



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MERU

ELC CASE NO. 149 OF 2016

KARWITHIA SELLA ISAAC.....1ST PLAINTIFF

FRANCIS MARETE M'IBUI.....2ND PLAINTIFF

VERSUS

FAMILY DEBTORS CHOICE AGENCIES LTD.....1ST DEFENDANT

OIKO CREDIT ECUMENCIAL

DEVELOPMENT CO-OPERATIVE SOCIETY.....2ND DEFENDANT

JUDGMENT

1. The plaintiffs instituted this suit on 1.9. 2016 seeking a declaration that the title deeds to the suit lands in NYAMBENE/ MBEU 111/662, NYAKI/ KITHOKA/2616 and KIBIRICHIA/KIBIRICHIA/2909 (the suit parcels) all currently registered in the name of the 1st Defendant be cancelled immediately and be returned to the plaintiffs.

2. It was their averment that the 1st Plaintiff is the registered owner of parcel NYAKI/KITHOKA/2616, whereas the 2nd Plaintiff is the registered owner of parcel KIBIRICHIA/KIBIRICHIA/2909. That they both obtained loans from the 1st defendant in the years 2009 and 2010 to the sum of kshs. 100,000 and 30 000 for 1st and 2nd plaintiff respectively to which they gave out their titles as security. That they dully paid the aforementioned loan, but the 1st Defendant defaulted in releasing back their respective titles. That the 1st defendant secretly and fraudulently transferred the suit premises to its name and obtained a loan from the 2nd defendant to the tune of Ksh. 13 million, of which the 1st defendant has since deliberately defaulted to pay the aforesaid loan.

3. The 1st defendant filed its defence on 28th October 2016 acknowledging that the plaintiffs indeed obtained a loan facility from them. That it was a term of their agreement that the defendants were at liberty to sell the plaintiffs' properties in case the plaintiffs defaulted in their payments. To this end, the plaintiffs had signed the necessary consent forms. They defaulted in their payments and the 1st defendant exercised its power of sale.

4. The participation of the 2nd defendant in these proceedings is rather vague. It did not file any pleadings nor did it adduce any evidence, but it was actively represented in the proceedings. On 15.9.2017, the 2nd defendant filed an application dated 7.12.2016 to have this matter consolidated with a case Nairobi HCCC No. 256 of 2014. In the Nairobi suit, the current 2nd defendant had sued the current 1st defendant herein averring that by a loan agreement signed by both parties, the 2nd defendant was to advance to the 1st defendant a loan of Ksh. 6 500 000, whereby, additional securities for the loan included the titles to the following parcels; **KIBIRICHIA/KIBIRICHIA/2909, NYAKI/KITHOKA/2616, NYAMBENE/MBEU/111/622**. The charges were duly executed, but the 1st defendant breached the agreement by failing to service the loan. The current 2nd defendant was therefore claiming a sum of sh. 4, 625 162 from the current 1st defendant with interest.

5. The application for consolidation was not opposed by the current plaintiffs, while the current 1st defendant undertook to oppose the same without filing any documents to that effect. However, the parties ventured into the pursuit of Alternative Dispute Resolution Mechanisms (ADR), thus the prosecution of the application for consolidation fizzled out. Finally on 6.3.2019, the 2nd defendant withdrew the aforementioned application dated 7.12.2016.

6. On 10.7.2019, the 2nd defendant closed their case without calling any evidence but contended that they would associate themselves with the case of the plaintiffs.

7. **Pw1 Karwitha Sella Isaac** adopted her witness statement recorded on 31.8.2016 as her evidence. It was her averment that she is the registered proprietor of parcel Nyaki/Kithoka/2616. She contended that in August 2009, she was lured to take a loan facility of Kshs. 100,000/= from the 1st defendant which she was to repay with an interest of 20%. It was her testimony that she paid a sum of Kshs. 180,000/= but the 1st defendant failed to return her title deed. Instead, the 1st defendant illegally and unlawfully changed ownership of the land into its name. The 1st defendant then proceeded to obtain a loan facility of Ksh. 6 500 000 from the 2nd defendant using the title of her land as security. She decried that her intention was neither to sell her property nor transfer the same to the 1st defendant.

