



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 64 OF 2013

JOEL MWANGI KAIRANG'A.....PLAINTIFF

VERSUS

JOYCE WANJIKU MATHARA1ST DEFENDANT

BENSON WAMALWA BWANAMO.....2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiff commenced this suit vide a plaint dated **4th April, 2013** and filed in court on **29th May, 2013** seeking the following orders:

- a. A declaration that the 1st defendant has no authority and consent from the plaintiff to sell, transfer and/or pass suit property to the 2nd defendant**
- b. That the transaction done on 29/12/2009 and all consequential registrations are null and void.**
- c. That the Register Uasin Gishu/El-Lahre Scheme/678 be rectified by removal of 2nd defendant name and inclusion of plaintiff name.**
- d. Costs.**

2. The defendants filed a joint defence dated **4th July, 2013** on the same date and the plaintiff's reply to this defence was filed on **31st July, 2013**.

3. The plaintiff filed his submissions on the **22/9/2018** and the defendant his on **16/11/2018**.

The Plaintiff's Case

4. The plaintiff's case is that by an agreement dated **17/6/1997** the plaintiff purchased a plot **0.1 acres** out of land known as plot **56 El-Lahre Settlement Scheme Moi's Bridge** from the **Joyce Nafula Wafula** at a tune of **Kshs.25,000/=** and paid full consideration of the plot; that the plaintiff has been visiting the suit plot occasionally but since **May, 2012** he realized that the plot is owned and occupied by the **1st defendant** (he must have meant the **2nd defendant**) and is now known as **Uasin-Gichu D-Lahre Scheme/678**; that the **1st defendant** by fraud and misrepresentation sold the plaintiff's plot to the **2nd defendant** and that the said transaction between **Joyce Nafula Wafula** (the former owner of the land) and the **2nd defendant** was *void ab initio* due to fraud and misrepresentation.

The Defendants' Joint Defence

5. The defendants joint defence filed on **4/7/2013** denies the plaintiff's claim and avers that the **1st defendant** owned the suit land and was in occupation of the suit plot since **May, 2012**; that the plaintiff willfully, without coercion and/or use of force sold the **1st defendant** the suit plot; that the **1st defendant** sold the suit plot to the **2nd defendant** without any misrepresentation; that the **1st defendant** has at all material times from **2005 - 2011** been the sole and legal owner of the suit plot while the **2nd defendant** upon purchase became and remains the sole and legal owner from **2011** to date; that the execution of the instruments of sale in favour of the **2nd defendant** by the **1st defendant** and also execution of transfer by one **Joyce Nafula Wafula** also in favour of the **2nd defendant** are genuine.

The Plaintiff's Reply

6. The plaintiff filed a reply to the defence dated **18/7/2013** in which he reiterates the averments in the plaint.

EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

7. **PW1** the plaintiff testified on **12/4/2017**. He narrated how he purchased the suit land from Joyce Nafula Wafula in the presence of witnesses who included the seller's daughter. He averred that when he purchased the land Joyce Nafula informed him that her husband was deceased and that she had not transferred the land to herself and land was under a succession cause. He never built on the plot and on 10/5/2012 Joyce Nafula called him while he was in Nyandarua and asked him if he had sold his plot because a certain woman had come to the plot. He then came to Kitale and went to Joyce Nafula; Joyce then informed him that the 1st defendant had come to her and informed her that the plaintiff had fallen sick, been taken home and died; Joyce then gave the 1st defendant a copy of the agreement between her and the plaintiff; she informed the plaintiff that she later came to know that the plot had been sold to another person; at this juncture the plaintiff went to the sub chief's and explained his problem to him and the sub chief told him to come the next day. He went with the seller and the seller explained to the chief in the presence of the defendants how she had sold him the plot. The defendants were asked to bring their documents. The elder who had witnessed the defendants' agreement happened to be the 1st defendant's father; he denied that the plaintiff was his grandson; the papers produced by the defendants at the meeting were photocopies; that finally after some delay the chief told the plaintiff that the land had been sold and had a title deed in another person's name and that he should follow up with the 1st defendant; the plaintiff reported to the police at Moi's Bridge who dismissed it as a civil case. Later his advocate wrote to the chief seeking information and he was furnished with a photocopy of the agreement alleged to be between him and the 1st defendant; a letter allegedly written by him in December 2002 saying that he had fallen sick and that she should take care of the plot and a copy of the title deed. The plaintiff averred that he did not know the 1st defendant but that he knew the 2nd defendant as an evangelist.

