



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ELC NO 405 OF 2017

MARTHA NJOKI MUTURURA.....PLAINTIFF

VERSUS

GATANGA CONSTITUENCY DEVELOPMENT FUND.....1ST DEFENDANT

THE HON ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff vide a plaint filed on the 19/6/17 urged a claim against the Defendants and sought the following orders;

- a. An order restraining the 1st Defendant and the Land Register Thika from transferring to the 1st Defendant a portion of 0.405 ha out of LOC 16/GATURA/1858 (suit land).
- b. An order that the sale between the 1st Defendant and the Plaintiff is null and void
- c. Costs of the suit.
- d. Any other or further relief that the Court may deem just.

2. The Plaintiff avers that she entered into an agreement of sale with the 1st Defendant for the sale of the suit land for purposes of the construction of the division headquarters for Kariara Division. That on abandonment of the project to build the divisional head office by the 1st Defendant, the Plaintiff found no need to continue with the transaction and sought to refund the purchase price. It is her case that the 1st Defendant and the Deputy Commissioner Gatanga Division have fraudulently attempted to transfer the suit land to the 1st Defendant. She had pleaded and particularized fraud under para 7 of the plaint. She urged the Court that the agreement be nullified and the 1st Defendant be ordered to accept a refund of the purchase price.

3. The 1st Defendant did not defend the Plaintiffs' claims and judgement in default was obtained against it.

4. The 2nd Defendant opposed the Plaintiffs' claims and, in its defense, urged the Court to dismiss the Plaintiffs claim with costs. It denied the allegations of fraud and sought to put the Plaintiff into strict proof thereof.

5. At the trial the Plaintiff led evidence and stated that she entered into an agreement with the 1st Defendant and was paid Kshs 800,000/-. That without her consent the Deputy Commissioner and the Land Registrar Thika obtained false documents to have the suit land registered in the 1st Defendants name. She insisted that she did not provide any documents nor attended the Land Control Board for purposes of transferring the suit land to the 1st Defendant. In support of her claim the Plaintiff produced the following documents; undated agreement of sale, letter dated the 1/11/16 offering to refund the purchase price to the 1st Defendant on grounds that she was unwilling to proceed with the sale of the suit land. in the said letter she claimed that she was being intimidated by the Deputy Commissioner Gatanga Sub County; the purpose of the purchase of the suit land has ceased and therefore no need to purchase the suit land, the copy of title of the suit land registered in the name of the Plaintiff, and certified copy of the certificate of official search dated the 24/8/16.

6. On cross examination by Ms Mwalizi, counsel for the 2nd Defendant, she added that she signed the agreement of sale with the 1st Defendant and received Kshs 800,000/-. That the suit land was to be used for the purpose of constructing the divisional headquarters by the Constituency Development Fund. That the project was abandoned because the division was subdivided. She denied that the land was ever to be used for the construction of Wanduhi Primary School. That since the purpose of the purchase of the land has ceased, she is no longer interested in completing the transaction. That despite the sell the 1st Defendant has never taken possession of the suit land. She pleaded with the Court to nullify the agreement and order the 1st Defendant to accept the refund of the purchase price.

7. Thereafter neither the state counsel representing the 1st Defendant nor the 1st Defendant attend the trial despite proof of service by the Plaintiff.

8. PW2, John Mwangi testified and stated that he is the son of the Plaintiff and the chairman of Kariaria Division Development committee. He admitted that her mother, the Plaintiff was persuaded to sell the suit land to the 1st Defendant for the purposes of building a divisional headquarters but after the split of the division the project collapsed and the community proposed the suit land be used for the construction of Wanduhi Primary school. That as a result his mother is not willing to sell the suit land to the 1st Defendant. That she did not apply for the Land Control Board consent and when shown the application form, he insisted that the same was not signed by the Plaintiff. He claimed that the Land Control Board consent dated the 30/9/16 was a forgery. He admitted that the Plaintiff has not refunded the purchase price to the 1st Defendant.

9. At the close of the hearing the Plaintiff filed written submissions and stated that the 1st Defendant and the Deputy County Commissioner of Gatanga District have without consent of the Plaintiff fraudulently attempted to transfer the suit land to the 1st Defendant. That the fraud is borne from the Land Control Board application was not signed; no evidence that the Plaintiff attended the Land Control Board meeting; that the minutes were wrong; land was allegedly approved for Wanduhi School which was not indicated in the agreement and obtaining Land Control Board consents.

10. I have considered the pleadings, the witness statements, the evidence as adduced at the trial and the written submissions filed by the Plaintiff and the issues that will dispose this suit are as follows;

a. Whether there is a valid agreement for sale between the parties.

b. Whether the Plaintiff has proved fraud?

c. Who pays the costs of the suit?

11. The Plaintiff has claimed that she entered into an agreement with the 1st Defendant and received Kshs 800,000/- being the purchase price. She exhibited a copy of an agreement of sale which is unsigned and undated. There is no evidence laid before the Court to exhibit the payment and /or receipt of the purchase price. That notwithstanding the unsigned undated agreement, the Plaintiff has admitted that there is an agreement. The same was contested by the 2nd Defendant and sought to put the Plaintiff into strict proof. It however did not tender evidence and the claim of the Plaintiff remains unchallenged.

12. That given Section 3 of the Law of Contract states as follows;

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party;

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust”.

13. Going by the dictates of the above law the Court could find that the unsigned and undated agreement, the basis of the suit cannot be said to be a valid agreement, however the agreement has been acknowledged by the Plaintiff and it would appear that the same was acted on by the parties so much so that the sum of Kshs 800,000/- was paid to the Plaintiff, receipt of which is acknowledged. The Court finds that there was a valid contract between the parties.

14. In respect to the second issue as to whether fraud has been proved, the Plaintiff has pleaded fraud and particularized it under para 7 of the plaint.

15. **Black’s Law Dictionary** defines fraud as follows;

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

16. Fraud is defined as a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her

detriment. In John Willard, A treatise on equity jurisprudence 147 (Platt Potter ed, 1879), fraud has been defined to be any kind of artifice by which another is deceived. Hence all surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one is to be considered as fraud.

17. In the case of In **R. G. Patel v. Lalji Makanji** (supra), the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

18. Despite the Plaintiff particularizing the claim of fraud, there is no evidence laid before this Court to prove fraud. Specifically, there is an incomplete copy of an application for Land Control Board so much so that the Court is unable to tell whether the application was signed, if yes, by whom, whether there is a forgery and by whom. There is no evidence that the 1st Defendant and the Deputy County Commissioner Gatanga, fraudulently obtained the Plaintiff's documents such as PIN Number, picture, ID.

19. From the foregoing, the Court finds that the claim of fraud remains unproven to the required standard which higher than the standard of probability obtainable in civil cases but lower than beyond reasonable doubt in criminal cases.

20. The upshot is that the Plaintiff's suit fails and is dismissed.

21. Each party to meet the costs of the suit.

22. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 9TH DAY OF OCTOBER 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ndegwa HB Karuga Wandai for the Plaintiff

1st Defendant – Absent

Mwaniki Warima HB for Mwalosi for the 2nd Defendant

Irene and Kuyiki, Court Assistants