



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 144 OF 2015

ANASTACIAWANGUMURIITHI.....PLAINTIFF

VERSUS

JEAN WAMARWANYAMU.....DEFENDANT

JUDGMENT

INTRODUCTION

The plaintiff in a plaint dated 9th November 2015 sought judgment for the following orders:

A. A declaration that the transfer of Land Parcel Number Ngariama/Nguriambu/4039 and registration of the same in the name of the defendant was irregular, unlawful and fraudulent and therefore null and void abinitio.

B. An order for cancellation of the registration of the defendant from the title of land Parcel Number Ngiriana/Ngiriambu/4039 and the said title to revert in the name of Duncan Muriithi Njagi, now deceased.

C. Costs of the suit with interest.

At paragraph 5 thereof, the Plaintiff averred that sometimes in early 2010 or thereabouts, her late husband expressed intentions of selling the only family land and she sought assistance from the then District Officer (DO) Gichugu who places a restriction on the land to protect her interest. After the restriction was placed, she was chased away from their matrimonial home by her husband (deceased) due to some marital differences. The Plaintiff averred that she later learned with shock that the Defendant had purchased the suit property. She averred that the transfer of the suit property to the Defendant was tainted with fraud particulars of which she set out thereunder as follows:

- i. Purporting to buy a parcel of land that had a restriction.
- ii. Processing registration of the land without obtaining a proper procedural and valid consent of the relevant Land Control Board yet the suit land is an agricultural land.
- iii. Failing to inform and involve the Plaintiff who is the wife to the registered owner who had a matrimonial home on the land and who had caused a restriction to be placed on the land.

In a statement of defence and counter claim dated 2nd November, 2017 and filed the same date, the Defendant denied the Plaintiff's claim and all particulars of fraud and put her to strict proof thereof. The Defendant counterclaimed against the Plaintiff the purchase price of Kshs.1.8million plus interest and the value of the developments in the suit land. In particular, the Defendant averred that on 10th July 2013, she entered into a sale agreement of the suit land parcel No. Ngariama/Ngiriambu/4039 with one, Duncan Muriithi Njagi who was accompanied by his wife one Susan Wawiria Muchiri at a consideration of Kshs.1.8 million which she paid in full on diverse dates between 2013 and 2014. The Defendant further averred that when she bought the suit property the Plaintiff was not residing on it. She sought to have the suit dismissed with costs.

PLAINTIFF'S CASE

The Plaintiff gave sworn testimony and stated that her husband was one Duncan Muriithi Njagi (deceased) who passed away on 7th March 2015. She got married to the deceased and that she was his only wife. She stated that the suit property was

registered in her late husband's name. On 6th April 2010, she placed a restriction through the DO's office Kianyaga because her husband (deceased) had sold ½ acre without informing her. They had disagreements in the process and she ran away with her six (6) children for

safety. She later learned that the land was transferred to the defendant as the registered proprietor. She stated that she was not informed by the purchaser that she had an interest in purchasing the suit property. She said that she went to the DO's Office and found out that no consent had been granted. She saw the agreement made on 12th July 2013 and one Susan Wamarwa Muchiri appeared as one of the vendors. She does not know her. She recorded her statement on 21st January, 2016 which was adopted in her evidence. She produced a letter from the Chief dated 30th June 2013 recognizing her as the wife of the previous proprietor. She also produced a green card and grant of letters of Administration as P. Exhibits 2 & 3 respectively. The Plaintiff denied the counterclaim.

DEFENDANT'S CASE

The Defendant testified on oath and stated that she bought the

suit property measuring 2½ acres from one Duncan Muriithi Njagi at a price of Kshs.1.8 million. They wrote an agreement on 10/07/2013. She visited the land and found the seller there and she liked it. Duncan Muchiri introduced her one Susan Mawira Muchiri as his wife. She said that the Plaintiff never featured. He employed a person to assist her do farming in the land known as David Kariuki. He sent him with the initial payment of Kshs.600,000/= which the seller demanded. At some point, the seller demanded more money and she became suspicious that he was running away with her money. He refused to sell the land and she put a caution. The seller later accepted to sell the land. He went and removed the caution that had been put by his wife. She then paid the balance through an account. She gave her agent the money to pay to the seller's account. The balance was paid after the seller brought her the title deed. She said that she did not personally attend the Land Control Board. She was put in possession in January 2014.

