



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

CIVIL SUIT NO. 62 OF 2017

(FORMERLY NAIROBI H.C.C.C NO. 606 OF 2010)

C'EST BON SUPERIOR SCHOOL LTD.....PLAINTIFF

VERSUS

JOSEPH ALEX GICHUHI.....1ST DEFENDANT

NDIRANGU KARANJA.....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

JUDGMENT

1. The plaintiff is a limited liability company, which is a family company. PW1, FELISTUS GICHUHI MWIHAKI was married to JOSEPH ALEX GICHUHI, the 1st defendant herein sometime in 1979 but they separated in year 2006. The couple had set up the company known as CEST BON SUPERIOR SCHOOLS in order to run the business of a school. The shareholding of the company was one where 1st defendant owned 5 shares, his wife had 1 share while their children Juliet Njeri and Michael Ngari owned 1 share each. The company became the registered owner of land parcel no KARAI/GIKAMBURA/635 on 5.7.2001 (the suit land). Vide the company's resolution of 23.6.2010, the land was sold to 2nd defendant, who was issued with a title deed on 1.10.2010.

2. It is alleged by plaintiff that 1st defendant sold the land through fraud and by another resolution of the company (Plaintiff exhibit 1), the company decided to seek legal redress in court hence this suit which was filed on 8.12.2010.

3. Meanwhile 1st defendant passed on (on 7.10.2013). The case against him was marked as abated on 21.11.2018.

4. The 2nd defendant in his statement of defence dated 10th July 2015 denied the particulars of illegality, irregularity and fraud and put the plaintiff to strict proof. He affirmed that he was furnished with all the plaintiff's annual returns and minutes of resolution which indicated that the 1st defendant was indeed a director of the plaintiff duly authorized to execute documents for the transfer of the property.

5. The 3rd defendant in their statement of defence dated 18th August 2011 also denied the allegations made in the plaint and put the plaintiff to strict proof.

6. **PW1 Felistus Mwihaki**, a director of the plaintiff company, adopted her statement filed on 20th November 2018 as her evidence and relied on the documents filed with the application dated 8th December 2010. The documents were produced as P-Exhibit 1-11 respectively. She averred that the 1st and 2nd defendant entered into a sale agreement for the Suit Property without the consent of the other three directors. That according to clause 20 of the company's Articles of Association, the seal of the company was to be used only with authority of the Board through a resolution. She further stated that the 1st defendant forged the company documents so as to effect the sale and used the company seal without the knowledge of the other director's.

7. After learning of the 1st defendant's action, PW1 put a caveat on the land preventing any dealings. But the 1st defendant filed an application in Kiambu Court seeking removal of the caution, which was allowed on 29th September 2010. She avers that the order in Kiambu court was obtained illegally by using a false affidavit of service as evidence of service on her as the cautioner.

8. PW1 contends that the 2nd defendant cannot claim to be an innocent purchaser for value as he illegally colluded with the 1st defendant by presenting registration documents dated 29th October 2010 for transfer purportedly signed and sealed by the plaintiff company without a board resolution as well as fraudulently obtaining a Land Control Board Consent which was more than one year old. What's more there is no evidence of the payment to the plaintiff's account. Pw1 also blames the land registrar Kiambu for the fraud, irregularity and illegality in

allowing the Suit Property to be transferred to 2nd defendant.

9. The Counsel for 2nd defendant actively participated in the trial and cross examined PW1, however, he averred that they would not call any witnesses.

10. Plaintiff and 2nd defendant duly filed their written submissions. The plaintiff submitted by affirming her assertions that due to fraudulent acts of the defendants the Suit Property was transferred to the 2nd defendant. They relied on the cases of;

- **Ofumbi vs. Nagongera Farmers and Another, Kampala H.C.C. No.449 of 1992,**
- **Zakayo Ndungu Ngugi v National Bank of Kenya Limited & another [2012] eKLR,**
- **Linus Nganga Kiongo & 3 others v Town Council of Kikuyu [2012] eKLR.**

11. The 2nd defendant submitted that the 1st defendant acted as agents of the Plaintiff and had authority to transact in the sale and transfer of the Suit Property vide the resolution dated 23rd June 2010. That **PW1** was not privy to what was happening as she ceased to be a director and shareholder. Furthermore, the 1st defendant was the majority shareholder who had authority to act on behalf of the plaintiff. That 2nd defendant exercised due diligence in good faith before purchase of the Suit Property and is indeed a *bonafide* owner. He relied on the following cases;

- **Ashok Morjaria v Kenya Batteries (1981) Ltd & 2 others (2002) eKLR 406,**
- **Lucy Njeri vs Isaac Wangoya Mwangi & Another Nairobi ELC Appeal Case No. 25 of 2014 (2018)Eklr**
- **Charter House Bank limited (under Statutory management) vs. Frank N. Kamau, Nairobi CA No. 87 of 2014 (2016)Eklr,**
- **Lawrence P. Mukiri v Attorney General & 4 Others [2013] eKLR,**
- **Katende v Haridar & Company Limited [2008] 2 E. A 173.**

12. The issues for determination are:

- i. Whether there was fraud, illegality and irregularity in the transfer of the suit land from the plaintiff company to the 2nd defendant.
- ii. Whether the 2nd defendant acquired a valid title to the suit Property and whether he is a bona fide purchaser for value without notice.

Whether there was fraud, illegality and irregularity in the transfer of the suit land from the plaintiff company to the 2nd defendant.

13. Before determining the issue in dispute herein, I must comment on the legal position where a party fails to tender evidence. The position taken by the plaintiff is that failure to adduce evidence means that the evidence tendered is un-controverted. The plaintiff has relied on the case of **Linus Nganga Kiongo & 3 others vs Town Council of Kikuyu [2012] eKLR.**

14. Defence on the other hand avers that plaintiff's case can still be discredited upon cross examination and that in any event, a party is bound to prove their case. On this point defence has relied on the cases of;

- **Lucy Njeri vs Isaac Wangoya Mwangi & Another Nairobi ELC Appeal case No. 25 of 2014 (2018) eKLR.**
- **Charter House Bank Limited (under Statutory Management) vs Frank N. Kamau, Nairobi CA No. 87 of 2014 (2016) eKLR.**

15. Section 107 of the Evidence Act provides that ;

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person”.

16. I find that a party to a suit has to discharge the burden of proving their case. Even in undefended suits, a party is still duty bound to adduce evidence to support his or her case. Thus in the present case, the plaintiff is under an obligation to prove the particulars of fraud, irregularity and illegality.

17. In the case of **Denis Noel Mukulo Ochwada & Another vs. Elizabeth Murangari Njoroge & Another**, COA NO. 298 OF 2014, the court made reference to the case of **R. G. Patel v. Lalji Makanji (the former Court of Appeal for Eastern Africa)** where with regard to the standard of proof in fraud cases, it was stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.

(See also **Gudka v. Dodhia**, CA. No. 21 of 1980 and **Richard Akwesera Onditi v. Kenya Commercial Finance Co Ltd**, CA.No. 329 of 2009”).

18. The plaintiff has set out the particulars of fraud, irregularity and illegality committed by the 1st and 2nd defendants in paragraph 6 of the plaint. However, the case against the 1st defendant who died in 2013 was marked as abated upon the request of the plaintiff on 21.11.2018. Thus the plaintiff cannot now purport to prove fraud as against the 1st defendant.

19. That certainly leaves the case hanging because the 2nd defendant was merely a recipient of the property. The position of the 2nd defendant was aptly captured in the ruling of this court on 18.7.2014 where the court was dealing with the application for injunction. The court had stated as follows;

“Thus a third party dealing with a company is entitled to assume the company has complied with its internal rules and procedures. The actions of a company are personified and executed through its agents/officers who are deemed to have the ostensible authority to represent and bind the company. A third party therefore dealing with the company is not expected to undertake any investigations to establish whether or not the officer/director has the authority to represent and bind the company. If that were to be the case it would practically become impossible for companies to transact any business (see the case of **Morjaria vs Kenya Batteries (1981) Ltd & 2 others (2002) IKLR 406”.**

20. The plaintiff was therefore required to prove the fraud, irregularity and illegality during the trial as against 2nd defendant. I have gone through the statement of PW1, the one recorded on 20.11.2018 and I find that much of the fraud, irregularity and illegalities have been heaped on the 1st defendant. Allegations against 2nd defendant are captured in paragraph 10 of the statement. The 1st allegation thereof is that 2nd defendant had presented documents for registration without a board resolution. This issue has already been dealt with in the ruling of 18.7.2014. The 2nd defendant was not expected to undertake investigations to establish whether directors had authority to represent the company or not.

21. The second allegation raised is that the consent to the land control board was not valid in respect of the transfer of the suit land. Again this issue was dealt with during the hearing of the application for injunction where the court stated in the ruling of 18.7.2014 that ;

“The land control act cap 302 laws of Kenya does not provide that a consent once given must be used within 6 months of the date of issue. “

22. PW1 did not state in which other manner the consent to the land control board was invalid. This allegation hence fails.

23. The third allegation made by plaintiff against 2nd defendant is **“colluding to transfer the property while knowing that the same had a dispute”**. However no evidence was adduced to demonstrate in which manner the 2nd defendant was in collusion to transfer the property. After all, the plaintiff no longer has a claim against the person who was the alleged master mind of collusion.

24. The other issue the court has considered is the status of the plaintiff company. From the evidence adduced by PW1, it is apparent that she was sidelined by her husband in the dealings of the company. She and her children were minority shareholders. However, the suit was not filed as a derivative suit so as to protect the interests of minority shareholders. See- **H.C.C.C. VOI CIVIL SUIT NO 1 OF 2017 WILMOT MWADILO& 3 Others VERSUS ELIUD TIMOTHY MWAMUNGA and Others**.

25. It must be presumed that 1st defendant had shares in this company. He was the majority shareholder. The property in question was sold by the company through this majority shareholder. The question is, who in the company is representing this party. The memorandum and articles of association of the plaintiff clause 9 (v111), do provide for what would happen in case of death of a shareholder. It is the executors or administrators of the estate who would have the mandate to transfer the shares to the relatives mentioned therein or to trustees of his will. No evidence was adduced to confirm compliance with this clause.

26. This is a situation whereby the plaintiff company appears to have been existing only in name as at the time of the transaction. The company was actually in the control of 1st defendant. The company appears to have had no account of itself. During cross examination, Pw1 admitted that when the school was running, it was using her personal account, but the school closed way back in 2005.

27. Further in cross examination, Pw1 confirmed the payments made in respect of the suit land via RTGS whose total was sh. 15 000 000. There having been no evidence of the company’s bank account, the company cannot claim there was no payment since 1st defendant was paid.

28. Further, it has emerged that PW1 did not know where the title was kept by 1st defendant. A perusal of the green card (Plaintiff exhibit 6) shows that before the transfer of the suit land to 2nd defendant, the title to the suit land had been used as security. However, PW1 was not aware of these transactions. She does not even know where 1st defendant was getting the title from. During cross examination she stated that;

“It is true we are here because the property was transferred without my knowledge and we were not in good terms. My husband was in control of the same”.

29. From the foregoing, it is apparent that 1st defendant sold the suit land using the company. Pw1 wants the land back using the company. Any fraud, illegalities and irregularities attributed to 1st defendant ought to be borne by his estate. And since the case against him was marked as abated, then such blame cannot be off loaded unto the 2nd defendant.

30. It is also not lost to this court that though PW1 has also blamed the Land Registrar Kiambu for effecting the transfer, that office has not been sued. The 3rd defendant is the Commissioner of lands, which office no longer exists.

31. The provisions of section 26 of the Land Registration Act provides that;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme”.

32. I find that there is no evidence to warrant the impeachment of the title held by the 2nd defendant.

33. In the circumstances, I find that this case has not been proved on a balance of probability, the same is dismissed with costs to 2nd defendant.

Dated, signed and delivered at Thika this 2nd day of May, 2019.

MBUGUA LUCY

JUDGE

2/5/2019

In the presence of

Court Assistant: Diana

J. Kouna for 2nd defendant

Tumu H/B for M/s Gathoni for Plaintiff

Kezia Wambui Ndirangu (Donee of Power of Attorney of 2nd Defendant).

All other parties absent

1st Defendant deceased