



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC NO. 942 OF 2013**

**KIAMBU MURUTANI COMPANY LIMITED.....PLAINTIFF**

**=VERSUS=**

**MICHAEL NJUGUNA.....1<sup>ST</sup> DEFENDANT**

**EQUITY BANK LIMITED.....2<sup>ND</sup> DEFENDANT**

**ANTIQUA AUCTIONS.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 1<sup>st</sup> August 2013, the plaintiff seeks judgment against the defendants jointly and severally for:-

- (a) A declaration that the transfer of Title No. Kiambu Municipality Block 1/57 to the 1<sup>st</sup> defendant is illegal, null and void.*
- (b) A declaration that the charge registered over Title No. Kiambu Municipality Block 1/57 in favour of the 2<sup>nd</sup> defendant is illegal null and void.*
- (c) An order of permanent injunction be issued restraining the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from advertising, selling, transferring or in any other way alienating the suit premises.*
- (d) A declaration that the plaintiff is the legitimate owner of Title No. Kiambu Municipality Block 1/57.*
- (e) An order directing the Land Registrar, Kiambu District Land Registry to amend the register for Kiambu Municipality Block 1/57 to indicate the plaintiff as the registered owner.*
- (f) General and punitive damages be awarded to the plaintiff as against the 1<sup>st</sup> defendant for breach of his fiduciary duty to the plaintiff.*
- (g) Mesne profits from 20<sup>th</sup> November 2009 until the 1<sup>st</sup> defendant hands over possession of the suit premises to the plaintiff.*
- (h) Cost of the suit.*
- (i) Such further relief as the court may deem just and expedient.*

2. Upon being served with summons to enter appearance and copies of plaint, the 1<sup>st</sup> defendant entered appearance through the firm of M/S Okemwa and Co. Advocates on the 15<sup>th</sup> August 2013. He also filed a statement of defence dated 30<sup>th</sup> September 2013. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a joint statement of defence dated 8<sup>th</sup> October 2013.

3. On the 3<sup>rd</sup> February 2020, the parties recorded a consent marking the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants settled with no orders as to costs.

4. This judgment is therefore in respect of the 1<sup>st</sup> defendant.

5. PW1 Antony Kamuna Kariuki told the court he is a retired teacher. He is also the current chairman of the plaintiff. He adopted, his witness statement dated 18<sup>th</sup> September 2017. He also relied on the list of documents dated 18<sup>th</sup> September 2017. He produced the said documents as exhibits in this case. He further told the court that the 1<sup>st</sup> defendant had been engaged by the plaintiff's former directors to collect rent from the plaintiff's suit premises being Kiambu/Municipality/Block 1/57. That the 1<sup>st</sup> defendant breached the fiduciary relationship against the plaintiff by drafting two sale agreements. The first sale agreement is dated 4<sup>th</sup> September 2009 in respect of Kiambu/Municipality Block 1/57. The purchase price was agreed at Kshs.7,500,000/-. The said agreement is purportedly signed by Joseph Munene (chairman). Esther Gichaiga (Vice chairman), Titus N. Kamundia (Secretary) and Irene Macharia (finance director), on one part and the 1<sup>st</sup> defendant as the purchaser. The second sale agreement is in respect of Plot No 1/57 Kiangoya for Kshs.4,600,000/-. The same is purportedly signed by Joseph Muiruri, (Director) and Titus N. N. Kamundia (Director) on one part and the 1<sup>st</sup> defendant as the purchaser.

6. PW1 stated that the sale agreements were forgeries. Upon realizing this, the plaintiff's officials made a report at CID Kiambu who commenced investigations. The 1<sup>st</sup> defendant was charged before a Kiambu court with offences relating to forgeries of the said agreements. The 1<sup>st</sup> defendant and Titus Ngochi Kamunida were found guilty and convicted of the said offences. The charge sheet and the copy of the judgment are among the exhibits produced in this court.

7. On the 3<sup>rd</sup> February 2020, the 1<sup>st</sup> defendant was represented by Mr. Thuo advocate. As the case was now between the plaintiff and the 1<sup>st</sup> defendant. It was agreed that:-

***“(1) The plaintiff be allowed to reopen its case and to file additional documents within 14 days.***

***(2) That the 1<sup>st</sup> defendant be allowed to file his additional documents if need be.***

***(3) That the 1<sup>st</sup> defendant be allowed to cross examine the plaintiff's witnesses.***

***(4) The status quo be maintained. The suit property is still registered in the 1<sup>st</sup> defendant's name who should not dispose of the suit property.***

***(5) The 1<sup>st</sup> defendant be granted leave to amend defence and/or witness statements if need be within 14 days upon service”.***

The said consent was adopted as the order of the court and the matter fixed for further hearing on 13<sup>th</sup> July 2020.

8. On the 13<sup>th</sup> July 2020 neither the 1<sup>st</sup> defendant nor his advocate attended court. There was no explanation for their absence. The plaintiff's witness was present and the matter was given a time allocation of 12.30 pm. By 12.30 pm there was still no attendance by the 1<sup>st</sup> defendant or his advocate. As they were aware of the date, this court directed that the matter proceeds.

9. PW1 was recalled to testify. The plaintiff had also filed a supplementary list of documents dated 26<sup>th</sup> February 2019. He produced the judgment in Thika ELC No. 77 of 2017 as exhibit in this case together with other documents as exhibit p2. PW1 further stated that the plaintiff is ready to refund Kshs.4,200,000/- to the 1<sup>st</sup> defendant which amount can be offset from the rent he has been collecting from the suit premises.

The plaintiff then closed its case. Subsequently the defence case was closed and the plaintiff was given time to tender final submissions.

### **The Plaintiff's submissions**

10. They are dated 3<sup>rd</sup> September 2020. The plaintiff is the registered owner of Title No. Kiambu/Municipality/Block 1/57. I had erected a commercial cum residential building on the property. The same was leased out to tenants with a monthly income of Kshs.25,200/- the annual rental income was approximately Kshs.302,400/-.

11. The plaintiff contracted 1<sup>st</sup> defendant trading as Njuakim Commercial Agencies to manage the property on its behalf and to collect rent from the tenants. The 1<sup>st</sup> defendant was to remit the collected rent to the plaintiff. A principal and Agent relationship therefore existed between the plaintiff and the 1<sup>st</sup> defendant.

12. Like any other principal/agent relationship, the agent owed a fiduciary duty to his principal. Such duty including but not limited to acting in the best interest of the principal. In breach of this fiduciary duty, the 1<sup>st</sup> defendant fraudulently and with intent to defraud the plaintiff forged two sale agreements purporting that the plaintiff had agreed to sell title number Kiambu Municipality Block 1/57, the suit property, to the 1<sup>st</sup> defendant.

13. The two sale agreements relate to the sale of the same property. They were drawn three months apart. The 1<sup>st</sup> defendant went a head and transferred the suit property to his name. the transfer of the suit property was registered on 20<sup>th</sup> November 2009 while one of the agreements for sale of same property is dated 16<sup>th</sup> December 2009. After discovering the fraud, the plaintiff reported the matter to Kiambu CID and the 1<sup>st</sup> defendant was charged and convicted of two counts of forgery and one count of stealing on 6<sup>th</sup> March 2014. The judgment was produced as an exhibit in this case.

14. The 1<sup>st</sup> defendant filed his defence on 2<sup>nd</sup> October 2013. His defence was not accompanied by a witness statement. He did not file any

bundle of documents. The court on numerous occasions directed the 1<sup>st</sup> defendant to file his bundle of documents and witness statements but he did not heed the court's directive. By 13<sup>th</sup> July 2020, the 1<sup>st</sup> defendant had not filed his witness statement or bundle of documents. This is a clear indication that the 1<sup>st</sup> defendant has no interest on this matter.

15. The two sale agreements were forgeries and the 1<sup>st</sup> defendant was charged and convicted of forgery of the said documents in Kiambu Criminal Case NO. 299 of 2010. The issue of fraud/forgery has been dealt with by a competent court and returned in the affirmative.

16. The plaintiff produced a judgment delivered in ELC No. 77 of 2017 (Thika). The said judgment is an indictment of the 1<sup>st</sup> defendant where the court found that he did not have the mandate to sell another property belonging to the plaintiff herein.

