



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 166 OF 2016

PRISCILLA WAMBUI MUKURIA.....PLAINTIFF

VERSUS

MARGARET WANJIRU KIRONJO.....1ST DEFENDANT

JAMES MUNGAI.....2ND DEFENDANT

PETER NJUGUNA NJENGA.....3RD DEFENDANT

REGISTRAR OF LANDS.....4TH DEFENDANT

JUDGMENT

(Plaintiff being owner of land which she contracted 3rd defendant to subdivide and source for buyers; 3rd defendant subdividing the land but proceeding to himself enter into a sale agreement with 1st and 2nd defendants and transferring three of the subdivisions to them; plaintiff seeking cancellation of these titles; no evidence that the buyers ever dealt with the plaintiff as the registered proprietor of the suit lands; sale agreements and transfers nullified; judgment entered for the plaintiff).

1. Through a plaint that was filed on 11 May 2016, the plaintiff pleaded being the owner of the land parcel Dundori/Lanet Block 5/169 (Kiamunyeki 'A'). She averred that in the year 2009, she instructed the 3rd defendant to subdivide the said land into 18 plots (sic) which produced the plot numbers Dundori/Lanet Block 5/ 11365-1380 (16 plots from my calculation). She pleaded that on 14 January 2010 and 29 January 2010, she sold the plot numbers 1375 and 1376 to two persons who are not parties to this suit. When she went to transfer these two plots to the buyers in the year 2012, she found these two plots registered in the names of the 1st defendant and the plot number 1365 registered in the name of the 2nd defendant, yet she had not transferred these properties to them. She has pleaded that the 3rd defendant, whom she had instructed to do the subdivision, sold the two plots from the subdivision to the 1st defendant and there was a subsequent sale to the 2nd defendant. She has pleaded that the 3rd defendant did not have capacity to sell or transfer the plots as he was not the registered owner of the plots. She did cause him to be arrested and to be charged in Nakuru Criminal Case No. 3228 of 2012. In this case she wants the defendants permanently restrained from the plots No. 1365, 1375, 1376; a declaration that the said plots were fraudulently transferred, and an order of cancellation of the titles in name of the defendants for the said plots and in place she be registered as proprietor.

2. The 1st defendant in his statement of defence denied that his registration of the land parcels No. 1375 and 1376 was fraudulent. He pleaded that the 3rd defendant was the lawful agent of the plaintiff in the sale and transfer to him of the said parcels of land and that the transfer documents were executed by the plaintiff. She averred that the 3rd defendant was charged with the offence of stealing by servant which is a demonstration that he was acting as agent of the plaintiff. She pleaded that she has built a house on the plot No. 1376. She also filed a Notice to the 3rd defendant under Order 1 Rule 24 of the Civil Procedure Rules, 2010, that she would seek indemnity from him in the event that the plaintiff's suit succeeds.

3. The 2nd defendant did not enter appearance nor file defence and did not participate in these proceedings.

4. The 3rd defendant in his statement of defence pleaded that his engagement was not restricted to subdividing the land parcel No. 169 but also included his engagement as agent to sell the whole land. He has pleaded that he advised the plaintiff to subdivide the land for maximum returns and following this advice, the plaintiff gave him authority to subdivide. He pleaded that the 1st and 2nd defendants are purchasers for value with good title having purchased the plots from him as the plaintiff's agent. He denied selling the land without capacity and denied all particulars of fraud.

5. The 4th defendant, filed defence wherein it was pleaded that the 4th defendant is a stranger to the claims of the plaintiff and the plaintiff was put to strict proof.

In her evidence, the plaintiff reiterated more or less what she had pleaded in her plaint. She did mention that her agreement with the 3rd defendant was oral and when she hired him, she only had a share certificate for her land, and she requested him to process for her the title deed and subdivide the property. He did get for her the title deed to the land which was the parcel Dundori/Lanet Block 5/169, and he then subdivided it as instructed and she surrendered the mother title to facilitate the subdivisions. She stated that she got two buyers namely Kepha Onderi and James Gitonga Gaiho who bought the plots even before they had acquired new registration numbers and she entered into sale agreements with them for sale of two plots in the year 2010. These are the plots numbers 1375 and 1376. She did mention that Kepha has now already developed the plot No. 1375. When she went to process for them title she found that they are in the name of the 1st defendant. She then did a search of all her plots and discovered that the plot No. 1365 had also been transferred to the 2nd defendant. She approached the 3rd defendant to explain but he became slippery and she reported to the police. He was later arrested and charged with the offence of theft by servant. While the criminal case was on going, the 3rd defendant approached her and offered to relocate the 1st and 2nd defendants to another plot and transfer back the land to her. They did enter into a written agreement on this issue, which agreement inter alia states that the 3rd defendant acknowledges having wrongfully sold the properties and undertaking to restore the titles before 30 December 2014 and upon doing so the criminal charges would be dropped. This did not happen but the 3rd defendant nevertheless was acquitted of the criminal charges. She testified that the 3rd defendant could not sell the plots as he did not hold her power of attorney and she asserted that she never signed any documents of transfer.

6. Cross-examined, she did affirm that she was to pay the 3rd defendant some money as agent but she has not paid him. The 3rd defendant used his money to subdivide the land and was to be paid once the properties are sold but she is yet to pay him. She did affirm that the 3rd defendant was charged with stealing by agent the sum of Kshs. 870,000/=. She however stated that her problem was not the money but the lack of authority to sell. She stated that she had given the 3rd defendant a copy of her ID card and PIN for purposes of processing the mother title and nothing else.

7. On her part, the 1st defendant testified that she saw a billboard advertising some plots for sale and that is how she came to know the 3rd defendant. She then bought two plots from him and they wrote a written sale agreement on 7 July 2009. She paid him the purchase price and she later got title deeds in her name. She took possession and built on one of the plots. In the other plot, another person built. She thought that she got her titles genuinely and indeed wanted the court to assist her get back the other plot. She was aware that the 3rd defendant was charged in court and in fact testified in the matter. Cross-examined, she stated that the 3rd defendant informed her that the plots were owned by one Ms. Wambui and that he has been given the plots to sell.

8. The 3rd defendant on his part testified that he is a property agent and that he was introduced to the plaintiff sometime in the year 2008. The plaintiff wanted to sell her land parcel No. 169 which measured 2 ½ acres and they agreed that he would use his own money to process this title which he did. He also advised her that she can get more money by subdividing the land and the land was thus subdivided into 18 plots from number 1363 to 1380. For all this he was to be compensated by getting one plot. He was to get buyers and the 1st defendant was his first customer who purchased two plots Nos. 1375 and 1376, which he sold at Kshs.290,000/= each, and he was to earn a 10% commission. He affirmed that it was he and not the plaintiff who executed the sale agreements. He gave the plaintiff the transfer forms to sign, which he claimed that she did, and she also gave him copies of her ID, PIN and photographs. He did not hand over the money to her because they were yet to reconcile accounts. In June 2012, he wrote her a demand of Kshs.465,900/= being money he believed the plaintiff owed him. He was later charged with stealing by agent. To resolve the matter, he entered into a written agreement with the plaintiff but he recanted it, basically stating that he signed it out of duress.

9. Cross-examined, he confirmed not having any certificate from the Estate Agents Board and not being a licenced real estate agent despite making depositions to that effect. He also acknowledged executing the sale agreements as vendor, and not as agent, and the name of the plaintiff did not appear in the sale agreements. He did not pay the plaintiff the Kshs.580,000/= from the sale of the properties to the 1st defendant. He stated that what the plaintiff signed were blank transfer forms and that he then took the forms to an advocate to sign.

10. The 4th defendant did not call any witness.

11. I invited counsel to file written submissions which they duly did and I have taken these submissions into account before arriving at my decision alongside the various authorities quoted.

12. First, there were submissions from counsel for the defendants that the 3rd defendant was a duly appointed agent and that he acted as such and that his actions thus bound the plaintiff. I do not agree with these submissions for the 3rd defendant could not act as agent in the nature of transactions in issue. The 3rd defendant himself admitted that he is not registered as an estate agent. We have to be alive to the provisions of Section 18 of the Estate Agents Act, Chapter 533, Laws of Kenya, which provides as follows :-

18. *Unregistered persons not to practice as estate agents*

(1) After the expiration of six months from the commencement of this Act or such further period as the Minister may, by notice in the Gazette, allow either generally or in respect of any particular person or class of persons—

(a) no individual shall practise as an estate agent unless he is a registered estate agent;

(b) no partnership shall practise as estate agents unless all the partners whose activities include the doing of acts by way of such practice are registered estate agents;

(c) no body corporate shall practise as an estate agent unless all the directors thereof whose duties include the doing of acts by way of such practice are registered estate agents.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding two years or to both.

19. The Estate Agents Act, entered into force on 9 April 1985, meaning that six months after this period, no person who is unregistered was supposed to practice as an estate agent. Indeed, under Section 18 (2) above, it is an offence for a person to practise as an estate agent without being duly licenced. Under Section 2, “*Practice as an estate agent*” means the doing, in connection with the selling, mortgaging, charging, letting or management of immovable property or of any house, shop or other building forming part thereof, of any of the following acts—

(a) bringing together, or taking steps to bring together, a prospective vendor, lessor or lender and a prospective purchaser, lessee or borrower; or

(b) negotiating the terms of sale, mortgage, charge or letting as an intermediary between or on behalf of either of the principals;

20. From the above provisions, it is clear that the 3rd defendant could not qualify to be an estate agent. He thus had no capacity to enter into any written contract on behalf of the plaintiff. He could not in fact have had any capacity to enter into a sale agreement on behalf of the plaintiff, even if he were a registered estate agent, without holding a valid power of attorney. The only person who had capacity to enter into a written agreement over the sale of the properties in issue was the plaintiff who was the registered proprietor of the said parcels of land or a person who held her power of attorney. The 3rd defendant does not pretend to have held any power of attorney from the plaintiff and it follows that the sale agreements purportedly entered into by the 3rd defendant with the 1st and 2nd defendants are thus null and void.

21. With the nullification of the sale agreements, on what basis then can the 1st or 2nd defendant claim to have purchased land from the plaintiff? The plaintiff has absolutely no contract with them for the sale of her land and she cannot be bound by the illegal sale agreements that were entered into by the 3rd defendant. It is easy to fault the 3rd defendant in all this, but the 1st defendant and 2nd defendants ought to have known better than entering into a sale agreement with a stranger who held no title to the property that they were purchasing.

22. I have nothing before me which would suggest that the plaintiff ever sanctioned the sale of her properties to the 1st and 2nd defendants. She in fact does not even appear to have known that the 1st defendant had title to the plot No. 1375, which she sold to Mr. Kepha. The 1st defendant herself acknowledges that there is another person in occupation of this parcel of land to which she holds title to. A reasonable person ought to have inquired why there is another person in this land who is actually confidently developing it, but this does not seem to have bothered the 1st defendant. There were warning signs before she entered into the sale agreement with the 3rd defendant, and also warning signs even after she took occupation of the plots that she purported to purchase. It has been said time and time again that one cannot enter into a land sale transaction with the “*alacrity of a potato dealer at Wakulima market*” (see case of **Moses Lutomia Washiali vs Zephania Ngaira Angweye & Another (2018) eKLR**), and clearly the 1st and 2nd defendants cannot be said to have conducted proper due diligence before they purchased the suit properties.

23. Counsel for the defendants have argued that the transfer forms are not in issue in this case and thus the transfer of the parcels of land to the 1st and 2nd defendants cannot be impeached. I do agree that the transfer forms were not brought to the attention of this court, but I already have evidence that the plaintiff never sold her land to the 1st and 2nd defendants. Given that position, it behoved the defendants to demonstrate how the land was transferred to them, and they never offered any explanation, save to state that the plaintiff signed blank transfer forms. There is nothing that can be termed as a “blank transfer form”. A transfer form is the instrument that is used to transfer land from one proprietor to a specific individual and the execution of such form requires to be attested by an advocate or such other qualified person. It is an important document which should not be trivialised by being equated to a mere paper that can be signed as blank and other details filled later. Before a transfer form is executed it must show what land is being transferred, who the transferor is, and who the transferee is. I do not see how one can confidently base his/her case on the execution of blank transfer forms.

24. It does appear to me that the 3rd defendant knew that he had acted improperly and that is why he signed the agreement dated 29 September 2014 with the plaintiff where he promised to make amends. At this time, he was already facing criminal charges and the purpose of the agreement was to see whether the matter could be settled, which would have led to the plaintiff withdrawing the criminal charges. In as much as the 3rd defendant tried to impugn the said agreement, I am not persuaded that he signed it out of duress. That agreement does acknowledge that the 3rd defendant sold the plots Nos. 1365, 1375 and 1376 without the knowledge or consent of the plaintiff. In that agreement, the 3rd defendant undertook to have the titles cancelled and restored back to the plaintiff (which was never done) with the parties agreeing that and if this was done, the criminal charges would have been withdrawn. The titles were never cancelled and the criminal charges thus continued. The acquittal of the 3rd defendant of the criminal charges does not in any way sanitise the manner in which the 3rd defendant dealt with the parcels of land and does not sanction the manner in which the title to the said properties were transferred to the 1st and 2nd defendants. I regret to inform the 1st and 2nd defendants that their titles cannot be protected, for to me, it does appear to have been titles that were illegally procured. Section 26 of the Land Registration Act does offer protection to title holders but such title cannot be protected if it is procured :-

(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, unprocedurally or through a corrupt scheme.

25. My view of the matter is that the title of the 1st and 2nd defendants was procured illegally, and/or unprocedurally. There is no way we can avoid the fact that the plaintiff never signed any sale agreement with the 1st and 2nd defendant and never acknowledged them as buyers of her property and further that she never executed any specific transfer form of any property to them; as I have explained, a blank transfer form, if

ever one was signed, is as good as no transfer form. The engineer was of course the 3rd defendant, but the 1st and 2nd defendants could have avoided getting into the mess that they find themselves in, if they conducted proper due diligence.

26. I have no option but to order the cancellation of the titles of the 1st and 2nd defendants to the land parcels Dundori/Lanet Block 5/365, 375 and 376. These parcels of land were never sold by the plaintiff to the 1st and 2nd defendants and the rightful proprietor of the said parcels of land is the plaintiff. The title should thus be rectified to read that the proprietor is the plaintiff. Being the proprietor, the plaintiff is also entitled to all proprietary rights including the right of exclusive possession. In this regard, the 1st and 2nd defendants must therefore vacate the land parcels Dundori/Lanet Block 5/365,375 and 376, within the next 3 months and if they do not do so, the plaintiff is at liberty to evict them.

27. There is the notice filed by the 1st defendant seeking indemnity from the 3rd defendant. In it, she has asked for the following orders :-

(a) That the 3rd defendant pays her the open market value of the land parcels Dundori/Lanet Block 5/1375 and 1376 as at the date of judgment, same to be agreed or ascertained by a registered valuer.

(b) General damages.

(c) Indemnity for any loss that may be occasioned to the 1st defendant as a result of this suit.

(d) Any other or further relief that this Honourable Court may deem fit and just to grant.

28. I have already held that the engineer of the illegal sale of the plaintiff's parcels of land is the 3rd defendant. He held himself out as agent and received the proceeds of sale. The end result is that the 1st defendant cannot get what she thought she had purchased. The 3rd defendant must shoulder the loss that has visited the 1st defendant. I will enter judgment for the 1st defendant for the current value of the land parcels Dundori/Lanet Block 5/1375 and 1376, for if it was not for the misrepresentations of the 3rd defendant, she would be having title to the said land and would be worth their current value. I direct the 1st and 3rd defendants to agree on the value, and if they cannot agree, they agree on a valuer to undertake the valuation and they be bound by the value given by their joint valuer. If they cannot agree on the valuer, the Government valuer to value the two properties and that value be the amount payable to the 1st defendant by the 3rd defendant. I however do not see the place of general damages and I do not see any other loss that she has suffered which is not covered by the award of the current value of the two properties.

29. The only issue now left is costs. Again, I reiterate that the cause of the problem is the 3rd defendant. He will thus shoulder the plaintiff's costs of the suit and also the costs of the claim by the 1st defendant. I make no order for or against the 2nd and 4th defendants in respect of costs.

30. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 30th day of September 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Tanga holding brief for M/s Wachira Wanjiru & Co. for the plaintiff.

Ms. Wangari holding brief for Mr. Ngure for 1st defendant.

2nd defendant- Not entered appearance.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU