



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**E.L.C. CASE NO. 598 OF 2010**

**SUSAN WAMUCII.....PLAINTIFF**

**VERSUS**

**STANLEY GATHURA NJENGA.....1<sup>ST</sup> DEFENDANT**

**ZAKARIA GATHOGA NDUNGU.....2<sup>ND</sup> DEFENDANT**

**FAMILY BANK LIMITED.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. In the Amended Plaint filed in court on 16/12/2010, the Plaintiff seeks an order for cancellation of the registration of the 1<sup>st</sup> Defendant as the proprietor of the land known as Nairobi/Block 113/367 (“the Suit Property”) and the subsequent transfer to the 2<sup>nd</sup> Defendant, who charged it to the 3<sup>rd</sup> Defendant. She seeks an order to restore the Suit Property to her name and a permanent injunction to restrain the Defendants or their agents from interfering with, disposing of, transferring or in any manner dealing with the Suit Property. In addition, she seeks the costs of the suit and any other relief that the court may deem fit to grant.

2. The Plaintiff claims that she was a member and shareholder of Lucky Summer Estates Company Limited, a land buying company which allocated the Suit Property to her. She was issued a certificate of lease on 24/9/1994. Her claim is that on or about 13/8/2003, the 1<sup>st</sup> Defendant fraudulently caused the Suit Property to be transferred to his name without the Plaintiff’s knowledge, permission or any right in total disregard of the Plaintiff’s rights over the land. The Plaintiff claims that the 1<sup>st</sup> Defendant manipulated the land registration process and obtained a certificate of lease over the Suit Property and yet the Plaintiff still holds the original certificate of lease over the Suit Property.

3. The Defendants filed a joint defence on 14/8/2013 in which they denied the Plaintiff’s claim. The 1<sup>st</sup> Defendant stated at paragraph 6 of the defence that he purchased the Suit Property from the Plaintiff for valuable consideration on or about January 2003. He further averred that he later learnt that Eddah Njeri Kamau had an interest in the land when she sued him in **HCCC No. 2135 of 2007 (O.S.)** which the parties eventually settled out of court.

4. The Plaintiff and her husband gave evidence. She stated that she was a member of Lucky Summer Estate Company Limited from 1986 and held share certificate number 766 which indicated that her plot was number 367. The Ministry of Lands allocated her the letter of allotment over the Suit property in 1994. She was later issued a certificate of lease over the Suit Property, which she still holds in her possession. She was to learn later that the 1<sup>st</sup> Defendant had transferred the Suit Property to his name yet she had not sold her land nor did she sign any transfer documents over the Suit Property.

5. The Plaintiff maintained that she never received any payment for the Suit Property and that she did not instruct anybody to sell the land on her behalf. When she went to the Suit Property intending to commence construction, she found the plot already built. She denied knowing the 1<sup>st</sup> Defendant. The Plaintiff was not aware of HCCC No. 2135 of 2007 between Eddah Kamau and Lucky Summer Company. The 1<sup>st</sup> Defendant transferred the suit land to the 2<sup>nd</sup> Defendant who charged it to the 3<sup>rd</sup> Defendant.

6. The Plaintiff produced a copy of share certificate number 766 dated 13/2/1986 issued by Lucky Summer Estate Company Limited on which plot number 367 is written. She also produced the subdivision scheme approval dated 26/8/1994 which the Ministry of Lands and Settlement issued to her in respect of Nairobi/ Block 113/367 and a copy of the certificate of lease dated 24/9/2003. She produced the abstract of title which shows that a certificate of lease was issued to her on 24/9/2002 over the Suit Property. It also shows that the Suit Property was transferred to the 1<sup>st</sup> Defendant on 13/8/2003 for the consideration of Kshs. 500,000/= and a certificate of lease was issued to the 1<sup>st</sup> Defendant on 13/8/2003. On 16/4/2007 a caution lodged by Eddah Njeri Kamau claiming an interest as allottee was registered against the Suit Property. That caution was withdrawn on 19/11/2009. The abstract shows that a certificate of lease was issued to the 2<sup>nd</sup> Defendant on 18/2/2010. A charge in favour of the 3<sup>rd</sup> Defendant to secure the sum of Kshs. 6 Million was registered against the land on 3/11/2010 and a further charge was noted against the register on 14/12/2011 for the sum of Kshs. 15 Million.

