



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC MISC. CASE NO. 58 OF 2008**

**JOYCE WARIARA KIARIE.....PLAINTIFF**

**VERSUS**

**1. THE REGISTRAR OF TITLES, MOMBASA**

**2. HON. ATTORNEY GENERAL**

**3. SAMUEL VARGHESE.....DEFENDANTS**

**JUDGEMENT**

1. The plaintiff took out the Originating Summons dated the 11<sup>th</sup> February 2008 against the 3 defendants seeking to be granted orders that;
  - (a) That this Honourable Court be pleased to issue an order directed at the caveator to attend before the court and show cause why the caveat lodged in respect of Subdivision Number 1270 (original NO.67/Rev. 557) Section 1 Mainland North should not be removed and/or withdrawn;
  - (b) That this Honourable Court be pleased to make an order directed at the senior registrar of Titles Mombasa District Land Registry to remove/withdraw the caveat lodged/registered against Title known as Subdivision Number 1270 (Original NO.67/Rev 557) Section 1 Mainland North with immediate effect;
  - (c) That the cost of this application and the applicant personal costs met pursuant to the lodging of the caveat herein be paid by the respondents jointly and severally.
2. The Originating Summons is premised on the grounds inter alia that the plaintiff is the registered proprietor of the suit land and she has discovered that there is a purported Power Of Attorney donated by her which is nothing more than a forged document. The plaintiff also stated that the caveat registered by the 3<sup>rd</sup> defendant is premised on a sale agreement and transfer of lease which on the face of it smirks of fraud and illegalities based on the reasons offered.
3. The Originating Summons is opposed by the 3<sup>rd</sup> defendant who filed a replying affidavit on 27<sup>th</sup> February 2008. The 3<sup>rd</sup> defendant deposed that he was introduced to the suit property by an estate agent called Mr John Chege Kamau in September 2006. He went and viewed the land and found it completely undeveloped and a piece of wilderness. That after protracted negotiations, they agreed on a price of Kshs5.2 million.
4. The 3<sup>rd</sup> defendant deposed that before an agreement was drawn, he visited the Land Registrar's office for enquiring the possibility of subdividing the plot. Thereafter he approached Mr. Vikram Kanji advocate to represent him in the transaction. That Mr. Kanji informed him that Mr Waweru would represent the vendor one David Mbai Kiarie who held a Power of Attorney. The sale agreement was drawn and executed on 10<sup>th</sup> October 2006 and procurement of consents and clearances followed.
5. The 3<sup>rd</sup> defendant deposed that he had purchased the suit premises to put up maisonettes for commercial disposal. That he had obtained a loan from EABS Bank Ltd against the charge on the title but the charge could not be registered because the title went missing. He gave a summary of his expenses so far incurred amounting to Kshs8.5 million. That registration of the transfer was delayed due to non-availability of the deed file. That finally in December 2007, the Registrar informed Mr Kanji that he had the file but could not register the transfer because he had received a complaint regarding the execution of the Power of Attorney. Consequently the Registrar registered a caveat which is the basis of this suit. He asked that the Originating Summons be dismissed.

