



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 441 OF 2009

MUCHANGI NDUATI NGINGO

T/A MUCHANGI NDUATI & CO. ADVOCATES.....PLAINTIFF

VERSUS

THE COMMISSIONER OF LANDS.....1ST DEFENDANT

MBO-I-KAMITI FARMERS CO. LIMITED.....2ND DEFENDANT

SAMIA PROPERTIES LIMITED.....3RD DEFENDANT

JUDGMENT

Background:

The Plaintiff is an advocate of the High Court of Kenya practising as such in the name and style of Muchangi Nduati & Co. Advocates. At all material times, the plaintiff's firm acted as advocates for the 2nd defendant. The 2nd defendant was cash strapped and was unable to pay the plaintiff's legal fees. The plaintiff and the 2nd defendant entered into an agreement on 15th June, 2007 under which the 2nd defendant agreed to transfer to the plaintiff fifteen (15) parcels of land namely, Ruiru/Kiu Block 4/2038, 2039, 2041, 2042, 2043, 2044, 2045, 2012, 2011, 2010, 2009, 2008, 2006, 1723 and 1726 (hereinafter jointly referred to as "the suit properties" and individually as "Plot Nos. 2006, 2008, 2009, 1723, 1726, 2010, 2011, 2012, 2038, 2039, 2041, 2042, 2043, 2044 and 2045") at a consideration Kshs.975,000/= in partial settlement of the plaintiff's fees which stood at Kshs.11,362,342/= as of the date of the agreement. It was agreed between the plaintiff and the 2nd defendant that upon execution of the said agreement, the 2nd defendant was to release to the plaintiff:

- (a) The sale agreements;
- (b) The share certificates;
- (c) The letters of allotment;
- (d) The transfers duly sealed and witnessed;
- (e) Two passport size photographs for the directors of the 2nd defendant authorized to execute the documents of the 2nd defendant.

Pursuant to the said agreement, the 2nd defendant through its advocates Kibatia & Company Advocates forwarded to the plaintiff on 18th June, 2007 the original share certificate, letter of allotment and transfer of leases duly sealed and witnessed in respect of the suit properties. The 2nd defendant's said advocates also forwarded to the plaintiff the 2nd defendant's directors passport size photographs. The plaintiff proceeded thereafter to the lands office and had the agreement dated 15th June, 2007 between him and the 2nd defendant stamped. He also opened the files for the suit properties and made payments for the land rent. The plaintiff then waited for the leases in respect of the suit properties to be processed in the name of the 2nd defendant before he could register the transfers of the said leases in his favour. Despite constant and persistent follow up with the 1st defendant on the progress of the preparation and registration of the leases in respect of the suit properties, no information came forth from the 1st defendant on the same. The plaintiff was left wondering as to what became of the documents that he had lodged with the 1st defendant and the payments he had made. The plaintiff was left with no alternative but to file this suit against the 1st defendant.

The interlocutory proceedings:

On 4th September, 2009, the plaintiff brought this suit against the 1st defendant seeking the following reliefs:

- (a) An order of inhibition and/or prohibition against the 1st defendant restricting him from dealing, registering, releasing or dealing in any way with the suit properties pending the hearing and determination of the suit.**
- (b) A declaration that the suit properties lawfully belong to the plaintiff and all necessary documents be registered and released to the plaintiff forthwith.**

Together with the plaint, the plaintiff filed an application by way of Chamber Summons dated 4th September, 2009 seeking the following orders:

- (a) An order directing the 1st defendant to produce all documents and leases relating to the suit properties forthwith.**
- (b) An order directing the 1st defendant to finalise the registration and issuance of all the leases for the suit properties within a time frame to be determined by the court and the same to be released to the plaintiff to enable him carry out the registration of transfer in his favour.**

The Plaintiff's application dated 4th September, 2009 came up for hearing ex parte on 8th September, 2009 when court granted prayers 1 and 2 thereof. The orders that were made on 8th September, 2009 directed the 1st defendant to produce forthwith all documents and leases relating to the suit properties and prohibited the 1st defendant from dealing with the suit properties pending the hearing of the application inter partes. When the application came up for inter partes hearing on 7th October, 2009, the same was not opposed and the court ordered the 1st defendant to finalise the registration and issuance of all leases relating to the suit properties and to release the same to the plaintiff to enable him register the transfers that had been executed in his favour by the 2nd defendant.

