



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 430 OF 2017

THUO NG'ANG'A.....1ST PLAINTIFF

VS

FAITH WANJIRU THUO.....1ST DEFENDANT

SAMUEL MACHARIA NDUATI.....2ND DEFENDANT

JUDGMENT

1. By a Plaintiff filed on 1/8/17 the Plaintiff filed suit against the Defendants seeking the following orders;

- a) A permanent injunction restraining the Defendants, their servants and/or agents from selling, leasing, charging, disposing, entering into, utilizing or interfering in any way with the Plaintiff's use and enjoyment of land known Land Reference Number Loc.3/Gituru/875.
- b) A declaration that the Plaintiff is the owner of the land known as Land Reference Number Loc. 3/Gituru/875 and the 1st and 2nd Defendant's title is revoked and the land be registered in the Plaintiff's name as sole proprietor.
- c) Costs of this suit and interest.

2. That at all material times the Plaintiff and the 1st Defendant were joint owners of the suit land which was exercised from LR No. Loc.3/Gituru/173. That the title was held in the custody of the 1st Defendant who refused to surrender it to him. See copy of the title registered on 6/6/11.

3. The 1st and 2nd Defendant have opposed the Plaintiffs claim through their pleadings filed on various date.

The Plaintiffs case.

4. The Plaintiff avers that upon the death of his 1st wife he invited the 1st Defendant to live with him for about 3 years in around 2010 before she left the home and went away. Being apprehensive that the 1st Defendant could sell the suit land without his knowledge the Plaintiff caused a restriction to be registered on the suit land on 22/1/14.

5. That on or around 5/1/2017 the Plaintiff got information that the 1st Defendant had fraudulently transferred the suit land to herself and eventually to the 2nd Defendant. That he was not given notice of removal of the restriction that was purportedly removed under section 73(3) of the Land Registration Act. That a title was registered in the name of the 1st Defendant on 12/8/16, the same day the restriction was removed. That the restriction was not removed by him. He denied receiving a letter from the Land Registrar dated 4/7/16 which is alleged to have led to the removal of the restriction on the suit land. Further that the said letter was not a notice of removal of the caution as provided under the law and was meant to facilitate fraud. He accused the Land Registrar of having been involved in a fraudulent scheme with one or 2 of the Defendants. Upon the removal of caution aforesaid, the title was registered in the name of the 1st Defendant.

6. The Plaintiff denied signing any documents, the transfer to the 1st Defendant including attending to the office of the law firm of Jeseo Kariuki at Kangari or any other place. He stated that his signature is now a thumb print or signature of his name "Thuo Nganga". He showed a copy of his signature as appearing on his Identity Card as well as on the land subdivision/mutation form. He stated that he wants the ownership of the land to be reverted to his name or joint names of the Plaintiff and 1st Defendant.

7. At the trial of the case the Plaintiff stated that he is legally married to the 1st Defendant despite her having left the matrimonial home on

her own volition. He confirmed that they have a daughter with her namely Blessing Wairimu named after his own mother. That he did not give her a power of Attorney neither did he sign any. That the 1st Defendant sold the land illegally to the 2nd Defendant without his consent. In Cross-examination he stated that he does not know how the 1st Defendant utilized the proceeds of sale; not aware of any hostility towards the 1st Defendant by his sons of his 1st marriage; that she had no disagreement with the 1st Defendant; that he did not sell the land to the 2nd Defendant; that he learnt from the lands office that the land had been sold.

1st Defendant's case.

8. The 1st Defendant stated in evidence that she is legally married to the Plaintiff initially through Kikuyu Customary Law & thereafter solemnized the marriage on 29/12/2009 and attached a marriage certificate No. [...] dated 29/12/09. That during their brief union she faced hostilities from the plaintiff's sons which made it difficult for her to settle peacefully. As a result, she suggested to her husband, the Plaintiff, that they sell the suit land and buy an alternative land in Naivasha and settle there. That at that time she was servicing loans and was unable to repay as she had been stopped from picking and selling tea from the suit land. She wanted to use the proceeds to repay the loan as well. That the Plaintiff signed a Power of Attorney in her favour over the suit land to facilitate the transfer of the land to her as a gift. That the Land Control Board consent was obtained jointly with Plaintiff.