7. The Plaintiff's husband denied in his evidence that she sold her land to anyone. He denied selling the plot on the Plaintiff's behalf or being paid any consideration for the Suit Property by the 1<sup>st</sup> Defendant. He denied that Eddah Njeri Kamau was ever the owner of the Suit Property stating that she ought to have pursued the company if she had any claim. He confirmed that he was a director of Lucky Summer from 2004 to 2010. He was not aware of the suit between Eddah Kamau and Lucky Summer Company Limited and the 1<sup>st</sup> Defendant. He stated that he knew the 1<sup>st</sup> Defendant around 2007 when he was the chairman of the project when the company was doing the infrastructure in the estate. He learnt in 2010 that the suit plot had been transferred when he found it developed. The search at the Lands Office made him aware of the caution registered against the land. He denied entering into any transaction with the 1<sup>st</sup> Defendant over the Suit Property.

8. Bernard Leitich, a Land Registrar at the Ministry of Lands gave evidence for the defence. He confirmed that the records at the lands office reflected that the Plaintiff was initially registered as the lessee of the Suit Property which was transferred to the 1<sup>st</sup> Defendant. When a lease is transferred, the old certificate of lease is cancelled and a new one issued. He confirmed that he authored the letter dated 22/1/2014 setting out these facts following an inquiry by the Defendants' advocates. He stated that the records held in their offices showed different dates for the date the Plaintiff's certificate of lease was issued and the date the records for the suit land were opened. He conceded that entries on the green card are made by the Land Registrar who keeps the green cards in his custody. He confirmed that he did not find the transfers to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants when he carried out his investigations into the Suit Property. He could not find the cancelled title in the 1<sup>st</sup> Defendant's name and had not seen the transfer from the Plaintiff to the 1<sup>st</sup> Defendant as all the supporting documents and the parcel file were missing from their records. He conceded that Land Registrars do make mistakes in the registration process and urged the court to go by the records on the white card.

9. Eddah Njeri Kamau was called as the second witness for the defence. She stated that she purchased shares in Lucky Summer Estate Company Limited in 1976 and was issued a membership certificate on 21/10/1983. She paid for the processing of the title for the plot allocated to her and in 1994 a letter of allotment was issued to her. She claims that she took possession of the plot in 1988 and started developing it. While pursuing her title in August 2003, she learnt that a certificate of lease had already been issued over her plot. Alarmed by this revelation, she sued the 1<sup>st</sup> Defendant in **HCCC No. 2135 of 2007**. An agreement was reached out of court and she withdrew the suit. The consent was to the effect that the 1<sup>st</sup> Defendant would be recognised as the proprietor of the Suit Property. She later learnt that the 1<sup>st</sup> Defendant transferred the Suit Property to the 2<sup>nd</sup> Defendant.

10. She confirmed that plot number 108 was indicated on her share certificate produced in court while the Plaintiff's share certificate showed plot number 367. She also confirmed that in her suit against the 1<sup>st</sup> Defendant she wanted to be registered as the proprietor of the Suit Property on the basis of adverse possession. Lucky Summer Estate Company Limited, the company which allocated her the Suit Property was not a party to the suit and settlement she reached with the 1<sup>st</sup> Defendant in HCCC No. 2135 of 2007.

11. The 1<sup>st</sup> Defendant gave evidence. He stated that the Plaintiff's husband approached him as the Plaintiff's agent in 2003 and told him the Plaintiff wished to sell the Suit Property. He stated that it was agreed between him and the Plaintiff through her husband, Patrick Muraya, acting as her agent that the plot would be transferred to him in consideration of Kshs. 500,000/= payable upon the formal transfer of the plot to him. He stated that he provided the requisite information to Mr. Muraya including the signed transfer forms to enable him effect the transfer to his name. He was to deliver the purchase sum to the Plaintiff through Mr. Muraya upon delivery of vacant possession.

12. The 1<sup>st</sup> Defendant stated that upon confirmation of the transfer of the plot to his name, he made repeated demands to hand over vacant possession but the Plaintiff failed to give him possession. Then he was served with court papers in respect of **HCCC No. 2135 of 2007** filed by Eddah Njeri Kamau against him and Lucky Summer Estate Company Limited. He stated that upon consideration of the documents produced by Eddah Njeri Kamau to confirm ownership which included the share certificate and letter of allotment, he instructed his advocates to enter into negotiations with Eddah Njeri Kamau's advocates which culminated in an agreement. Eddah was to withdraw her suit against him on the understanding that he would pay her Kshs. 1 Million after which the suit was to be marked as settled.

13. Following that settlement, he was given vacant possession of the Suit Property by Eddah Njeri Kamau. He challenged the documents relied on by the Plaintiff in support of her claim as not being genuine and intended to deceive the court. He conceded that the Plaintiff was the first registered owner of the plot and claimed that he was an innocent purchaser for value without notice. Further, that having entered into a settlement with Eddah Njeri Kamau, he remained the duly registered owner of the Suit Property as any claims to the suit land were extinguished by the settlement. He denied that the Plaintiff was entitled to the equitable relief she seeks urging that her conduct soiled her hands. He confirmed that he sold the Suit Property to the 2<sup>nd</sup> Defendant who developed it and charged it to the 3<sup>rd</sup> Defendant.

