



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

ELC CASE NO. 327 OF 2015

ELIAS NJUE IRERI.....PLAINTIFF

VERSUS

KUBU BENSON NDERI.....1ST DEFENDANT

P.M. KIHU.....2ND DEFENDANT

THE DISTRICT LAND REGISTRAR EMBU.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

JUDGEMENT

1. By a plaint dated 20th March 2007, the Plaintiff sought the following reliefs against the Defendants;

a. A declaration that the purported transfer and the registration of the 1st Defendant Kubu Benson Nderi as the proprietor of land parcel No. Gaturi/Weru/3033 was and was illegal, irregular, fraudulent and unprocedural and that the Plaintiff herein was the lawful proprietor thereof.

b. That the District Land Registrar Embu be ordered to reverse, delete, cancel and/or remove the name of the 1st Defendant Kubu Beson Nderi from the proprietorship section of land parcel Number Gaturi/Weru/3033 and that the name of the Plaintiff Elias Njue Ileri be restored, reinserted, re-entered and/or indicated as the proprietor of land parcel No. Gaturi/Weru/3033 and a title deed be duly issued to the Plaintiff.

c. Costs of the suit.

2. It was pleaded that the Plaintiff was the lawful owner of *Title No. Gaturi/Weru/3033* (hereinafter the *suit property*) which was registered in the name of the 1st Defendant. It was pleaded that the 1st Defendant obtained registration of the suit property in a fraudulent, illegal, unprocedural and irregular manner with the collusion of the 2nd and 3rd Defendants.

3. The Plaintiff pleaded several particulars of alleged fraud and collusion in paragraph 15 of the plaint. The key particulars enumerated were that the 1st Defendant's registration was undertaken without the consent or valid consent of the Land Control Board (hereinafter *LCB*); that the said registration was undertaken in 2005 but backdated to 2004; that the transfer was undertaken without a transfer form duly executed by the Plaintiff; and that the transfer was undertaken without payment of stamp duty and other government taxes.

4. The Attorney General filed a statement of defence dated 14th August 2007 on behalf of the 2nd, 3rd and 4th Defendants denying the Plaintiff's allegations of impropriety in the 1st Defendant's registration as proprietor of the suit property. It was pleaded that it was the Plaintiff who had voluntarily sold the suit property to the 1st Defendant and that all necessary steps and procedures were followed in the transfer of the suit property to the 1st Defendant. It was denied that there was any fraud or collusion with respect to the said transaction.

5. The 1st Defendant filed a written statement of defence dated 7th December 2007 in which the Plaintiff's claim was denied. The 1st Defendant pleaded that he was lawfully registered as proprietor of the suit property after complying with all the legal requirements for registration. The 1st Defendant admitted the existence of a sale agreement for the sale of the suit property and the payment of the purchase price but denied fraud and the particulars of fraud and collusion pleaded by the Plaintiff. He prayed for dismissal of the Plaintiff's suit with costs.

6. At the trial hereof, the Plaintiff called 2 witnesses and closed his case. The Plaintiff testified as PW 1 and he adopted his witness statement

dated 3rd October 2017 as his sworn testimony. He stated that sometime in 1992 he sold one acre of land out of the original parcel No. 254 to the 1st Defendant. His brother Paul Njiru Barnabas (PW 2) also sold a portion of one acre out of the said parcel 254 which the two brothers were to share. It was stated that parcel 254 was initially sub-divided into parcel Nos. 2855 and 2856 whereupon the Plaintiff took 2856 and PW 2 took No. 2855.

7. It was the Plaintiff's case that there was an understanding amongst the 3 parties to the sale transaction that the Plaintiff would transfer 2 acres to the 1st Defendant and thereafter recover one acre directly from PW 2. The agreed purchase price was Kshs 36,000 per acre and the 1st Defendant paid the full purchase price and took possession of the suit property.

8. It was the Plaintiff's further case that even though the parties attended the LCB for consent to sub-divide the land for sale, they never attended the LCB for consent to *transfer* the suit property to the 1st Defendant. He further stated that when he inquired from the 1st Defendant in 2000 on the issue of transfer, the 1st Defendant was not in a hurry to conclude the transaction.

9. The Plaintiff denied having signed an application form for consent of the LCB to transfer. He also denied having signed the transfer form which was contained in the Defendant's list of documents. He contended that the sale agreement for the suit property was therefore null and void for want of consent of the LCB. He, therefore, wanted the 1st Defendant's title cancelled and the suit property to be restored to him.

10. During cross-examination by the advocate for the 1st Defendant, the Plaintiff conceded that he and his brother were paid the full purchase price and that the 2 acres comprised in the suit property were intended to be transferred to the 1st Defendant. He, however, denied having signed the transfer form and he couldn't remember having signed an application form for consent of the LCB to transfer the suit property. He also claimed to have reported the alleged fraud to the Directorate of Criminal Investigations even though he did not produce documentary evidence to back up such report.

11. The evidence of PW 2 was similar to that of PW 1. He adopted his witness statement dated 3rd October 2017 as his sworn testimony. He testified that although the 1st Defendant had paid the full purchase price for the suit property, he failed to go back for transfer for more than 10 years. He, therefore, thought the 1st Defendant was not interested hence he rescinded the sale agreement. PW 2 admitted that he had not transferred one acre to PW 1 as per the earlier understanding. It was strange that PW 2 was looking for the 1st Defendant for the purpose of transfer whereas the arrangement amongst the parties was for PW 2 to transfer one acre directly to PW 1.

12. The 1st Defendant testified on his own behalf as DW 1. He adopted his sworn statement dated 19th August 2014 as his sworn testimony. His evidence on the purchase of the suit property was similar in most respects to the account given by the Plaintiff. He, however, denied any fraud or impropriety in the transfer of the suit property to him. He stated that Plaintiff actually attended the LCB and the consent to transfer was duly granted. He maintained that the Plaintiff also duly signed the application for consent form as well as the transfer form.

13. It was the 1st Defendant's evidence that the Plaintiff had never questioned his occupation of the suit property for over ten years after the sale and that he had never demanded anything from him. He testified that he had never faced any criminal charges with respect to transfer of the suit property to him. He, therefore, wanted the Plaintiff's suit to be dismissed with costs.

14. The Attorney General called the Land Registrar Embu to testify on behalf of the 2nd and 3rd Defendants. The Land Registrar, who testified as DW 2, produced certified copies of the land register and the documents which were available in the parcel file for the suit property. It was her evidence that the transfer of the suit property to the 1st Defendant was regular on the face of the record and that there was nothing to indicate that it was fraudulent.

15. When the hearing was concluded on 17th October 2018, the Plaintiff was given 45 days to file and serve his written submissions whereas the Defendants were given a similar period upon service to file and serve theirs. The record shows that the AG filed written submissions on behalf of the 3rd and 4th Defendants on 28th November 2018 whereas the Plaintiff filed his on 8th March 2019. There is no indication of the 1st Defendant having filed submissions by the time of preparation of the judgement.

16. The court has noted that the parties did not file an agreed statement of issues for determination. The record shows that the Plaintiff filed a list of eleven (11) issues for determination on 29th January 2018 but none of the Defendants filed any statement of issues. The court shall, therefore, frame the issues for determination as provided for under **Order 15 Rule 2 of the Civil Procedure Rules**. The court is of the opinion that the following issues arise for determination in this suit;

- a. Whether the suit property was transferred on the basis of a forged transfer form.
- b. Whether the transfer of the suit property was undertaken without payment of stamp duty and other government taxes.
- c. Whether the transfer of the suit property to the 1st Defendant was back-dated.
- d. Whether the transfer of the suit property to the 1st Defendant was illegal, null and void.
- e. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
- f. Who shall bear the costs of the suit.

17. The court has considered the evidence and submissions on record on the 1st issue for determination. The Plaintiff contended that the consent of the LCB was not obtained for the transfer of the suit property to the 1st Defendant. He contended that the only consent which was obtained was for sub-division. It was his further contention that the signature on the application form for consent was not his but a complete forgery.

18. The court notes that the Plaintiff did not avail any documentary evidence which would lend credence to the allegation of forgery. An allegation of forgery is a serious allegation. It is an allegation that someone has committed a criminal offence in the nature of a felony. The standard of proof of such allegation must be higher than on a balance of probabilities. Although the Plaintiff filed the suit more than 10 years ago alleging forgery of his signature, he did not tender any document from a handwriting expert or a document examiner to support this allegation. He did not even produce details of the occurrence book (OB) number despite claiming that he had reported the alleged forgery to the Police Service for investigation. No results of any criminal investigation were tendered before court.

19. The court has also noted that the Plaintiff's signature in the verifying affidavit accompanying the plaint, the affidavit in support of his application for interim orders as well as the signature in his witness statement are strikingly similar. In the absence of expert evidence to the contrary, the court is unable to hold that the Plaintiff's signature was forged.

20. The court has further noted that the Plaintiff did not discredit the letter of consent which was produced by the 1st Defendant. It was not demonstrated that the consent letter was a forgery and that it was not issued by the LCB. The Plaintiff did not produce any letter or minutes from the LCB to the contrary. In the circumstances, the court accepts the letter of consent as genuine and as having been issued by the LCB.

21. The Plaintiff raised an alternative argument to the effect that the consent of the LCB was invalid because it was obtained out of time. It is not in doubt that the sale agreement was made on or about 30th November 1992 and that the consent of the LCB was issued on 13th July 1993 which was about 7 ½ months later. It was submitted by the Plaintiff that any consent issued after 6 months was invalid and of no legal effect. The Plaintiff relied upon the case of **Rose Wakanyi Karanja and 3 Others Vs Geoffrey Chege Kirundi and Another [2016] eKLR** in that regard.

22. The court is aware that there are at least two contradictory decisions from the Court of Appeal of Kenya on the consequences of lack of consent of the LCB with respect to a controlled transaction. For instance, in the case of **David Ole Tukai Vs Francis Arap Muge & 2 Others [2014] eKLR** (*hereinafter the Ole Tukai Case*) the Court of Appeal held that the failure to obtain consent rendered a sale transaction null and void and of no legal effect and that the equitable doctrines of trust were inapplicable. On the other hand, the Court of Appeal constituted differently came to a contrary decision in the case of **Willy Kimutai Kitilit Vs Michael Kibet [2018] eKLR** (*hereinafter the Willy Kimutai Case*).

23. In the latter case the Court of Appeal consciously departed from the decision in the **Ole Tukai Case** and held, *inter alia*, that;

“There is another stronger reason for applying the doctrines of constructive trust and proprietary estopped to the Land Control Act. By Article 10 (2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law. (Article 10 (1) (b). Further, by Article 159 (2) (a), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential provisions in the Sixth Schedule to the Constitution, the Land Control Act should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the Constitution.”

24. The court is persuaded by the decision in the **Willy Kimutai Case** that the principles of equity are applicable to the application and interpretation of the provisions of the **Land Control Act**. The court is further satisfied that the absence or invalidity of the consent of the LCB would not necessarily render the transaction in issue null and void for all purposes. The court, therefore, finds that although the consent of the LCB was obtained slightly out of time, that did not invalidate the sale transaction. There is evidence on record that the 1st Defendant fully paid the purchase price, took possession of the suit property and has been utilizing it since 1993.

25. The second issue is whether the suit property was transferred to the 1st Defendant on the basis of a forged transfer form. The court has fully considered the evidence and submissions on this issue. The court is of the opinion that the Plaintiff has failed to demonstrate that the signature on the transfer form was a forgery. An allegation of fraudulent and criminal conduct must be proved on a degree which is higher than a mere balance of probabilities. See **Koinange & 13 Others Vs Koinange [1986] KLR 23**.

26. The Plaintiff had at least ten (10) years before the date of trial to assemble and avail cogent evidence of forgery. He did not provide any expert evidence on the authenticity of the signature on the transfer form. He did not produce a report from either a document examiner or handwriting expert to support his allegation. He did not even produce any document to demonstrate that he reported the alleged crime to the police service or that the matter was pending investigation.

27. The court has noted that by a letter dated 7th June 2005 the Plaintiff's advocate wrote to the 1st Defendant purporting to rescind the agreement for sale. The said letter also offered to refund the entire purchase price of Kshs 72,000/- for alleged lack of interest on the part of the 1st Defendant in concluding the transfer process. It was never alleged that the 1st Defendant had forged the transfer form since the Plaintiff was clearly aware of the transfer having registered a caution against the suit property on 16th May 2005. The court is far from satisfied that the alleged forgery was proved. The 2nd issue is accordingly answered in the negative.

28. The 3rd issue is whether the suit property was transferred without payment of stamp duty and other government taxes. There was scanty evidence on record on this issue. The 1st Defendant contended that he paid stamp duty and related penalties thereon in the sum of Kshs 15,000/-. He could not produce a payment receipt because it could not be found. The transfer form in the parcel file indicated that stamp duty was duly assessed one day after presentation of documents and that a further assessment was done later on.

29. Although there were no copies of receipts for payment of stamp duty in the parcel file at the time of trial, that is not necessarily an indication that it was never paid. It is a matter of public notoriety and the court takes judicial thereof that parcel files in Kenya hardly keep a complete record of transactions. There are many such files which lack even the most basic documents such as transfer forms and LCB consent letters. The court is aware that the sale transaction was being handled by H.M. Utuku Advocate who apparently died before concluding the process. The material on record also shows that the transfer in issue took place more than 10 years before trial. It is possible for receipts to get lost after passage of such a long period of time. The court is of the opinion that the 1st Defendant had a reasonable explanation for failure to produce the original receipts for payment of stamp duty.

30. The court has also considered the evidence of the Land Registrar who testified at the trial. She stated that a triplicate of the payment receipt would normally be kept in the parcel file and that a transfer would not be registered without payment of stamp duty. It was also her evidence that upon processing of documents lodged for registration (which may take several days), the ultimate entries in the register would be dated on the date of presentation of the documents and not the date of completion of the process. The court is therefore of the opinion that the allegation of non-payment of stamp duty was not proved.

31. The 4th issue is whether the transfer of the suit property to the 1st Defendant was back-dated. It was contended that the transfer was actually affected in 2005 but was backdated to 8th November 2004. It was the Plaintiff's case that when he conducted an official search on 18th April 2005 the results showed that he was the registered owner. The court has noted from the copies of the land register that it indicates the transfer as having been effected on 8th November 2004 whereas the Plaintiff's caution was registered on 16th May 2005. The Plaintiff did not produce a certified copy of the land register as at 18th April 2005 and neither did he produce the certificate of official search which was allegedly issued to him on that date.

32. The contents of the parcel title, though not complete in every respect, did not reveal that the land register was doctored. It was curious though that there were two separate copies of application forms for transfer of the same property. The first set was dated 5th November 2004 whereas the second one was dated 24th August 2005. Although this anomaly was not explained by the Land Registrar, it would appear that it is the earlier application of 2004 which was acted upon. The Land Registrar's evidence was to the effect that there were no irregularities on the face of the record and that there was no evidence of back-dating of the transfer.

33. The court is of the view that the Plaintiff has not demonstrated the allegation of back-dating to the required standard. In the absence of a certified copy of the land register or certificate of official search for the period between November 2004 and May 2005 supporting the Plaintiff's allegations, the court is unable to hold that the land register was backdated. The 4th issue is accordingly answered in the negative.

34. The 5th issue is whether the transfer of the suit property was illegal, null and void. In view of the court's findings and holdings on the preceding issues, it would follow that there is no evidence on record upon which it may be concluded that the transfer of the suit property to the 1st Defendant was illegal, null and void. In the circumstances, this issue is answered in the negative.

35. The 6th issue is whether the Plaintiff is entitled to the reliefs sought. In view of the court's findings and holdings on all the preceding issues, it would follow that the Plaintiff is not entitled to the reliefs sought in the plaint or any one of them.

36. The 7th and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. In this case, the court finds no reason why the successful parties should not be awarded costs of the suit.

37. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove his case to the required standard. Accordingly, the Plaintiff's suit is hereby dismissed with costs to the Defendants.

38. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED at EMBU this 21st day of MARCH, 2019.

In the presence of Ms Muriuki holding brief for Ms Ndorongo for the 1st Defendant and in the absence of the Attorney General for the 2nd, 3rd and 4th Defendants.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

21.03.19