9. She stated that the caution registered on the suit land impeded the intended transaction. That the Plaintiff was irresponsible as to the reason why he filed the caution. That it was removed by the Land Registrar when the Plaintiff failed to honour the Summons by the Land Registrar paving the way of registration of the suit land in her name. Thereafter she transferred the land to the 2nd Defendant at the price of Kshs 2.6 m. That the Plaintiff was present when the acknowledgement of 1.6 m was signed and indeed witnessed the said acknowledgement. That she proceeded to buy another land in Naivasha namely, Maela /Ndabibi/Block 2/2286 where she and her children currently reside. That her husband approved the transfer of the suit land to the 2nd Defendant.

10. The 1st Defendant stated in her evidence in chief *inter alia* that she did not obtain a spousal consent for the transfer of the suit land from joint names of the Plaintiff and herself to herself. That she was not aware of entry No. 5 (restriction) until later. That the Plaintiff secretly registered the restriction on the suit land. On cross-examination she stated that the letter from the Land Registrar did not mention any restriction. That she is not aware if Plaintiff received the letter from Land Registrar.

11. Further she stated that she went to the office of Jesse Kariuki where the Sale Agreement between herself and the 2nd Defendant was prepared and she acknowledged the purchase price in the sum of Kshs. 1.6 million. That the Plaintiff also acknowledged by witnessing the document. She denied forging the signature of the Plaintiff on the acknowledgement letter undated, the Power of Attorney or the transfer to herself.

12. That the 2nd Defendant was introduced to her by the Land agents; John Kimani and Kuria Wanono in 2016. That they inspected the land in the presence of the Plaintiff who was aware of the impending sale. That she had the blessings of the Plaintiff to sell the suit land. That the Plaintiff approved the purchase price. That thereafter they proceeded to the offices of Jesse Kariuki to execute the Sale Agreement and transfers which were prepared and signed before the secretary at the said law firm at Kangari. Upon signing the agreement of sale she received Kshs. 100,000/= and the balance was to be paid later. That she obtained Land Control Board consent and thereafter the 2nd Defendant was registered as owner on 9.11.2016.

The 2nd Defendant's case

13. The 2nd Defendant stated that in May 2016 he was approached by Kuria Wanono and John Kimani, land agents, that they had a property on sale. That he, the 2 land agents & the 1st Defendant visited the land whereupon they met the Plaintiff at his homestead and on being explained to the mission the said Plaintiff pointed out the boundaries of the said land to them. That satisfied of the conditions of the land they with the exception of the Plaintiff went to the law offices of Jesse Kariuki where the agreement of sale was drawn and executed the same day. That on 1/11/16 he paid Ksh. 1.3m to the 1st Defendant via RTGS in the presence of the Plaintiff and thereafter signed the acknowledgement of Kshs. 1.6 million being total payment for the purchase of the land paid as of that date. That the Plaintiff too acknowledged by signing the same. That he became registered as owner on 9/11/16. That he is yet to pay Kshs 600,000/- being the balance of the purchase price. That he has not taken possession of the land. He stated that the Plaintiff was aware of the transaction from the beginning.

14. DW 3- Kuria Wanono testified and reiterated the testimony of the DW2. He stated that the secretary at Jesse Kariuki's office took the executed documents to another office and came back with them signed and therefore unaware if indeed they were signed by the Advocate or not. That he did not meet with Mr Jesse Kariuki Advocate or any other Advocate in the said office.

The Submissions

15. All the parties filed written submissions which I have read and considered. The Defendants each filed separate issues for determination while the Plaintiff did not file any.

The Determination

16. Having considered the evidence on record, the written submissions of the parties, the issues that commend themselves for determination are as follows;

A. Whether the transfer of Land to the 1st Defendant was fraudulent and/or illegal?

B. Whether the 2nd Defendant was a bonafide purchaser for value without notice of fraud and or illegality?

C. Costs?

17. There are common facts in the case such as: the suit land was registered jointly in the name of the Plaintiff and the 1st Defendant. The 1st Defendant and the Plaintiff were/are legally married as husband and wife. The 1st Defendant produced a marriage certificate No. [...] which the plaintiff did not controvert; that at the time of transferring the suit land to the 1st Defendant, in 2016 the Plaintiff and 1st Defendant were living apart, though still legally married. The suit land had a restriction registered against it on 22/1/14 as follows;

‘Restriction. No dealings shall be registered without personal appearance of both parties and their identity cards. Wife has left with the title’;

A. Whether the transfer of land to the 1st Defendant was fraudulent and or illegal?

18. The 1st Defendant stated in evidence that she faced hostilities in her marriage from the sons of the Plaintiff and suggested to the Plaintiff that they should sell the land and buy an alternative land elsewhere where they could settle peacefully. She also stated that she had taken unsecured loans from the bank and needed money to repay the said loan. It would appear that these were the driving factors behind the sale of the land. Unknown to the 1st Defendant, the Plaintiff had placed a restriction on the suit land on 22/1/14. The Plaintiff stated that the title of the suit land, on being registered jointly, was kept by the 1st Defendant who was adamant to release it to him. Fearing that she may sell the land without his consent, he placed the restriction on the land on 22/1/14. It would appear that at this time the 1st Defendant had walked out of the marriage with the Plaintiff and hence his apprehension was founded.

19. It is the evidence of the Plaintiff that he did not sign the transfer to the 1st Defendant and application for Land Control Board consent; not attend Land Control Board for the consent to transfer to the 1st Defendant and did not sign the Power of Attorney. The 1st Defendant stated that the Plaintiff gave her a Power of Attorney to facilitate the transfer of the suit land to herself as a gift; that they applied and attended Land Control Board to obtain a consent and even the Plaintiff paid for the Land Control Board fees. She produced a receipt allegedly in the name of Thuo Nganga. That the Plaintiff voluntarily executed the transfer in her name which led to the registration of the title. That the restriction was removed by the Land Registrar when the Plaintiff failed to appear before the Land Registrar as summoned via the letter dated 4/7/16.

20. I have examined the record and would like to analyse all the documents relied on by the 1st Defendant to effect registration of the title in her name. Firstly, the Power of Attorney is undated and unregistered against the title. The Plaintiff has denied that the signature by way of thumb print belongs to him. I fail to see the purpose of this Power of Attorney in facilitating the transfer of the suit land to the 1st Defendant. It is the 1st Defendant’s evidence that the transfer was executed by the Plaintiff (that he signed and thumb printed). What then was the purpose of the Power of Attorney if the plaintiff did execute the transfer?

21. The Power of Attorney referred to above stated as follows;

“Power of Attorney – Title No LOC 3/GITURU/875.

I Thuo Nganga ID No [...] hereby appoint Faith Wanjiru Thuo ID. No. [...] of P.O Box 25, Kangari to be my attorney and generally in relation to my interest in the above mentioned title to do anything and everything that I myself could do and for me and in my name to execute all such instruments and to do all such acts, matters and all things as may be necessary or expedient for the carrying out of the powers hereby given”.

