



REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA**

ELC NO. 152 OF 2014

**TOTOTO HOME INDUSTRIES.....PLAINTIFF
= VERSUS =**

PREM GUPTA.....1ST DEFENDANT

BULIBULI BOSE.....2ND DEFENDANT

JUKO TABULO..... 3RD DEFENDANT

REGISTRAR OF LANDS MOMBASA DISTRICT.... 4TH DEFENDANT

HON. ATTORNEY GENERAL..... 5TH DEFENDANT

J U D G E M E N T

1. The plaintiff vide her plaint dated 18th June 2014 sued the 5 defendants that they had jointly through fraud sold and transferred her land parcel No. MN/1/1274. That as a result of the fraud, the plaintiff has suffered loss and damage. The plaintiff prays for judgment against the defendants jointly and severally as follows:

(a) A declaration that the transfer registered on the 10th December 2009 purportedly transferring the suit property plot No. 1274/1/MN CR. No. 36051 from the plaintiff to the 1st and 2nd defendant is null and void.

(b) A permanent injunction restraining the 1st and 2nd defendants or any other person acting on their behalf from entering, occupying, or in any way charging, transferring leasing or otherwise alienating or dealing with or disposing of the whole or part of the suit property plot No. 1274/1/MN CR. 36051.

(c) The 1st, 2nd and 3rd defendants to deliver the original grant for the suit property to the plaintiff forthwith.

(d) General damages.

(e) Costs of this suit.

(f) And any other relief as the court may deem fit.

2. The 1st & 2nd defendants filed a joint statement of defence on 16th July 2014. The 1st & 2nd defendants admitted the plaintiff was the original owner of the suit land adding that the 3rd defendant property executed the sale agreement and documents for the transfer of the property. The 1st & 2nd defendants denied the plaintiff's claim and put her to strict proof. They urged the court to dismiss the suit with costs.

3. The matter proceeded to hearing after the close of the pleadings. The plaintiffs called only one witness who testified on 19/9/2017. Mr. Stephen Muli gave evidence on behalf of the plaintiff. He presented a work card to show he works for the plaintiff as an assistant secretary and trustee of the board. **PW1** said the Chairman of the board is called Joseph Njoya, Treasurer Susan Kuria and Secretary is Mary Stevens. **PW1** continued that they filed a joint statement dated 22/6/2019 and list of documents which were produced as Pex 1 – 9.

4. In the 10 paragraph witness statement, the signatories stated that the plaintiff owned the suit property MN/1/12474. That on 23/10/2009, the 3rd defendant fraudulently and without authority executed deed of indemnity lifting a caveat restricting transactions on the property. That on 7th December 2009, the 3rd defendant without authority executed a transfer to the 1st & 2nd defendants for Kshs.5 million. That there are

two grants existing in respect of the suit property i.e. one in the name of the plaintiff and the other in the name of the 1st & 2nd defendants. For these reasons, the purported sale and transfer is invalid.

5. In cross-examination, **PW1** said he joined the plaintiff in 1996 as a project manager. That since then his services have not been terminated. That by November 2006, he was still an employee of the plaintiff. Shown a letter of his termination, **PW1** said he had never seen it before. **PW1** was aware of the letter dated 3rd May 2001 in which resolution No. 4 confirms disposal of the suit property due to financial difficulties. That the letter dated 30th January 2000 is signed by the chairman to sell the suit land. That at one point the plaintiff got de-registered vide gazette notice dated 16th August 2003. **PW1** knew the 3rd defendant acted as the executive director of the plaintiff.

6. In further cross-examination by Mr. Wafula counsel appearing for the 3rd defendant, the witness admitted that the Chairman, Treasurer and Secretary ranked above him. He confirmed that the letter dated 29/7/2002 confirmed the retirement of Njoya as the Chairman. That there was a proposal to sell part of the plaintiff's properties to pay off her debts. **PW1** maintained that the 3rd defendant wrongfully sold the suit property to the 1st and 2nd defendants. In respect of the case of the 4th and 5th defendants, **PW1** conceded that the Registrar would not have known the fraud committed by the plaintiff's directors. He said the Registrar should have demanded for the consent of the NGO co-ordination board. That the transfer form was executed by the officials of the plaintiffs.