17. Mesne profits are actionable per se. the plaintiff herein has not only made a claim for mesne profits, but has also provided evidence of the extent of the loss suffered as a result of the 1<sup>st</sup> defendant's fraudulent transfer and wrongful possession of the suit property. It has put forward the case of **Rajan Shah t/a Rajan S. Shah & Partners vs Bipin P. Shah [2016] eKLR**. The 1<sup>st</sup> defendant transferred the suit property to himself on 20<sup>th</sup> November 2009. The suit property was attracting a monthly rent of Kshs.25,200/- way back in 2007. The 1<sup>st</sup> defendant has been in illegal possession of the suit property for ten years and ten months. The witness testified that the current rent is Kshs.100,000/-. Mesne profits payable would be Kshs.13,000,000/-.

18. The plaintiff acknowledges receipt of kshs.4,200,000/- from Equity Bank. It is ready and willing to refund the money which was received as purported part payment of the purchase price.

19. Punitive damages should be awarded in deserving cases. It has put forward the case of **Bank of Baroda (Kenya) Ltd vs Timwood Products Ltd [2008] EKRL**. The 1<sup>st</sup> defendant's conduct and actions were calculated to procure financial and other benefits at the expense of the plaintiff. The 1<sup>st</sup> defendant has been exclusively collecting rent from the suit premises for over ten years. The court must send a strong warning to the 1<sup>st</sup> defendant, his ilk who use their fiduciary positions to unjustly enrich themselves at the expense of their principals. It urges the court to award Kshs.3,000,0000/- as punitive/exemplary damages.

20. The plaintiff has proved its case to the required standard and urges the court to grant all the prayers on the plaint.

21. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are:-

*i. Whether the 1<sup>st</sup> defendant in order to transfer the said property forged sale agreements dated 4<sup>th</sup> September 2009 and 16<sup>th</sup> December 2009 purporting that the plaintiff had agreed to sell the suit property to the 1<sup>st</sup> defendant.*

*ii. Whether the 1<sup>st</sup> defendant, as an agent of the plaintiff acted in breach of his fiduciary duty to the detriment of the plaintiff.*

*iii. Who should bear costs of the suit?*

22. By an agreement dated 4<sup>th</sup> September 2009 it is purported that the plaintiff sold Plot No. Kiambu Municipality 1/57 to the 1<sup>st</sup> defendant for Ksh.7.5 million. It is purportedly signed by Joseph G. Muiruri (Chairman), Esther W. Githaiga (Vice Chairlady), Titus N Kamundia (Secretary) and Irene W. Karanja (Financial Director) on behalf of the plaintiff on one hand and Michael Njuguna as the purchaser. The said agreement is witnessed by one Kimani Charagu, advocate. The second agreement is dated 16<sup>th</sup> December 2009. It is purported that the plaintiff sold Plot No.1/57 Kangoya, Kiambu Municipality to the 1<sup>st</sup> defendant for Kshs.4.6 Million. It is stated that the purchaser paid Kshs.4.2 million and the balance of Kshs.400,000 to be paid within 90 days. It is signed by Joseph G Muiruri (Director) and Titus N Kamundia on behalf of the plaintiff, and Michael Njuguna (1<sup>st</sup> defendant) as the purchaser. The agreement is also witnessed by Kimani Charagu advocate.

23. The two sale agreements are forgeries and the 1<sup>st</sup> defendant was charged and convicted of forgery of the said documents. The plaintiff produced the proceedings and judgment in Kiambu Criminal Case No. 299 of 2010 as exhibits in this case. In the proceedings in the criminal court, Kimani Charagu Advocate, who was purported to have witnessed the two sale agreements denied that he witnessed the same. The 1<sup>st</sup> defendant was convicted of forgery of the sale agreements. I agree with the plaintiff's counsel's submissions that the issue of fraud and forgery has been dealt with by a competent court who stated that the two sale agreements are not genuine.