It is clear that the Power of Attorney was a general power of Attorney. It did not authorize the 1st Defendant to transfer the land to herself and/or to the 2nd Defendant. The land having been held by the two, the 1st Defendant could not have been selling it on behalf of the two. There is no evidence that the Plaintiff authorized the 1st Defendant to transfer/sell the land alone and receive the proceeds of sale to the exclusion of the co-owner, the Plaintiff. The evidence on record is that the 1st Defendant received the proceedings of the sale alone. At the trial she stated that she used the proceeds of sale to acquire land in Naivasha registered in her name. There is no evidence that she gave an account to the proceeds of sale to the Plaintiff. In the absence of a waiver by the Plaintiff of his right to sell and receive the proceeds of sale, it is irresistible to decline the evidence of the Plaintiff that he did not know or authorize the 1st Defendant to dispose the suit land. In any event she could not singularly sell the land without spousal consent. She had no authority to make a disposition of the suit land to either herself or the 2nd Defendant.

22. There is a booking form for the Power of Attorney but no evidence of registration of the same was shown to the Court. Even if the Power of Attorney was validly signed, to the extent that it was not registered, it remains invalid. It follows that the said power of Attorney did not create nor donate any rights in favour of the 1st Defendant by the Plaintiff to transfer the suit land to herself.

23. No evidence has been produced by the 1st Defendant to show that the Plaintiff indeed attended to the Land Control Board for purpose of obtaining consent to transfer. The Court has been shown a Land Control Board consent date 25/6/2015. No witness was called to attest to the veracity or otherwise of the consent. The 1st defendant has placed reliance on a receipt issued on 1/8/2016. She attributes the receipt to a payment made by the plaintiff for the Land control board consent referred to above. The receipt has a date that is 1/8/2016 and the land control Board consent has a date which is 25/6/15. The gap between these dates is that the receipt of the land control board consent was issued more than a year later after the alleged land control board consent. The two documents do not lend credence on probable actions that lead to application, payment, and issuance of land control board consent.

24. The 1st Defendant stated that the Plaintiff transferred the land as a gift. The transfer on record which is being relied by the 1st Defendant

is undated and unregistered. There is no endorsement by the Land Registrar to show that it was registered. The 1st Defendant did not call the Land Registrar to corroborate the evidence. The amount of sale price is not disclosed but the consideration is indicated as a sale and not a gift as averred by the 1st Defendant. This is inconsistent with the 1st Defendant's testimony that it was transferred to her as a gift. That the Plaintiff has denied that he signed the transfer document is not unfounded.

25. The 1st Defendant has submitted that the power of Attorney, the Consent and the transfer of land to her as a gift are sufficient evidence that she acquired a genuine title in the suit land from the Plaintiff. The Power of Attorney, the Land control board consent and the transfer have too many irregularities that are not consistent with the restriction on the title. The Plaintiff has maintained that the restriction was placed to protect the title from unauthorized transfer by the 1st Defendant. He states that the restriction was removed without being notified. I have seen the letter that is alleged to have summoned the plaintiff to the Land Registrar which letter summoned both joint owners to appear before the Land Registrar regarding the suit land. It did not state that the restriction was the subject of the meeting or letter. It asked the parties to avail documents in their custody regarding the suit land. There is no evidence that the plaintiff did receive it. He says he did not. The letter on record is the one addressed to 1st Defendant. There is none addressed to the Plaintiff.

26. Further entry No. 6 on the title states that the restriction registered on 22.1.2014 is removed under section 73(3). I presume it is the Land Registration Act, 2012. Section 73(3) deals with removal of a caution. Section 78 (1) & (2) deals with removal and variation of restrictions. The law recognizes cautions and restrictions as encumbrances in land. Both serve different purposes and that is why different provisions of the law exist to handle each. If indeed the restriction was removed under section 73(3) of the Land Registration Act then it was so removed under the wrong provisions and hence through an unlawful process. In any event the Act provides for a mechanism to follow in the event of removal of a restriction. No evidence was tendered to show that the restriction was validly removed. For purposes of clarity Section 78 (1) of the Land Registration Act states as follows;

“Removal and variation of restrictions

(1) The Registrar may, at anytime and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.

(2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the Court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.

27. The alacrity of actions relating to the removal of the restriction, the registration of transfer and the issuance of the title in the name of the 1st Defendant is noticeable. I say so because all these matters were done on a singular date which is on the 12/8/16.

28. The evidence of the Plaintiff that he learnt that the land had been transferred to 1st defendant in 2017 is consistent with the certificate of search annexed dated 6/7/17.

29. The 1st Defendant stated in evidence that the transfer of the suit land was prepared and executed in the law firm of Jessee Kariuki. She did not appear before the Advocate for the witnessing of their signatures by the Jesse Kariuki Advocate. She herself could not vouch for the signatures of the said Advocate. This puts the transfer in doubt as to its validity. The said Advocate was not called to verify the signatures on the document at the trial.

30. The totality of the evidence on record points to fraud and illegality on the part of the 1st Defendant. The alleged transfer is wrought with illegalities and inconsistencies which overall leads the Court to conclude that no interest in the title was transferred to the 1st defendant by the Plaintiff. There was no spousal consent. I find and hold that the alleged transfer was therefore null and void.

B. Whether the 2nd Defendant was a bonafide purchaser for value without notice of fraud and or illegality?

31. As to whether the 2nd Defendant is a bonafide purchaser for value without notice, The Court of Appeal in **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** pronounced itself on the doctrine of bonafide purchaser for value without notice by offering a definition as outlined in Black's law Dictionary 8th Edition as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

32. The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner. For one to be a bonafide purchaser for value without notice, he must be such person who made all the necessary and relevant enquiries in respect of the land he desires to buy and such efforts could not reasonably access any information that adversely affects the land.

33. In the case of the 2nd Defendant this issue has been largely disposed by issue No. A above. Having determined that the transfer between the Plaintiff and the 1st Defendant was null and void, it then follows that the 2nd defendant received nothing from the 1st defendant.

34. At the signing of the agreement of sale between the 1st Defendant and the 2nd Defendant the suit land was still registered in the joint names of the plaintiff and 1st defendant. The restriction was also still in place.

Section 29 in Land Registration Act states as follows;

“Every proprietor, at the time of acquiring any 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”.

It therefore shows that if indeed the 2nd Defendant carried out proper due diligence he would have found out that the 1st Defendant had no interest independent of the Plaintiff that she could convey to him. Further even if the transfer to 1st Defendant is assumed to be valid (which is not) the transfer was done without spousal consent thus invalidating the same.

35. The documents allegedly executed in respect of the transfer to the 2nd Defendant are tainted with the same illegalities like the purported transfer in respect to the 1st Defendant. They are all null and void.

36. The totality of the evidence on record is that the Plaintiff has proved his claim against the Defendants. In the written submission the Plaintiff had varied his claim to the extent that he wants the suit land to be reverted to him and or to the joint names of the Plaintiff and the 1st Defendant as before. It is on record that the two parties are married.

37. Final Orders;

a. The titles in respect to Land Reference Number Loc.3/Gituru/875 registered in the names of the 1st Defendant and/or the 2nd Defendant be and are hereby cancelled.

b. The title in respect to Land Reference Number Loc.3/Gituru/875 do and hereby reverts to the names of the Plaintiff and the 1st Defendant as per entry No.3 in the title register.

c. A permanent injunction restraining the 2nd Defendant, his servants and/or agents from selling, leasing, charging, disposing, entering into, utilizing or interfering in any way with the Plaintiff and 1st Defendant use and enjoyment of land known Land Reference Number Loc.3/Gituru/875.

d. The Defendants shall pay the cost of this suit.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 12TH DAY OF JULY 2018

J G KEMEI

JUDGE

Judgment read in open Court in the presence of;

Mr Wandaka for the Plaintiff

1st Defendant – Present in person

2nd Defendant – Present in person. Advocate is absent.

Ms. Irene and Ms Njeri, Court Assistants.