawyer's office, that the agreement was not signed anywhere by the lawyer and the 2nd defendant. She stated that she received on the 18th July 2008;

- a) Sale agreement
- b) Transfer
- c) Original Title
- d) Original previous transfers
- e) Acknowledgement
- d) Copy of the identity card and passport.

The witness said that later M/s Mulongo Busieka & Co advocates instructed Makini Auctioneers to levy distress against her for arrears of rent on the said house she had purchased in his office. The witness was shown the court order she registered in the land office where Clause 3 of the order said that she showed as the owner of the house. A clause that was forged and a ruling made in that respect by Kasango J. The plaintiff said she got the order from the advocate's office.

[5] On further cross examination the plaintiff changed her mind and said she now received the title document on the suit land on 2nd August 2008. She said that she was not aware that the original certificate was gazetted as lost but was aware there was a provisional title. The plaintiff on being asked by the court what denomination the Kshs. seven million she paid the 1st defendant was, said the money was in US Dollars. That she changed the same to Kenya shillings in the black market. That she had no receipt for such change. She said she paid lawyer's fees Kshs. 50,000/- but she has lost the receipt. She said the acknowledgment was done by the 1st defendant in the lawyers office. Her husband was there and said nothing. That she entered the house on 18th of August, 2009.

[6] The 1st respondent first called Mr. Daniel Gulu a Chief Inspector of Police (C.I.P) No. 231663. Who gave evidence that he is a forensic document examiner working full time with the Director of Criminal Investigation Nairobi. He said that he had been a document examiner for six (6) years. That his duties were examination of among others to examine handwriting and signatures disputed seals and stamp impressions. He said that on 16th September 2014 he received in his laboratory from PC Margret Omorumba of C.I.D. Central Nairobi Exhibition No 4 marked A5 - the questioned documents form and B - the known signatures of Ernest Benjamin. There was one request to compare whether the pointed signature was made by the author of the known signature. His conclusion was that the signatures were made by different authors, meaning Ernest Benjamin did not sign the questioned document. He finally stated that the signature in the agreement differs from the known signature of Ernest Graham Benjamin. Justine Jelegat Benjamin the 1st defendant adopted her statement and relied on the same. She explained how the plaintiff and the fiancée Francis Chappi was their neighbour. How they entered into an arrangement to change black money into legal tender. How she was made to buy a chemical to clean black money for Kshs. 120,000/-. How they took her to their house showed her how black money is 'washed' to become Kenyan legal tender. They required from her Kshs. 7 million to buy the said chemical to clean black money to be Kshs. 50 million. That she said, she did not have that money. She explained how the plaintiff then told her she could give her title of the suit property to take a loan to buy the chemical. She said her husband did not know, he was ailing and bedridden. She gave the plaintiff the title of the house. She said on 18th July 2008 she went to M/s Mulongo Busieka & Co. advocates office. The purpose was to make an agreement and use her title deed to get a loan from the bank. She said that it was only her and the defendant who went to the lawyers office. The plaintiff had told the 1st defendant not to tell anyone else because it was illegal to make counterfeit money in Kenya.

[7] The 1st defendant said she went to the lawyer's office. She signed her part but she did not sign the 2nd defendant's part. She said she never received, the money at all and there was no payment of any kind to her. She denied having written the acknowledgment produced in court. She stated that she was not selling the house. The 1st defendant said that the plaintiff had told her to move out of her house and let the plaintiff stay in that house because it was the best place for the plaintiff and her fiancée Chappi to make the black money. The plaintiff rented her a house for Kshs 8,000 and she moved out and the plaintiff moved into her house. The plaintiff then stopped to talk to the 1st defendant. This is when she went back to M/s Mulongo Busieka & Co Advocates and asked that a letter be sent to the plaintiff demanding rent. A letter dated 23rd July 2009 was produced in court. The 1st defendant said she needed the house. The plaintiff was in occupation and had ran away to Nairobi. The 1st defendant went to Bamburi Police station and reported the whole story. She said she did not get the original title from the plaintiff, She had the title advertised and a copy was issued. She has since charged the title to Kenya Commercial Bank. She said that this area where the title is situated is subject to the Land Control Consent. None was obtained. That the plaintiff when she learnt there was a copy of the title made, she had the 1st defendant charged in Mombasa Criminal Case No. 1798 of 2011 for obtaining registration by false pretences. The case is still pending in court. She said her husband the 2nd defendant died in April 2009 and this case was filed in October 2009.

[8] Justu Mbogo DW3 gave evidence that he was working at M/s Mulongo Buseika & Co. Advocates. He said the plaintiff and the defendant came to make an agreement at their offices. He said there was no payment done at all. That he knew this because he was the only person doing all bankings and that if there was any payment, he would have known. That the 1st defendant later came and asked that a distress be done on the plaintiff. The witness said that the agreement that was to be made between the plaintiff and the defendant was for the purposes of getting a loan.

The question for determination in this case is whether the 1st defendant should be restrained from transferring, alienating, selling, trespassing, damaging or disposing the suit land and whether the plaintiff should be allowed access, to reside/or lie in the suit land and whether or not the plaintiff is entitled to any mesne profits.

Did the plaintiff purchase this house as she alleges?

[9] This property was registered in the names of the 1st defendant and the 2nd defendant as joint tenants on the 8th June 2004. The agreement for sale dated 18th July 2008 was between the 1st and 2nd defendants and the plaintiff. It is allegedly signed by both the defendants. It was made and drawn by M/s Mulongo Busieka & Company advocates of Zuljanah Centre 2nd floor Moi Avenue Mombasa. A Mr. Peter Mulongo advocate of P.O. Box 99327-80100 Mombasa witnessed the signing of the agreement by Justine Jelagat Benjamin and Ernest Graham Benjamin, the 1st and 2nd defendants herein. Whereas the 1st defendant does not dispute the signing of the same. It is denied that Ernest Graham Benjamin signed the agreement as he was bedridden and ailing. The first defendant called CIP Daniel Gulu a document examiner with Directorate of Criminal Investigation Nairobi who said the agreement was not signed by the 2nd defendant. This fact was not challenged by the plaintiff at all. Mr. Peter M. Mulongo who allegedly witnessed the signature being made and who has or had an office here in Mombasa was not called to give evidence at all. The 2nd defendant's known signature was taken from his British passport which was produced before this court. There is therefore no doubt the 2nd defendant did not sign the alleged agreement for sale. The plaintiff alleged she paid Kshs. seven million in Kenya Shillings in cash. This fact was completely denied by the 1st defendant. The plaintiff produced no evidence that she had the money, either by showing bank accounts and/or statements or bank withdrawals or any form of payment to her. She alleged she had it in cash in U.S. Dollars. She however said when she went to the advocates office she paid in Kenya Shillings and she changed in the black market. She had no receipts for such exchange or even any other evidence from the person who changed the money for her or any witness that she had that kind of money. The plaintiff said she paid the advocate Kshs. 50,000/- as his fees. There was no receipt of such money from the advocate at all. The said advocate was not called to say that he received such fees for the sale agreement or he saw the money change hands in his office.

[10] Mr. Justus Mbogo said he was a clerk in the firm of M/s Mulongo Buseika & Company Advocates. That he remembers the plaintiff and 1st defendant coming to the office. That no money was paid at all. That the plaintiff and the defendant were making agreements for taking a loan in the bank. That if there was any payment he should have known as he was the one that was taking the money to the bank.

[11] The plaintiff produced an acknowledgment of receipt of money by the first defendant dated 18th July 2008. The same was acknowledging Kshs. 7,000,000.00 cash from the plaintiff. She was acknowledging on her own behalf and on behalf of the 2nd defendant. The cash was in respect of sale of her plots to the plaintiff. There was another letter of the same date giving consent to transfer plot no. 9952 to the plaintiff. The consent was by herself and on behalf of the husband the 2nd defendant. These two documents are vehemently denied by the 1st defendant. She says she did not write the same and they are a forgery. Two issues then arise on the said documents. First, why was the 1st defendant writing an acknowledgment on her own handwriting in an advocate's office when both parties had gone to the advocate for that purpose? Why was the document not witnessed by the advocate, who had just drawn and witnessed signatures on the agreement for sale? Why was the advocate not called to say he witnessed the acknowledgment being written and signed? Further why did the second defendant who was allegedly in the advocates office not acknowledge the money and give his consent when he was a joint tenant? Secondly, can a joint owner in a tenancy give consent for the co tenant? If that was done without the co tenant, is the consent then valid? It is my conclusion that this consent cannot be valid. If it was made on the 18th of August 2008 as alleged, it should have been witnessed by the advocate Mr. Mulongo and the 2nd defendant. It was therefore not made in the advocate's office. In any case the consent to transfer the portion of land belonging to the 2nd defendant was illegal. The 1st defendant had no capacity to do so on a property jointly owned and when the 2nd defendant was still alive.

[12] The agreement for sale being forged against the 2nd defendant, the consideration of Kshs.

seven million having not at all been proved to have been paid, The acknowledgments being invalid for the reason that the 1st defendant denies ever having written them and the consent to transfer the suit property for the second defendant being a nullity. I find that there was no sale at all. Indeed when this matter came before Anzangalala J and he gave very specific orders on 17th May 2010, the plaintiff herein had the order extracted and illegally added the following order which the judge never gave.

3. *"That the 1st and 2nd defendant/respondents be and are hereby ordered to execute all necessary transfer documents over title no. 29883 subdivision No. 9952 (original no. 9617/6) Section 1 Mainland North on favour of the plaintiff/applicant and the plaintiff/applicant be registered as absolute owner thereof".*

This order was also another forgery. It was set aside by Kasango J on 20th July 2012. It would appear to me that the plaintiff has tried all ways to get registered as the owner of the defendants property. This she cannot have. Forging and faking documents will not afford her any relief or rest in this matter. The court has a duty to protect the defendants to protect them from such onslaught. The prayers for injunctive orders prayed in para 14 (a) and access to reside and/or live in title number CR. NO. 29883 subdivision no. 9952 (original no. 9617/6) section 1 Mainland North are dismissed as being without any merit at all. The claim for damages and mesne profits is dismissed with costs. For the avoidance of doubt I find as a fact that this suit land belongs to the 1st and 2nd defendants. The counter claim succeeds and is allowed with costs as prayed in the defence.

Dated and delivered in open court at Mombasa this 14th day of November 2014.

S. MUKUNYA

JUDGE

14.11.2014

In the presence of:

Mr. Ratemo Advocate for the 1st defendant'