



**REPUBLIC OF KENYA**

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

**THIKA LAW COURTS**

**ELC CASE NO.36 OF 2017**

**(FORMERLY NAIROBI ELC NO.1736 OF 2000)**

**NGOIGWA COMPANY LIMITED.....PLAINTIFF**

**-VERSUS-**

**DORCAS WANJIKU IKINU.....DEFENDANT**

**JUDGMENT**

By a **Plaint** dated 13<sup>th</sup> **October 2000**, the Plaintiff herein filed the instant suit against the Defendant and sought for the following orders;

- 1. A declaration that the transfer and the registration of the suit premises to the Defendant was fraudulent.***
- 2. An order of re transfer of L.R THIKA MUNICIPALITY/BLOCK 20/339 into the Plaintiff's name.***
- 3. An order for the Deputy Registrar to execute all transfer documents on behalf of the Defendant in favour of the Plaintiff if the Defendant fails to do so voluntarily.***
- 4. In the alternative and without prejudice to the above compensation for the suit premises on the prevailing /current value of the suit premises together with all the developments therein at the time of the determination of this suit.***
- 5. Costs of the suit and interest.***
- 6. Any other or further relief this Honourable court deems fit to grant.***

In its statement of claim, the Plaintiff averred that it was the registered owner of **L.R THIKA MUNICIPALITY/BLOCK 20/339**. That prior to **29<sup>th</sup> June** and prior to **June 1994**, it had a bank loan with Kenya Commercial Bank. Further, since it had no means of repaying the loan, the Defendant promised to assist them in repaying the said loan by seeking for the help from the President on their behalf. Later the Defendant informed them that the President could not assist them and they decided to sell the suit property to repay the loan. It was then that the Defendant offered to sell the suit property on their behalf and she introduced a prospective buyer. However she afterwards fraudulently misrepresented to the Directors of the Plaintiff Company that the prospective buyer could not purchase the suit premises while it was in the company's name unless the same was transferred and registered in her name. That sometimes in 1994, the defendant caused the Plaintiff's Directors to execute a sale agreement and consequently fraudulently caused the suit premises to be transferred and registered in her name.

The Plaintiff particularized fraud as; misrepresentation to the Plaintiff's Directors that she could assist them in repaying the bank loan by selling the suit premises on their behalf, misrepresenting and deceiving the Plaintiff's Directors that the suit premises could only be bought by transferring and registering the same in her name, causing the Plaintiff's Directors to sign a sale agreement and transfer forms for the suit premises, knowing very well there was no purchaser for the same and her only intention was to have the suit premises registered in her name as the legal owner, causing the suit premises to be registered in her name without any consideration being paid at all, monetary or otherwise.

It was the Plaintiff's contention that the whole transaction was fraudulent as the Defendant never sold the suit premises to any other party to enable them repay the loan. That the Plaintiff paid all the expenses involved in the transaction to enable the Defendant repay the same as earlier promised. However, the Defendant did not pay any money to the Plaintiff either from herself or any other person and when she obtained the certificate of lease upon her registration as owner, she became hostile to the Plaintiff's Directors and filed a civil suit claiming to be the legal owner. However, she later withdrew the Application for injunction on the **9<sup>th</sup> of November 1998**, and later the entire suit on the **27<sup>th</sup> April 1999**.

The suit is contested and the Defendant filed her Amended Defence dated **23<sup>rd</sup> March 2001**, and denied all the averments made in the Plaintiff. She averred that by a duly executed agreement for sale, the Plaintiff agreed to sell to her **L.R No. Thika Municipality/Block 20/339**. That she had offered consultancy services to the Plaintiff at **Kshs. 40,000** for a period of two years bringing the amount of service fees to **Kshs. 960,000/=** but in settlement of part of the fees, it was agreed that the Plaintiff would transfer the suit property to the defendant at an agreed price of **Kshs. 700,000/=**. Further that the Plaintiff would bear the legal fees and also pay the stamp duty, registration fees and all other incidental arising from the transfer and thus the purchase price was paid in kind by transferring the suit property **No. Thika Municipality/Block 20/339** into her name.

