



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 143 OF 2012

ALICE JANE NJOKI CHEGE.....PLAINTIFF

=VERSUS=

RACHEL WANJIKU CHEGE.....1ST DEFENDANT

BEDAN GITHAE WAMBURU.....2ND DEFENDANT

DANSON WAMBURU GITHAE...3RD DEFENDANT

JUDGMENT

The facts giving rise to this suit which are not disputed are as follows. At all material times, the plaintiff was registered as the owner of all that parcel of land known as Tigoni/Mabrouke Block 1/1080 (hereinafter referred to as “the suit property”). The plaintiff purchased the suit property on 19th January, 2007 from one, Stephen Njuguna Mwangi at a consideration of Kshs.495,000/=. The suit property was registered in the name of the plaintiff on 15th February, 2007. The 1st defendant is a sister to the plaintiff. The plaintiff was at all material times residing in Australia.

When the plaintiff was purchasing the suit property, she was accompanied by the 1st defendant. The 1st defendant had access to a copy of the plaintiff’s Identity Card and a copy of her Kenya Revenue Authority Personal Identification Number (PIN) Certificate. After executing the agreement for the purchase of the suit property from Stephen Njuguna Mwangi and paying the purchase price, the plaintiff left the country and returned to Australia. The plaintiff left the 1st defendant to follow up on the title deed for the suit property which had not been issued by the time she left the country. The plaintiff instructed the 1st defendant to put the title deed for the suit property once issued in a safe at Unity Finance Bank, Limuru Branch for safe keeping. The title deed for the suit property was issued in favour of the plaintiff on 8th March, 2007 and the 1st defendant deposited the same with Unity Finance Bank for safe keeping on 2nd July, 2007. The instructions which the 1st defendant gave to Unity Finance Bank while depositing the said title deed with them was that either the plaintiff or the 1st defendant could collect the same from the safe.

While the plaintiff was still in Australia the 1st defendant on or about 13th May, 2010 fraudulently held herself out as the plaintiff and sold to the 2nd and 3rd defendants the suit property at Kshs.846,000/=. After receiving the purchase price in full, the 1st defendant once again holding herself as the plaintiff transferred the suit property to the 3rd defendant after collecting the title deed for the suit property from the bank where it was kept in a safe.

When the 1st defendant’s fraudulent activities aforesaid were discovered, a report was made to the police and she was arrested and charged at the Limuru Chief Magistrate’s Court with the offences of obtaining money from the 2nd defendant by false pretences, obtaining the suit property by false pretences and cheating Limuru Land Control Board to issue her with a consent to transfer the suit property. On 23rd October, 2012, the 1st defendant was found guilty of all the three offences and was sentenced to serve 2 ½ years in jail. The 1st defendant did not appeal the conviction and sentence. In the criminal case, the 2nd defendant was a complainant and a witness.

The plaintiff brought this suit against the defendants on 21st March, 2012 to recover the suit property from the 3rd defendant to whom it had been transferred fraudulently using deceit and misrepresentation as aforesaid. The plaintiff averred that she was deprived of the suit property by the fraudulent acts of the 1st defendant in collusion with the 2nd and 3rd defendants. The plaintiff averred that the 2nd defendant fraudulently purchased the suit property from the 1st defendant and with a view to conceal the fraud, caused the property to be registered in the name of the 3rd defendant. The plaintiff sought a declaration that the suit property belonged to her and that its purported sale and transfer to the 3rd defendant was fraudulent. The plaintiff also sought an order for the rectification of the register for the suit property by the cancellation of the registration of the property in the name of the 3rd defendant so that the property reverts to her name.

The 1st defendant neither entered appearance nor filed a defence. The 2nd and 3rd defendant defended the suit through a joint statement of defence filed on 7th December, 2012. The 2nd and 3rd defendants denied that they colluded with the 1st defendant in the fraudulent sale of the suit property. The 2nd and 3rd defendants contended that they had no reason not to believe that the person who sold the suit property to them was the plaintiff. The 2nd and 3rd defendants averred that they were not aware that it was the 1st defendant whom they were dealing with and that she had fraudulently obtained the title deed for the suit property, a copy of the plaintiff's Identity Card, Kenya Revenue Authority Personal Identification Number (PIN) Certificate and Land Control Board Consent.

The 2nd and 3rd defendants averred that they did not know the plaintiff physically and as such had no reason to believe that the 1st defendant who presented herself as the plaintiff was not the plaintiff. The 2nd and 3rd defendants averred that they acted in good faith while purchasing the suit property and took all precautions and due diligence that a reasonable purchaser for value would be expected to take. The 2nd and 3rd defendants averred that the plaintiff's allegations that they acquired the suit property fraudulently had no merit.

In the alternative, the 2nd and 3rd defendants averred that if the suit property was transferred to the 3rd defendant fraudulently by the 1st defendant, the fraud was abetted and/or facilitated by the plaintiff's acts of omission and/or commission and as such the plaintiff was the author of her misfortune. The 2nd and 3rd defendants averred that the plaintiff was all along aware of the sale of the suit property to the 3rd defendant and that the filing of this suit was an attempt by the plaintiff to resile from the acts committed with her knowledge and consent with the aim of unjustly enriching herself at the expense of the 3rd defendant. The 2nd and 3rd defendants averred further that the criminal case that was instituted against the 1st defendant was not relevant in establishing the legality of the sale of the suit property.

The plaintiff filed a reply to defence on 20th December, 2012 in which she joined issue with the 2nd and 3rd defendants in their defence. The plaintiff denied the allegations of fraud pleaded in the 2nd and 3rd defendants defence. The plaintiff reiterated that the 2nd and 3rd defendants were aware that the 1st defendant was not the registered owner of the suit property and colluded with her in depriving the plaintiff of the ownership of the suit property.

At the trial, the plaintiff tendered evidence through her mother and attorney, Mercy Wangui Chege (PW1) and called one witness, Apollo Rwamba Mwangi (PW2). PW1 told the court that the plaintiff was a resident of Australia and had lived in Australia for over 10 years. She told the court that the plaintiff had given her a power of attorney to represent her in court. She stated that the plaintiff was the owner of the suit property and that they were together with the 1st defendant when she was purchasing the property. She stated that when the title deed for the property was issued, it was given to the 1st defendant who was instructed to keep the same for the plaintiff in a safe at a bank for safety. She stated that the 1st defendant followed instructions and placed the title deed for the suit property in a safe at a bank. She stated that she later learnt from PW 2 that the 1st defendant had sold the suit property. When she carried out a search, she found that the property had been sold to the 2nd defendant. Upon obtaining this information, she reported the matter to the police. She stated that the plaintiff was in Australia at the time and denied selling the suit property.

PW1 stated that the 1st defendant was arrested and charged at Limuru Law Court with the offence of selling land that did not belong to her. She stated that the plaintiff was convicted and sentenced to serve a jail term. PW1 stated further that the 2nd and 3rd defendants colluded with the 1st defendant in her fraudulent acts. She stated that the 2nd defendant made payment of the purchase price to the 1st defendant. She averred that the 2nd defendant should have noted that the suit property did not belong to the 1st defendant to whom the purchase price was paid. PW1 stated further that the payment of the purchase price, the issuance of the Land Control Board Consent, the transfer of the suit property to the 3rd defendant and the issuance of the title deed in favour of the 3rd defendant were all done on the same day. She stated that the speed at which the transaction was conducted was evidence enough of collusion. PW1 stated that the 1st defendant had no interest in the suit property that she would transfer to the defendants. PW1 produced as exhibits among others copies of, a power of attorney dated 4th July, 2010 that was donated to her by the plaintiff, a title deed for the suit property dated 8th March, 2007 that was issued to the plaintiff, a certificate of official search dated 25th June, 2010 in respect of the suit property, the plaintiff's Identity Card, certificate of deposit of the title deed for the suit property in safe custody, a statement that the 2nd defendant recorded with the police, instrument of transfer of the suit property in favour of the 3rd defendant, a letter of consent, a deposit slip through which the purchase price was paid in to the 1st defendant's account, charge sheet in Limuru Criminal Case No. 712 of 2010 and proceedings and judgment in Limuru Criminal Case No. 712 of 2010.

The plaintiff's second witness, Apollo Rwamba Mwangi (PW 2) told the court that he owned a parcel of land next to the suit property and that it was he who informed PW1 that the suit property had been sold. He stated that he accompanied PW1 to Kiambu Land office to carry out a search on the property which confirmed that that the property had indeed been sold.

