



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 603 OF 2008

MOSES M. KIEMA.....PLAINTIFF

VERSUS

MARGARET MUTHONI MUGWERU.....1ST DEFENDANT

PHANUEL M. NZIOKA.....2ND DEFENDANT

CITY COUNCIL OF NAIROBI.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

TOM OKETCH.....5TH DEFENDANT

PETER KAMAU NYUTU.....6TH DEFENDANT

(5TH & 6TH defendants are trading as Pet-M-Oketch Auctioneers)

JUDGMENT

The facts giving rise to this suit are to a large extent not in dispute. On 14th February, 1992, the 3rd defendant allocated to the 2nd defendant all that parcel of and known as Plot No. 313-Jamhuri Phase II. After survey, Plot No. 313-Jamhuri Phase II was given land reference Nairobi/Block 63/412. Plot No. 313-Jamhuri Phase II also known as Nairobi/Block 63/412 (hereinafter referred to as “the suit property”) was allocated to the 2nd defendant on terms and conditions that were set out in the letter of allotment dated 14th February, 1992. The 2nd defendant was granted a leasehold interest in the property for a term of 99 years less 3 days of the residue of the 3rd defendant’s lease from the Government of the Republic of Kenya.

The 2nd defendant was required to accept the allotment and pay a sum of Kshs.10,800/= comprising of stand premium and annual rent. The 2nd defendant accepted the allotment and paid the said sum of Kshs.10,800/= to the 3rd defendant. The 2nd defendant also paid a further sum of Kshs.15,700/= for survey and was shown the boundaries of the suit property. On or about 13th September, 1993, the 2nd defendant sold the suit property to the plaintiff at a consideration of Kshs.250,000/= which was inclusive of the costs of the structure which the 2nd defendant had put up thereon and the building material that he had on site. The 2nd defendant sold the suit property to the plaintiff before he was issued with a formal lease in respect thereof and before the property was registered in his name. After the sale of the suit property to the plaintiff by the 2nd defendant, the plaintiff was neither issued with a lease nor registered as the owner of the suit property.

On or about 28th September, 2001, the 3rd defendant granted to the 5th and 6th defendants a lease over the suit property for a term of 99 years with effect from 1st January, 1968 (less 3 days) at a revisable annual rent of Kshs.1,800/=. The 5th and 6th defendants were registered as the proprietors of the leasehold interest in the suit property on 28th September, 2001 and were issued with a certificate of lease on the same date.

On 15th October, 2002, the 5th and 6th defendants sold their leasehold interest in the suit property to the 1st defendant at a consideration Kshs.675,000/= through an agreement for sale of the same date. Following that agreement for sale, the suit property was transferred and registered in the name of the 1st defendant on 24th October, 2002 and the 1st defendant was issued with a certificate of lease on the same date.

The plaintiff brought this suit against the defendants by way of a plaint dated 5th December, 2008 which was amended on 22nd November, 2010. In his amended plaint, the plaintiff averred that the suit property belonged to him and that the same was fraudulently transferred to the 1st defendant. The plaintiff averred further that the 2nd defendant breached the agreement for sale between him and the plaintiff by failing to pass a clean title in respect of the suit property to the plaintiff. The plaintiff sought judgment against the defendants jointly and severally for;

1. A permanent injunction restraining the 1st defendant from wasting, demolishing, damaging, alienating or trespassing on the suit property.
2. A declaration that the suit property belongs to the plaintiff.
3. An order for the cancellation of the title held by the 1st defendant and the registration of the property in the name of the plaintiff.
4. In the alternative, compensation for the loss of the property based on the current market value of the suit property.
5. General damages.
6. Costs and interest.

The suit was defended by the 1st, 3rd and 4th defendants. The 2nd defendant who is said to be deceased did not enter appearance. The 5th and 6th defendants did not also enter appearance and interlocutory judgment was entered against them on 29th September, 2011.

In her statement of defence dated 12th February, 2010, the 1st defendant denied that she acquired the suit property fraudulently. The 1st defendant averred that the 2nd defendant did not have a title to the suit property that he could pass to the plaintiff through a power of attorney or otherwise. The 1st defendant also denied the plaintiff's claim that he had taken possession of the suit property, put up a building foundation thereon and fenced the same. The 1st defendant denied further that the plaintiff was entitled to any of the reliefs sought in the plaint as against her. In its statement of defence dated 16th February, 2009 and filed in court on 17th February, 2009, the 3rd defendant denied the plaintiff's claim in its entirety.

In its statement of defence filed on 12th May, 2009, the 4th defendant also denied the plaintiff's claim in its entirety. The 4th defendant averred that it was a stranger to the transactions which gave rise to the plaintiff's claim and denied allegations of fraud leveled against it by the plaintiff. The 4th defendant averred that if any title was issued by the 4th defendant, the same was issued strictly in accordance with the law.

At the trial, only the plaintiff and the 1st defendant tendered evidence. For the plaintiff, the evidence was given by his attorney, Florence Betty Molonza while the 1st defendant gave evidence in her defence. I have considered the pleadings, the evidence tendered by the parties and the submissions of counsels. The parties did not agree on the issues for determination by the court. From the pleadings, the following in my view are the issues which arise for determination in this suit;

1. Whether the 1st defendant acquired the suit property fraudulently.
2. Whether the plaintiff is entitled to the reliefs sought?
3. Who is liable for the costs of the suit?

Whether the plaintiff acquired the suit property fraudulently:

The onus was upon the plaintiff to prove the allegations of fraud pleaded against the defendants in relation to the transfer of the suit property to the 1st defendant. Fraud must not only be pleaded with the necessary particulars but must also be strictly proved. In **Virani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd [2004] 2 E.A KLR 269**, the Court of Appeal held that: -

“Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt”.

In **Kampala Bottlers Ltd. v. Damanico (UG) Ltd. [1990-1994] E.A141(SCU)**, the Supreme Court of Uganda held that:-

“To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters.”

I am not satisfied on the evidence before the court that the plaintiff has proved the allegations of fraud pleaded against the defendants. It is not disputed that the suit property was allocated to the 2nd defendant by the 3rd defendant. When the plaintiff purported to acquire the suit property from the 2nd defendant, the 2nd defendant had not been registered as the owner of the suit property. What the 2nd defendant held was a beneficial interest in the property. This is what the 2nd defendant conveyed to the plaintiff. There is no evidence that the 3rd defendant consented to the transaction between the plaintiff and the 2nd defendant or that the 3rd defendant was aware of the same. The 3rd defendant leased the suit property to the 5th and 6th defendants on 28th September, 2001 about 9 years after the property had been allocated to the 2nd defendant and 8 years after the 2nd defendant had transferred his interest in the property to plaintiff. For the entire period, neither the 2nd defendant nor the plaintiff had taken steps to obtain a title in respect of the suit property from the 3rd defendant. Although the plaintiff claimed in his evidence that he made several attempts to secure a lease from the 3rd defendant but was told on each occasion that the file was

not available, no evidence was placed before the court in proof of these attempts. The 1st defendant acquired the suit property from the 5th and 6th defendants in the year 2002 about 10 years after the property was allocated to the 2nd defendant.

When the 1st defendant acquired the suit property, the 5th and 6th defendants were the registered proprietors thereof and had held the property for a year. It is not clear from the evidence on record as to how the 5th and 6th defendants acquired the suit property from the 3rd defendant. Neither the 3rd defendant nor the 5th and 6th defendants tendered evidence at the trial. There is however no evidence before the court showing that the 5th and 6th defendants acquired the suit property fraudulently from the 3rd defendant. Although the plaintiff had claimed that the 5th and 6th defendants were not issued with an allotment letter by the 3rd defendant in respect of the suit property, no evidence was placed before the court in proof of this fact. It may have been irregular and unlawful for the 3rd defendant to allocate the suit property to the 5th and 6th defendants while the earlier allotment to the 2nd defendant was subsisting. That however is not the same as saying that the allocation of the property to the 5th and 6th defendants was fraudulent. There is no evidence that the 5th and 6th defendants were aware that the suit property had been allocated to the 2nd defendant. There is also no evidence that while purchasing the suit property from the 5th and 6th defendants, the 1st defendant was aware of the 2nd defendant's or the plaintiff's interest in the suit property. I am satisfied from the evidence on record that the 1st defendant was an innocent purchaser of the suit property for value without notice of the plaintiff's interest in the same. It is my finding therefore that the 1st defendant did not acquire the suit property fraudulently.

Whether the plaintiff is entitled to the reliefs sought in the plaint:

I have already held that the 1st defendant acquired the suit property lawfully from the 5th and 6th defendants. The 1st defendant's legal interest in the suit property cannot be defeated by the plaintiff's equitable interest which was acquired from the 2nd defendant. Due to the foregoing, there is no basis upon which an injunction can issue to restrain the 1st defendant from dealing with the suit property in respect of which she has a title. The court cannot also cancel the 1st defendant's title and declare the plaintiff to be the owner of the suit property. The plaintiff had also sought general damages. No basis was laid for this relief in the pleadings, evidence and submissions. The same is therefore not for granting.

The plaintiff had sought an alternative prayer for compensation for the loss of the suit property at the current market value of the property. As I have stated earlier, it is not contested that the 3rd defendant had allocated the suit property to the 2nd defendant. While that allotment was subsisting, the 3rd defendant could not lawfully allot the suit property to any other person save where the 2nd defendant had breached the terms of the allotment. There is no evidence that the 2nd defendant had breached any of the terms of the allotment. It was wrong therefore for the 3rd defendant to allocate the suit property to the 5th and 6th defendants while the allotment in favour of the 2nd defendant was subsisting.

That said, there is no evidence that the 3rd defendant consented to the sale of the suit property by the 2nd defendant to the plaintiff. I would have had no hesitation in awarding the 2nd defendant compensation for the loss of the suit property as against the 3rd defendant. In the absence of a consent by the 3rd defendant to the sale of the suit property by the 2nd defendant to the plaintiff, I find no basis for making an order for compensation against the 3rd defendant in favour of the plaintiff with whom the 3rd defendant had no dealings. I am aware that the 2nd defendant had given to the plaintiff a power of attorney to do all that which the 2nd defendant could do in relation to the suit property. This suit was however not brought by the plaintiff as an attorney of the 2nd defendant but in his own right. The said power of attorney cannot therefore enable the plaintiff to receive compensation on behalf of the 2nd defendant.

As concerns the claim against the 1st, 4th, 5th and 6th defendants, I have not found any wrong doing on their part. There is no merit therefore in the compensation claim made against them by the plaintiff in his alternative prayer. The plaintiff's alternative claim also fails.

Who is liable for the costs of the suit?

Costs is at the discretion of the court and as a general rule, the same normally follows the event. In this case, I am not persuaded that there are valid reasons to warrant a departure from the general rule on costs. I would however not award any costs to the 3rd defendant whose conduct of double allocation of the suit property led to the filing of this suit and to the 2nd, 5th and 6th defendants who did not defend the suit.

Conclusion:

In conclusion, I find no merit in the plaintiff's claim. The suit is dismissed with costs to the 1st defendant.

Delivered and Dated at Nairobi this 24th day of October 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Ms. Musa for the Plaintiff

N/A for the Defendants