8. **Pw1** produced the documents in her list dated 31.8.2016 items a-f as plaintiffs' exhibits 1-6. The said documents are; **Pexh 1- Title deed to parcel No. Nyaki/Kithoka/2616, Pexh 2-Certificae of search dated 18th May 2016, Pexh3- Official receipt No. 146 and 4994 dated 30th December 2009 and 7TH July 2010, Pexh 4-Green card to parcel No. Kibirichia/Kibirichia/2909, Pexh 5- Certificate of search dated 10th February 2012 in respect to Kibirichia/Kibirichia/2909, Pexh 6- Official receipts dated 28/8/2009 & 26/1/2009.**

9. Pw1 further stated that parties had explored Alternative Dispute Resolution Mechanisms (ADR), of which they had appeared before Njuri Ncheke for deliberations. She produced the aforementioned mediation deliberations as **Pexh 7**, as well as correspondence between their advocates via two letters dated 23.2.2018 and 15.3.2018 as **Pexh 8 a & b**.

10. **Pw2 Francis Marete M'Mbui** also adopted his witness statement recorded on 31.8.2016 as his evidence. He confirmed that he took a loan of Kshs. 30,000/= from the 1st defendant using his title KIBIRICHIA/KIBIRICHIA/2909 as security. He paid sh.12 000. However, his efforts to clear the balance were met with hostility and cruelty. He was taken round and round by the 1st defendant until he realized that the 1st defendant had changed ownership of the suit land into its name and had also taken a loan facility with the 2nd defendant using the suit land as security. He denied signing the transfer forms or going to the land control board to effect transfer of his property. He relied on the documents produced as exhibits by the 1st plaintiff.

11. The plaintiffs submitted that the 1st defendant illegally and unlawfully changed the plaintiffs' parcels of land and registered the same into its name, thus un procedurally and illegally transferring the plaintiffs' interest. They cited Section 26 and 80 of the Land Registration Act and the following authorities i.e. **Elijah Makeri Nyangwara vs Stephen Mwangi Njuguna & Anor Eldoret case No. 609B of 2012, Arthi Highway Development ltd vs West End Butchery Limited & 6 Others (2015) eklr, Kiboro Wagoro Makumi vs Francis Nduati Macharia & Anor (2018) eklr, Alice Chemutai Too v Nickson KipKirui Korir & 2 Others [2015] eklr.**

12. **Dw1 Ignatius Gitonga** a director of the 1st defendant testified that they were formerly known as FAMILY DEBTORS CHOICE AGENCIES LTD but are currently known as SMALL HOLDERS ENTERPRISES EMPOWERMENT (K) LIMITED (SHEEP). He adopted his witness statement recorded on 5.8.2019 as his evidence. He averred that they gave out loans to the plaintiffs as per the Micro finance Act. Vide the agreement dated 24/8/2009, they gave 1st plaintiff a sum of Kshs. 100,000/= at an interest rate of 20% but the same changed to 30% upon default. That at the time of signing the Agreement, Karwitha had executed the transfer forms. The land was to be used as collateral. When Karwitha defaulted, they undertook a charge over the property. The property was transferred in the name of the 1st Defendant on 17/12/2009 and it was not valued. They did not advertise the sale of the land either. Karwitha would later on pay Kshs. 174,000/= to the 1st defendant which was acknowledged but DW1 contended that Karwitha still had a remaining balance.

13. As to the consent it was his testimony that they attended the Special land board, but he did not know whether Karwitha was present. The cost of the consent was met by the 1st defendant. The agreement was also prepared by their advocates, which they used on several occasions. Dw1 however admitted that the agreements did not bear the names of the advocate who prepared it.

14. With regard to the claim of Francis Marete, the 2nd plaintiff, Dw1 testified that they gave him a loan facility of Kshs. 30,000/=. When 2nd plaintiff defaulted, the 1st defendant proceeded to acquire the property. Dw1 admitted that they did not write to Marete informing him of the default and they did not equally advertise the property. He denied appearing before the Njuri Ncheke concerning the issues raised in this case. He denied being in occupation of the suit properties but acknowledged taking out a charge on the same.

15. The 1st defendant relied on the documents in his list dated 5.8.2019 items 1-9 whose originals were produced as Dexh 1-9 respectively as follows; **Dexh 1-Agreement between Family Debtors and Karwitha Sella Isaac dated 24/8/2009, Dexh 2- Agreement dated 19/9/2013, Dexh 3- Copies of transfer forms, KRA Pin and Photos of Sella, Dexh 4- Application to withdraw caution, Dexh 5- Statement of accounts, Dexh 6- Affidavit of one Harriet Karambu to withdraw a caution on land parcel Nyaki/Kithoka/2616, DEhx 7- Agreement dated 23/12/2009, Dexh 8- Transfer forms, Copy of I.D. and KRA pin of Francis Marete, DEXH 9 Agreement of 28.8.2009 between 1st defendant and 2nd plaintiff.**

16. The 1st defendant submitted that their actions were in line with the terms of their agreement and that the plaintiffs are only seeking intervention of this court to rewrite their contracts. It was submitted that the plaintiffs were well aware of the repercussion of not complying with the terms of the agreements and that the plaintiffs have not come to court with clean hands as they are avoiding performance of their obligations in respect of the agreements. The 1st defendant cited **Section 3 of the Law of Contract Act, Black's Law Dictionary at Pg. 213**, as well as the following cases; **Rufale vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R.1Kb 592 (Strutton L.J), William Muthee Muthami vs Bank of Baroda (2014) eklr, Kinyanjui Kamau vs George Kamau (2015) eklr, Vijay Morjaria vs Nansingh Darbar & Anor [2000] eklr.**

Analysis and Determination

17. I have considered the pleadings, the evidence adduced as well as the submissions of the parties. I do find that the main issues for determination are;

a. Whether the suit premises herein were fraudulently transferred by the 1st defendant?

b. Whether the plaintiffs warrant the Orders sought?

18. Section 26 of the Land Registration Act Provides as follows;

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except;

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme (emphasize added).

19. The 1st Defendant has submitted that the court cannot rewrite a contract and as such, the plaintiffs cannot seek to change the terms of the agreement. The Court of Appeal In **Margaret Njeri Muiruri -V- Bank of Baroda (Kenya) Limited (2014) eKLR** on whether or not a court can rewrite a contract held as follows:-

“It is not for the court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 “a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.”

Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case.”

20. The 1st defendant has not denied that he transferred the suit parcels into its name. Plaintiffs’ exhibit 1 is the a copy of title to parcel Nyaki/Kithoka/2616 which was registered in the name of the 1st plaintiff on 15.9.2005. The same was however transferred to the 1st defendant on 17.12.2009 and a title was issued on 24.12.2009 as per the copy of search certificate availed as Pexh 2. For parcel Kibirichia/Kibirichia/2909, the same was registered in the name of 2nd plaintiff on 30.7.1998 and was transferred to 1st defendant on 14.4.2010 where a title deed was issued on 22.4.2010. The court will therefore interrogate the circumstances leading to the transfer of the suit parcels to determine if the titles now held by the 1st defendant can be challenged under section 26 of the Land Registration Act.

21. It was a common term of both agreements entered into by the 1st and 2nd plaintiffs that the interest to be paid was 20% per month and in default the same shall be 30 % per month. **Clause 6,7 and 12** of the agreement between the 2nd plaintiff and 1st defendant dated 28.8.2009 (Dexh -9) provided as follows;

“6) That the borrower in an event of default in repayment of the said loan offers as collateral security of Title deed No. Kibirichia/Kibirichia/2909.

7) The lender will give the borrower a period of 30 days to repay the loan once the borrower defaults(emphasize added)and after lapse of the said 30 days the lender shall be at liberty to confiscate the said items and sell it to whomever the lender wishes.

12) That if default is made by the borrower in payment of the principal sum together with the interest or any other monies specific in this agreement in accordance with this agreement the lender agent or servant may without giving any notice immediately *entire* premises or land where the assets are kept and may take possession of the same and sell the same for recovery of the principal sum advanced together with the interest and other costs that may have been incurred”.

22. The agreement between the 1st plaintiff and the 1st defendant (Dexh 1) contains similar clauses to the one of the 2nd plaintiff save that the suit land taken as security is parcel Nyaki/Kithoka/2616 in respect of the 1st plaintiff.

23. The first point of call concerns the issue of transfer of the suit parcels. **Section 37 of the Land Registration Act** provides as follows;

“(1)A proprietor may transfer land, a lease or a charge to any person with orwithout consideration, by an instrument in theprescribed form or in such other formas the Registrar may in any particular case approve.

(2) A transfer shall be completed by—

(a) filing the instrument; and

(b) registration of the transferee as proprietor of the land, lease or charge”.

24. When were the transfer forms executed and when was the transfer completed? Dw1 avers that when the plaintiffs signed the agreements for the loan, they also signed the transfer forms. However, the transfer forms availed by the 1st defendant (see Dexh 3 & 8) bears no dates and they have no signature and designation of the person certifying the same. The transfer form in respect of the 2nd plaintiff is in fact a blank document bearing only an ID No, Pin and a signature. These documents cannot be considered as duly executed transfer forms. Secondly, the 1st defendant still has the original transfer forms. When were the instruments of transfer lodged in accordance with the provisions of section 37 (2) (a) of the Land Registration Act. There is no plausible explanation as to how the 1st defendant is in possession of incomplete transfer forms, which have not been duly executed yet he claims these are the documents which led to the transfer of the suit land to itself. The logical conclusion to make is that the transfer of the suit parcels from the plaintiffs to the 1st defendant was fraudulent.