8. The plaintiff produced the original agreement between him and Joyce Nafula a copy of his identity card; letter dated **7/2/2012** to Joyce Nafula; and a letter to the 1st defendant dated **15/6/2012**, a letter to the 2nd defendant and the bundle obtained from the chief upon request for information among others.

9. On cross examination the plaintiff stated that he left the plot under the guard of the seller and not the 1st defendant. He denied that he had given the 1st defendant any authority to sell the plot. After the cross examination and in what may pass for re-examination, the plaintiff stated that he does not thumbprint documents but signs them by pen.

10. **PW2 Ben Kakai**, testified on **31/1/2018**. His evidence is that the plaintiff bought the suit land in 1997; that there were maize plants on the land during purchase; that it was agreed that when Joyce Nafula removed the maize the plaintiff would take possession; that he did not know the 1st defendant and that he acted as a witness in the agreement between the plaintiff and Joyce Nafula.

The Defendant's Evidence

11. **DW1, Joyce Wanjiku Mathara**, 1st defendant, testified on **30/7/2018**. She adopted her statement dated **4/7/2013** and filed in court record as her evidence-in-chief. Her evidence is that she knew the plaintiff while he was a hawker; that she was his customer; that Joyce Nafula was selling her land as a result of some personal problems; that the 1st defendant informed the plaintiff of the intended sale; that the plaintiff paid the whole amount; that when the plaintiff purchased the land the 1st defendant was not present. That there were crops on the suit land at the time of the sale. That the plaintiff showed the 1st defendant the land and asked the 1st defendant to look after the land; that the plaintiff stayed away for **8 years**, though he would occasionally pass by; that after 8 years he came and told her that he wanted to sell the land and the 1st defendant asked that they proceed to the chief's office and they made an agreement there vide which the suit land was sold for **Kshs. 100,000/=**; that she paid **Kshs. 120,000/=**; that she stayed on the land and later sold it on **7/4/2011** to the 2nd defendant for **Ksh 154,000/=**; that Joyce Nafula was a witness to the agreement; that she later saw the plaintiff coming and saying that he did not know her; that the chief wrote a letter to the Soy Land Control Board dated **14/11/11** and that the 2nd defendant obtained title. Later upon complaint by the plaintiff the 1st defendant was arrested and brought to court. On cross examination 1st defendant admitted that she only knew the plaintiff for three months; that her father denied that the plaintiff was his grandson; that Joyce Nafula was there at the chief's office when the plaintiff reported the alleged fraud; that her witnesses signed the agreement between her and the plaintiff and never gave the identity card numbers; that there was maize on the suit land when the plaintiff purchased the land.

12. **DW2, Joyce Nafula Wafula** testified on **15/10/2018**. She adopted her statement dated **4/7/2013** which was filed in court, as her evidence-in-chief. Her evidence is that she knows the plaintiff and the defendants; that she sold the plaintiff a plot in 1997; that he never came to reside on the land; that the 1st defendant went to her and said that the plaintiff is her nephew and sold the 2nd defendant the land; that the agreement between the defendants was written at the chief's office; that the chief wrote a letter saying that the land had been transferred from the plaintiff to the 2nd defendant; that she (DW2) did not commit any fraud. Upon cross examination she agreed that she only remained with a copy of the agreement between her and the plaintiff; that the land had maize on it at the time of purchase and that her son ploughed for the plaintiff in 1998; that in 1999 she brought the plaintiff who was in town some maize from the land; that in the year 2000 she and the plaintiff discussed the issue of title but none was processed; that the 1st defendant informed her that she and the plaintiff had transacted over the plot at the chief's office; that the plaintiff's wife came to her and DW2 gave her condolences for she had been informed by the 1st defendant that the plaintiff had died and that she would sell the land because the plaintiff was her nephew and that the 1st defendant then sold the land to the 2nd defendant; that she never gave the defendants any papers, not even the photocopy of the agreement between her and the plaintiff; that she was summoned to the chief's office while the defendants were transacting and one month after the 2nd defendant purchased the land, the plaintiff's wife came along. That from 2005 she did not know that the land had been sold; that the 1st defendant had reported

that the plaintiff had fallen sick and left her the plot; upon re-examination she stated that when she sold the land the 1st defendant was not present; upon examination by the court the witness stated that the 2nd defendant called her to witness the sale by the 1st defendant to him.

13. DW3 Joseph Mjumbe Wafula testified on **18/7/2018**. He stated that he met the plaintiff the first time when he was selling the land to the 1st defendant; that later they met at the chief's office in 2012; that he wrote an agreement between the plaintiff and the 1st defendant on 29/12/2005; that the land was being sold for Kshs. 120, 000/= that the money was paid in cash; that he instructed the parties to thumbprint the agreement; that in 2012 the 1st defendant alleged to him that the plaintiff was asking for additional monies for the land; that by then she had sold it to the 2nd defendant.

14. Upon cross examination however, he stated that he could not remember if the witnesses produced their identity card numbers.

15. DW4 Benson Wamalwa, the 2nd defendant testified on **15/10/2018**. He adopted his statement in the matter. He stated that he got to know the plaintiff when he sued him over the land; that the 1st defendant sold him the land which is contiguous to his; that she had been using that land for more than **10** years; that he conducted a search on the land and found that it was Joyce Nafula's; that she requested her to accompany them to the chief's office and then to the land board. An agreement was then written before the chief and the parties executed it; that the chief then wrote a letter to the land board and his application was approved and a title issued to him. Upon being cross examined the witness stated that the 1st defendant began farming on the land in **1997**; that he did not know that the land had a dispute; that the 1st defendant produced to him an agreement showing that she had bought the land from the plaintiff.

DETERMINATION

Issues for Determination

16. The issues that arise from the pleadings in this suit are as follows:-

a. Whether the 1st defendant fraudulently sold the suit land to the 2nd defendant.

b. Whether the transfer of the land to the 2nd defendant should be cancelled.

c. What orders should issue?

17. It is not in doubt that on the **17th June 1997**, the plaintiff purchased a plot measuring point one (**0.1**) acres from the land formerly known as **Plot 56 El-Lahre Settlement Scheme** Moi's Bridge from Joyce Nafula Wafula at a tune of **Kshs. 25,000/=** and that he paid full consideration for the plot.

18. It is also not in doubt that the 1st defendant sold the land to the 2nd defendant in 2011 for **Kshs. 154, 000/=**. The issue at hand is whether she employed fraud to achieve that sale.

19. The agreement between the original owner of the land Joyce Nafula was produced by the plaintiff as **PEXh 1**. The copy of the agreement purportedly vide which the 1st defendant purchased the land from the plaintiff was produced as **DEXh 1**. The two documents are quite different in their mode of execution.

20. The agreement vide which the plaintiff is purported to have sold the land to the 1st defendant was allegedly thumbprinted by both parties while it is clear from the agreement between Joyce Nafula and the plaintiff that the plaintiff executed his documents by affixing a signature by pen. I find it quite unusual that the plaintiff a young man by all standards, would inexplicably change his mode of execution of documents and in such a drastic manner.

21. However it is important to note that **DW2** identified **PEXh 1** as the agreement she entered into with the plaintiff in **1997**.

22. DEXh 1 is dated **29/12/2005**. It was not explained why the 2nd defendant being the buyer did not possess the original of the agreement that was produced as **DEXh 1** yet the produced copy was purportedly certified by a local advocate on **15/4/2018** as a true copy of the original. Some of the details of the village elder before whom it was allegedly made are not legible and have been cut out in that photocopy. The 1st defendant should have presented a better document that could show who made it. I find the said recent certification of **DEXh 1** and the non-production of the original and the presentation of a copy with some details cut out of the photocopied range to be a device to conceal some evidence and create confusion and thus derail justice. **DEXh 1** must be rejected as a document that is not genuine.

23. DW2 testified that from **2005** to **2011** she never knew that the land had been sold to the 1st defendant. She only learnt of the sale of the land when the 1st defendant approached her and informed her that she was the plaintiff's aunt and that she would dispose of the land since the plaintiff had fallen sick and died. I did not hear **DW2**, the defendants' chief witness who lives next to the land, corroborate the evidence of **DW3** to the effect that the 1st defendant had been using the suit land for 6 years. In my view it is implausible that the defendants' chief witness lived next to the sold land for six years while it had been sold and never knew that it had been sold.

