



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 927 OF 2005

PETRONILLAH NAFUNA KHAEMBA.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL 1 ST DEFENDANT

COMMISSIONER OF LANDS2 ND DEFENDANT

THE CHIEF LAND REGISTRAR 3 RD DEFENDANT

THE CHIEF VALUER4 TH DEFENDANT

CENTRAL BANK OF KENYA5 TH DEFENDANT

ELIAS KAGWA KUBANIA6 TH DEFENDANT

DN NDUNGU ADVOCATE 7 TH DEFENDANT

SK BUNDOTICH ADVOCATE 8 TH DEFENDANT

JUDGMENT

Introduction

1. The dispute in this suit relates to a transfer registered on 26/4/2005 against the parcel register of Land Title Number **Nairobi/Block 111/409 (the suit property)** in favour of Elias Kagwa Kubania (the 6th defendant) and a subsequent charge registered against the title on the same day in favour of the Central Bank of Kenya (the **5th defendant**). Prior to the said transfer, Petronillah Nafuna Khaemba (the **plaintiff**) was the registered proprietor of the suit property. The plaintiff contends that the said transfer was fraudulent; she was neither privy to nor aware of the said transfer until the day the 6th defendant laid claim of title to the suit property; and that she held and still holds the original lease and certificate of lease relating to the suit property.

2. Aggrieved by the impugned transfer and charge, she brought this suit through a plaint dated 21/7/2005. The plaint was subsequently amended on 16/6/2016. She sought the following verbatim reliefs:

a) A declaration that the transfer of NAIROBI/BLOCK/111/409 belonging to the plaintiff to the said Elias Kagwa Kubania is fraudulent and thereto void ab initio.

b) A declaration that the plaintiff is the registered owner of land reference number NAIROBI/BLOCK/111/409 situated in Komarok and subsequent transactions be cancelled and the register be rectified.

c) Mesne profits as per paragraph 17 with interest thereon at commercial rates of 19% p.a from respective dates till full payment.

d) General damages and costs of this suit.

Plaintiff's Case

3. The Plaintiff's case was that she was the registered proprietor of the suit property situated in Komarok Estate. She contended that the 2nd, 3rd, 4th, 7th and 8th defendants caused the suit property to be transferred to the 6th defendant fraudulently. She further contended that the 5th defendant caused a legal charge to be registered in its favour while aware that the impugned transfer was a fraud. She further contended

that the 7th and 8th defendants, in their capacity as advocates, facilitated and conspired in the fraudulent transfer of the suit property. She faulted them for failing to identify the transferor by the national identity card. She added that she discovered the fraud on 2/07/2005 when her nephew who was staying in the suit property informed her that there were tiles being offloaded onto the suit property by a stranger with the intention of repairing the house thereon. She then reported the matter to Kayole Police Station where the 6th defendant was summoned.

Case of the 1st, 2nd, 3rd and 4th Defendants

4. The 1st, 2nd, 3rd and 4th defendants filed their joint defence on 19/10/2005 in opposition to the plaintiff's claim. They contended that the material transfer was procedurally effected in accordance with the law. Consequently, they denied liability.

5. The 5th defendant's case was that the 6th defendant charged the property to it as security for a loan it advanced to him. It contended that it was under no obligation in law to enquire or establish how the 6th defendant acquired title to the suit property. The 5th defendant further contended that it was an innocent chargee without notice of fraud and therefore, could not pay any damages to the plaintiff.

Case of the 6th Defendant

6. The 6th defendant denied the allegations of fraud and stated that he was the lawful registered owner of the suit property. He contended that he was an innocent purchaser for value without notice of any fraud and his title was protected by the law.

Case of the 7th Defendant

7. The 7th defendant did not enter appearance. Evidence on record reveal that upon discovery of the alleged fraud, a criminal case was instituted against him in Kibera Criminal Case Number 5473 of 2005. He was charged with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code.

Case of the 8th Defendant

8. The 8th defendant denied fraud on his part and stated that his involvement in the transaction was limited to witnessing execution of the transfer instrument by the 6th defendant. He stated that he was not served with notice of intention to sue.

Plaintiff's Evidence

9. At the hearing, the plaintiff testified as PW 1 and called two other witnesses. She adopted her witness statement dated 2/8/2012 as her sworn evidence in chief. She testified that she was the owner of the suit property, having bought it from Nairobi City Commission in 1989 through financing from Housing Finance Company of Kenya. She added that she did not transfer her title to the 6th defendant. She stated that she discovered that her property had been transferred to the 6th defendant when she went to Kayole Police Station to report that there was an intruder in her compound claiming ownership of the property. At that point, she discovered that the property had been charged to the 5th defendant for a loan given to the 6th defendant. Together with her witness, they produced a total of 22 exhibits which included a certificate of lease and the original lease which showed that she was the 1st registered proprietor of the suit property prior to the impugned transfer. She stated that she charged the suit property to HFCK when she bought it and the title was discharged in 1996 after she finished paying the loan. She further stated that her nephew used to stay in the suit property but was removed through an injunction. She added that the signatures on the transfer of lease and sale agreement did not belong to her.

10. Mecca Ben Collins testified as PW2. He adopted his witness statement dated 2/8/2012 as his sworn evidence in chief. He stated that he was a nephew of the plaintiff and lived in the suit property. He added that on 2/7/2005, he noticed that some roofing materials had been deposited in the compound. On inquiry, he was informed that the 6th defendant had bought the suit property and intended to repair the roof. On the same day, the 6th defendant came to the suit property and informed him that he was the new owner of the suit property. He stated that he informed the plaintiff and they proceeded to Kayole Police Station to report the incident.

11. Jane W Mburu testified as PW 3. She stated that she was a principal valuer at Primeland Valuers and had been instructed by the plaintiff to prepare a rent valuation report. She produced a valuation report dated 23/11/2015 which was marked as PExh No. 22. She stated that she inspected the property from outside by looking at the building plan of the house. She was of the opinion that the value of the suit property at that time was Kshs. 8,500,000 and the rental value in 2015 was Kshs. 32,000 per month.

Defence Evidence

12. The defence called 5 witnesses. Elias Kagwa Kubania, the 6th defendant, testified as DW1. He adopted his witness statement dated 13/9/2012 as his sworn evidence in chief. He testified that he learnt about the intended sale of the suit property through an agent called Geoffrey Mutai. He added that the 5th defendant financed the purchase of the property. He stated that the 5th defendant referred him to M/s Cheptumo & Company Advocates who acted for him and for the Bank. He further stated that he insisted on seeing the owner of the suit property before buying it and a lady who claimed to be Petronilla Nafula Khaemba, the purported owner, was introduced to him by Mutahi. He stated that the lady he was introduced to as the owner of the property was not the plaintiff herein and that he had not seen the said lady since the dispute arose. He testified that he took possession in July 2005 by breaking the door to the house because the seller did not show up to give him vacant possession and she had switched off her phone. At that point, he suspected there was something amiss and he reported the matter to the Banking Fraud Unit of the CID. Investigations by the Unit culminated in the arrest and prosecution of the 7th defendant.

13. Benson Wanjala Chumah testified as DW 2. He stated that he was an employee of the 5th defendant, Central Bank of Kenya. He adopted his written statement dated 13/9/2012 as his sworn evidence in chief. He stated that the 6th defendant applied for a loan from the 5th

defendant on 15/12/2004 and the loan was approved subject to creation of a charge in favour of the Bank. The Bank then appointed the firm of Cheptumo & Company Advocates to act for it in registering the charge over the suit property. He stated that both the transfer and the charge were registered on 26/4/2005. He further stated that the Bank became aware of the fraud when the 6th defendant raised alarm.

14. The 8th defendant testified as DW3. He adopted his written statement dated 14/3/2014 as his sworn evidence in chief. He stated that he used to work at M/s Cheptumo & Company Advocates as an advocate. He testified that the 5th defendant's policy was that its employees would use the law firms on the Bank's panel of advocates when undertaking purchases financed by the Bank. He stated that his role in the transaction was limited to witnessing the execution of the transfer instrument by the 6th defendant. He denied putting a date on the transfer and stated that a transfer is dated at the point of stamping the instrument. He added that the transfer was drawn by the law firm of Cheptum & Co Advocates and he only witnessed the purchaser signing the transfer. He stated that he was sued wrongly because it was not his role to do due diligence. He contended that the firm of D.N Ndungu, the 7th defendant, was acting for the vendor.

15. Edward Munoku Wafula testified as DW4. He stated that he was a Lands Registrar. He added that the plaintiff was registered as proprietor of the suit property on 13/9/1990. On 26/2/2005, a transfer of lease from the plaintiff to the 6th defendant was registered. He stated that for a transfer to be effected, the following requirements were necessary: (a) duly executed transfer documents; (b) payment of stamp duty and franking of the documents; (c) rates clearance certificate; (d) consent to transfer by the Council; and (e) original title. He added that all the requirements were met and therefore, there was no reason not to effect the transfer. He stated that the registration of the transfer was done by one Jane Nyambura Kimani.