14. The Defendants called Peter Mutua Musse as their witness. He stated that he had been a director of Lucky Summer Company since January 1975 and was its Chairman. The company would purchase large parcels of land and subdivide it into plots and sell the plots created to developers. He confirmed that on making full payment to the Company, a shareholder would get a certificate bearing a date, name, number of shares and amount paid. The share certificate would also show the plot details. The Suit Property was created from L.R. No. 7107/1 which the company bought and subdivided into small plots. During the survey of the land, the Company would give share certificates to the members. After allotment, they would register that in a book. The company gave the government a list which was then used to prepare the letters of allotment to be issued to shareholders. He confirmed that he prepared the list on behalf of the Company and took it to the Lands Office. He did not produce the list in court. He denied that the Plaintiff was a member of the company.

15. His testimony was that Eddah Njeri Kamau bought the Suit Property from the Company. He stated that the 1<sup>st</sup> Defendant contacted the Company around September 2007 seeking information about the Suit Property when he was sued by Eddah Njeri Kamau who was claiming ownership of the plot. The 1<sup>st</sup> Defendant wanted to know who between the Plaintiff, whom he claimed had sold him the plot, and Eddah Njeri Kamau, was the true owner of the suit plot. The 1<sup>st</sup> Defendant informed this witness that he had purchased the Suit Property from the Plaintiff through Patrick Gukura Muraya who was the Plaintiff's agent. He later learnt that the 1<sup>st</sup> Defendant had entered into an out of court settlement with Eddah Njeri Kamau. The 1<sup>st</sup> Defendant did not inform him that Eddah Njeri Kamau had also sued Lucky Summer Estate Company Limited alongside him. The 1<sup>st</sup> Defendant later sold the Suit Property to the 2<sup>nd</sup> Defendant who constructed a block of flats on it which are occupied by tenants. Between the Plaintiff and Eddah Njeri Kamau he believed that the Suit Property belonged to Eddah Njeri

Kamau. He did not have the register or other records to show which shareholder was allocated which specific plot. He stated that the 2<sup>nd</sup> Defendant is his close friend whom he has known since 1998.

16. The 2<sup>nd</sup> Defendant stated in his evidence that he was an innocent purchaser for value and should be afforded the protection of the law. He claimed that he did an official search at the lands registry before buying the suit plot. He did not know the Plaintiff and stated that her claim to the Suit Property was strange. He confirmed that he had erected flats upon the Suit Property and charged it to secure financing from the 3<sup>rd</sup> Defendant. He stated that he bought the plot for Kshs. 1.5 Million even though the green card showed Kshs. 600,000/= as the consideration. He did not have a copy of the sale agreement he entered into with the 1<sup>st</sup> Defendant. He neither had the copy of the transfer in court nor did he have copies of the receipts issued by the Lands Office on payment of stamp duty and registration fees at the time the land was transferred to him.

17. The 3<sup>rd</sup> Defendant did not call any evidence. Counsel for the 3<sup>rd</sup> Defendant indicated that the 3<sup>rd</sup> Defendant had no role to play in the hearing of the case having discharged the Suit Property. The 3<sup>rd</sup> Defendant maintained that in charging the Suit Property, it relied on the official search it conducted which did not show that the 2<sup>nd</sup> Defendant was not the genuine owner. Further, that the charge was registered before the 3<sup>rd</sup> Defendant learnt of the Plaintiff's claim to the Suit Property. The Plaintiff did not issue a demand letter to the 3<sup>rd</sup> Defendant before instituting this suit. On learning of the ownership dispute, the 3<sup>rd</sup> Defendant moved to extricate itself from the dispute by taking an alternative security for its loan from the 2<sup>nd</sup> Defendant and discharged the Suit Property. According to the 3<sup>rd</sup> Defendant, the only issue left for determination in the suit was that of ownership of the Suit Property which did not concern the 3<sup>rd</sup> Defendant. The issue of costs would be addressed in the submissions.

18. The issue for determination is whether the Plaintiff has made out a case for the grant of the orders she seeks in the Plaintiff. Parties filed submissions which the court has read and considered.