On the part of the defendants, both the 2nd and 3rd defendants gave evidence and called one witness. The 2nd defendant (DW1) told the court that before the transaction which gave rise to the suit herein, he did not know the plaintiff and the 1st defendant. He stated that he had never met the plaintiff. DW1 stated that he came to know the 1st defendant through a friend by the name Joseph Njoroge (DW 2) who had heard that he was looking for land to purchase. It is DW2 who took him to the 1st defendant who introduced herself as Alice Njoki Chege. He stated that, the 1st defendant told him that she was the owner of the suit property and that she had all the necessary documents. DW1 stated that when he purchased the suit property he knew that he was dealing with the plaintiff, Alice Njoki Chege and that it was after the transaction was concluded that he was summoned to the Police Station where he learnt from PW1 that the 1st defendant was not Alice Njoki Chege but Rachel Wanjiku Chege. He stated that it was at that point that he learnt that the person with whom he had concluded the transaction was not the owner of the suit property. DW 1 stated that he did not collude with the 1st defendant to acquire the suit property. He stated that he purchased the suit property for the 3rd defendant who is his son and who at the time was working in Nairobi and could not get time to attend to the matter.

He stated that the 3rd defendant had given him authority to act on his behalf in the transaction. DW1 stated that he gave evidence as a witness in the criminal case at Limuru Law Court where the 1st defendant was charged with the offence of obtaining money by false pretence

and was convicted and jailed for 2 ½ years. He stated that he followed due process while acquiring the suit property. DW1 produced in evidence as exhibits among others, copies of a deposit slip dated 13th May, 2010 through which a sum of Kshs.746,800/= was deposited into the account of the 1st defendant by the 2nd defendant, application for Land Control Board Consent, PIN Certificate for the plaintiff, the plaintiff's Identity Card, Letter of Consent dated 13th May, 2010, undated and unregistered instrument of transfer, title deed dated 13th May, 2010 in the name of the 3rd defendant, a cash withdrawal slip for Kshs.746,802/= dated 13th May, 2010 and a cash withdrawal slip for Kshs.100,000/= dated 13th May, 2010.

DW2, Joseph Njoroge Kuria told the court that he owned a parcel of land next to the suit property and that the 1st defendant told him that she wanted to sell the suit property. He stated that he introduced the 2nd defendant to the 1st defendant. He stated further that the person who was selling the suit property was Alice Njoki Chege and that he learnt later from the 2nd defendant that the person who sold the land was not the owner of the same.

DW3, Danson Wamburu Githae is the 3rd defendant. He told the court that he authorized the 2nd defendant to purchase the suit property for him because he was very busy at work and could not get time to attend to the transaction. DW3 stated that when the 2nd defendant informed him that the suit property was on sale, he accompanied him to the suit property together with DW2 and the seller. He stated that the seller identified herself as Alice Chege. He stated that after viewing the property, he left the 2nd defendant to complete the transaction. DW3 stated that he came to learn on 26th June, 2010 that the person from whom they purchased the suit property was not the owner thereof. He received this information from the 2nd defendant who was at a police station by then over the matter. He stated that he had not met the 1st defendant prior to the transaction and that he had never met the plaintiff.

After the close of evidence, the parties made closing submissions in writing. I have considered the evidence adduced by the parties in support of their respective cases and the submissions of counsels. The parties did not agree on the issues for determination by the court. In their submissions, the plaintiff framed 4 issues for determination while the 2nd and 3rd defendants framed 8 issues. From the pleadings and the evidence tendered I am of the view that the issues that arise for determination in this suit can be summarized as follows: -

1. Whether the suit as against the 2nd and 3rd defendants jointly or against the 2nd defendant alone is bad in law and should be struck out.
2. Whether the 1st defendant through misrepresentation, deceit and fraud sold and transferred the suit property which was owned by the plaintiff to the 3rd defendant.
3. Whether the 2nd and 3rd defendants colluded with the 1st defendant in her acts of fraud and deceit.
4. Whether the plaintiff abetted or facilitated the 1st defendant's acts of fraud aforesaid.
5. Whether the 3rd defendant obtained a valid title in respect of the suit property from the 1st defendant.
6. Whether the plaintiff is entitled to the reliefs sought.
7. Who should bear the costs of the suit?

Whether the suit as against the 2nd and 3rd defendants jointly or against the 2nd defendant alone is bad in law and should be struck out.

This suit was filed in the name of the plaintiff, Alice Jane Njoki Chege. The suit was however prosecuted by Mary Wangui Chege. During the hearing, Mary Wangui Chege (PW1) told the court that she had authority of the plaintiff to prosecute the suit on her behalf. In proof of the existence of this authority, PW1 produced a power of attorney that was donated to her by the plaintiff on 14th July, 2010. The said power of attorney was duly stamped and registered on 9th August, 2010. The said power of attorney gave PW 1 power in the name of the plaintiff to among others "*commence, prosecute, defend any action or suit at law or in equity in any court in the Republic of Kenya that may arise*" in relation to the properties registered or in the process of being registered in the plaintiff's name. The 2nd and 3rd defendants did not challenge the validity of this power of attorney or its scope in relation to the present proceedings. The 2nd and 3rd defendants' complaint was with regard to the admissibility of the evidence adduced by PW1 on the strength of this power of attorney. The 2nd and 3rd defendants contended that all that PW1 told the court was hearsay evidence which was not admissible. The 2nd and 3rd defendants contended that the plaintiff donated to PW1 a power of attorney after the transaction which gave rise to the suit and as such PW1 who was not privy to the transaction could not plead or testify on behalf of the plaintiff. I find no merit in the 2nd and 3rd defendants' contention that the plaintiff's suit is bad in law. Whether or not evidence adduced by a party is admissible in my view does not render a suit bad in law. The admissibility or otherwise of evidence becomes relevant only when the court is considering whether the claim is proved or not. Furthermore, I am of the view that the objection to the admissibility of the evidence by PW1 should have been taken when the witness was giving her testimony. A party cannot wait until after the evidence is tendered and admitted by the court to challenge the admissibility of the same. In any event, all that PW1 told the court was what was within her own knowledge. I have not seen any part of her evidence which can be said to be hearsay. Apollo Rwamba Mwangi who informed her about the sale of the suit property was called as a witness and gave evidence as PW2. The 2nd and 3rd defendants had an opportunity to cross-examine him on the information he was said to have given to PW1. I also see no connection between the date when PW1 was given the power of attorney and her evidence in court. After considering the matter as a whole, I find no merit in the 2nd and 3rd defendants' contention that the plaintiff's suit is bad in law. The objection to the suit on that ground is overruled.

Whether the 1st defendant through misrepresentation, deceit and fraud sold and transferred the suit property which was owned by the plaintiff

to the 3rd defendant.

It was not contested that the suit property was registered in the name of the plaintiff and that while selling the property to the 2nd and 3rd defendants, the 1st defendant deceived them that she was the plaintiff and executed the application for land control board consent and instrument of transfer as the plaintiff. The 1st defendant was arrested and charged with the offences of obtaining money by false, obtaining land by false pretence and cheating. The 1st defendant was convicted and sentenced to serve 2 ½ years in prison by Limuru Senior Principal Magistrate's Court in Criminal Case No. 712 of 2010. The conviction of the 1st defendant in the said criminal case established that the 1st defendant purported to sell to the 2nd and 3rd defendants the suit property which did not belong to her; that while selling the suit property, the 1st defendant pretended to be the plaintiff and that; she obtained consent of the land control board to transfer the suit property to the 3rd defendant through fraud. In their testimony, the 2nd and 3rd defendants did not contest the fact that they purchased the suit property from the 1st defendant who had lied to them that she was the plaintiff. I am satisfied that the 1st defendant through fraud, misrepresentation and deceit sold and transferred the suit property which belonged to the plaintiff to the 3rd defendant.

Whether the 2nd and 3rd defendants colluded with the 1st defendant in her acts of fraud and deceit.

There is no evidence before the court showing that the 2nd and 3rd defendants colluded with the 1st defendant in her fraudulent sale and transfer of the suit property to the 3rd defendant. I must say however that the 2nd defendant who conducted the transaction on behalf of the 3rd defendant was not diligent. First, the speed with which the whole transaction was conducted should have raised eye brows. According to the evidence on record, the 2nd defendant went to view the property with the 1st defendant and one, Joseph Njoroge on 1th May, 2010 and on the same day they booked the land control board meeting even without entering into an agreement for sale. On 13th May, 2010 less than two (2) weeks after the said meeting, they obtained land control board consent, had the full purchase price paid, land transferred to the 3rd defendant and a title deed issued. Secondly, if the 2nd defendant would have been keen enough, he could have noted that a sum of Kshs.746,802.00 which he paid as part of the purchase price for the suit property was deposited in the account of the 1st defendant and not that of the plaintiff. According to the cash withdrawal and deposit slips that were produced in evidence, the 2nd defendant withdrew Kshs.746,802.00 on 13th May, 2010 at 10:47a.m. and the said amount was deposited in the 1st defendant's account at 10:52 a.m, five(5) minutes later.