6. The matter proceeded by way of oral evidence. The plaintiff called two witnesses. The defence also called two witnesses. The plaintiff testified as PW1 on 9<sup>th</sup> and 10<sup>th</sup> July 2013. She said that she uses her two names interchangeably i.e Joyce Wariara Kiarie or Joyce Wariara Ramsey. She produced her Kenyan ID as P ex 1, Passport No. A839825 as P ex 2 and marriage certificate as P ex 3. PW1 said she owns the suit property and produced a provisional copy of the title as P ex 4.
7. PW1 continued that in March 2007, her husband was diagnosed with cancer which necessitated her to apply for a loan to take care of their financial needs. That it is in this process that a search was done and she discovered that a caveat had been registered by the 3<sup>rd</sup> defendant on her title. The file also went missing forcing her to lodge a complaint with the Commissioner of Lands. That the letter to the commissioner was copied to the Provincial Lands Registrar, Mombasa which letter is produced as P ex 5.
8. After she wrote the letter, the Registrar showed her a Power of Attorney dated 21<sup>st</sup> July 2006 produced as P ex 7. That the passport no A313977 entered on that power of attorney was for her passport which had expired a long time ago. That her current passport no A839825 was issued to her in Nairobi on 5<sup>th</sup> April 2004. The plaintiff said the signature on the Power of Attorney is not hers and that she never appeared before David Ongera advocate. PW1 said that the donee of the Power of Attorney is her younger brother. That she called him about it but he denied any knowledge of the Power of Attorney.
9. The plaintiff testified further that she reported the matter to the CID, the brother was arrested but after interrogation, the police found he did not sign any of the documents. That his bank accounts also did not reflect any sums of money the 3<sup>rd</sup> defendant said he paid. That the sale agreement dated 10<sup>th</sup> October 2006 does not mention David Mbai Kiarie anywhere. She therefore filed this case to have the caveat removed to enable her sell the land to Mrs Thuraya. The plaintiff said she does not know John Chege or Alexander Mwangeka or Vikram Kanji advocate.
10. In cross-examination PW1 said she is Kenyan by birth and later she acquired a British Citizenship. She obtained a British passport on 26<sup>th</sup> November 2007 but maintained her Kenyan ID. That in 2006, she travelled to the UK with a Kenyan Passport. That she knew it was her brother who dealt with the matter after seeing his photo on the transfer form. That is why she had him arrested. That she knew her brother was not of good behaviour. That she was not aware the 3<sup>rd</sup> defendant paid Kshs5.4 million which monies was conveyed to Omondi Waweru & Company Advocates who acted for David Kiarie. She was shown letters exchanged between AB Patel & Co. advocates and Omondi Waweru & Co. Advocates (MFI DI, DII & D4) and she answered that she had not seen them.
11. David Njoroge Kihiko testified as PW2. He said that he is holding the original title for the suit property on account of monies he advanced to the plaintiff in the year 2008. That the money was meant to refund a buyer who had wanted to purchase the said property but the deal could not go through because of a caveat registered on the title.
12. In cross-examination by 1<sup>st</sup> & 2<sup>nd</sup> defendants, PW2 said the plaintiff had informed him that she reported the matter of false agreement to the police. That she never told him of doing a search before entering into the agreement. PW2 did not however bring the original title to court because he did not now it was required.
13. In cross-examination by Mr Oloo learned counsel for the 3<sup>rd</sup> defendant, PW2 said he gave the plaintiff Kshs4 million but he had no evidence to confirm the payments. Their agreement with the plaintiff was verbal and he had not registered his interest on the title to the suitland.
14. The defence opened their case on 20<sup>th</sup> June 2018 with the evidence of Vikram Kanji Advocate. Mr. Kanji stated that the 3<sup>rd</sup> defendant instructed him in mid 2006 in regard to purchase of the suit property. They did a search which revealed the plaintiff's name as the owner. The search was produced as D ex 1. DW1 said he was informed the vendor's advocate was Omondi & Waweru advocates. They exchanged draft agreements with the said law firm forwarding a letter to them a copy of the title on 30<sup>th</sup> August 2006 produced as D ex 2. A formal agreement was subsequently done executed by the vendor and returned to their firm vide the letter dated 29<sup>th</sup> September 2006. DW1 said he witnessed the signature of the 3<sup>rd</sup> defendant. The consideration was Kshs5.2 million.
15. DW1 continued that he forwarded the deposit of purchase price to Omondi Waweru advocates under cover of their letter dated October 2006 and later they released the balance of the price. This letter is produced as D ex 6. The money was released before receipt of the completion documents. DW1 confirmed that the documents were received on 3<sup>rd</sup> March 2007. The documents are produced as D ex 7. They applied for and obtained consents, paid stamp duty before lodging the documents for registration (D ex 8, 9, 10, 11 & 12). The sale agreement is produced as D ex 13.
16. DW1 said they were unable to register these documents because the deed file and the lands registry went missing. He made regular follow ups but no answer was given. After a fair amount of time had lapsed, he advised the 3<sup>rd</sup> defendant to register a caution – D ex 15 and later got a court order – D ex 15. That the signature of the vendor was never witnessed in his office. That they cannot be faulted for releasing the balance. That based on documents presented, they had no reason to doubt them.
17. In cross-examination by Mr Matheka Advocate for the plaintiff, DW1 said he never received any letter cancelling the transaction. That the money was to be released to the vendor after registration of the transfer. That the 3<sup>rd</sup> defendant had lodged a complaint against their firm. That it was not the business of Mr Vikram to meet Joyce or the holder of the Power of Attorney.
18. The 3<sup>rd</sup> defendant testified as DW2. He said that John Chege of Homestead Properties approached him and showed him the suit property. That Chege informed him that the owner was in London but had given a Power of Attorney to her brother. DW2 took Chege to Vikran's office where he informed the advocate that Omondi Waweru & Company Advocates would represent the vendor. DW2 continued that he visited the Land Office where the Land Registrar after calling the file confirmed that the title was genuine but there was a caveat placed by Kenya Revenue Authority for non-payment of full stamp duty.

19. DW2 continued that an agreement was drawn and he paid the deposit as well as the balance through AB Patel & Company Advocates. That he later learnt there was another agreement. They got a court order to restrict the title. DW2 said that the plaintiff appears to have made several copies of the title to sell to different people. That she transferred the property to Knights Bridge while this matter was still pending. That todate the property has not been transferred to him (the 3<sup>rd</sup> defendant).

20. In cross-examination, DW2 said he only met the plaintiff at Nyali Police Station. That he has not lodged a complaint against David Kiarie. That he told Vikram to either recall the money or transfer the property. In cross-examination by the Attorney General, DW2 said he visited the Lands Office and confirmed the land was registered in the plaintiff's name. That he also confirmed the Power of Attorney was also registered. That he has not heard of any case where David Kiarie has been charged with falsely registering a document.

21. The 1<sup>st</sup> and 2<sup>nd</sup> defendant adopted the affidavit sworn by Mr. Gathachi on 6<sup>th</sup> March 2008 as their evidence. This marked the close of the 1<sup>st</sup> – 3<sup>rd</sup> defendants' case.

22. Parties thereafter filed written submissions which I have read and considered. The issue for this court's determination is whether there was a valid sale between the plaintiff and the 3<sup>rd</sup> defendant. And whether or not the caveat placed by the 3<sup>rd</sup> defendant on the suit title should be removed.

23. The burden was on the plaintiff to prove that indeed she did not donate the power of attorney to David Kiarie which power of attorney Mr Kiarie used "to sell the land" to the 3<sup>rd</sup> defendant. The plaintiff in her evidence stated that the date of execution shown on the power of attorney found when she was living in the United Kingdom. She presented copies of her passport no A839825 which bore exit/entry stamps to confirm that she was indeed away from Kenya. She also said the passport number A313977 used in the preparation of the power of attorney was her expired passport. That her current passport no A839825 was issued to her in the year 2004. Lastly she disowned the signature appearing on the power of attorney as hers.

24. The defence rebuttal was that they did all the due diligence and thus should not bear any blame. The 3<sup>rd</sup> defendant said that after being approached by Mr Chege of Homestead Properties he went to the lands office to confirm if the property was genuine. That the Registrar confirmed the property was genuine except for a restriction placed by Kenya Revenue Authority. I find missing links in the 3<sup>rd</sup> defendant's evidence in countering the plaintiff's evidence disowning of the power of attorney and relying on doctrine of innocent purchaser first; guarantees given to him by the vendor on how the caveat by Kenya Revenue Authority was going to be resolved which begs the question of the title being free from encumbrances. Second and very important, the 3<sup>rd</sup> defendant told the court that he negotiated the purchase price of the land with Mr. Chege who was the agent. The letter dated 16<sup>th</sup> August 2006 (annex SV-1) and written by Mr John Chege of Homestead Properties Limited stated that he was offering to purchase the property on behalf of his client for Kshs5.2million. He requested Mr Waweru advocate for confirmation of the offer to proceed. From this letter, Mr. Chege was definitely acting on behalf of the purchaser. The 3<sup>rd</sup> defendant did not say if he ever met David Kiarie before or after execution of the sale agreement. While the defence mention that they did all the due diligence expected of them but failure to meet the owner of the property or her attorney before putting the agreement into writing make their due process he agreed to execute the agreement of sale without questionable. I have also looked at the sale agreement dated 10<sup>th</sup> October 2006 and find that it made no reference to the caveat registered on the search certificate under Section 65(1) of Cap 281 Laws of Kenya.

25. The 3<sup>rd</sup> defendant having registered the caveat claiming purchaser's interest which interest had been denied also had a responsibility to prove his case. In my view, the 3<sup>rd</sup> defendant ought to have requested from Omondi Waweru & Company Advocates documents/details of the person who received/was paid the money. This could have been done either by summoning the said advocates to confirm that monies forwarded to them as stakeholders for the vendor was indeed paid out or joining them as parties to these proceedings. Without shifting the burden entirely on the 3<sup>rd</sup> defendant, this step would have rebuffed the plaintiff's assertion that she checked the accounts of David Kiarie and did not see any payments made for Kshs5.2 million as the reason why David Kiarie was released by the police.

26. Further, the transaction has not been completed as between the plaintiff and the 3<sup>rd</sup> defendant because the property todate is not registered in the 3<sup>rd</sup> defendant's name. Clause 3(b) of the sale agreement provided that the balance of the purchase price being Kenya shillings 4,680,000 was to be paid on the completion date. The agreement had a proviso that "**subject to the terms hereof, the vendors advocate was to hold all sums paid to them as stakeholders until registration of the transfer.**" This proviso made Ms. Omondi & Waweru advocates a key party/witness to protect the 3<sup>rd</sup> defendant's interest if at all. The proviso was also stated in the letter by A. B Patel & Company Advocates to the said law firm dated 19<sup>th</sup> January 2007.

27. The Court of Appeal in the case of **Weston Gitonga & 10 Others –versus- Peter Rugu Gikanga & Another (2017) eKLR** quoted the Ugandan Case of **Katende –versus- Haridas & Company Ltd (2008) 2EA 173** that reiterated that described a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For that person to succeed, he must prove that;

- (a) He holds a certificate of title;
- (b) purchased the property in good faith;
- (c) has no knowledge of the fraud;
- (d) purchase it for valuable consideration;
- (e) he was not a party to the fraud.

28. The 3<sup>rd</sup> defendant does not hold a certificate of title. The 3<sup>rd</sup> defendant said he took Mr. Chege to his advocate's office and Mr Chege is the one who informed Mr Vikram that Omondi & Waweru & Company Advocates was acting for the vendor. However he also stated that it is Vikram (DW1) who later told him that Omondi & Waweru advocates were representing the vendor. If he was acting in good faith and had no knowledge of the fraud then he ought to have disclosed who showed him documents of title before commencing the process and why he opted to instruct his advocate to release the funds before the completion documents were surrendered to them and or registered in his name. The 3<sup>rd</sup> defendant in alleging fraud on the plaintiff, stated that the plaintiff produced several copies of the title to sell to different people. This averment is not supported by any evidence since the time the 3<sup>rd</sup> defendant lodged the caveat and when this suit was filed, the title bore the name of the plaintiff.

29. I am unable to find that the 3<sup>rd</sup> defendant is an innocent purchaser for value for the reasons given in paragraphs above. It is interesting to note from the correspondence exchanged between the parties particularly the letters dated 19<sup>th</sup> January 2007 forwarding the cheque for the balance and those dated 12<sup>th</sup> February 2007 and 1<sup>st</sup> March 2007. They to show that the balance of the purchase price was released before receipt of the completion documents contrary to the terms of the alleged sale agreement. Where was the diligence of the 3<sup>rd</sup> defendant or his advocate? Further the registration process not having been completed, I find no reason why the 3<sup>rd</sup> defendant caveat should remain registered on the suit title.

30. Therefore according to the provisions of "*the sale agreement*" entered into between David Kiarie and Samuel Vairghese on 10<sup>th</sup> October 2006, the monies paid as purchase price are assumed to be still in the hands of the Omondi & Waweru Co. Advocates. The 3<sup>rd</sup> defendant in cross-examination said that he instructed Mr Vikram advocate to either recall the money or register the transfer. The transfer not having been registered and the sale having been alleged to have been fraudulent the 3<sup>rd</sup> defendant has the recourse of recalling for the money instead of registering a caveat on the title.

31. In the result, I find claim in the originating summons is proved. Consequently I do order that the caveat registered by the 3<sup>rd</sup> defendant on 6<sup>th</sup> December 2007 be removed forthwith. Each party to meet their respective costs of this suit.

**Dated, Signed and Delivered at Mombasa this 21<sup>st</sup> day of June 2019.**

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**A. OMOLLO**

**JUDGE.**