



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 54 OF 2009

EMILY WANJIRA MURIITHI.....PLAINTIFF

VERSUS

CITY MILLERS LIMITED.....1ST DEFENDANT

THE ADMINISTRATORS OF THE ESTATE OF

JOHN NDUATI KARIUKI (DECEASED).....2ND DEFENDANT

STEPHEN KARIUKI NDUATI.....3RD DEFENDANT

RAHAB WAIRIMU NDUATI.....4TH DEFENDANT

CHARLES KIARIE NDUATI.....5TH DEFENDANT

TYSONS LIMITED.....6TH DEFENDANT

JUDGEMENT

1. The Plaintiff and John Nduati Kariuki (John Kariuki) incorporated Kardag Limited (“the Company”), which had a share capital of Kshs. 50,000/=. They held 250 shares each and were directors of this company. The Company purchased Dagorretti/Riruta/1908 (“the Suit Property”) and was issued a title on 28/1/1994. The Company constructed a five storeyed commercial building on the Suit Property named Kassy Plaza. The name of the building was later changed to Ngong Road Professional Centre. The construction of the building was partially financed through a loan the Company obtained from Standard Chartered Bank Limited for which the title over the Suit Property was offered as collateral. The bank loan was paid off sometime in 1998. The Plaintiff claimed the bank continued to hold the title over the Suit Property even after the debt was paid off.

2. Gimco Limited managed the Suit Property and collected rent until February 2004 when the Plaintiff avers that John Kariuki directed the tenants to pay rent to the Company without the Plaintiff’s knowledge. The Plaintiff claimed that John Kariuki did not remit the rent from the Suit property into the Company’s account and he refused to attend the Company’s board meeting called to sort out the rent issue. The Plaintiff learnt in July 2006 that John Kariuki had collected the title over the Suit Property from the bank in December 2003. John Kariuki died on 17/6/2006.

3. On conducting a search on the Suit Property, the Plaintiff discovered that the Suit Property was discharged on 7/9/2004 and transferred to the 1st Defendant on the same day. The Plaintiff conducted a search at the Companies Registry which confirmed that the 3rd, 4th and 5th Defendants were the directors of the 1st Defendant together with the late John Kariuki, who is now represented by the administrators of his estate.

4. The Plaintiff maintained that she never signed any documents on behalf of the Company to transfer the Suit Property to the 1st Defendant and that she did not know about the transfer until she retrieved documents from the lands registry. She stated that the late John Kariuki collected rent from the Suit Property and used it for his own private enrichment to the exclusion of the Company. When the Suit Property was transferred to the 1st Defendant, the Defendants took over collection of the rent from the Suit Property through the 6th Defendant. The Plaintiff claimed that the Defendants had acted fraudulently in dealing with the Suit Property.

5. In the Amended Plaintiff filed in court on 31/1/2011, the Plaintiff sought a declaration that the transfer of the Suit Property from the Company to the 1st Defendant was fraudulent and that the title issued to the 1st Defendant should be cancelled. She sought an order to cancel the registration of the Suit Property in the 1st Defendant’s name and restoration of Kardag Limited as the owner of this parcel of land. She also sought a permanent injunction to restrain the Defendants or their agents from collecting rent or dealing with the Suit Property, and an

order for the Defendants to render an account for the rent proceeds they collected from the time they took possession of the Suit Property. Further, she sought an order that Kardag Limited is entitled to the rent proceeds, general damages and costs of the suit.

6. The 1st Defendant filed its defence on 11/5/2009 denying the Plaintiff's claim while averring that the Plaintiff had not established any cause of action against the Defendants. In her defence filed on 10/3/2009, the 2nd Defendant who is the administrator of the estate of the late John Kariuki denied the Plaintiff's claim as well as the particulars of the fraud attributed by the Plaintiff to the late John Kariuki. The administrator averred that the Plaintiff was guilty of prolonged, inordinate and inexcusable delay in bringing this action. The administrator proffered that damages would be an adequate remedy for any acts that may have been committed by the late John Kariuki. The 3rd and 4th Defendants in their defence filed on 10/3/2009 denied the Plaintiff's claim and averred that the Plaintiff had not established any cause of action against the Defendants and that the suit was fatally defective. The 5th Defendant filed a defence similar to that of the 3rd and 4th Defendants.

7. The Plaintiff gave evidence. She stated that the Company was incorporated on 2/8/1993. Its share capital was increased to Kshs. 14,950,000/= on 28/10/1997. The Company acquired the Suit Property on 28/1/1994. She produced copies of the application for Land Control Board consent dated 29/5/2003 made by the late John Kariuki which was not signed; the rates clearance certificate issued on 20/5/2004; the Land Control Board consent dated 5/5/2004 for the transfer of the Suit Property from Kardag Limited to the 1st Defendant; and the transfer of land registered on 7/9/2004. The abstract of title she produced shows that the Suit Property was transferred to the 1st Defendant on 7/9/2004 and had other encumbrances. The Plaintiff stated that she was seeking the return of the Suit Property to Kardag Limited and clarified that her family and that of the late John Nduati Kariuki were shareholders in this Company. She was emphatic that she not involved when the decision to transfer the Suit Property to the 1st Defendant was made. She stated that Mr. John Nduati refused to cooperate with her in the management of the Company. She stated that she paid money towards offsetting the loan owed to the bank and contended that the Company's books of accounts had not been audited.

8. Nathan Mulinge gave evidence in support of the Plaintiff's case. He confirmed that Inter-Consultancy Services Architects, where he is a partner and an architect, was commissioned by the Company to design and supervise the construction of the building on the Suit Property. He stated that they officially handed over the development to the Company in November 1999 on being issued a certificate of occupation by the Nairobi City Council. He confirmed that the Plaintiff and John Nduati Kariuki used to buy building materials for the development of the Suit Property. He stated that their fees were never fully paid. He never dealt with City Millers Limited. He gave the estimates for the construction.

9. The 3rd Defendant gave evidence. He confirmed that the Plaintiff was a shareholder of Kardag Limited. He averred that his late father was the one who developed the Suit Property and solely supervised the construction of the building. He added that the Plaintiff had not shown evidence of the contribution she made towards the acquisition or development of the building. He did not know if there was a company resolution to transfer the Suit Property since it was his late father who dealt with all the transactions.

10. Parties filed submissions which the court has considered. The Plaintiff maintained that she had the right to bring this suit. She relied on the application dated 18/9/2009 vide which she sought to amend the suit to remove Kardag Limited as one of the Plaintiffs. She stated that the application was allowed on 17/1/2011 and that the grounds on which the application was based showed that it was a derivative action. The Plaintiff challenged the transfer of the Suit Property to the 1st Defendant based on the signatures on the transfer and maintained that as a director of the Company she never executed any transfer documents. She added that the Company did not execute the application for Land Control Board Consent. In addition, the 1st Defendant did not pay any consideration for the Suit Property and could not explain how it acquired it. No stamp duty was paid for the transfer and there was no resolution authorising the directors or the Company to transfer the Suit Property. The Plaintiff relied on Section 26 of the Land Registration Act in urging that fraud or misrepresentation are some of the grounds on which title to land can be challenged or where the title was acquired illegally, unprocedurally or through a corrupt scheme.

11. The 1st, 3rd and 4th Defendants contended that the Plaintiff lacked standing to bring the suit because she is separate from the Company and that there was resolution by the Company authorising the filing of this suit. They added that this suit being a dispute among shareholders, the proper forum to adjudicate this claim was not the Environment and Land Court. They submitted that in any event the Plaintiff did not prove that the documents which she produced in court were the very documents that were used to transfer the Suit Property. Further, that there was nothing in the documents produced by the Plaintiff to show that the signature on the transfer was supposed to be her signature. They concluded that the Plaintiff had failed to show that the transfer of the Suit Property was done fraudulently and for that reason her suit must fail.

12. The 2nd Defendant submitted that the Plaintiff should have commenced a derivative action. She added that the Plaintiff did not seek the court's leave to bring the derivative action and added that it should be the Company to complain about any injury done to its assets and not the Plaintiff as a shareholder. The 2nd Defendant submitted that the Plaintiff lacked the *locus standi* to bring this suit and that she had failed to prove fraud on the part of the Defendants. The 2nd Defendant also maintained that what was in dispute was the issue of shareholding in the Company which should be dealt with by the Commercial Division of the High Court.

13. The Plaintiff filed further submissions in which she contended that once she was granted leave to continue the suit against the Defendants there was no need for another application to institute a derivative action. The Plaintiff implored the court not to dismiss her suit on a technicality. The Defendants in their supplementary submissions maintained that this suit does not qualify as a derivative suit since no leave was sought.

14. The issue for determination is whether the court should grant the orders sought by the Plaintiff with the Defendants' main contention being that the Plaintiff lacked the capacity to bring this suit. The court has looked at the orders made by Lady Justice Ougo on 17/1/2011 with regard to the Plaintiff's application for amendment of the plaint. This suit was initially filed by two plaintiffs, that is Kardag Limited and the Plaintiff. The Plaintiff filed the application dated 18/9/2009 seeking to amend the claim.

15. Prayer (a) of that application which was brought under Orders I and VIA of the Civil Procedure Rules sought to amend the plaint and strike out the name of Kardag Limited from the proceedings for being non-suited as a party to the suit. The court granted prayers (a), (b) and (c) of the application dated 18/9/2009 and gave directions on the filing of the amended pleadings. The leave which the Plaintiff sought and obtained through the application dated 18/9/2009 was for the amendment of the plaint, it was not to continue this suit as a derivative suit as the Plaintiff submitted.

16. Looking at the documents that facilitated the transfer of the Suit Property from Kardag Limited to the 1st Defendant, it appears on the face of it that there may have been anomalies and impropriety in those transactions. The Plaintiff claimed that she learnt in July 2006 that John Kariuki had collected the title over the Suit Property from the bank in December 2003. She later learnt of the transfer of the Suit Property when she did a search at the Lands Registry. She averred that John Kariuki refused to attend Company meetings to resolve the issue. John Kariuki died on 17/6/2006. She filed this suit in 2009.

17. As a director and shareholder of Kardag Limited, the Plaintiff ought to have taken a keen interest in the running of the Company and the management of its assets. As soon as she learnt of the fraudulent transfer of the Suit Property, the Plaintiff should have been more diligent in pursuing the restoration of the Suit Property to the Company using the provisions of the Companies Act. The court agrees with the administrator of the estate of the late John Kariuki that there was inordinate and inexcusable delay on the part of the Plaintiff in bringing this claim.

18. The Suit Property was registered in the name of Kardag Limited, which is a separate legal person from the Plaintiff even though she was a shareholder and director in the Company. The court agrees with the Defendants that the Plaintiff ought to have sought and obtained leave to bring a derivative suit on behalf of Kardag Limited which was the aggrieved party in the alienation of the Suit Property to the 1st Defendant.

19. The court declines to grant the orders sought in the Amended Plaint dated 31/1/2011. Each party will bear its own costs.

Dated and delivered at Nairobi this 13th day of December 2019

K.BOR

JUDGE

In the presence of:-

Mr. K. Rono for the Plaintiff

Mr. C. Omollo holding brief for J. Thongori for the 1st, 3rd, 4th and 5th Defendants

Mr. C. Omollo holding brief for J. Maangi for the 2nd and 6th Defendants

Mr. V. Owuor- Court Assistant