There were four (4) banana trees and coffee downgraded and empty land down to the river on the right was ½ acre which he said was not well catered. She started taking care of the coffee and replaced the dead ones. She also planted bananas and partly fenced the land. She said that there was no restriction when she bought the land. She says that if the Plaintiff wants their land back she should be paid the purchase price and the value of the developments she has done on the land otherwise the title should not be cancelled. She produced the following documents in defence and in support of the counterclaim:

1. Agreement of sale dated 10th July 2013.
2. Search Certificate in respect of Land Parcel Ngariama/Ngiriambu/4039
3. Certified copies of the register of Land Parcel No. Ngariama/Ngiriambu/36661.
4. Certified copy of the register of Land Parcel No. Ngariama/Ngiriambu/4040
5. Petty cash voucher dated 6/1/2014
6. Petty cash voucher dated 7/1/2014
7. Petty cash voucher dated 20/1/2014
8. KCB Statement for account number 1133492193 operated by David Kariuki Mugwimi concerning deposit of Kshs.600, 000/=.
9. KCB statement for account number 1133492193 operated by David Kariuki Mugwimi concerning the deposit of Kshs.890,000/=.
10. Statement for account number 1148710809 operated by Duncan Muriithi Njagi concerning the payment of Kshs.890,000/=
11. Application for consent of Land Control Board.
12. Letter of consent and
13. Transfer form.

The Defendant also referred to her statement dated 14/1/2016 which was adopted in her evidence. The Defendant stated that she bought the suit property legally and wants the suit to be dismissed. In the alternative, she wants the Plaintiff to refund her the purchase price and the value of the developments she has made on the suit property.

DW1 was David Kariuki Mugwimi. He stated that he was requested by the Defendant in this case to look for her a piece of land. He was introduced to one Duncan Muriithi Njagi and he told the Defendant about it. The Defendant came and saw the land and she liked it. The said Duncan Muriithi Njagi had a title deed in his name. He asked for his ID card and Pin together with correspondences. They negotiated for the price and they agreed at Kshs. 1.8 million. She asked the Defendant to come and see the property. She came and agreed to buy. He signed the agreement on her behalf. The agreement was drawn in the office of an advocate in Mwea. His name is Githinji Karuri Advocate (P. Exhibit No. 1 identified). He said that Susan Wawira Muchiri who appears in the sale agreement was said to be the vendor's wife. The seller had said that because she had put a restriction, he wanted her to be on the agreement to show that she had consented to the sale. On signing the agreement Kshs.600,00/= was paid. The balance of Kshs.1.2 million was paid later. The witness stated that after paying the down payment of Kshs.600, 000/=, the seller came to him and said he had changed his mind. The defendant told him to put a caution on the land. Later the seller came back and said that he was ready to sell the property. The defendant then instructed him to remove the caution they had placed on the suit property. The witness stated that he did not know the name of the Plaintiff in this case. It was also the same time he came to know that the seller was living with Susan Wawira Muchiri as husband and wife. He also confirmed that they were husband and wife after they

removed the caution and came with the title deed. The Vendor left the application for consent and transfer in his shop. The seller asked him to assist buyer to sign which he did and the seller later brought a title deed. The seller demanded for the payment of the purchase price. He told him to open a bank account jointly with his wife or child. He refused and said that he could only open one with his brother. He eventually opened an account which he paid the sum of Kshs. 890,000/=. The rest of the purchase price was paid by way of Petty Cash Vouchers. The money was paid by the Defendant to his account which he paid to the account of the seller. He said that he did not commit any fraud or anything fishy. He only signed the sale agreement on behalf of the Defendant and later received money from the Defendant for onward transmission to the seller Duncan Muchiri Njagi. He said that the land belongs to the Defendant. After the Defendant purchased the suit property, the witness managed the same on her behalf. He said that when the Defendant bought the suit property, there was no dwelling house inside. There were 780 stems of coffee which had dried up. He replaced them. He also planted 480 stems of bananas. He ploughed a portion of the land and dug a latrine. He received a court order after the burial of the seller (deceased). He said that no one came to raise any issues when the seller was alive. He said that he saw the Plaintiff in court. He also stated that the sale was above board and that the suit property belongs to the Defendant.