The 1st defendant did not comply with the said orders that were made on 8th September, 2009 and 7th October, 2009. This prompted the plaintiff to apply on 22nd December, 2009 for the 1st defendant and the Land Registrar, Thika to appear in court and show cause why they could not be committed to civil jail for non compliance with the said orders.

The joinder of the 2nd and 3rd defendants to the suit:

While the plaintiff's application to commit the 1st defendant and the Land Registrar, Thika to civil jail for contempt of court was pending, the plaintiff amended the plaint on 30th April, 2010 and added the 2nd and 3rd defendants as parties to the suit. In his amended plaint dated 30th April, 2010, the plaintiff averred that he was at all material times the transferee of the suit properties which were allocated to him by the 2nd defendant to cover part of his legal fees for professional services rendered to the 2nd defendant. He averred that upon allocation of the suit properties to him, he entered into an agreement with the 2nd defendant under which the 2nd defendant agreed to transfer the suit properties to him and proceeded to execute instruments of transfer in his favour for the properties.

The plaintiff averred that the 2nd defendant also released to him all the original documents pertaining to the suit properties necessary to facilitate the registration of the leases in the name of the 2nd defendant and subsequent transfer of the leases to him. The plaintiff averred that using an agent one, Benedict Wakaba Kihui, he lodged the said documents with the 1st defendant at his own cost and paid all the charges that were demanded by the 1st defendant including land rent for the years 2008 and 2009. The plaintiff averred that the preparation of the leases for the suit properties commenced but after some time, the 1st defendant started playing mischief by misplacing the files and the plaintiff's representative who was following up the registration of the said leases kept being shifted from one office to the other before he was informed that the files relating to the suit properties were missing. The plaintiff averred that since the documents relating to the suit properties were lodged by him, the 1st defendant was not supposed to release the documents pertaining to the suit properties to any other person without his knowledge or consent.

The plaintiff averred that it ultimately came to his notice that the 1st defendant unlawfully released the leases relating to the suit properties to the 2nd defendant who fraudulently and unlawfully purported to transfer the same to third parties. The plaintiff averred that the 2nd defendant had already assigned its interest in the suit properties to him and as such it had no proprietary interest in the same. The plaintiff averred that the 1st defendant in releasing the leases aforesaid to the 2nd defendant acted negligently, in bad faith and in contempt of court. The plaintiff averred that the defendants fraudulently and unlawfully conspired to dispose him of the suit properties. The plaintiff sought the following reliefs in the amended plaint;

- (a) An inhibition and/or prohibitory order against the defendants restricting them from dealing, registering, releasing or dealing in any way with the suit properties;**
- (b) A declaration that the suit properties lawfully belong to the plaintiff and all the necessary documents be registered and released to the plaintiff forthwith.**
- (c) A declaration that any transaction between the defendants and any third parties in respect of the suit properties is null and void and subsequent registration of transfers to third parties be revoked.**

On 26th November, 2010, the court issued a warrant of arrest against the 1st defendant when he failed to appear in court on 22nd November, 2010 to show cause why he could not be committed to civil jail. On 22nd February, 2011, by consent of the plaintiff and the 1st defendant,

the court ordered the 1st defendant to release the leases in respect of Ruiru/Kiu Block 4/2042, 2043 and 2044 to the plaintiff forthwith and to process the leases for Ruiru/Kiu Block 4/1723 and 1724 within a month from the date of the order. This order was also not complied with by the 1st Defendant.