19. Peter Mutua Musse, the director of Lucky Summer Estate Limited testified that the share certificate bore the plot number. Going by his evidence, the Suit Property appears on the Plaintiff's share certificate while a different plot number is indicated in the share certificate issued to Eddah Njeri Kamau. This witness later contradicted himself by stating that the Plaintiff's share certificate was not genuine as it was not supposed to have had a plot number. He did not produce the company's register which would have confirmed whether or not the Plaintiff was a shareholder of this company. He did not produce the list of shareholders that he forwarded to the Lands Office for the preparation of letters of allotment and titles which would have showed who between the Plaintiff and Eddah Njeri Kamau was allotted the Suit Property. Being the 2<sup>nd</sup> Defendant's close friend, the court believes that he was not truthful in his evidence as he may have wished to help his friend who is currently registered as the owner of the Suit Property.

20. It is not clear why Lucky Summer Estate Limited was not served with the court papers filed by Eddah Njeri Kamau in HCCC NO. 2135 of 2007, or why the 1<sup>st</sup> Defendant did not insist that this company and the Plaintiff who he claimed had sold him the Suit Property should be made parties to that suit and participate in the proceedings. The Chairman confirmed that the company was not served with the court papers. Had the company been made aware of that suit, it would have verified from its records whether the Suit Property rightfully belonged to the Plaintiff, or to Eddah Njeri Kamau.

21. The 1<sup>st</sup> Defendant did not produce the sale agreement he entered into with the Plaintiff or her husband yet he alleged that he bought the suit plot through the Plaintiff's husband. He neither provided evidence that he paid the purchase price to the Plaintiff or her husband, nor did he produce a copy of the transfer signed by the Plaintiff. His statement was to the effect that the Plaintiff's husband was to have processed the title in his name before he could make payment. It is highly unlikely that the Plaintiff's husband could have undertaken the conveyance of the Suit Property to the 1<sup>st</sup> Defendant and procured a title in his favour without having received payment of the agreed consideration. The Plaintiff's husband testified and denied selling the Suit Property to the 1<sup>st</sup> Defendant.

22. The Land Registrar who gave evidence did not produce a copy of the transfer of the Suit Property from the Plaintiff to the 1<sup>st</sup> Defendant. The court is inclined to believe the Plaintiff's evidence that she never sold the Suit Property to the 1<sup>st</sup> Defendant, more so due to the fact that the Plaintiff still holds the original certificate of lease over the Suit Property which should have been cancelled and retained at the lands office at the time when the transfer to the 1<sup>st</sup> Defendant was registered and a certificate of lease issued to him.

23. In the absence of the transfer document from the Plaintiff to the 1<sup>st</sup> Defendant and in light of the fact that the Plaintiff still holds the title over the Suit Property, the court is persuaded that the Plaintiff's title over the Suit Property was fraudulently transferred to the 1<sup>st</sup> Defendant.

24. Eddah Njeri Kamau stated in her affidavit filed in support of the Originating Summons in **HCCC No. 2135 of 2007** that she was allocated the Suit Property and only learnt while pursuing the title that a certificate of lease had been issued to the Plaintiff who had transferred it to the 1<sup>st</sup> Defendant. She claimed that she had been in open and continuous occupation of the suit plot with the knowledge of the 1<sup>st</sup> Defendant. If indeed the 1<sup>st</sup> Defendant bought the suit plot from the Plaintiff as he claims, it would have been necessary for him to seek to have the Plaintiff joined as a party to the proceedings in HCCC No. 2135 of 2007 if indeed he had acquired his title from her through her husband. He instead entered into negotiations with Eddah Njeri Kamau for settlement of that suit and paid her off without involving the Plaintiff. The manner in which the 1<sup>st</sup> Defendant handled the transaction involving the purchase of the same property from two different parties without letting them know they both laid claim to the same piece of land creates doubt as to the 1<sup>st</sup> Defendant's good faith in the transactions that led to his registration as proprietor of the suit land.

25. The 2<sup>nd</sup> Defendant submitted that he played no role in the 1<sup>st</sup> Defendant's dealings with the Suit Property and only dealt with it in due course knowing it to have been properly acquired. He urged the court to find that he was an innocent purchaser for value without notice or defect on the title and that he had invested considerably in the development of the Suit Property. Having found that the Plaintiff's claim over the suit land succeeds, the 2<sup>nd</sup> Defendant's title which he acquired from the 1<sup>st</sup> Defendant cannot therefore stand.

26. The court finds that the Plaintiff has proved her case on a balance of probabilities and grants prayers (a), (b) and (c) of the Amended Plaint dated 10/12/2010. Due to the fact that the Suit Property was discharged, the order for cancellation of the charge is not granted. The Plaintiff will have the costs of the suit to be borne by the 1<sup>st</sup> Defendant.

**Dated at Nairobi this 18<sup>th</sup> day of February 2019.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. G. Mwangi for the Plaintiff

Mr. K. Marete for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr. V. Owuor – Court Assistant

No appearance for the 3<sup>rd</sup> Defendant