25. The second point of concern is that there is no evidence that the consent of the Land Control Board was duly obtained in respect of the aforementioned transfer. Dw1 conceded that they obtained the consent but he cannot tell whether the plaintiffs attended the board or not, Further, neither the application for the consent nor the relevant consent from the land control board was availed by the 1st defendant. This is another tell tale sign of the fraudulent transactions engineered by the 1st defendant which led to the change of ownership of the land in their favour.

26. Thirdly, I find that the point of default has not been indicated by the 1st defendant. The agreements made between the parties were craftily made, such that the 1st defendant was to take over the properties and even sell them without notice to the plaintiffs in case of default. However, the 1st defendant was still duty bound to indicate the date of default but he didn't.

27. Going by the statement of account availed as Dexh 5 for the 1st plaintiff, it is apparent that the said plaintiff paid a sum of Ksh 174 000 by 24.6.2010. This was long after 1st defendant had transferred the land Nyaki/Kithoka/2616 to itself on 17.12.2009. Indeed Dw1 in his evidence admitted that they also used the suit parcel again as collateral, and thereafter, 1st plaintiff came and paid some money amounting to sh. 174 000. It is not fathomable that the 1st defendant continued to receive money from this plaintiff long after they had transferred the land to themselves. It is illegal, un-procedural and fraudulent . What is crystal clear is that there was no communication from the 1st defendant to the two plaintiffs detailing the point of default to enable clause 9 and 14 in respect of the agreement with the 1st plaintiff and clause 7 and 12 in respect of the agreement with the 2nd plaintiff to take effect. It follows that the process leading to the transfer of the land was tainted with procedural abuse on the part of the 1st defendant.

28. Fourthly and finally, I find that the properties were never valued. In **Kings Group of Schools Limited & another v Kenya Women Microfinance Bank Limited [2018] eKLR** the court held as follows;

“It is not in doubt that the general purpose of valuation is envisaged under section 97(2) of the Land Act, 2012 and is two fold; to wit, to obtain the best price reasonably obtainable at the time of sale thus protecting the right of the chargor to the property. It is also meant to ensure best and reasonable price which is comparable to interests in land of the character and quality is part of the right to property itself and to prevent unscrupulous chargee from selling the charged property at a price which is peppercorn or not compatible to the interests in the property in terms of character and quality.....”

29. Dw1 admitted that they did not value the suit properties. How then did they compute the balance owed to them by the plaintiffs. This is again another tell tale sign of the unscrupulous machinations of the 1st defendant.

30. **Section 80 of the Land Registration Act, 2012**, provides thus:-

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained made or omitted by fraud or mistake.....”

31. I have already found that there was fraud and misrepresentation on the part of the 1st defendant. Should the suit properties revert back to the plaintiffs? Certainly. The issue of accounts and or none payment of the loan was not counterclaimed by the 1st defendant in their pleadings of 18.10.2016, and further, that is a commercial issue which is not factored under Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act. The nature of that dispute on accounts and interest is commercial, See **Kings Group of Schools Limited (supra)** and **Danson Muriuki Kihara v Johnson Kabungo [2017] eKLR**.

32. The actions of the 1st defendant clearly show they preyed on the plaintiffs to acquire an unjust benefit towards them. There was clearly acts of misrepresentation and concealment on the part of the 1st Defendants. This is a proper case where the court ought to revert back the titles to the plaintiffs. I must however, add that the amendment made on 6.3.2019 by the plaintiffs to include parcel Nyambene/Mbeu/111/622 finds no favour in the eyes of this court. This is because no evidence was adduced by either of the two plaintiffs to explain the claim touching on this land. I must also express my dismay with regard to the submissions of the plaintiff which were done in such tiny fonts that I could barely discern the contents therein.

33. In the final analysis, the court allows plaintiffs claim excluding the claim on parcel Nyambene/ Mbeu/111/622 as follows;

(a) a declaration be and is hereby issued that the title deeds to the suit lands in NYAKI/ KITHOKA/2616 and KIBIRICHIA/KIBIRICHIA/2909 all currently registered in the name of the 1st Defendant be cancelled immediately and the same to revert back to their previous owners that is the 1st and 2nd plaintiffs respectively.

(b) The Deputy Registrar of this court is hereby authorized to sign all requisite documents in order to give effect to the implementation of this judgment.

(c) Any orders of inhibition issued during the subsistence of this suit are hereby discharged.

(d) The 1st defendant is hereby condemned to pay costs of this suit to the plaintiffs with interest at courts rate from the date of delivery of this judgment.

DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF NOVEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 21.10.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE