



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 7 OF 2007

JOSEPH WARARI GATHOGA..... PLAINTIFF

=VERSUS=

CHARLES OKINDO OTEKI.....1ST DEFENDANT

MARTHA WAMAITHA NGUNJIRI

(sued as the administrator of the estate of

JACKSON GITHUA NGUNJIRI).....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

Background

At all material times, all that parcel of land known as Nairobi/Block 63/348 (hereinafter referred to as “the suit property”) was registered in the name of Jane Wangari Njuru (hereinafter referred to only as “the plaintiff”). The plaintiff was registered as the owner of the suit property on 16th March, 2000. The suit property is leasehold from the City Council of Nairobi for a period of 99 years with effect from 1st January, 1968. The plaintiff was issued with a certificate of lease on 16th March, 2000. On 25th August, 2005, the suit property was transferred and registered in the name of Jackson Ngunjiri Githua, deceased (hereinafter referred to only as “the second defendant”) who was issued with a certificate of lease on the same date. The second defendant is said to have acquired the suit property from the plaintiff at a consideration of Kshs. 1,000,000/=. On 2nd February, 2006, the suit property was once again transferred and registered in the name of the 1st defendant, Charles Okindo Oteki who is said to have acquired the same from the 2nd defendant at a consideration of Kshs. 2,300,000/=. The 1st defendant was issued with a certificate of lease on 2nd February, 2006.

The plaintiff brought this suit against the 1st and 2nd defendants on 28th March, 2007 through her attorney, Joseph Warari Gathoga. The plaintiff amended on 19th October, 2007 to add the 3rd defendant to the suit and re-amended on 22nd May, 2015 to substitute the 2nd defendant with his legal representative following his death on 11th March, 2009. The 1st defendant filed his statement of defence on 30th January, 2008 while the 2nd and 3rd defendants filed their statements of defence on 6th February, 2008 and 11th February, 2008 respectively. The plaintiff filed a reply to the 1st and 2nd defendants’ defences on 11th February, 2008. The 2nd defendant filed what was referred to as statement of defence to the re-amended plaintiff on 17th July, 2017.

The plaintiff’s case:

The plaintiff was at all material times residing in the United States of America (U.S.A). In her re-amended plaintiff, the plaintiff averred that she was registered as the proprietor of the suit property on first registration. The plaintiff averred that since she was registered as the proprietor of the suit property on 16th March, 2000, she had remained the proprietor of the property which she had fenced. The plaintiff averred further that she still had in her possession the original title for the suit property. The plaintiff averred that while on holiday in Kenya in December, 2006 or thereabouts, she learnt while on inspection of the suit property that there was some construction being undertaken on the property by persons who were unknown to her and upon inquiry she learnt that the construction was being undertaken by the 1st defendant who claimed to have acquired the suit property from the 2nd defendant.

The plaintiff averred that the 2nd defendant was said to have been registered as proprietor of the suit property on 25th August, 2005. The plaintiff averred that the registration of the 2nd defendant as the proprietor of the suit property was fraudulent and as such null and void. The plaintiff averred that she never entered into any sale transaction with the 2nd defendant that could have led to the transfer of the suit property

to the 2nd defendant. The plaintiff averred further that the 2nd defendant was unknown to her. The plaintiff averred that the instrument of transfer that was purportedly executed by her in favour of the 2nd defendant was a forgery. The plaintiff averred that the 2nd defendant did not acquire a valid interest in the suit property and as such he had no legal interest in the property that he could transfer to the 1st defendant. The plaintiff averred that in the circumstances, the titles that were purportedly acquired by the 1st and 2nd defendants in respect of the suit property were null and void. The plaintiff averred further that the Land Registrar did not observe the law while effecting the transfer of the suit property in favour of the 2nd defendant in that he should not have transferred the property to the 2nd defendant without calling for the surrender of the original title of the suit property that was in the possession of the plaintiff.

The plaintiff averred further that the transfer was effected contrary to the provisions of Legal Notice No. 146 of 2005. The plaintiff averred that the Land Registrar colluded with the 1st and 2nd defendants in the illegal transfer of the suit property to the said defendants. The plaintiff averred that by reason of the foregoing, the plaintiff had been deprived of her right to the suit property and had suffered loss and damage. The plaintiff sought declarations and injunctive reliefs against the defendants. The plaintiff also sought the

cancellation of registration of the 1st and 2nd defendants as owners of the suit property and reversion of the property to the name of the plaintiff. In the alternative, the plaintiff prayed for compensation for loss of the suit property at the current market value.

At the trial, the plaintiff narrated to the court how she acquired the suit property and how she came to learn of the entry by the 1st defendant into the suit property and the transfer of the property to the 2nd defendant and subsequently to the 1st defendant. The plaintiff produced a copy of her passport in evidence and stated that after leaving Kenya in 2002, she did not come back to the country until 3rd November, 2005. She stated that all along, she had her certificate of title with her in the U.S.A and that she still had it. The plaintiff produced her original certificate of lease for the courts perusal. She stated that the 2nd defendant was not known to her and that she did not transact any business with him in relation to the suit property. She stated that she did not advertise the suit property for sale. She stated that when she is said to have sold and transferred the suit property to the 2nd defendant, she was in the U.S.A. The plaintiff stated that she did not know Gibson Morara advocate and that she did not go to his office neither did she enter into an agreement of sale with the 2nd defendant in respect of the suit property. The

plaintiff denied receiving any payment from the 2nd defendant for the suit property. She stated that she did not know how the 2nd defendant obtained her KRA PIN Certificate. She denied transferring the suit property to the 2nd defendant. She stated that the signatures in the purported agreement of sale between her and the 2nd defendant and the purported instrument of transfer in favour of the 2nd defendant were forgeries. The plaintiff urged the court to grant the reliefs sought in her re-amended plaint. The plaintiff produced the documents attached to her list of documents filed in court on 11th February, 2008 as exhibits. The plaintiff called a document examiner (PW2) as her witness. PW2 confirmed that the plaintiff did not sign the agreement of sale that she was said to have entered into with the 2nd defendant and the instrument of transfer in favour of the 2nd defendant.

The 1st defendant's case:

The 1st defendant denied that the plaintiff was the owner of the suit property. The 1st defendant averred that he acquired the suit property for valuable consideration from the 2nd defendant and had constructed a house thereon. The 1st defendant averred that the suit property was lawfully transferred to him by the 2nd defendant and that he was entitled to develop the same. The 1st defendant denied that the suit property was transferred to him fraudulently and that his title was null and void. The 1st defendant averred that before purchasing the suit property he carried out a search that showed that the property was registered in the name of 2nd defendant as the owner.

In his evidence at the trial, the 1st defendant narrated to the court how he acquired the suit property from the 2nd defendant. He stated that the suit property was advertised for sale and when he contacted the telephone number that was given in the advertisement, he met the 2nd defendant and expressed interest in the property. The 2nd defendant gave him a copy of the title for the suit property which he used to do a search on the title of the property. The search confirmed that the suit property was registered in the name of the 2nd defendant. It was after that that they entered into an agreement of sale. He stated that he was represented in the transaction by Z. M. Wandera & Co. Advocates while the 2nd defendant was represented by Gibson Morara & Co. Advocates. He stated that the purchase price was agreed at Kshs. 2,300,000/= which he paid in full after which the suit property was transferred to him by the 2nd defendant. After the transfer, he was issued with a new certificate of lease for the suit property. He stated that he was the owner of the suit property and had developed the same with a two (2) storey building. He stated that he was the one paying land rates for the suit property. The 1st defendant stated

that the transaction between him and the 2nd defendant was aboveboard and that no act of fraud was involved. The 1st defendant produced his bundle and supplementary bundle of documents as exhibits.

The 2nd defendant's case:

In his defence, the 2nd defendant denied that he acquired the suit property fraudulently and that the title that he held in respect of the suit property was null and void. The 2nd defendant averred that he acquired the suit property from the plaintiff at a consideration of Kshs. 1,700,000/=. The 2nd defendant averred that he was a bona fide purchaser of the suit property and as such the title of the suit property passed to him lawfully. The 2nd defendant contended that the allegations of fraud levelled against him were scandalous, baseless and unfounded. He averred that the plaintiff was not entitled to the reliefs sought.

As stated earlier, the 2nd defendant died while the suit was pending and was substituted with his wife and legal representative Martha Wamaitha Ngunjiri. At the trial, Martha Wamaitha Ngunjiri adopted her witness statement filed in court on 17th July, 2017 as her evidence

in chief and produced the 2nd defendant's bundle of documents filed in court on 17th September, 2008 as exhibits among others. She told the court that she was not aware that the 2nd defendant had purchased the suit property and that she was not involved in the transaction. She told the court that she had no comment on the transaction and that as at the time the 2nd defendant passed away, he did not own the suit property. She urged the court to grant her the costs of the suit.

The 3rd defendant's case:

In its statement of defence, the 3rd defendant denied the plaintiff's claim in its entirety. The 3rd defendant denied that it was involved in the alleged fraudulent transfer of the suit property to the 1st and 2nd defendants. The 3rd defendant averred further that the plaintiff's suit was time barred as against the 3rd defendant. At the trial, the 3rd defendant closed his case without calling evidence.

After the end of evidence, the parties made closing submissions in writing. The plaintiff filed her submissions on 22nd January, 2020. The 1st, 2nd and 3rd defendants filed their submissions on 10th February, 2020, 30th January, 2020, and 14th February, 2020 respectively.

I have considered the evidence tendered by the parties, the submissions by the parties' respective advocates and the authorities cited in support thereof. The parties did not file a statement of agreed issues. From the pleadings, the following in my view are the issues arising for determination in this suit;

1. Whether the 2nd defendant acquired the suit property lawfully.
2. Whether the 1st defendant acquired a valid title from the 2nd defendant in respect of the suit property.
3. Whether the 1st defendant was an innocent purchaser of the suit property for value without notice and if so whether that validates his title.
4. Whether the plaintiff is entitled to the reliefs sought in the re-amended plaint.
5. Who is liable for the costs of the suit?

Whether the 2nd defendant acquired the suit property lawfully.

I am satisfied from the evidence before the court that the plaintiff did not enter into a sale transaction with the 2nd defendant in respect of the suit property and that the plaintiff neither signed the purported agreement of sale dated 21st June, 2005 or the purported transfer of lease dated 2nd August, 2005. The plaintiff placed uncontroverted evidence before the court showing that on 21st June, 2005 when she is alleged to have entered into an agreement of sale with the 2nd defendant and 2nd August, 2005 when she is alleged to have executed the said instrument of transfer, she was not in Kenya. The evidence that was adduced by PW2 to the effect that the signatures in the purported agreement of sale and instrument of transfer purporting to be that of the plaintiff did not belong to the plaintiff was not controverted. I am in agreement with the plaintiff's contention that the purported agreement of sale and instrument of transfer were created by fraudsters with the aim of depriving her of the suit property. As pointed out by the plaintiff in her submissions, there are a number of discrepancies in the said agreement of sale and instrument of transfer. In the agreement of sale dated 21st June, 2005 that was produced by the 2nd defendant in evidence, the purchase price for the suit property is given as Kshs. 1,000,000/= . However, in the acknowledgments that were allegedly signed by the plaintiff upon being paid the purchase price, the consideration is given as Kshs. 1,700,000/=. The transfer of lease dated 2nd August, 2005 in favour of the 2nd defendant also has Kshs. 1,000,000/= as the consideration. I have also noted from the record that there appears to have been another agreement of sale that had a purchase price of Kshs. 1,700,000/=. See the agreement of sale that was annexed to the affidavit of Jackson Githua Ngunjiri sworn on 13th April, 2007 as annexure "JNN1". In his defence, the 2nd defendant averred that he purchased the suit property for Kshs. 1,700,000/=. In the circumstances, the actual amount that was paid by the 2nd defendant for the suit property if at all he made any payment is not clear.

Section 33 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) under which the suit property was registered provided as follows:

“33. (1) If a title deed or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the title deed or the certificate shows all subsisting entries in the register, a note of the registration shall be made on the title deed or the certificate.

(2) If the disposition is a transfer, the certificate if produced shall be destroyed, and in that case a new certificate may be issued to the new proprietor.

(3) If the disposition is a charge, the certificate shall be delivered to the chargee.”

It is clear from the foregoing that if the plaintiff had sold the suit property to the 2nd defendant she should have surrendered the original certificate of lease to the Land Registrar for cancellation before a new certificate of lease was issued to the 2nd defendant. From the evidence before the court, I am satisfied that the plaintiff did not surrender her certificate of lease to the Land Registrar. The plaintiff produced her original certificate of lease in respect of the suit property for the court's perusal.

On his part, the 2nd defendant produced in evidence what was purported to be a photocopy of the original certificate of lease for the suit property that was surrendered by the plaintiff when she transferred the suit property to the 2nd defendant. This copy of the certificate of lease that was produced by the 2nd defendant was different from the plaintiff's certificate of lease in several material respects which means that the certificate of lease that was purportedly surrendered when the suit property was transferred to the 2nd defendant was not the certificate of lease that had been issued to the plaintiff for the suit property and which was still in the plaintiff's possession. It follows therefore that the 2nd defendant was registered as the owner of the suit property on the strength of a fake certificate of lease.

For the foregoing reasons, I am persuaded that the 2nd defendant did not acquire the suit property lawfully. I am satisfied on the evidence adduced by the plaintiff that the 2nd defendant acquired the suit property fraudulently. With the uncontroverted evidence that the plaintiff was in the U.S.A when she is said to have been in Kenya executing the sale agreement, receiving the purchase price and signing the instrument of transfer, what other evidence of fraud and forgery can one look for? The 2nd defendant having acquired the suit property fraudulently and illegally, he did not have a valid title to the property.

Whether the 1st defendant acquired a valid title from the 2nd defendant in respect of the suit property.

I have held that the 2nd defendant acquired the suit property fraudulently and illegally. It follows that the 2nd defendant did not have a valid title to the suit property since a fraudulent and illegal title cannot confer a valid interest in land as it is a nullity. Since the 2nd defendant did not have a valid title to the suit property, he had no interest in the property that he could transfer to the 1st defendant. In Macfoy v United Africa Co. Ltd. (1961)3 All ER 1169, Lord Denning stated as follows at page 1172:

“If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

I am in agreement with the 1st defendant that no evidence was placed before the court showing that the 1st defendant was involved in the 2nd defendant's acts of fraud and illegality. That in my view cannot validate the 1st defendant's title to the suit property. I am in agreement with most of the decisions cited by the 1st defendant in his submissions on this issue. I am of the view however that they are distinguishable. I am not convinced that under the Torrens System of land registration a fraudster with avoid title to land can confer a valid title on an innocent purchaser. In Alberta Mae Gacie v Attorney General & 4 Others [2006] eKLR the court stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come....”

I am of the view that no valid interest can be derived from avoid transaction. Similarly, an invalid interest cannot be validated on being transferred to an innocent third party. It is my finding therefore that the 1st defendant did not acquire a valid title from the 2nd defendant in respect of the suit property.

Whether the 1st defendant was an innocent purchaser of the suit property for value without notice and if so whether that validates his title.

The 1st defendant submitted at length that it was an innocent purchaser of the suit property for value without notice of any defect in the title that was held by the 2nd defendant. From the evidence before the court, I am satisfied that the 1st defendant purchased the suit property innocently from the 2nd defendant. As I have stated above, the 2nd defendant did not have a valid title to the suit property. The title he had was a nullity the same having been acquired fraudulently and illegally. It follows therefore that even though the 1st defendant dealt with the 2nd defendant in good faith, the 2nd defendant had no title that he could convey to the 1st defendant. It should be noted also that the plaintiff had a legal and not an equitable interest in the suit property. Such interest overrides the doctrine of an innocent purchaser for value without notice. In other words, an innocent purchaser's interest cannot defeat a prior legal interest in a property. It follows therefore that the doctrine of innocent purchaser for value without notice cannot validate the plaintiff's title to the suit property. In Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR, the Court of Appeal clarified the distinction between legal rights and equitable interests when it comes to the invocation of the doctrine of innocent purchaser as follows:

“...Furthermore, the protection accorded by law in the event of fraud, is to a “bona fide purchaser without notice” and even then, only against equitable interests...Snell's Principles of Equity(supra) illustrate the issue, thus:-

“An important qualification to the basic rule is the doctrine of the purchaser without notice, which demonstrates a fundamental distinction between legal estates and equitable interests.

1. The doctrine. A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void against him for want of registration. If A sells to C land over which B has a legal right of way, C takes the land subject to B's right, although he was ignorant of the right. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case

equity follows the law, the purchaser's conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails."

It is also stated therein that "the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests". So that, even if the issue of bonafide purchaser arose in this matter which, in our finding, it did not, we are not satisfied that the evidence tendered by Arthi supports a credible finding that it was a bona fide purchaser of the disputed land."

In the circumstances of this case, it is my finding that even if the 1st defendant purchased the suit property innocently for value without notice of the 2nd defendant's acts of fraud, the title that he acquired could not defeat the plaintiff's legal rights in the suit property.

Whether the plaintiff is entitled to the reliefs sought in the re-amended plaint.

From the findings above, I am satisfied that the plaintiff has proved her case against the defendants on a balance of probabilities. The plaintiff is therefore entitled to the reliefs sought in the re-amended plaint dated 21st May, 2015.

Who is liable for the costs of the suit?

On the issue of costs, the same is at the discretion of the court. As a general rule, costs follow the event. In this case, I am of the view that the 2nd defendant as the author of the fraudulent scheme that gave rise to this dispute should bear the costs of the suit.

Conclusion:

In conclusion, I hereby enter judgment for the plaintiff against the defendants jointly and severally in terms of prayers (a), (b), (bb) and (c) of the re-amended plaint dated 21st May, 2015. The execution of the orders granted herein shall be stayed for a period of sixty (60) days within which the 1st defendant shall be at liberty to enter into negotiations with the plaintiff on compensation in lieu of cancellation of the 1st defendant's title to the suit property as ordered by the court if the plaintiff is willing to enter into such negotiations. In the event that the parties reach an agreement on compensation, they shall be at liberty to move the court for review of the order issued herein for the cancellation of the 1st defendant's title. The plaintiff shall have the costs of the suit to be paid by the 2nd defendant.

Dated and Delivered at Nairobi this 8th Day of October 2020

S. OKONG'O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiffs

Mr. Dingi for the 1st Defendant

N/A for the 2nd Defendant

N/A for the 3rd Defendant

Ms. C. Nyokabi-Court Assistant