PLAINTIFF'S SUBMISSIONS

The Plaintiff through the firm of Maina Kagio & Co. Advocates submitted that there was no need to enjoin the Land Registrar a party in this suit as he did nothing wrong. The Learned Counsel also submitted that the discovery of the sale of the suit land to the Defendant was after the Plaintiff's husband died. The Plaintiff also argued that there was no proper, procedural, and valid consent of the Land Control Board. The Plaintiff further submitted that there was a restriction against the title of land which had been registered at the instance of the Plaintiff and that no proper explanation was given how it was removed and the suit land transferred. The Plaintiff also submitted that the suit land is a matrimonial property as defined under **Section 5.2 of the Matrimonial Property Act, 2013**. He stated that the Plaintiff gave a forthright and candid explanation but the Defendant did not offer any evidence of alternative land where the family lived.

It was further submitted that the Plaintiff is the only legitimate wife of the deceased Duncan and that the name of Susan Wawira Muchiri remains just a woman whose status is unknown. He submitted that the allegation that she was introduced as a wife hold no water. The Plaintiff distinguished the submissions by the Defendant on the interpretation of **Section 7 of the Matrimonial Property Act** and the authority relied being **Petition No. 164B of 2016 (Milimani) (2018) e KLR**. He submitted that this was a claim for lack of spousal consent and procedural improprieties at the time of the alleged sale of the suit land. The Plaintiff sought to have the cancellation of the registration of the Defendant as the owner of the suit land.

DEFENDANTS SUBMISSIONS

The Defendant through the firm of P.M. Mudira & Co. Advocate made submission based on five issues framed as follows;

1. Whether the suit filed by the Plaintiff is competent for the orders sought?
2. Whether the sale and transfer of the suit land to the Defendant was irregular, unlawful or fraudulent?
3. Whether the Defendant title to the suit land ought to be cancelled for the land to revert to the Plaintiff?
4. The fate of the Defendant's counterclaim?
5. Who should pay the costs of the suit?

In his submissions on the first item, the Defendant stated that from her evidence, the Defendant played a very peripheral role in the transfer of the suit land Parcel No. Ngariama/Ngiriambu/4039. She stated that since she resides in Nairobi she left the nifty gritty of the transaction to her agent David Kariuki Mugwimi (DW2) and the vendor. Her role was only restricted to passing the purchase price money to her agent (DW2), signing the application D. Exhibit 11 and the transfer form D. Exhibit 13.

The Defendant also submitted that it is instructive to note that after the transfer of the suit land to the Defendant on 7/1/2014 the vendor was alive until 7th March 2015 and that the Plaintiff did not mount any suit during his lifetime. The Defendant also stated that the restrictions and cautions placed on the suit land were removed by the Land Registrar who is the only person with authority under the law to remove such restrictions. He cited **Sections 73 and 78 of the Land Registration Act**. The Defendant submitted that if there was any challenge to his conduct regarding the removal of the caution/restriction, he should have been enjoined in this suit as a party.

On the second ground, the Defendant submitted that the particulars of fraud particularized in the plaint do not fit in the definition of fraud as defined in the Blacks Laws Dictionary.

On the issue of Land Control Board consent, the Defendant obtained from the Land Registrar defence exhibits 11, 12 and 13 which were application for consent of the Land Control Board, letter of consent and the transfer form respectively for Land No. Ngariama/Ngiriambu/4039. Those documents were properly executed by the late Duncan Muriithi Njagi and the Defendant. The letter of consent is duly issued and signed by the Chairman of the Land Control Board Kirinyaga East. On the issue that the Defendant failed to inform the Plaintiff about the purchase of the land, the Defendant submitted that she visited the land in question and that there was no matrimonial home thereon. She also submitted that she was introduced to a different woman as the wife of Duncan Muriithi Njagi (deceased). In respect to the third issue, the Defendant submitted that no evidence was adduced by the Plaintiff why the title should be cancelled and the same registered in her name. She submitted that no evidence of contribution towards acquisition of the property or its development was availed by the Plaintiff in respect of the suit land.

The Defendant on the 4th and 5th issue submitted that she has proved on a balance of probabilities that she procedurally and lawfully bought the suit land Ngariama/Ngiriambu/4039 and prays that the Plaintiff's suit be dismissed and her counterclaim be allowed as prayed.