24. I also find it unusual that the **DW2** would testify falsehoods against the 1st defendant who called her as her witness at the hearing. Her evidence that the 1st defendant had informed her that the plaintiff had died and hence she would dispose of his plot was quite striking but credible. This evidence was not controverted by the defendants, and it is quite damaging to the defendants' case as the plaintiff is alive and kicking and in court in person to agitate his claim. In my view there would be no good reason why the 1st defendant would lie except that she

had something to hide concerning the alleged sale to her by the plaintiff.

25. In this case the 1st defendant also contradicted herself when she testified that she cultivated on the land in **1997**. The evidence of the plaintiff is to the effect that Joyce Nafula had maize on the land while it was being sold to him in the year **1997**. The plaintiff was to take over after the maize was harvested and this was corroborated by Joyce Nafula.

26. The evidence of the 1st defendant that she was appointed to take care of the land by the plaintiff is in doubt. The plaintiff's evidence is that he appointed Joyce Nafula to look after his land.

27. The evidence of Joyce Nafula corroborates that of the plaintiff, for she states that her son ploughed the land on behalf of the plaintiff in the year **1998** and she remembers taking some maize from the land to the plaintiff who was in town in **1999** and in the year **2000**.

28. There is no record of conflict between the 1st defendant and Joyce Nafula over the custody of the land while the plaintiff was away and I take it that there was actually none. I note that there is evidence that Joyce Nafula called the plaintiff at the earliest to raise alarm when she learnt that the 1st defendant was claiming ownership of the plot. If there was no such conflict I find the plaintiff's evidence that he appointed Joyce Nafula to be the caretaker of the land he had bought from her to be true. It is also regrettable that by extension this court is constrained to reject, for the reasons above, the evidence of **DW3**, a man of the cloth.

29. All the evidence adverse to the defence case coming from Joyce Nafula, who came to court as the 1st defendant's witness, who was not declared a hostile witness by the defence, is sufficient to demonstrate that the 1st defendant was not telling the truth in this case.

30. Consequently, I find from the above evidence that the 1st defendant has not demonstrated that the plaintiff sold the land to her, that she has on the other hand been proved to have employed lies or misrepresentation to enable her cause the transfer of the land to the 2nd defendant by alleging to **DW2** that the plaintiff was deceased while he is still alive to date and thus she did not have a clean title to pass to the 2nd defendant. Consequently, I find that her sale and transfer of the suit land to the 2nd defendant is fraudulent.

31. The 2nd defendant is said to have a title. This court must be careful lest it grant the title waved about in its face by the 2nd defendant undue attention to the extent of failing to examine its root. In the case of **Hubert L Martin And 2 Others Vs Margaret J. Kamar And 5 Others 2016, eKLR** the court stated as follows:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld”. [Emphasis mine].

32. The 2nd defendant never conducted a due diligence exercise to verify whether the alleged agreement between the plaintiff and the 1st defendant was genuine. Ordinarily, he should be holding the original of that agreement. He does not have it. The agreement he relies on in respect of the transaction between him and the 1st defendant is also a mere photocopy. He ought to be having the original of that agreement too. He has no explanation for that. The 2nd defendant's title is therefore tainted with fraud.

33. In the final analysis I find that the plaintiff has established his claim against the defendants on a balance of probabilities and I enter judgment in his favour and I issue the following orders against the defendants jointly and severally:

(a) A declaration that the 1st defendant had no authority and consent from the plaintiff to sell, transfer and/or pass the suit property to the 2nd defendant;

(b) That the transaction done on 29/12/2009 between the 1st and 2nd defendants and all consequential registrations in the Land Register in respect of LR Uasin Gishu El-Lahre Scheme/678 null and void;

(c) That the title issued to the 2nd defendant in respect of Uasin Gishu/El-Lahre Scheme/678 is hereby cancelled;

(d) That the register for Uasin Gishu/El-Lahre Scheme/678 be rectified by way of cancellation of 2nd defendant's name and substitution thereof with the plaintiff's name.

(e) The defendants shall bear the costs of this suit.

It is so ordered.

Dated, signed and delivered at Kitale on this 29th day of **January, 2019**.

MWANGI NJOROGE

JUDGE

29/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Plaintiff in person present

N/A for the defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

29/01/2019