24. It is on record that the 1<sup>st</sup> defendant was an agent of the plaintiff for purposes of collecting rent in the said premises. Therefore, there existed a principal/agent relationship between the plaintiff and the 1<sup>st</sup> defendant. I find that the 1<sup>st</sup> defendant acted in breach of his fiduciary duty fraudulently transferring the suit property to his name.

The 1<sup>st</sup> defendant filed a statement of defence dated 30<sup>th</sup> September 2013 denying the allegations of fraud as particularized in paragraph 6 of the plaint. I find that his defence amounts to mere denials. I also note that by a consent adopted by court on 3<sup>rd</sup> February 2020, he sought leave to file his witness statement. By the time of writing this judgment the 1<sup>st</sup> defendant has not filed his witness statement and/or a bundle of documents. It appears he lost interest in this matter.

25. I find that the plaintiff has proved its case on a balance of probabilities as against the 1<sup>st</sup> defendant and it is entitled to the reliefs sought. The plaintiff has provided evidence of the extent of the loss suffered as a result of the 1<sup>st</sup> defendant's fraudulent transfer and wrongful possession of the plaintiff's property. In the case of **Rajan t/a Rajan S. Shah & Partners vs Bipin P. Shah [2016] eKLR** J Mativo stated

thus:-

*“The term mesne profits relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The mesne profits are nothing but a compensation that a person in the unlawful possession of others’ property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.*

*‘Mesne profits’ are the rents and profits which a trespasser has or might have received or made during his occupation of the premises and which therefore he must pay over to the true owner as compensation for the tort which he committed. A claim for rent is therefore liquidated while a claim for mesne profits is always unliquidated”.*

26. It is on record that, the 1<sup>st</sup> defendant transferred the suit property to himself on 20<sup>th</sup> November 2009. The plaintiff filed a supplementary bundle of documents dated 26<sup>th</sup> February 2020. They have attached rent collection records by Njuakim Commercial Agencies from the month of September 2007 to December 2007. It shows that the monthly rent was kshs.25,200/-. PW1 stated that the rent has gone up and would be Kshs.100,000/- currently. There was however, no evidence adduced to confirm that the rent is now Kshs.100,000/- I will take Kshs.25,200/- as the monthly rent. The mesne profits payable will be Kshs.25,200 X 130 = Kshs.3,276,000/-. Which I award accordingly. It should be noted that the plaintiff is holding Kshs.4,200,000 which amounts it is ready and willing to refund to the 1<sup>st</sup> defendant. This amount can be offset with the mesne profits above.

27. I will also award the plaintiff general damages. The 1<sup>st</sup> defendant has been in possession of the suit property for all these years. The plaintiff is entitled to compensation. I award Kshs. 1 million which I think is adequate compensation. In the case of **Abdulhamid Ebrahim Ahmed vs Municipal Council of Mombasa [2004] eKLR** Maraga J (as he then was) held that:-

*“Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions in tort, and only in three categories of cases. The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. The other two categories are where the defendant’s conduct is calculated to earn him a profit and the third one is where exemplary damages are expressly authorized by statute”.*

I agree with the plaintiff’s submissions that the 1<sup>st</sup> defendant’s conduct and actions were calculated to procure him financial and other benefits at the expense of the plaintiff.

28. Accordingly judgment is entered for the plaintiff as against the 1<sup>st</sup> defendant in the following terms:-

*(a) That a declaration is hereby issued that the transfer of Title of Land Parcel No. Kiambu Municipality Block 1/57 to the 1<sup>st</sup> defendant is null and void.*

*(b) That a declaration is hereby issued that the plaintiff is the legitimate owner of Land Parcel No Kiambu/Municipality Block 1/57.*

*(c) That an order is hereby issued directing the Land Registrar, Kiambu Land Registry to amend the register for Kiambu Municipality Block 1/57 to indicate the plaintiff as the registered owner.*

*(d) General and punitive damages Kshs.1,000,000/-.*

*(e) Mense profits Kshs.3,276,000/-*

*(f) Costs of the suit and interest.*

It is so ordered.

Dated, signed and delivered in Nairobi on this 10<sup>th</sup> day of December 2020.

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Njeru Gitonga for the Plaintiff

Mr. Thuo for the 1<sup>st</sup> Defendant

Kajuju – Court Assistant