



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C CASE NO. 63 OF 2017

KIBIRO WAGORO MAKUMI Alias

KIBIRO WAGORO.....PLAINTIFF

VS

FRANCIS NDUATI MACHARIA.....1ST DEFENDANT

STANDARD CHARTERED BANK LIMITED.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated 16/09/2015 and amended on 12/10/2015 the Plaintiff prays for the following reliefs;

- a. A declaration that the 1st Defendant acquired title to land Parcel No. 8 NDIKWE/131 fraudulently thus it should be cancelled by an order of the Court and revert it to its original owner KIBIRO WAGORO.
- b. A declaration that the charge in favor of the 2nd Defendant was based on a bad title that the same be discharged unconditionally.
- c. Costs of the suit.

2. The Plaintiff's claim is that on 17th October 1972 the 1st Defendant fraudulently caused the suit land to be registered in his name allegedly after purchasing the suit land for Kshs.5,635/- and later caused a charge to be registered against the title in favour of the 2nd Defendant. He contends that the charge in favour of the 2nd Defendant is null and void as it is supported by a bad title. The Plaintiff claims to have discovered the fraud in September 2014 while he went to the lands office to procure an official search certificate on the land as he had an interested buyer.

3. The 2nd Defendant filed its defence dated 27.11.2015 in opposition to the Plaintiff's claim. In its defence the 2nd Defendant states that they advanced several facilities to the 1st Defendant against the title to the suit land and that the sum outstanding now stands at Kshs. 5,616,126/-. Further that they exercised due diligence by conducting a search of the title, obtaining consent of the Land Control Board and ensuring that the charge and further charges are registered against the title before advancing the facilities. The 2nd Defendant therefore claims that it acquired interest on the suit land as an innocent chargee for value. That the 2nd Defendant had no notice of fraud or illegality on the title to the suit property. It denies the particulars of fraud in the plaint and claims that the Plaintiff's claim offends the Limitation of Actions Act cap 22 Laws of Kenya.

4. The 1st Defendant failed to enter appearance or file any reply to the claim herein despite being served through an advertisement in Nation Newspaper with leave of the Court. Interlocutory judgment was therefore entered against him on 1/12/2016.

5. At the hearing, the Plaintiff called two witnesses. PW1- the Plaintiff herein testified that he is the owner of the suit land having been registered as such in the 1st registration. That he did not transfer his title to anyone. That he discovered at the lands office that his land had been transferred to the 1st Defendant who was unknown to him and later charged to the 2nd Defendant. He produced the search certificate dated 22.9.14, green card which showed he was the 1st registered owner of the suit land. That he discovered that his land was transferred to the 1st Defendant in September 2014. He stated that he has lived on the suit land with his family since 1961 and no one has ever interrupted his occupation. That his title deed got burnt some time back.

6. The 2nd Defendant called one witness, Weldon Mutai, the Thika branch operations manager with the 2nd Defendant. He relied on his

witness statement as his evidence in chief. He testified that before disbursing the loan, the banks requests for a copy of the title and does an official search. He could not give a description of the suit land before the charge as he did not have a status report of the property in form of a valuation or any other document and also did not explain why the security had not been realized despite the loan being long outstanding.

7. The Plaintiff in his submissions stated that his claim did not offend the Limitation of Actions Act as the suit was filed the following year after the fraud was discovered. That fraud is one of the main grounds that once proved a Court of law is allowed to cancel a certificate of title to land under section 26 of the Land Registration Act No. 3 of 2012. On the issue raised by the defence on the failure to enjoin the Land Registrar Muranga as a party to the suit the Plaintiff submits that the oversight is curable under Order 1 rule 9 of the Civil Procedure Rules.

8. The 2nd Defendant neither filed any issues nor written submissions.

Determination

9. The issues for determination are as follows; is the Plaintiff's claim statute barred? Whether the 1st Defendant's title to the suit land was fraudulently obtained? What is the validity of the charge; costs of the suit.

10. As to whether the claim of the Plaintiff is statute barred, Section 26 of the Limitations of Actions Act states as follows; - "Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it: (emphasis is mine).

11. The Plaintiff explained that he discovered the fraud in September 2014 and filed suit on 17/9/15. He produced a copy of certificate of search dated 22/9/14. This is consistent with his evidence which is believable to that extent and in the circumstances the Court finds and holds that the claim is not statute barred.

12. The 1st Defendant did not enter any appearance nor file any defence and on the 1/12/16 the Judgement in default was entered against him. I have seen the service by advertisement carried in the Daily Nation on 28/10/16. The evidence of the Plaintiff though uncontroverted, the burden of proof does not shift from the Plaintiff. He retains the onus to proof his case to the standard required.

13. As to whether the 1st Defendant's title to the suit land was fraudulently acquired, the term fraud is in **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. 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".

14. It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 in **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition** quoting with approval the cases of **Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308, Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 ch.D. 473 at 489** it is stated that:-

"Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (i). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice".

15. Locally, the above principles have been stated in **HCCC No. 135 of 1998 Insurance Company of East Africa –vs- The Attorney General & 3 Others** as thus whether there was fraud is, however, a matter of evidence.

16. In Civil Appeal No. 246 of 2013 between **Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others.....** the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The Court specifically referred to the law as stated in the case of **Dr. Joseph Arap Ngok – Vs - Justice Moijo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997** where the Court categorically declared that:-

"Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title

bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

17. In this particular case the statement of claim as contained in the plaint has set out 5 counts of fraud that has been pleaded against the 1st Defendant as thus; -

- a). causing the suit land to be transferred to his name without his knowledge and consent
- b). forging the land transfer form alleging to have been signed by the Plaintiff
- c). forging the land control board consent for transfer forms alleging that they have been issued by the Land Control Board
- d). registering a transfer form in 1972 and acquiring a title to the suit land causing the title of the suit land to be charged to the 2nd Defendant while he knew the same to be obtained through fraudulent means.

18. The Plaintiff has produced a certificate of official search dated 22/9/14 as well as a green card issued on 15/9/15 to support his claim of ownership of the property. The green card shows that the Plaintiff was registered as owner of the suit property on 15/5/61 and the title issued on the 18/9/72. Exactly one month later the 1st Defendant became registered as owner on 17/10/72 and the title issued on 27.10.72. Against the said entry on the green card there is a sum of Kshs. 5,635.00 indicated to denote the purchase price of the suit property. The Plaintiff in his summarized averments in evidence in chief stated as follows;

“I did not sell my land to the 1st Defendant. The 1st Defendant got himself registered as owner by fraud. I do not know him. I have no relationship with the 2nd Defendant. I am the registered owner of the land since 1961. I live on the said land with my family since 1961 and no one has disturbed me on the land. I do not know the 2nd Defendant”.

19. The Plaintiff appeared to be an old man in his 70's and gave evidence that was found to be consistent and believable having observed his demeanor in Court in respect to his responses. His evidence is uncontroverted as far as relates to the 1st Defendant.

20. The 1st Defendant had a duty under section 29 of the Registration of land Act which states that every proprietor at the time of acquiring land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land lease or charge and subsisting at the time of acquisition. The 1st Defendant had a duty to know who the registered owner of the land is. To the extent that he got registered as owner in 1972 without reference to the Plaintiff that amounts to concealment of deceit. The Plaintiff has plainly stated that he has never sold his land to the 1st Defendant not to anybody for that matter. It is his contention that for the 1st Defendant to have acquired the suit property in such a manner, he did it fraudulently, that is to say forging the transfer, application for consent of the lands control board and so registering himself as owner and purporting to charge the same to the 2nd Defendant.

21. As stated the fact that the 1st Defendant was duly served but did not appear in Court to defend the title to land, the Court is satisfied that unless evidence is given to the contrary the 1st Defendant's actions were fraudulent and therefore he did not obtain a good title. The Plaintiff has stated that he did not transfer his land to the 1st Defendant or anyone and he cannot be guilty of failure to produce any documents relating to the transfer or charge of the 1st Defendant and the 2nd Defendant respectively. He is the proprietor of the legal interest in the disputed land and did not part with it, as alleged or at all. Section 26 of the Registration of Land Act No 6 of 2012 protects Title issued to a purchaser upon the transfer or transmission by the proprietor thereof and not one tainted by fraud and /or illegality. The Plaintiff has proved fraud to the standard required.

22. As regards whether the charge is valid, DW 2 Weldon Mutai testified on behalf of the 2nd Defendant and stated that as the Branch Operations Manager Thika of the 2nd Defendant he was familiar with the history of the case. He denied any involvement in fraud and stated that the 2nd Defendant dealt with the 1st Defendant whom they knew as the registered owner of the land and who enjoyed various financial facilities from the bank from as far back as 1974. That the loan was secured by the suit property. He produced a copy of title in the name of the 1st Defendant, Land Control Board consent to charge, charge document, certificate of official search which shows the 1st Defendant as the registered owner.

23. That before advancing the facilities to the 1st Defendant the 2nd Defendant carried out due diligence on the title and the borrower to satisfy themselves of the validity and credit worthiness of the 1st Defendant. That it is only then that they advanced the facilities to the 1st Defendant. That it therefore acquired legal interest in the suit land as an innocent chargee for value without any notice of any fraud misrepresentation on the 1st Defendant. That the loan is still outstanding in the sum of Ksh. 5.6 m.

24. From the evidence the 2nd Defendant did not lead evidence that the loan is being repaid; it did not show any efforts on its part to recover the said loans from the 1st Defendant or to realize the security given that the loan was advance way back in 1974, the most recent as long ago as 1992. Para 9 of the 2nd Defendants witness states that the sum outstanding is Kshs 5.6 million which has been charged off to await settlement. The witness did not explain the meaning of this statement. Could it imply that the same has been written off? On cross examination the witness stated;

“I do not know the status report of the land. I cannot describe the land before the charge was registered. We have not realized the security on account of the outstanding Kshs 5.6 million. There is no reason why the security has not been realized”.

25. It could appear on record that the charges are innocent until on scrutiny of the green card an entry No. 8 appears as thus;

a. **“charge contains an agreement in terms of section 70 owner deceased Order 287/2001”**.

The 2nd Defendant did not explain what the entry meant. No material was placed before the Court in respect to the agreement on terms of section 70, (I guess Registered Land Act) were. Neither the Plaintiff nor the 2nd Defendant has led evidence on the above somewhat disturbing entry on the green card. The Court also observed that after that entry, further facilities were advanced to a third party going by the name of B P Riruta Service Station, the said facilities being secured by the Plaintiffs title.

26. Going by the decision in the case of **Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 others (2015) Eklr**, having analyzed the totality of the evidence adduced, having found that the title of the 1st Defendant was acquired fraudulently, the onus was on the 2nd Defendant to challenge the claim of the Plaintiff that the title upon which they advanced the loan is tainted with fraud. It did not discharge that duty. It then follows that there was no valid title that was charged to the 2nd Defendant capable of conveying a legal interest in the suit land by way of a realizable security. The question of the validity of the charge is called into question. It is doubtful. The 1st Defendants title and by extension the charge to the 2nd Defendant must be cancelled. The Bank has to pursue the 1st Defendant personally as well as the third-party borrower for recovery of the loan.

27. The upshot is the Plaintiffs claim succeeds and the orders made are as follows;

a. A declaration is hereby made that the 1st Defendant acquired title to land Loc 8/Ndikwe /31 fraudulently and the same is hereby ordered to be cancelled and the title reverts to the name of KIBIRO WAGORO.

b. It is hereby declared that the charge in favour of the 2nd Defendant is hereby cancelled and discharged unconditionally.

c. Costs of this suit to the Plaintiff.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 8TH DAY OF MARCH,2018

J G KEMEI

JUDGE