The defence to the plaintiff's claim:

The 1st defendant entered appearance on 10th May, 2010 but did not file a statement of defence. The 2nd defendant neither entered appearance nor filed a defence to the plaintiff's claim. The 3rd defendant entered appearance and filed a statement of defence on 22nd August, 2011. In its defence, the 3rd defendant denied any knowledge of the circumstances under which the 2nd defendant purportedly agreed to transfer the suit properties to the plaintiff. The 3rd defendant averred that it was at all material times the absolute registered owner of the parcels of land known as Ruiru/kiu Block 4/2006, 2008, 2009, 2010, 2011, 2012 and 2041 (hereinafter referred to as "the disputed properties"). The 3rd defendant averred that after he acquired the leasehold interest in the disputed properties, it was issued with certificates of lease in respect thereof on 21st November, 2007 and 22nd November, 2007.

The 3rd defendant averred that it acquired the disputed properties for valuable consideration without notice of any adverse claim in respect thereof. The 3rd defendant averred that it was a bona fide purchaser for value without notice. The 3rd defendant averred that its titles were indefeasible. The 3rd defendant averred that it had no interest in the parcels of land known Ruiru Kiu/Block 4/2038, 2039, 2042, 2043, 1723 and 1726. The 3rd defendant averred that it was wrongly joined in this suit as it was not a party to the agreement between the plaintiff and the 2nd defendant.

The reply to the defence:

The plaintiff filed a reply to the 3rd defendant's defence on 25th August, 2011. The plaintiff averred that once the 2nd defendant executed the instruments of transfer in respect of the disputed properties in his favour the 2nd defendant ceased to have proprietary interest in the suit properties which it could confer upon third parties. The plaintiff averred that the subsequent dealings with the disputed properties by the 2nd and the 3rd defendants were fraudulent. The plaintiff averred that the interest that the 3rd defendant acquired in the disputed properties was tainted with fraud and as such unlawful. The plaintiff averred that the 3rd defendant could not benefit from an unlawful act and that all the dealings between the 2nd and 3rd defendants were nullities.

The hearing and determination of the issues arising:

The suit came up for hearing on 20th June, 2017 when the plaintiff gave evidence and closed his case. The 1st and 3rd defendants closed their respective cases without calling evidence. The parties thereafter made closing submissions in writing. The plaintiff filed his submissions on 15th August, 2017 while the 1st and 3rd defendants filed their submissions on 1st December, 2017 and 20th September, 2017 respectively.

The parties did not agree on the issues for determination by the court. In my view the following are the issues which arise for determination in this suit.

- 1. Whether the 2nd defendant agreed to transfer to the plaintiff the suit properties in part payment of the legal fees that was owed by the 2nd defendant to the plaintiff.**
- 2. Whether the 2nd defendant allocated to the plaintiff the suit properties and thereafter executed instruments of transfer in respect thereof in favour of the plaintiff.**
- 3. Whether the 3rd defendant is the absolute registered owner of the disputed properties namely, Ruiru/Kiu Block 4/2006, 2008, 2009, 2010, 2011, 2012 and 2014.**
- 4. Whether the transfer of the disputed properties by the 2nd defendant to the 3rd defendant was lawful.**
- 5. Whether the 3rd defendant was a bona fide purchaser for value of the disputed properties without notice of the plaintiff's interest therein.**
- 6. Whether the plaintiff is entitled to the reliefs sought in the amended plaint.**

The 1st and 2nd issues:

In his evidence, the plaintiff adopted his witness statement dated 11th February, 2014 that was filed in court on the same date and produced the documents that were attached to his list of documents dated 11th February, 2014 as exhibits. The said documents were produced in evidence as a bundle and marked as P.Exh. 1. The plaintiff told the court that the suit properties were allocated to him by the 2nd defendant in lieu of his fees since the 2nd defendant was unable to pay fees at the time. He stated that they thereafter entered into an agreement for sale of the said properties with the 2nd defendant on 15th June, 2007 under which the 2nd defendant agreed to transfer the suit properties to him. Thereafter, the 2nd defendant furnished him with all the necessary documents relating to the suit properties to enable him process the transfers in respect thereof in his favour.