16. Corporal Joel Kiplagat testified as DW5. He stated that he was attached to the Banking Fraud Investigation Unit of the CID. He testified that Sergeant Patrick Kisilu who was to testify could not be procured. He added that the said Sergeant Kisilu was a prosecution witness in Kibera Criminal Case Number 5473 of 2005. He stated that the police file could not be traced and he was therefore relying on the record of proceedings relating to the criminal case at Kibera.

Submissions

17. The Plaintiff filed her submissions on 2/11/2018. She argued that she had proved that the 6th defendant acquired the suit property through fraud. She relied on the case of **Richard Gitau Muguro v Benson Macharia Wandungo & 2 Others (2017)** where it was held that where a title has been acquired illegally, a purchaser is not protected by the law. Reliance was also placed on the case **Arthi Highways Developers Limited v West End Butchery Limited and Others (2015) eKLR Civil Appeal No 246 of 2013** where the court in interpreting Section 23 (1) of the Land Registration Act stated that indefeasibility of a title is open to challenge if there is fraud or misrepresentation. The plaintiff further submitted that the 5th defendant should have gone beyond conducting an official search to determine the ownership of the property. Further, reliance was placed on **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR**. Lastly, the plaintiff submitted that the court should award her *mesne profits* because there was evidence of trespass. Reliance was placed on **Josephine Chepkurgat Ruto & another v William K. Meli [2013] eKLR** and **Kenya Hotel Properties Limited v Wilsden Investments Limited [2009] eKLR**.

18. The 1st-4th defendants filed their submissions on 24/1/2019. They submitted that the plaintiff had not proved fraud as required under Section 107 of the Evidence Act. They further submitted that they should not be held liable for fraud because they had acted procedurally. Reliance was placed on the case of **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR**.

19. The 5th and 6th defendants filed their submissions on 24/1/2019. It was their submission that the 6th defendant was a bonafide purchaser for value who was protected under Section 26 (b) of the Land Registration Act. Reliance was placed on **Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others [2017] eKLR** where it was held that a bonafide purchaser must prove that; (a) he has a certificate of title; (b) he purchased the property in good faith; (c) he had no knowledge of the fraud; (d) he purchased the property for valuable consideration; (e) the vendor had apparent valid title; (f) he purchased the property without notice of any fraud; (e) he was not party to any fraud. It was also submitted that no evidence had been provided to prove that they participated in acquiring the property by fraud. Reliance was placed on **Eunice Grace Njambi Kamall and another v The Hon. Attorney General and 5 others Civil Suit No. 976 of 2012**. It was further submitted that the plaintiff had not met the standard of proof in relation to fraud. Reliance was placed on the decision **Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR**.

20. The 8th defendant filed his submissions on 4/12/2005. It was his submission that the allegations of fraud against him had not been proved. He argued that his role was limited to witnessing the signature of the purchaser

Analysis & Determination

21. I have considered the parties' pleadings, evidence and submissions. I have also considered the notice by the 5th and 6th defendants, taken out and served on the 1st, 2nd, 3rd, 4th and 7th defendants under Order 1 rule 24 of the Civil Procedure Rules. I have similarly considered the relevant legal framework and jurisprudence. Five key issues fall for determination in this suit. The first issue is whether the sale and subsequent transfer of the suit property on 26/4/2005 from the plaintiff to the 6th defendant (Elias Kagwa Kubania) was fraudulent. The second issue is whether the resultant title, currently held by the 6th defendant and charged to the 5th defendant, is null and void. The third issue is whether the plaintiff is entitled to the reliefs sought in the plaint, including damages. The fourth issue is whether, if found liable to the plaintiff, the 5th and 6th defendants are entitled to indemnification against any of the other defendants. The fifth issue relates to the quantum of damages in the event the court finds that the same are payable. I will make pronouncements on the five issues sequentially in that order. The first and second issues are intertwined. I will therefore deal with the first two issues simultaneously. Before I do that, I will state the court's decision on the position of the 7th defendant.

22. The 7th defendant, Mr D N Ndungu is an advocate of this court. He neither entered appearance nor filed defence. He is the one who is alleged to have uttered the alleged fake title document and witnessed the transfer instrument against which the impugned transfer was registered. He is also the one who is alleged to have received purchase price in respect of the impugned sale and transfer. He was a key player in the impugned transaction. He is the one who knows the person(s) who procured the impugned sale and transfer. If the money

received by him was passed over to a third party, only him knows the identity of that third party. It is noted that the said D N Ndungu was duly served but opted not to put forth a defence. Similarly, while the hearing of this suit was ongoing, the said D N Ndungu appeared in this court in relation to a different suit and the court drew his attention to this suit and he confirmed he was aware of this suit. He did not, however, bother to participate in the proceedings. The plaintiff's claim against him is therefore undefended and wholly succeeds.

23. The first issue is whether the sale and subsequent transfer of the suit property on 26/4/2005 from the plaintiff to the 6th defendant was fraudulent. The second issue is whether the resultant title is null and void. It is common ground that up to 26/4/2005, the plaintiff was the legitimate registered proprietor of the suit property. The impugned sale to the 6th defendant was procured by M/s Geda Agencies and Property Managers and a Mr Mutahi. Geda Agencies and Property Managers allegedly took the 6th defendant to the offices of the 7th defendant and the 7th defendant informed the 6th defendant that he had instructions from the owner of the suit property to sell the suit property. In his evidence before court, the 6th defendant was categorical that the person who was presented to him as the seller is not the plaintiff herein. He further testified that the said seller switched off her phone after purchase price was remitted to the 7th defendant and was not available to hand over vacant possession of the suit property. Consequently, he broke the door to gain access to the suit property. Both the alleged seller and the brokering agents were not called as witnesses. Similarly, the advocate who witnessed the vendor's execution of the agreement and transfer did not testify to identify the "Petronillah Nafuna Khaemba" who allegedly executed the agreement for sale and the transfer and on whose behalf he allegedly received the purchase price. The certificate of lease against which the impugned transfer was effected was similarly not produced as an exhibit for scrutiny and interrogation by the parties and the court.

24. In her evidence, the Plaintiff was categorical that she did not sell the suit property to the 6th defendant. She asserted that she has all along had the original title documents. She produced the original certificate of lease and lease. She stated that she had actual possession of the suit property up to the time the 6th defendant broke into the house and threw her nephew out of the suit property.

25. Having considered the totality of the evidence presented before this court, what emerges is that a fraudster masquerading as the plaintiff herein, in conjunction with the 7th defendant and unidentified Lands Registry staff, fraudulently procured the impugned transfer. Secondly, the impugned transfer was procured without the authentic original certificate of lease which the plaintiff holds to-date. It was procured on the basis of a fake certificate of lease.

26. When the 5th and 6th defendants learnt about the fraud, they approached the Banking Fraud Unit of the Criminal Investigations Department (CID) and the 7th defendant was arraigned in court on a charge of obtaining money by false presences contrary to Section 313 of the Penal Code. It is clear from the proceedings of the criminal trial court that the 6th defendant was the complainant in that case. Both the 6th defendant and the plaintiff were prosecution witnesses and duly testified. There is no evidence to suggest that the plaintiff herein was privy to the impugned sale and transfer.

27. The totality of the evidence before court therefore is that the sale and transfer of the suit property to the 6th defendant was fraudulent and the certificate of lease used to procure the transfer was fake. The plaintiff was not privy to that fraud. My finding on the first issue therefore is that the sale and transfer of the suit property to the 6th defendant was procured fraudulently by fraudsters working in cahoots with the 7th defendant and staff in the Lands Registry. The said transfer was procured using a fake certificate of lease hence it is null and void.

28. Counsel for the 5th and 6th defendants submitted that the title of the 6th defendant was protected by Section 26 of the Land Registration Act. I do not agree with that view. Both this Court and the Court of Appeal have been consistently categorical that it was never the intention of Parliament to confer a thumb of approval to fraud in acquisition of title to land both under the repealed and current land registration legal framework. Where a legitimate land owner is dispossessed of land through fraud such as what is before court presently, courts of law have a duty to remedy the fraud by annulling the fraudulent entries. Indeed, our courts have reiterated this principle in a myriad of cases, among them: (i) **Reddiff Holdings Limited v Registrar of Titles & 2 others (2017) eKLR**; (ii) **Moses Lutomia Washialu v Zephania Ngira Agweyi & Another (2015) eKLR**; and (iii) **Arthi Highway Development Limited v West End Butcher Limited & others (2015) eKLR**. It is therefore the finding of this court that the transfer to the 6th defendant was fraudulent; was procured on the basis of a fake certificate of lease; and is liable to cancellation. The same fate befalls all subsequent entries.

29. The third issue is whether the plaintiff is entitled to the prayers sought in the plaint. The Amended plaint contains the following prayers:

(i) A declaration that the transfer of NAIROBI/BLOCK/111/409 belonging to the plaintiff to the said Elias Kagwa Kubania is fraudulent and thereto void ab initio.

(ii) A declaration that the plaintiff is the registered owner of land reference number NAIROBI/BLOCK/111/409 situated in Komarok and subsequent transactions be cancelled and the registers be rectified.

(iii) Mesne profits as per paragraph 17 with interest thereon at commercial rates of 19% p.a from respective dates till full payment.