Further that the sale agreement was fully executed by the Plaintiff pursuant to the Law Society of Kenya conditions of sale and payment of the purchase price by her in the mode that was duly acknowledged by the Plaintiff. She denied that the sale agreement was a sham and further averred that pursuant to the Plaintiff obtaining a lease from the Government of Kenya duly registered in its favour on **29th June 1994**, it proceeded to affix its seal witnessed by two of its Directors to a transfer of lease in her favour and which transfer of lease was subsequently registered on the same date. It was her contention that save that she filed **High Court suit No. 3531 of 1995**, and subsequently an Application for injunction against the Plaintiff dated **1<sup>st</sup> December 1995** and the same having not been determined by the court and as such the suit is subjudice and should be stayed.

#### **PLAINTIFF'S CASE**

**PW1 Damaris Njoki Kamau**, stated that she is a Director of the Plaintiff, but some other Directors have since died. That she is the secretary to the Company and she keeps all the Company records and the title deeds and she also issues title deeds. She adopted her witness statement dated **11<sup>th</sup> June 2011**. It was her evidence that the Plaintiff took a loan of **Kshs. 3.7 million** from Kenya Commercial Bank, but they were unable to clear the balance. The late **Racheal Wanja** who was also a Director brought the idea of talking to the Defendant on how to pay the loan. She identified the Defendant as **Dorcas**. She denied that they turned the Company into a Society and testified that they sold some of their plots to offset the loan and also gave the Defendant the suit property so that she could help them pay the loan. That **Dorcas** (the Defendant) was to sell the seven plots so that the money could be used to repay the loan. That Defendant told them that she could not sell the plots when they were in the company's name but in her name. They wrote an agreement indicating that they were paid **Kshs. 700,000/=** and they paid for the stamp duty and transfer fees.

However the Defendant did not sell **Block 20/339**, nor did she give them the money for the plot. She testified that the seven plots were registered in the names of the persons named in her witness statement. She denied that they had given the Defendant the Plot for the assistance that she had given them and the Defendant never gave them any money. It was her evidence that they are in possession of the parcels of land and they have sold some of them to other persons and that they would want the Court to order the Defendant to give them back their title deed and cancel the same if it is in the Defendant's name so that they can give the new shareholders their title deeds.

She testified that she would like to have the statement of **Racheal Murira** adopted and on **26<sup>th</sup> June 2018**, the court allowed the statement of **Racheal Wanja Murira** to be produced in Court.

She further testified that after this instant suit was filed, they

reported the matter to the District Commissioner and the Defendant was summoned but she failed to appear. That the Plaintiff also reported the matter to the CID as evidenced by the letter dated **22<sup>nd</sup> May 2000**. Further that they also had another land subject to cause **No. 103 of 2001**, held by the Defendant. She urged the Court to order for cancellation of the title deed and the same to be issued to Plaintiff.

On cross examination, she testified that she had signed an agreement on **5<sup>th</sup> April 1994**. That the Plaintiff asked the Defendant to assist them in repaying the loan, they then transferred the plot to her name so that she could help repay the loan. That they had possession of the land for over 15 years before they transferred it to the Defendant and the Advocate acted on their instructions. She denied that they sold the properties and stated that though she does not have evidence that they gave the Defendant seven plots so that she can return the suit land to them, it was her testimony that they gave the Defendant 7 certificates of ownership and she transferred those plots to her family and she had a letter dated **1994**. That she filed the Plaintiff in the year 2000 with particulars of fraud and that in 1994 to 1998 they did not file any complaint against the Defendant. That they filed their Complaint with the CID in **1999**. Further that the Defendant did not do any work for them and she could not remember the year that the Defendant grabbed the Land from them.

During re-examination, she testified that the Defendant was to sell the plots for purpose of paying the debt and they gave her certificates for the 7 plots and the Plaintiff relied on her documents.

#### **DEFENCE CASE**

**DW1 Dorcas Wanjiku Rigathi**, adopted her witness statement dated **12<sup>th</sup> June 2018**. She testified that the Agreement dated **5<sup>th</sup> April 1994** bears her signature and that of the Directors of Ngoingwa Company. Further that the Bank statement for Ngoingwa Farmers Company Limited and cheques drawn from the said account and the signatures were from the Directors of the Plaintiff. It was her testimony that the Plaintiffs came to her and informed her that the land was to be auctioned within **14 days** as they had a loan with Kenya Commercial Bank. She then went to the chairman of the bank and requested him to help the Plaintiff and further sought assistance from the President. She was however informed that the Company is a Limited Liability Company and the Company was urged to turn around its assets to repay the loan. She tried to seek help from various places but was unable to. However when she approached the Cooperative Bank Chairman, he agreed to help on condition that the money was used to turn the farm and coffee around and the Company was given **Kshs. 600,000/=** and that is how the account was opened and the overdraft account started operating.

It was her testimony that she was managing the company so that they could pay the loan and in return they gave her 5 acres being payment for her consultancy as she helped the company to get profits. **In 1994**, the parties entered into the sale agreement and she gave the Plaintiff

some money.

On cross examination, she denied withdrawing instructions from her Advocate. She testified that she was the manager in charge of coffee and the accounts pertaining to coffee. That the people named in PW1's statement are her relatives and two of them are her sons and she did not know how the Director of the Plaintiff got their names. Further that the document dated **19<sup>th</sup> June 1995**, talks about a loan she was giving to the Company. Further that she gave the Plaintiff an advance loan from her account. The sale agreement is dated **5<sup>th</sup> April 1994**, the advance loan is dated **19<sup>th</sup> June 1995**, and her mother was a Co-opted Director, though she did not have any document to prove the same. She further testified that the letter dated **5<sup>th</sup> October 1994**, is authored by Ngoingwa Company Limited and the one dated **4<sup>th</sup> October 1994**, was authored by her and it did not have any signature

She further testified that the Plaintiff contracted her to render services but she did not have evidence of such contraction. She testified that she was given **5 acres worth Kshs. 750,000/=** and she took less amount because she was also giving them personal loans and the company gave her land worth **Kshs.260,000/=**. She denied that she was given the parcels of land to sell on behalf of the Plaintiff. Though she was the buyer, she did not pay stamp duty nor did she take possession or develop the land as she had already sold the land though she had nothing to show that she sold the land to a 3<sup>d</sup> party and she denied authoring the minutes.

On re-examination, she testified that she sold the parcel of land in **1996**, which was **5 years** before the suit was filed and she put her mother to counter check that the money was well utilized.

The Court then directed parties to file written submissions of which the Plaintiff through the **Law Firm of G.N Gichong'i Gichuhi** filed its submissions on the **31<sup>st</sup> of July 2018**, while the Defendant through the Law Firm of **Moses N. Siagi & Company Advocates** filed its submissions on **24<sup>th</sup> July 2018** and further a Reply to the Plaintiff's submissions on **17<sup>th</sup> December 2018** to which the Court has now carefully read and considered.

It is the Court's opinion that the issues for determination are;

- i) Whether the suit is Res Judicata***
- ii) Whether the suit is statute barred***
- iii) Whether the defendants Actions were Fraudulent***
- iv) Whether the Plaintiff is entitled to the Reliefs sought***

***(i) Whether the suit is Res Judicata***

The Defendant in their submissions filed on **17<sup>th</sup> December 2018**, averred that the parties have already litigated on the issues at hand and the same had already concluded and therefore the matter is Resjudicata. A look at the pleadings and the proceedings of the other suit that have been attached to these proceedings reveal that the Defendant withdrew the previous suit before the same could be heard and determined on merit. It therefore goes to show that the suit that the parties were litigating upon was never heard and determined on merit and as such this suit cannot be termed as Resjudicata. The guiding law on res Judicata is **Section 7 of the Civil Procedure Act** which provides as follows:

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”. (emphasis mine)***

It is this Court's finding and holding that the matter having not been finally decided cannot be res judicata. See the case of **Samuel Kiiru Gitau...Vs... John Kamau Giteru, Nairobi HCCC No.1249 of 1998**, where the Court held that:-

***“For a matter to be res judicata, it must be one which the Court has previously exercised its judicial mind and has after argument and consideration, come to a conclusion on the contested matter and for this reason, a matter is said to have been ‘heard and finally decided’ notwithstanding that the former suit was disposed off by a Decree or an Award”.***

***ii) Whether the suit is statute barred.***

The Defendant has also averred that the suit is statutory barred. The same

goes to the Jurisdiction of this court and therefore the court should deal with it in the first instance. It is the Defendant's allegation that the Plaintiff discovered the fraud in the year **1995** and therefore to file a suit in **2000** and the suit being one founded on fraud, then the same was clearly statute barred. The question that this court must then ask itself is whether the fraud was discovered in **1995**. It has been the Plaintiff's evidence that the misrepresentation and the fraudulent acts by the Defendant were perpetrated in in **1995**, there has been no express implication by the Plaintiff of when the misrepresentation and the fraud was discovered and PW1 went ahead and acknowledged that she could not tell when they discovered the fraud that had been perpetrated by the Defendant. It is the court's finding that the plaintiff learnt that the defendant was claiming the suit land when the defendant filed a suit claiming to be the owner of the suit property. It would therefore have been impossible for the Plaintiffs to file another suit as an already existing suit was in place that dealt with the said subject matter and similar issues and the same has been evidenced by an order on record which had stayed the present suit and further the defendant's defence that

acknowledged that this suit was subjudice. It is the court's further finding that time could not begin to run in 1995 since the Plaintiff was not aware that whatever it was engaged with was fraudulent act by the Defendant at that time.

Since there was a suit already filed, filing another suit would have

been subjudice and the same was evidenced by staying of this suit once. The court finds that it would have been impossible for the Plaintiff to bring a suit while the previous suit was still subsisting and further, the Plaintiff could only bring a suit when the Defendant withdrew her previous suit. Therefore, the Court holds and finds that the suit is not statute barred.

***iii) Whether the Defendant's Actions were Fraudulent.***

Fraud has been defined by the Black's Law Dictionary as follows: -

***"Fraud consists of some deceitful practice or willful 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. Fraud, as applied to contracts, 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'.***

In the case of *Gichinga Kibutha v Caroline Nduku (2018) eklr* the Court stated that;

***'Fraud is essentially a common law tort of deceit and its essentials are:-***

- a. false representation of an existing fact;***
- b. with the intention that the other party should act upon it;***
- c. the other party did act on it; and***
- d. the party suffered damage.***

***With respect to a contract, fraud means and includes any of the***

***acts set out below committed by a party to a contract, or with his connivance or by his agent with the intent to deceive another party thereto or his agent or to induce him to contract:-***

- a. the suggestion as a fact, of that which is not true by one who does not believe it to be true;***
- b. the active concealment of a fact by one having knowledge or belief of the fact;***
- c. a promise made without intention of performing it;***
- d. any other act fitted to deceive; and***
- e. any such act or omission or the law declares to be fraudulent.***

***"Equity has exercised a general jurisdiction in case of fraud, sometimes concurrent with and sometimes exclusive of common law courts. Fraud would, therefore, consist of deceitful actions which may be made through either positive assertions or concealment of facts."***

Unfortunately for this court to be able to determine whether there was fraud and in essence misrepresentation by the Defendant, it has been left to decide which of the witness evidence is credible. This so because there is no documentation by either party to support the allegations that have been brought forth as to what is truly the right position of how things went forward. Allegations have been made and this Court has no option but to make a determination.

While the Plaintiff claim that they agreed to transfer the suit premises on the promise by the Defendant that she would be able to help them in repaying the loan, the Defendant on the other hand alleges that the Plaintiff sold the suit premises to her However the Defendant in giving evidence in Court later changed tune and averred that that the same was a gift to her from the Plaintiff for having helped them out, this again changed and the Defendant stated that the same was payment of the consultancy fees that was paid to her. This Court is then left to wonder which of the versions that has been presented by the Defendant was the correct version.

Further the Defendant in her submissions has gone ahead to insist that she bought the suit lands and again this is contrary to the evidence that has been given in Court. The Plaintiff have however been consistent in their evidence in claiming that the suit land was transferred to the Defendant when she misrepresented to them that they could not sell the suit property in their own name. This Court is more inclined to believe the version of events as presented by the Plaintiff. In line with the definition of fraud as stated above, the Court further finds that the

Defendant misrepresented facts to the Plaintiff to be able to have the suit premises transferred and registered in her name to the detriment of the Plaintiff, the allegations by the Defendant that she had already transferred the suit property to 3<sup>rd</sup> parties have not been supported by any evidence nor have they been substantiated. These are also allegations that have not been pleaded and therefore the Defendant is barred from relying on them. It is the court's findings and holding that the explanation given by the Plaintiff would explain why the Defendant has never been in occupation. The person the Defendant allegedly sold the land to, has also never even tried to take possession as the plaintiffs have alleged that they have always been in possession. This allegation that the Plaintiff is in possession has not been denied by the Defendant. As such, this Court finds that the Plaintiff has established that there was indeed fraud and misrepresentation by the Defendant.

**iv) Whether the Plaintiff are entitled to the Prayers sought**

Section 26 of the **Land Registration Act** provides that;

*“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

*(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.*

From the foregoing the Court has made a finding that the Certificate of title issued to the Defendant was done fraudulently and through misrepresentation of facts by the Defendant. In that regard the Court is therefore inclined to cancel the certificate of title held by the Defendant as stipulated by the above proviso to **Section 26(1)(a)&(b)** of the **Land Registration Act**.

Further **Section 80** of the Land Registration Act provides that;

*(1) Subject to subsection (2), the court may order the*

*rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.*

*(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”*

Taking into account the provisions of **Section 26(1) (a)&(b)** above and having held that the Defendant acquired the certificate of title either fraudulently, through misrepresentation or illegally, then the court finds that the said title can be impeached and the Plaintiff has gone ahead and challenged the same. The court cannot hold and find that the Defendant herein is the absolute and indefeasible owner of the suit property herein. **Elijah Makeri Nyangw'ra ...Vs... Stephen Mungai Njuguna & Another (2013) eKLR**, where the court held that;-

*“the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.*

*For the first limb, it appears to me that the title of the 1<sup>st</sup> defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1<sup>st</sup> defendant was a party to the fraud or misrepresentation. Indeed, to me the 1<sup>st</sup> defendant was an innocent purchaser for value. He was probably conned of his money by the 2<sup>nd</sup> Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2<sup>nd</sup> Defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2<sup>nd</sup> defendant. I cannot therefore impeach the title by virtue of the provisions of section 26 (1) (a).*

*Is the title impeachable by virtue of section 26(1) (b)? First, it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26(1) (b) is to remove protection from an innocent purchaser of innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of the titles by subsequent transactions”.*

Having found that the Defendant's certificate of title is impeachable, then as provided by **Section 80(1)** of the **Land Registration Act** which is a replica of **Section 143(1)** of the **Registered Land Act Cap 300 (now repealed)** the court proceeds to cancel the certificate of title held by the Defendant and directs that the Register be rectified so that the said certificate of lease can be registered in favour of the Plaintiff.

The Upshot of the foregoing is that the court finds that the Plaintiff has proved its case on the required standard of balance of probabilities. For the above reasons, the court enters Judgment for the Plaintiff against the Defendant as prayed in the Plaintiff in terms of prayers No.1,2,3 plus costs and interest as prayed in prayer no.5.

On any other or further relied, that the court may find or deems fit to grant, the court finds that the Plaintiff did not seek for general damages. However, given the length of time the case has taken, the court is behoved by Section 3A of the Civil Procedure Act to issue orders that are necessary in ensuring that end of justice is met. Consequently, the court awards the Plaintiff nominal general damages to the tune **Kshs.200,000/=** plus

interest at courts rate from the date of filing of this suit to the date of payment in full.

It is so ordered.

**Dated, Signed and Delivered at Thika this 15<sup>th</sup> day of November, 2019.**

**L. GACHERU**

**JUDGE**

**15/11/2019**

In the presence of

M/S Vundi holding brief for M/S Gichuhi for Plaintiff

Mr. Omollo holding brief for Mr. Siagi for Defendant

Jackline - Court Assistant.

**L. GACHERU**

**JUDGE**

**15/11/2019**