I am satisfied from the evidence on record that the plaintiff has established that there was an advocate/client relationship between him and the 2nd defendant and that he entered into an agreement with the 2nd defendant under which the 2nd defendant was to transfer to him the suit properties in satisfaction of his legal fees. At page 2 of P.Exh.1 is a letter dated 23rd January, 2006 addressed to the plaintiff by the 2nd defendant instructing the plaintiff to act for it in five (5) civil suits that had been instituted by various parties against the 2nd defendant. At page 3 of P.Exh.1 is a letter dated 13th October, 2006 by the 2nd defendant acknowledging receipt of a fee note from the plaintiff in the sum of Kshs.11,362,342/40. At page 4 of the said exhibit is an extract of the minutes of the meeting that was held on 2nd May, 2007 by the 2nd defendant's board of directors at which they resolved among others, to allocate to the plaintiff fifteen (15) plots valued at Kshs.65,000/= each as part payment of his fees. At page 5 of the exhibit is an agreement for sale dated 15th June, 2007 between the plaintiff and the 2nd defendant pursuant to which, the 2nd defendant offered to the plaintiff and the plaintiff accepted the transfer of the suit properties in partial settlement of his legal fees. At page 10 of the exhibit is a letter dated 18th June, 2007 from Kibatia & Company advocates who were acting for the 2nd defendant forwarding to the plaintiff documents relating to the suit properties which included, the share certificate, the letter of allotment, subdivision scheme approval and duly executed transfer of leases. From pages 11 to 20 of the said exhibit are duly executed instruments of transfer of leases by the 2nd defendant to the plaintiff in respect of the suit properties.

The evidence that was adduced by the plaintiff regarding his relationship with the 2nd defendant and the agreement they had reached on the settlement of his fees was not controverted. The fact that the 2nd defendant allocated to the plaintiff the suit properties and executed instruments of transfer of leases in respect thereof in favour of the plaintiff was also not controverted. I am satisfied from the evidence before me that the plaintiff and the 2nd defendant entered into an agreement pursuant to which the 2nd defendant agreed to transfer the suit properties to the plaintiff in partial settlement of his legal fees and that the 2nd defendant in fulfillment of his obligations under the said agreement executed instruments of transfer of leases in favour of the plaintiff in respect of the suit properties. My answer to the first and second issues is in the affirmative.

The 3rd, 4th and 5th issues:

In its statement of defence, the 3rd defendant contended that it was the absolute registered owner of the disputed properties which it acquired for valuable consideration without notice of the plaintiff's interest therein. Certificates of search at pages 53, 54, 56, 58, 59 and 61 of P.Exh.1 show that, the disputed properties are registered in the name of the 3rd defendant. Copies of the registers for the disputed properties at pages 63, 66, 67, 68, 69, 70 and 71 of P.Exh.1 show that the 3rd defendant was registered as the owner of the disputed properties on 21st November, 2007 and that it acquired the same at a consideration of Kshs.100,000/= each. The 3rd defendant did not give evidence in its defence. No evidence was adduced by the 3rd defendant on how he acquired the suit properties. Apart from the certificates of official search and copies of the registers for the suit properties before the court, the 3rd defendant placed no other material before the court on how it came to be registered as the owner of the disputed properties although its titles were being challenged.

I am of the view that the plaintiff having established that the disputed properties were previously owned by the 2nd defendant and that the 2nd defendant had allocated the same to him in partial settlement of his fees, executed instruments of transfer of leases in his favour and furnished him with all necessary documents to enable him process the titles and that, he lodged the said documents with the 1st defendant and paid the requisite fees for processing of titles, the burden shifted to the 3rd defendant to demonstrate that it acquired the disputed properties in good faith for valuable consideration without notice of the plaintiff's interest therein.

I am in agreement with the 3rd defendant's submission that the onus was upon the plaintiff to establish fraud. As I have stated above, the plaintiff placed evidence before the court showing that the disputed properties had already been transferred to him and that what remained was only the registration of the instruments of transfer in his favour. How the documents that had been lodged by the plaintiff with the 1st defendant were released by the 1st defendant to the 2nd defendant is a mystery. It is also a mystery how the disputed properties changed hands from the 2nd defendant to the 3rd defendant taking into account the fact that the 2nd defendant had already executed instruments of transfer of leases in respect of the disputed properties in favour of the plaintiff. In the absence of any explanation from the defendants on how these transactions took place, fraud in which all the defendants were involved cannot be ruled out.