DECISION

From the pleadings by the parties, the issues that present itself for determination in this case can be framed as follows:

- 1. Whether the sale transfer and issuance of title in favour of the Defendant in Land Parcel No. Ngariama/Ngiriambu/4039 was regular, lawful, and/or procedural?**
- 2. Whether the Defendant's title of the suit land ought to be cancelled and the same revert to the Plaintiff?**
- 3. Whether the Plaintiff's claim or the Defendants counterclaim succeeds?**
- 4. Who should bear the costs of the suit?**

In the first issue, the Plaintiff has poked holes on the manner in which the Defendant acquired the suit property. From the particulars of land shown in the plaint, the Plaintiff has given three grounds of fraud as follows:

- i. Purporting to buy a parcel of land that had a restriction.
- ii. Presenting registration of the land without obtaining a proper procedural and valid consent of the relevant Land Control Board yet the suit land is an agricultural land and
- iii. Failing to inform and involve the Plaintiff who is the wife to the then registered owner who had a matrimonial home on the land, and had caused a restriction to be placed on the land.

According to the *Black's Law Dictionary, 10th Edition*, fraud is defined as follows;

“A knowing misrepresentation or know concealment of a material fact made to induce another to act to his or her detriment.”

From the evidence adduced by the Plaintiff, there is no proof that there was information within the Defendants knowledge which she concealed and/or misrepresented the result of which it induced another person to act to his/her detriment.

The evidence on record shows that when the suit land was transferred to the Defendant on 07/1/2014, all the subsisting encumbrances recorded in the register had been removed by the Land Registrar who is empowered by law to remove the same. There is no evidence or suggestion that the Defendant influenced the Registrar towards the removal of the said restrictions or caution. If the Plaintiff thinks that the said caution and restriction were removed illegally or un-procedurally, then she should have enjoined the Land Registrar as a party to answer the alleged irregularities.

The other issue is the Land Control Board consent. The Defendant produced an application for consent of the Land Control Board, the letter of consent and the transfer as D. Exhibits 11, 12 and 13 respectively. The said documents have been properly executed by the parties concerned. Neither the Plaintiff nor his Advocate objected to the production of those documents. The letter of consent from the Land Control Board is issued and signed by the Chairman of the Land Control Board Kirinyaga East. There was no suggestion that the documents were forged or irregularly obtained. There was no suggestion that the consent was not signed by the persons who were required to execute. There is no letter from the Lands Office that the same were invalid in anyway. The Plaintiff cannot be heard to complain on behalf of institutions, concerning documents which the institutions themselves have no complain about.

On the other issue why the Defendant failed to inform the Plaintiff about the purchase of the land, the Defendant came out candidly and stated that she visited the suit land before she bought it and found that there was no matrimonial home or any other structures. She also stated categorically that she was introduced to a different woman as the wife of the seller. The Plaintiff has not proved that the Defendant knew that she was the vendor's wife or that the vendor had no other wife except her. If the Plaintiff's late husband presented a different woman as his wife and the Defendant who did not know took it to be true, then the Defendant cannot be faulted for believing that the Vendor was telling the truth. In my view, the Defendant is a purchaser for value without notice.

My overall analysis of the evidence and the applicable law is that the Plaintiff has not proved her case against the Defendant on the required standard. It is now settled law that fraud being a serious allegation must be pleaded procedurally and proved to a standard above a balance of probabilities but not beyond reasonable doubt.

In the case of *Dr. Joseph Arap Ngok Vs Justice Moyo Ole Keiwa & 5 Others, Civil Appeal No. Nairobi. 60 of 1997*, the Court declared as follows;

“Section 23 (1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of title and the entire system. In relation to ownership of property in Kenya would be placed in jeopardy.”

Having found that the Plaintiff failed to prove her claim based on grounds of fraud as particularized in the plaint, this suit therefore fails and

the same is hereby dismissed. The Defendant on the other hand has proved that she acquired the suit property parcel No. Ngariama/Ngiriambu/4039 regularly, procedurally and in accordance with the law. As regards the orders sought in her counterclaim, this court cannot order the Plaintiff to refund the purchase price as properties are sold on willing seller willing buyer. If the Plaintiff is interested in having the suit property reverts back to her family she is at liberty to take the offer by the Defendant seriously before it lapses. In conclusion, I wish to express my gratitude to both Counsels appearing for the Plaintiff Mr. Maina Kagio and Mr. P.M. Mudira for their able representation and submissions in this case. In view of the nature of this case, I order each party to bear her own costs. It is so ordered.

READ and DELIVERED in open Court at Kerugoya this 12th day of February 2019.

E.C. CHERONO

ELC JUDGE

12TH FEBRUARY 2019

In the presence of:

1. Mr. Kagio for the Plaintiff - present
2. Mr. Muchira for the Defendant - present
3. Defendant - present

1. Plaintiff - absent