



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CIVIL SUIT NO. 100 OF 2002

HENRY NDUMBA (Suing as the legal representative of the

Estate of MWIRICHIA M'ANGARE)PLAINTIFF

VERSUS

M'IBIRI M'MBOGORI1ST DEFENDANT

JUSTUS MURUGA M'IKIUGU 2ND DEFENDANT

STANDARD CHARTERED BANK3RD DEFENDANT

JUDGMENT

The History and Record

1. Despite the lengthy litigation history of this matter spanning a period of over 17 years, only one witness, the initial plaintiff has tendered his testimony and he did so on 9.10.2007. Sadly, this plaintiff passed on, on 29.6.2010 and an application dated 6.8.2010 was filed to have one HENRY NDUMBA M'MWIRICHIA appointed as the legal representative of the deceased. This application was allowed on 6.6.11.

2. The suit was instituted by the plaintiff vide a plaint dated 27.5.2002 against 4 defendants namely; M'Ibiiri M'Mbogori, Justus Muruga M'Ikiugu, Sabarkange Investment limited and Barclays Bank of Kenya limited. The plaint was amended on 24.1.2004 and again on 22.11.2006. In the latest amendment, the 3rd and 4th defendants were dropped from the suit and in came the Standard chartered Bank as the 3rd defendant. This amendment was preceded by a consent order entered into on 20.9.2006, where it had been agreed as follows;

“By consent the plaint dated 27.5.2002 be and is hereby amended as follows:- the 3rd and 4th defendants be and are hereby removed as parties. The claim against the said 3rd and 4th defendants in terms of prayer (b) of the plaint be and is hereby abandoned. The standard chartered Bank be and is hereby enjoined as an interested party. Costs for the 3rd and 4th defendants to be agreed or taxed for payment immediately thereafter. The plaintiff is granted leave to file and serve the amended plaint within 14 days from today”.

3. Despite the removal of the 3rd and 4th defendants from the case, the said parties continued to be represented by the various advocates. The new party, Standard chartered bank was also being referred to as a 5th defendant or an interested party. For instance, on 3.7.2007, a counsel known as Mr. Lompo was appearing for the interested party/5th defendant, whom I believe is the standard chartered bank. This party filed its defence on 14.12.2006.

4. For one reason or another, this matter has been in court for a very long time. The plaintiff's case was closed way back in year 2007. On 24.11. 2011, the defence was given a last adjournment, and such directions were again given on 8.10.2014. I handled this file for the very first time on 26.7.2017, where I directed the defence to file their documents and witness statements, of which similar directions were again given on 19.10.2017. However, this time round, I did put all the parties on notice that the case would not be adjourned again. Defence never complied with the court's directions hence defence case was marked as closed without any evidence on 25.4.2018.

The pleadings.

5. In the further amended plaint dated 22. 11. 2006 against the three defendants, the plaintiff has sought the following orders:

a) *General damages for breach of contract.*

b) An order compelling the 1st and 2nd defendants to pay the loan to enable the 5th defendant discharge Meru Municipality/ Block 11/97.

c) An order for the 1st and 2nd defendants to transfer to the plaintiff ½ share of Meru Municipality/ Block 11/97, and in default, the executive officer of the court be empowered to execute all papers to effect transfer to the plaintiff.

d) Costs of the suit.

e) Any other appropriate relief as may be just.

6. In the pleadings, plaintiff avers that at all material times, himself and 1st defendant were registered as proprietors in common in equal shares of parcel no. Meru Municipality/Block 11/184 (**hereinafter 1st Suit Property**). The 1st and 2nd defendants were also the proprietors in common of parcel no. Meru Municipality/Block 11/97 (**hereinafter 2nd Suit Property**). Through an agreement dated **5th October 1990** made between the plaintiff and 1st and 2nd defendants, the plaintiff permitted the two defendants to utilize his title for the 1st Suit Property to secure a loan from **National Bank of Kenya Limited Meru branch** not exceeding **Kshs. 1.2 Million**. The 1st and 2nd defendants alone were responsible for the repayment of the loan within 48 months and they were not allowed to seek or obtain advances or overdraft without the plaintiff's consent.

7. However, without the consent and knowledge of the plaintiff, the 1st and 2nd defendants registered a variation of charge by varying the name of the borrower in **1993** and secured another sum of **Kshs. 1.32 Million**, and upon discharge of the charges secured a sum of **Kshs. 6 Million** from **Kenya Commercial Bank on 12th June 1995**.

8. On **28th May 1996** an **agreement** was made between the plaintiff and the 1st and 2nd defendants where the plaintiff agreed to transfer to the 1st defendant alone the whole of the 1st Suit Property in consideration whereof, the 1st and 2nd defendants would in turn transfer to the plaintiff, their half share interest and title of the 2nd Suit Property, the side facing Tom Mboya Street to the plaintiff. The two transfer transactions were to be effected simultaneously or concurrently.

9. In or about **1996** the plaintiff honored his part. But at the time of executing the documents he was not aware that title to the 1st Suit Property was used to secure the **Kshs. 6 Million from Kenya Commercial Bank** and that the 2nd Property too was encumbered in favor of **Kenya Commercial Bank** to secure another sum of **Kshs. 6 Million** advanced to the defendants. These transactions were not known or disclosed to the plaintiff. Had he been aware, he would not have entered into the said agreement of 28.5.1996.

10. The plaintiff further pleaded that the 1st and 2nd defendants refused to transfer the half share of the 2nd Suit Property having tricked the plaintiff into relinquishing his title in the 1st suit property.

11. That was not all, on **17.6.1996**, the two defendants (1st and 2nd) apparently colluded together and fraudulently caused the title to the 1st suit property to be transferred and to be registered in the name of the 3rd defendant who knew of the fraud and illegalities and that on **12.10 1999**, the 3rd defendant purported to charge the title of the 1st suit property to the 4th defendant to secure a sum of **Kshs. 2.8 million**. Plaintiff again avers that the 4th defendant knew of the fraud.

12. Moreover, on or about **31.1.1997** without his knowledge the 1st and 2nd defendants charged the 2nd Suit Property to the standard chartered bank through fraud. The 1st and 2nd defendants failed to service this loan hence the threat of sale by the 5th defendant.

13. Through their defence (filed on 6.7.2007) to the further amended plaint, the 1st and 2nd defendants denied the allegations and put the plaintiff to strict proof. They stated that any money borrowed if any, on the security of the 1st Suit Property was with the full knowledge, consent and authority of the plaintiff. They denied that there was any agreement for exchange of half share in the 2nd Suit Property with transfer of 1st Suit Property to the 1st defendant. No such transfer has ever been effected. There was no consideration that passed from the plaintiff to themselves that would entitle the plaintiff to a transfer of half share in 2nd Suit Property. The two defendants further pleaded that the 1st Suit Property was sold by Kenya Commercial Bank after the plaintiff and 1st defendant defaulted in the repayment of the loan which both parties had borrowed from the said bank. The plaintiff was in full knowledge of the sale of this suit property to the buyer.

14. The 5th defendant in its defence to amended plaint dated 14th November 2006 stated that it is a stranger to the averments of the plaintiff. It denied committing any fraudulent acts at the time of charging the 2nd Suit Property which was free from any encumbrances. Further, the 5th defendant pleaded that there is no suit pending between itself and the plaintiff but there are a number of suits between the 5th defendant and the 1st and 2nd defendants over the same subject matters. Finally, the 5th defendant pleaded that its right over the 2nd Suit Property ranks in priority against any other party.

The Evidence

15. **PW1 M'Mwirichia M'angare**, the plaintiff gave a sworn testimony on 19.10.2007. He reiterated the averments in his pleadings. He added that the 1st and 2nd defendants are an in law and a cousin respectively, of which they bought properties together. He and the 1st defendant developed the 1st Suit Property together where they put up a commercial shop. The 1st and 2nd defendants went and obtained a loan of **Kshs. 6 Million** secretly which resulted in the said property being sold to the 3rd defendant. The 1st and 2nd defendants then told him to accept half of their plot in the 2nd Suit Property. They informed him that they had a loan of **Kshs. 70,000/-** and after paying it they would

transfer half of that 2nd suit property. But they had taken a loan with the 5th defendant of Kshs. 2.5 Million. The bank attempted to sell the property but he stopped via an order of the court. The defendants lied to him through their transactions and it is untrue that he knew of the loan. Neither did he receive any money from them and the said defendants failed to assist in loan repayments.

16. In support of his case, plaintiff had produced the following documents as his exhibits.

- 1) P-EXH1; The green card for parcel no. Meru Municipality /Block 11/184 (1st suit property).
- 2) P-EXH2; Agreement of 5.10.1990 to surrender the certificate of the lease to secure the loan.
- 3) P-EXH3; Letter of 28.5.1996, where the property was to be sold for ksh. 6.5 million.
- 4) P-EXH4; Agreement of 28.5.1996, where plaintiff and 1st and 2nd defendants had agreed to exchange plots
- 5) P-EX5; A search certificate dated 4.10.2004 for parcel Meru Municipality.Block11/97 (2nd suit property).
- 6) The green card for plot no. Meru Municipality.Block11/ 97(the 2nd suit property).

17. At this juncture, I must point out that when I took over the matter, and having noted that the evidence of plaintiff had been taken a decade earlier, I did inquire as to whether the exhibits are intact, of which counsel for the plaintiff had addressed the court on 19.10.2017 as follows:

“plaintiffs’ case was heard and closed. Plaintiff had produced P- Exhibits 1-6. I have confirmed that all the exhibits are there save exhibit no. 2 which was an agreement to show where a supposed loan was to be taken by the parties”.

18. A perusal of the file confirms that indeed there is no P-Exhibit 2. I further note that P-exhibit 4, the agreement of 28.5.1996 is torn, but the content there in is discernible. Likewise, the letter of 28.5.1996, P-exhibit 3, the same is torn and is in 3 pieces, but the content there in can be read.

Determination.

19. The plaintiff and 1st defendant did avail their respective submissions, which I have duly considered along with the evidence, the pleadings and the record. The issues for determination revolve around ***“the ownership of the 2nd Suit Property Meru Municipality 11/97, and whether the plaintiff is entitled to the reliefs sought in the further amended plaint.***

20. The genesis of the dispute as far as plaintiff’s claim is concerned is the agreement dated 5th October 1990 where the plaintiff allowed the 1st and 2nd defendants to use his title for the 1st Suit Property to acquire an amount not exceeding Kshs. 1. 2Million from National Bank of Kenya. They did so but the defendants went ahead and acquired another sum of Kshs. 1.32 Million. Once the title was discharged the defendants acquired another loan of Kshs. 6 Million from Kenya Commercial Bank. All this was done without his knowledge apart from the initial loan.

21. Looking at the green card availed as P exhibit 1, the charges placed on the 1st Suit Property can be seen. The plaintiff, **PW1**, himself stated that the initial loans by National Bank to the defendants were repaid and title discharged. In particular, plaintiff confirmed that the entry no 4 in the green card is a discharge of the encumbrance of the 1st suit property to National bank. During cross-examination he went on to admit that he allowed the 1st and 2nd defendants to take the loan of 1.2 million from National Bank of Kenya.

22. The plaintiff alleged that through the agreement dated 28th May 1996 which was produced as P-exhibit 4, he agreed to transfer to the 1st defendant the whole of the 1st Suit Property and in turn, the 1st defendant and 2nd defendants were to transfer to him half of the 2nd Suit Property. He affirmed that in 1996 he honored his part but the said defendants failed to honor their part. The 1st and 2nd defendants denied that there was any such agreement or that such a transfer was ever effected through their pleadings.

23. **Section 107 of the Evidence Act** stipulates that:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

24. The plaintiff stated that he executed the documents and transferred title of the 1st suit property to the 1st defendant pursuant to the agreement of 28.5.1996. These documents of transfer were not produced before this court to establish the purported transfer.

25. What’s more, the plaintiff produced the letter dated 28th May 1996 (P-exhibit 3) which evidences otherwise as it is a letter to the Kenya Commercial Bank from the plaintiff himself and the 1st and 2nd defendant. As stated earlier herein, the letter is torn into 3 parts and the starting sentence is no longer discernible, nevertheless, the rest of the content is legible and I find it necessary to reproduce the same;

“The Manager,

28th May, 1996.

Kenya Commercial Bank Ltd

P.O.BOX 178

MERU

Dear Sir

FACILITIES ON ACCOUNT OF M/S EMBASSY WHOLESALERS CO. LTD – ACCOUNT NUMBER 281580332 AND LOAN ACCOUNT NUMBER 281935... L.R NUMBER MERU TOWN BLOCK 11/184.

Kindly release..... Lawyers M/s Kagundu and Mukunya Advocates to transact sale and transfer of the Meru Town Block 11/184 to buyers who are willing to buy our said property at an agreed figure of Kshs.6,500,000/= (six million five hundred thousand only). The money will be released to yourselves immediately on release of the said lease document.

The balance outstanding after receipt of Kshs.6,500,000/= will be cleared within two (2) weeks. Thereafter you close all our accounts in our books.

Signed by - Mwirichia M'Angare

- M'Ibiri M'Mbogori

- Justus Muruga M'Ikiugu”.

26. This is plaintiff's own document, where he is the one admitting that their property, the 1st suit property had a buyer, where the price was Ksh6, 500 000. This is a contradiction to the allegation made by the plaintiff that he transferred his interests in the 1st suit property to the 1st defendant. Furthermore, there is no proof of any fraudulent illegalities as alleged by the plaintiff going by that letter of 28.5.1996.

27. Another notable aspect is that the alleged transfer of the title of the 1st suit property by the plaintiff to 1st defendant is not captured in the green card which has been availed by the plaintiff. Plaintiff claims to have performed his part of the agreement in 1996. The entry number 5 in that green card captures a charge in favour of the Kenya commercial Bank on 12.6.1995 (P. Exhibit 1) while the subsequent entry no 6 reveals that there was partial discharge of entry no.5 on 17.6.1996. The entry number 7 is a transaction of 12.10.1999, which is a charge in favour of Barclays bank of Kenya. Nothing in these transactions indicate that the plaintiff had transferred the 1st suit property to the 1st defendant as he alleges.

28. Having produced the letter of 28.5.1996, (P-exhibit 3) authored by himself and the 1st and 2nd defendants, the plaintiff cannot now turn around and feign ignorance regarding the transactions which affected the 1st suit property. The common thread running in the evidence and the pleadings of the plaintiff is that the 1st suit property was never transferred to 1st defendant so as to have the 2nd suit property transferred to plaintiff.

29. This being a civil matter the standard of proof is based on a balance of probability. However, it should be noted that when one alleges fraud the standard of proof is higher but not to the extent of beyond reasonable doubt. This was so stated by the Court of Appeal in the case of ***Central Kenya Ltd v Trust Bank Limited & 4 others [1996] eKLR***- where it was stated that;

“The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima face proof was much heavier on the appellant in this case than in an ordinary civil case.”

30. It is interesting that the three parties signed the letter dated 28th May 1996 which allowed the bank to sell the 1st suit property the same day the agreement to exchange the properties was made. This smacks of hypocrisy on the part of the plaintiff and craftiness on the part of all the three parties (plaintiff, 1st defendant and 2nd defendant).

31. I find that the plaintiff has failed to discharge his burden of proof in so far as his claim to the suit properties is concerned. As for general damages for breach of contract, these are not available since there was no evidence of any contract in the first place.

32. In the final analysis, I hereby dismiss this suit. Considering the lengthy litigation history of this matter, I direct that each party do bear their own costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 7TH DAY OF NOVEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Gikonyo holding brief for Kiome for plaintiff

Muthomi for 1st defendants

Plaintiff

Muthomi holding brief for Murango M. for 2nd defendant

HON. LUCY. N. MBUGUA

ELC JUDGE