(iv) General damages and costs of this suit.

30. From the evidence on record, the fraudulent transfer happened because of the involvement of Lands Registry staff. As the custodian of land registers, the Chief Land Registrar was under a statutory duty to ensure that a fraudulent transfer was not procured on the basis of a fake certificate of lease. For a transfer to be effected and a new certificate of lease to be issued, the registered proprietor was required to present both the original lease and the original certificate of lease to the Land Registrar. The Land Registrar would cancel the original certificate of lease but retain it for future reference. In the present case, the Land Registrar proceeded to effect a transfer and issue a new title to the 6th defendant without the original lease and certificate of lease which the plaintiff holds to-date. Consequently, the plaintiff as the legitimate proprietor of the suit property has been kept out of the suit property for 14 years. In my view, the Chief Land Registrar, together with the 7th defendant, are liable to compensate the plaintiff by way of damages.

31. There was no evidence of fraud on part of the 5th, 6th and 8th defendants. Firstly, the involvement of the 5th defendant in the

transaction was as a financier of the 6th defendant. Secondly, evidence on record shows that the 6th defendant paid purchase price which was duly remitted to the 7th defendant. The 7th defendant has not told the court to whom he ultimately released the money. I therefore find no culpability on part of the 5th and 6th defendants. Similarly, there was no evidence of culpability on part of the 8th defendant. All that the 8th defendant did was to witness execution of the transfer instrument by the 6th defendant. There is therefore no evidential basis for holding the 5th, 6th and 8th defendants liable.

32. The fourth issue is whether an order for indemnification should issue in favour of the 5th and 6th defendants against the other defendants under Order 1 rule 24 of the Civil Procedure Rules. Through a notice dated 10/11/2015, the 5th and 6th defendants sought an order of indemnification in the event that they were found liable to the plaintiff. I have made a finding that the 5th and 6th defendants are not liable to the plaintiff. I have made a further finding that the Chief Land Registrar (3rd defendant) and the 7th defendant are the only parties liable to the plaintiff. Consequently, the indemnification order sought by the 5th and 6th defendants under Order 1 rule 24 of the Civil Procedure Rules would not lie in the circumstances.

33. I now turn to the issue of damages. The plaintiff was dispossessed the suit property in 2005. PW3 Jane Mburu, a registered land valuer, testified and produced a valuation report in which rent for the suit premises was assessed at Kshs 215,000 for the period 2005 to 2006; Kshs 240,000 for the period 2007 to 2008; Kshs 270,000 for the period 2009 to 2010; Kshs 300,000 for the period 2011 to 2012; Kshs 360,000 for the period 2013 to 2014 and Kshs 384,000 for the year 2015. The plaintiff is still dispossessed of the suit property to-date. I will therefore accept the above assessment. I will further award the plaintiff a sum similar to the rent payable in 2015 for the subsequent 42 months running from 01/1/2016 to date at a monthly rent of Kshs 32,000, making a total of Kshs 1,344,000 for the 42 months. Together, the above figures make a total of Kshs 3,114,000. I therefore award the plaintiff damages in the sum of Kshs 3,114,000 payable jointly and severally by the 3rd and 7th defendants. The damages will attract interest from the date of judgment. Lastly, costs of this suit shall be borne by the 3rd and 7th defendants jointly and severally.

34. The 5th and 6th defendants will leave this court without any award. This is because they did not bring a claim against any of the parties. They only sought indemnification in the event that they were held liable to the plaintiff. They have not been held liable. They are however at liberty to pursue a remedy against the culpable parties in light of the findings in this judgment.

Disposal Orders

35. In light of the above findings, I hereby enter judgment in favour of the plaintiff in the following terms:

a) It is hereby declared that the transfer of Nairobi/Block 111/409 from Petronillah Nafuna Khaemba to Elias Kagwa Kubania was fraudulent and is therefore null and void.

b) It is ordered that the said transfer and all subsequent entries are nullified and ownership of the suit property is restored to the plaintiff, Petronillah Nafuna Khaemba.

c) The 3rd and 7th defendants shall jointly and severally pay the plaintiff damages assessed at Kshs 3,114,000/- together with interest from the date of this judgment.

d) The 3rd and 7th defendants shall bear costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10 TH DAY OF JUNE, 2019

B M EBOSO

JUDGE

In the presence of:-

Mr Mureithi holding brief for Mr Thiga for the plaintiff

Mr Dar for the 5th and 6th defendants

Ms Sagini holding brief for Mr Terrell for the 1st, 2nd, 3rd and 4th defendants

Ms Sagini for the 8th defendant