That said, there is no evidence to suggest that the 2nd and 3rd defendants knew that the 1st defendant was selling land that did not belong to her and went ahead with the transaction thereby perpetuating the fraud.

Whether the plaintiff abetted or facilitated the 1st defendant's acts of fraud aforesaid.

The 2nd and 3rd defendants' allegation that the plaintiff abetted or facilitated the 1st defendant's fraud for personal gain was not supported by evidence. I am of the view that if the plaintiff was part of the fraud, there would have been no reason why she would have reported the 1st defendant to the police and had her prosecuted. Furthermore, the 1st defendant's claim in the criminal case that the plaintiff had authorised her to sell the suit property was dismissed by the court. In the criminal case, the court stated in part as follows:

“Accused has not challenged the evidence presented against her. Her defence that her sister had allowed her to transact on her behalf is unsupported. I dismiss her defence as having no basis and find her guilty as charged in the three counts.”

The 2nd and 3rd defendants did not place any material before the court to prove or from which the court could infer that the plaintiff had knowledge of the 1st defendant's dealings and approved or turned a blind eye to the same.

Whether the 3rd defendant obtained a valid title in respect of the suit property from the 1st defendant.

It was not disputed that the suit property was owned by the plaintiff. It was also not disputed that the plaintiff did not transfer the suit property to the 3rd defendant. The decision in the criminal case and the evidence before the court are unanimous that the suit property was transferred to the 3rd defendant by the 1st defendant who did not own it and as such had no right to sell the same. Since the 1st defendant was not the owner of the suit property, she had no interest in the property which she could convey to the 3rd defendant. The 3rd defendant could not therefore acquire proprietary interest in the suit property however innocent he was in his dealings with the 1st defendant. See, Alberta Mae Gacie v. Attorney General & Others [2006] eKLR and Arthi Highway Developers Ltd. Vs. West End Butchery Ltd. & 6 Others [2015] eKLR.

It is my finding therefore that the 3rd defendant did not obtain a valid title over the suit property.

Whether the plaintiff is entitled to the reliefs sought.

I am satisfied that the plaintiff has established her claim against all the defendants. The 2nd and 3rd defendants had contended that the plaintiff disclosed no cause of action against the 2nd defendant since he was not registered as the owner of the suit property. It is clear from the evidence adduced by both parties that it was the 2nd defendant who was the prime mover of the transaction. He is actually the person who purchased the suit property and had it transferred to the 3rd defendant. The 2nd defendant was in the circumstances not only a necessary party but a party whose presence before the court could enable the court to effectually and completely adjudicate and settle all questions which were involved in the suit. The joinder of the 2nd defendant in the suit was therefore proper. As I have indicated above, the plaintiff's case has been proved. The plaintiff had sought a declaration that she is the owner of the suit property and that the sale and transfer of the property

to the 3rd defendant was fraudulent and an order of rectification of the register of the suit property by the cancellation of the name of the 3rd defendant and reversion of the property to the name of the plaintiff as the owner thereof. From the evidence on record, there is no hindrance to the granting of these reliefs.

Who should bear the costs of the suit?

Costs is at discretion of the court. The general rule is that costs follow the event unless for good cause the court orders otherwise. In the circumstances of this case there is no reason to depart from the general rule on costs. The plaintiff has established her claim against the defendants and is entitled to the costs of the suit.

Conclusion:

In conclusion, I hereby enter judgment for the plaintiff against the defendants jointly and severally in terms of prayers (a) and (b) of the plaint dated 20th March, 2012. The Land Registrar, Kiambu Land Registry shall rectify the register of L.R No. Tigoni/Mabroukie Block 1/1080 by cancelling entries numbers 6 and 7 through which the land was registered in the name of the 3rd defendant and shall restore entries numbers 4 and 5. The 3rd defendant shall return the title deed that was issued to him to the Land Registrar forthwith for cancellation in default of which it shall be deemed as cancelled. Since the title deed that was issued to the plaintiff was cancelled when the suit property was transferred to the 3rd defendant, the Land Registrar shall henceforth issue the plaintiff with another title deed for L.R No. Tigoni/Mabroukie Block 1/1080 subject to the payment of the necessary charges. The plaintiff shall have the costs of the suit.

Delivered and Dated at Nairobi this 30th day of September 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Nyiha h/b for Mrs. Muhoho for the Plaintiffs

N/A for the Defendant

C. Nyokabi-Court Assistant