7. In re-examination, the witness stated that the letter dated 4th August 2014 lists Mr. Njoya as the Chairman. That the case was filed in 2014 while he was still working for the plaintiff. That they never authorised the 3rd defendant to sell the suit plot. That under Section 19 of the NGO Act, the board must give consent. That he did not see any receipts to prove the 3rd defendant paid any debts. That the gazette of 2013 was for intent to cancel but the plaintiff was never served with a cancellation certificate **PW1** became an official in 2010. This marked the close of plaintiff's case.

8. The 1st & 2nd defendants also called one witness – Prem Gupta who gave evidence on 7th March 2018. Mr. Gupta stated that he is a businessman owning horse racing and apartments. **DW1** said he got to know about the suit plot through an agent called Miss Muli in 2009. That he visited the suit plot and found it vacant. That after viewing, he found it worth buying as he had a vision of putting 120 houses on it. He asked the agent to do for him a search.

9. **DW1** continued that the search revealed it was owned by Tototo Industries. He instructed his advocate to handle the transaction on his behalf. That he later met the 3rd defendant and they agreed he was to remove the clause that restricted the plot from being converted into a commercial property. The 3rd defendant also brought to him the original title for the plot. That he never met any other director besides the 3rd defendant. **DW1** stated that after the transfer in his name, he built a perimeter wall around the plot.

10. In cross-examination by Mr. Ratemo learned counsel for the plaintiff, Mr. Gupta said the agent was called Mercy Muli. That he owns the Company with his brothers and anyone can sign the cheque. That they do not pass resolutions while buying properties. That he knew his advocate obtained consent from the lands office before the transfer. That he did not give money until the transfer was done. That he paid the entire purchase price of Kshs.10 million but he does not have the evidence in court. **DW1** was not aware there exists another title for the same property. He denied colluding with the 3rd defendant to defraud the plaintiff.

11. In further cross-examination by counsel for the 3rd defendant, **DW1** said he was not concerned with the internal management of the plaintiff. He was not aware of any fraud charges lodged against the 3rd defendant. That he paid Kshs.10 million but stamp duty was paid on a sum of Kshs.5 million. That before buying the property, he confirmed it was owned by the plaintiff. That he was not aware of any other officials besides the 3rd defendant. He urged the court to dismiss the plaintiff's case. This marked the close of the 1st & 2nd defendant's case.

12. The 3rd defendant testified as **DW2**. He said that he is now retired. Back in 2000, he worked as the executive director of the plaintiff. **DW2** stated that he knew the 1st defendant having interacted with him over the sale of the suit property. **DW2** said that Stephen Muli (**PW1**) was the plaintiff's office messenger on a contract of 6 months but was sacked by the Chairman for misbehaviour on 8/11/2006. That Mr. Njoya resigned from the board in the year 2002 (page 5 of their documents). **DW2** stated he has not seen another letter to confirm that **PW1** is an employee of the plaintiff.

13. **DW2** continued that he knows the land was purchased by the 1st & 2nd defendants. That he sold the plot to pay off the plaintiff's debts because none of the board members wanted to deal with the financial problems of the organisation. That the auctioneers even came to levy distress for rent. He relied on the documents he filed as part of his evidence.

14. **DW2** was put to cross-examination by Mr. Ratemo counsel appearing for the plaintiff. He denied that Stephen Muli is the assistant secretary. That he was given authority to sell the land vide a letter. That there were 3 signatories to the plaintiff's Bank Account and any two could sign. He denied signing a transfer to the 6th defendant (Omar). **DW2** conceded not obtaining consent of the NGO board to sell the land. That he did not see the terms of the Constitution of the plaintiff. He sold the property for Kshs.10 million.

15. In cross-examination by Khalid learned counsel for the 1st & 2nd defendants, **DW2** stated that the letter dated 30th January 2000 gave him authority to sell the land. That the suit land had been grabbed and it had almost 8 titles. That when he did the transfer, he had the original title deed in his possession. That as the executive director he had powers to sign the transfers. This also marked the close of the 3rd defendant's case. The 4th & 5th defendants' case was closed without any evidence being adduced.

16. The 1st, 2nd and 3rd defendants filed their submissions on 11th March and 10th May 2019 respectively. I did not find on record the plaintiff's submissions. From the pleadings and the evidence, I frame the following questions for determination:

- (a) Did the 3rd defendant have authority of the plaintiff to dispose the suit property?
- (b) Whether or not the transfer to the 1st & 2nd defendants was fraudulently done?
- (c) Does the plaintiff still exist?
- (d) Whether or not the prayers sought be granted?
- (e) Who bears the costs of the suit?

17. It is not in dispute that the plaintiff being an NGO could only act through its board of directors. The 3rd defendant was the Executive Director of the plaintiff at the time of the impugned transaction. The plaintiff pleaded in paragraph 6 of the plaint that in the years 2008 and 2009 it stopped operations due to financial difficulties and closed her offices temporarily. **PW1** denied that the 3rd defendant was never authorised to dispose of the suit property.

18. In support of the plaintiff's case, they relied on the following documents:

- (i) Certificate of Registration of the organisation.
- (ii) Search dated 1/10/2009.
- (iii) Search dated 21/3/2012.
- (iv) Deed of Indemnity.
- (v) The transfer and copy of title.
- (vi) Plaintiff's constitution.
- (vii) Minutes and letters.

19. The 3rd defendant in evidence stated that he disposed off the suit property pursuant to authorisation of the board. The 3rd defendant referred to a letter dated 30th January 2000. However, I do not find it having any nexus to this case as it refers of authority from the Directors to peter Kamau to sell plot No. MN/1/6231. **DW2** did not give any explanation linking the plot no.6231 and the suit plot. **DW2** in his evidence stated that there was a meeting of the board attended by Mary Stevens and himself where it was agreed that the property be sold to pay the debts. The minutes of that meeting was not produced.

20. The 3rd defendant has attached a proclamations issued by Kithemu Auctioneers demanding for rent of Kshs.145,250. It is not denied that the plaintiff was in financial distress but their constitution required a resolution of the board to dispose its property. DW2 a one of the directors. It was not made clear to this court the role of the executive director and whether he required support of an additional director to engage in the transaction. PW1 was not in office as a director and he has not presented sufficient evidence to demonstrate that the persons in office then did not approve of the 3rd defendant's action.

21. Was the transfer to the 1st & 2nd defendants fraudulently done? Proof of fraud is required to be discharged above the standard set in civil cases and section 107 & 108 of the Evidence Act provides that he who alleges fraud must prove the allegations. The particulars of fraud are listed in paragraph 8 of the plaint. As stated in paragraph 16 above, the plaintiff could only transact through its officers. One such officer is the 3rd defendant who the plaintiff has not denied was her Executive Director at the material time. The plaintiff pleads that she has never authorised the 3rd defendant to transact or execute the deed of indemnity and or sell the suit property. In my view lack of authority cannot be equated to fraud. On this limb, I am not satisfied the plaintiff proved the fraud against the 1st – 3rd defendants.

22. The 1st – 3rd defendants pleaded that this suit is a non-starter because the plaintiff was de-registered by a notice in the Kenya Gazette dated 16th August 2013. A copy of the gazette was produced by the 1st – 3rd defendants as exhibit. The notice No. 11962 read thus:

“Notice is hereby given pursuant to Section 16 of the NGO Co-ordination Act that the NGO Board intends to cancel the registration of the listed organisations on the grounds that they have breached the provisions of the NGO Co-ordination Act of 1990 and violated the terms and conditions attached to their certificates. Cancellation of the said certificates shall take effect after Fourteen (14) days after the date of this notice”.

23. The plaintiff is included at page 2 of this notice. The plaintiff's counsel argued that the gazette notice was merely a notice of intent to cancel registration and that the plaintiff was never served with a cancellation letter. The notice was however self-serving in that it provided the effective date to be fourteen (14) days after it was issued which then would be 31st of August 2013. This suit was filed on 18th June 2014. The plaintiff having been put on notice by the 1st – 3rd defendants was thus under obligation to show that it indeed had been re-instated. Without it, the suit was brought by an entity which ceased to exist thus a non-starter.

24. In light of the de-registration of the plaintiff and failure to prove the alleged fraud and/or lack of authority, the prayers sought in the plaint

cannot be issued. **PW1** thus lacked authority to ventilate the claim without first re-instating the life of the plaintiff. In conclusion I dismiss the plaintiff's suit with costs to the defendants.

Dated and signed at Busia this 23rd day of Sept, 2019.

A. OMOLLO

JUDGE

Delivered and Read at Mombasa this 7th day of October, 2019

C.YANO

JUDGE

In the Presence of:

Counsel for the Plaintiff:

Counsel for the Defendants: