



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO.2115 OF 2007

SALOME WANJIKU NJUGUNA.....1ST PLAINTIFF

ELINE NYAMBURA.....2ND PLAINTIFF

TIMOTHY KUNGU.....3RD PLAINTIFF

ISAAC KIBATHI.....4TH PLAINTIFF

JAMES NGUNDU NJUGUNA.....5TH PLAINTIFF

VERSUS

JOEL KUNGU WAINAINA.....1ST DEFENDANT

WILSON WAITHAKA GITAU.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiffs' claim is that on or about 18/12/2006 the 1st Defendant fraudulently sold L.R. No. Kiganjo/Gachika/1331 ("the Suit Property") to the 2nd Defendant yet the land belonged to the Plaintiffs. The sale was pursuant to a public auction and the Plaintiffs aver that they were not served with a notice of the attachment. The Plaintiffs seek a declaration that the sale of the Suit Property was illegal and irregular. They also seek exemplary damages through the plaint dated 22/12/2006 which was initially filed as Nairobi **HCCC No. 1164 of 2006**.

2. The Defendant in their Amended Statement of Defence and Counterclaim filed in court on 4/8/2009 denied that the sale of the Suit Property was fraudulent while stating that the sale was pursuant to the execution of the decree in **High Court Civil Case No. 200 of 1998** in which the 1st Plaintiff's husband, Njuguna Kungu was the judgement debtor. The Defendants denied the 1st Plaintiff's allegations that she owned the Suit Property while stating the suit land was fraudulently transferred by the 1st Plaintiff's husband to her. The Defendants also faulted the Land Registrar for withholding the prohibitory order from 17/5/2005 until 25/1/2007 without registering it against the Suit Property. The Defendants counterclaimed a declaration that the transfer of the Suit Property to the Plaintiff was fraudulent and they therefore seek an order to cancel that transfer or any other transfer of the suit land.

3. The 1st Plaintiff gave evidence. She stated that she is registered as proprietor of the Suit Property as trustee for her children who are the 2nd to 5th Plaintiffs. She stated that prior to December 2006 the Suit Property was registered in her husband's name jointly with her name. She contended that on 18/12/2006 when the Suit Property is alleged to have been sold by way of public auction to the 2nd Defendant pursuant to execution of a decree between the 1st Defendant and her husband, had a search been conducted at the registry it would have shown that she was the registered owner.

4. She denied being served with the notice to proceed with execution issued in **HCCC No. 200 of 1998**. She faulted the auctioneer for conducting the sale of the Suit Property knowing well that she was also registered as co-owner of the Suit Property. She produced copies of the title deed which shows that she was registered with Francis Njuguna Kung'u as co-owners of the Suit Property on 17/5/2005. She also produced a copy of the official search which showed the two names as proprietors of the Suit Property as at 21/6/2006. She produced a copy of the notice of objection which she filed as objector in **HCCC No. 200 of 1998**. A title deed was issued in her name alone on 20/12/1996. The search dated 11/4/2012 shows that a prohibitory order restricting dealings with the suit land was registered against the land. The entry shows that the court order was dated 6/11/2003.

5. The 1st Plaintiff's explanation for the transfer of the land was that that was intended to protect the land from being sold. She stated that at the time of transfer she did not know that there was a case pending in court over the Suit Property. She stated that by the time the auction of

the Suit Property was conducted she was the registered proprietor of the land and that the auctioneer went to the land in 2006.

6. The 5th Plaintiff gave evidence. He more or less reiterated the evidence of the Plaintiff. He confirmed that his father was still alive.

7. The 1st Defendant testified. He stated that the 1st Plaintiff's husband, Francis Njuguna, assaulted him in 1995, was prosecuted and convicted. The 1st Defendant filed **HCCC No. 200 of 1998** and obtained judgement against Francis Njuguna in which Francis Njuguna was ordered to pay him Kshs. 153,000/= together with interest and costs which he failed to pay. The Suit Property was sold in execution of that decree. He stated that after he was paid his money he did not follow up the issue but was to learn later that Francis Njuguna had transferred the Suit Property to his wife who went ahead and got the children registered as proprietors of the land to defeat the auction.

8. Stephen Nyambu Mbijiwe who conducted the auction also gave evidence. He stated that he served Francis Ndung'u with a notification of sale for the Suit Property on 14/6/2006 and that the property was to be sold on 28/7/2006. The 1st Plaintiff filed an objection but failed to prove ownership. The property was re-advertised for sale and sold on 18/12/2006. He stated that the auction took place at Ruiru town outside the post office building and that the Plaintiff and her husband were present at the auction. The 2nd Defendant was the highest bidder at the auction and paid the purchase price of Kshs. 470,000/=. He stated that the sale by public auction held on 18/12/2006 was confirmed and made absolute by the order issued by Lady Justice Anga'wa on 25/1/2008. According to him, the sale which took place at the public auction was lawful and was carried out in accordance with the law.

9. The 2nd Defendant stated in his evidence that on 18/12/2006, he went to Ruiru Town and saw a gathering of people and upon inquiry he was informed that there was some land being sold in Gachika, Kiganjo location, that land is the suit land in this case. He joined the bidders and emerged as the highest bidder and bought the land at Kshs. 470,000/=. The land was being sold in execution of the decree in **HCCC No. 200 of 1998**.

10. He got an order vesting the property in his name from the High Court on 25/1/2008. The order stated that if the Defendant did not transfer the property to him within 30 days, the Deputy Registrar would execute the transfer documents. The Principal Deputy Registrar signed the transfer on 24/4/2008. After obtaining consent from the Land Control Board he took the transfer for registration and was shocked to learn that Francis Njuguna Kung'u had transferred the land to his wife who in turn had caused the title to be registered in her name and those of her four children. The 2nd Defendant alluded to another case being HCCC No. 2115 of 2007 having been filed by the Plaintiff against him.

11. He produced copies of the prohibitory order issued on 6/11/2003 to Francis Njuguna Kung'u mentioning the decretal sum of Kshs. 253,838.30/= he also produced a copy of the decree and the certificate of taxation. The copy of the official search which he produced is dated 8/4/2002 and showed that the Suit Property was registered in the name of Njuguna Kung'u. He also produced a certificate of sale to confirm that the Suit Property was sold to him at a public auction conducted by Lifeline Traders. He produced a copy of the green card which shows that Kung'u Karanja Njuguna Kung'u was registered as the proprietor of the suit property on 30/7/1993. The land was registered in the names of Francis Njuguna Kung'u and Salome Wanjiku Njuguna on 17/5/2005. On 20/12/2006, the title was transferred to the names of the Plaintiffs to hold in equal shares. Entry number 8 shows that a prohibitory order prohibiting dealings with the land was registered against the Suit Property on 29/1/2007. He produced a copy of the order issued on 25/1/2008 following his application for the prohibitory order. The evidence of Stephen Mbijiwe, the auctioneer who sold the Suit Property to the 2nd Defendant that the 1st Plaintiff and her husband, Francis Njuguna Kung'u attended the auction was not controverted.

12. The issues for determination are whether the transfers of the Suit Property to the Plaintiffs was fraudulent; and whether the court should grant the orders sought in the plaint or those sought in the counterclaim. Parties filed submissions which the court has considered.

13. Looking at the ruling delivered by Ang'awa J. on 15/11/2007, it is clear that Francis Njuguna Kung'u, the Defendant and judgement debtor in HCCC No. 200 of 1998 was well aware of the execution process and even tried to resist it. The Ang'awa J. was dealing with the decree holder's application for a vesting order over the Suit Property which the court granted and directed that the Deputy Registrar would execute the transfer if the defendant failed to do so. No appeal was filed to challenge or set aside the vesting order. The 1st Plaintiff filed an objection in the same suit under Order XXI of the Civil Procedure Rules. She went no further than filing the notice on 27/6/2006.

14. Francis Njuguna was registered as proprietor of the suit land on 30/7/1993 and remained so registered until 17/5/2005 when he was registered as co-owner with the 1st Plaintiff. It was transferred to the 1st Plaintiff on 20/12/2006 to hold in trust for the 2nd to 5th Plaintiffs. The decree in HCCC No. 200 of 1998 was issued on 18/6/2003. The prohibitory order was registered against the suit land on 29/1/2007. The Suit Property was sold at an auction which took place on 18/12/2006.

15. In **Suleiman Bin Abdulla Bin Mohamed El Kiyumi v Azzan Bin Zahor El Ruwehi and Said Bin Azzan Bin Zahor el Ruwehi [1958] EA 553**, the court held that circumstantial evidence suffices to prove fraud and that the timing of the transfer established that the 1st Defendant's object was to put the property out of the reach of his creditor. The court concluded that in light of all the circumstantial and other evidence, the Defendants had conspired together to defeat the Plaintiff's claim by a transfer of the land to the 2nd Defendant with the object of preventing the Plaintiff from attaching it and the transfer was accordingly void.

16. Going by the timing of the transfers of the suit land from Francis Njuguna Kung'u to the 1st Plaintiff, and the fact that the 1st Plaintiff was well aware of the proceedings leading to the issue of the prohibitory order against the suit land, the court is satisfied that the 1st Plaintiff conspired with her husband, Francis Njuguna Kung'u to transfer the Suit Property first to her name as co-owner alongside Francis Njuguna Kung'u and then later to her name as trustee for the 2nd to 5th Plaintiffs with the sole aim of defeating the 2nd Defendant's claim and prevent the vesting of the suit land in the 2nd Defendant's name following the prohibitory order issued by the court on 6/11/2003.

17. The Plaintiffs have failed to prove their case on a balance of probabilities, it is dismissed. The court enters judgement for the Defendants

in terms of prayers (a) and (b) of the Counterclaim dated 31//7/2009. The Defendants are awarded costs of the suit and the counterclaim.

Dated and delivered at Nairobi in open court on 28th May 2019.

K.BOR

JUDGE

In the presence of: -

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiffs and the Defendants