In my view, it was not enough for the 3rd defendant to produce the certificates of lease for the disputed properties as proof of his ownership of the said properties (see the 3rd defendant's list of documents dated 17th November, 2014). It was the legality of the said certificates of lease that was being challenged. The 3rd defendant had a duty to explain how he acquired the disputed properties. In the case of Mbiti Kieba & Another v Isaya Theuri M'lintari & Another [2014] eKLR the Court of Appeal stated as follows;

“Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. How the appellant got registered as proprietor of Land Parcel No. 70 is a fact within the appellant and it was incumbent upon the appellant to dislodge the notion that Land Parcel No. 70 was ancestral land and refute that he was not registered as proprietor as a representative of the family of the late M’Kieba.”

In the same case, the court stated further that;

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title which is in challenge and the registered proprietor must go beyond the instrument and rebut the notion that the property is not free from any encumbrances including any and all interests which need not be noted in the register.”

I am of the view that after the 2nd defendant entered into an agreement with the plaintiff under which it agreed to transfer the suit properties to the plaintiff in partial settlement of the plaintiff's fees and executed the instruments of transfer of leases in respect thereof in favour of the

plaintiff, the 2nd defendant held the suit properties in trust for the plaintiff and as such it could not deal with the same contrary to that trust. The disputed properties were registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Section 28 of the Registered Land Act provides that the rights of a proprietor acquired for valuable consideration shall be held by the proprietor together with all privileges and appurtenances belonging thereto and shall not be liable to be defeated except as provided in the Act. The proviso to that section provides that nothing in the section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

I am in agreement with the submission by the plaintiff that after the 2nd defendant agreed to transfer the disputed properties to him and executed the instruments of transfer of leases in his favour in respect thereof, the 2nd defendant had no interest in the suit properties that it could transfer to third parties. The purported transfer of the disputed properties to the 3rd defendant was in the circumstances unlawful. Since the 3rd defendant did not give evidence, I am not satisfied that it acquired the suit properties for value in good faith without notice. According to Black's Law Dictionary, 8th Edition that was cited by the 1st defendant a "**bona fide purchaser**" is defined 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 sellers title, one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

The 3rd defendant had to bring itself within this definition. It could only do so by tendering evidence. In the absence of any evidence, there is no basis on which this court can make a finding that the 3rd defendant is a bona fide purchaser of the disputed properties.

The 6th issue:

The plaintiff has proved that the suit properties were allocated to him by the 2nd defendant which thereafter executed transfer of leases in respect thereof in his favour. The plaintiff has also proved that while the said transfers were awaiting registration ten (10) parcels of land comprised in the suit properties were transferred to the 3rd defendant and other persons who are not parties to this suit in unclear circumstances. The plaintiff has proved that the transfer of the disputed properties to the 3rd defendant was unlawful and fraudulent. It is my finding that the plaintiff has proved his case against the defendants and that he is entitled to the reliefs sought in the amended plaint dated 30th April, 2010.

Conclusion:

In conclusion, I hereby enter judgment for the plaintiff against the defendants jointly and severally as follows:

1. I declare that the plaintiff had lawful beneficial interest in Land Reference Numbers Ruiru/Kiu Block 4/2006, 2008, 2009, 2010, 2011, 2012, 2041, 2042, 2043, 2044, 1723 and 1726.
2. I declare that the transfer of Land Reference Numbers Ruiru/Kiu Block 4/2006, 2008, 2009, 2010, 2011, 2012 and 2041 to the 3rd defendant was illegal, null and void.
3. I hereby cancel the titles in the name of the 3rd defendant in respect of Land Reference Numbers Ruiru/Kiu Block 4/2006, 2008, 2009, 2010, 2011, 2012 and 2041.
4. The 1st and 2nd defendants shall process and issue titles in respect of the Land Reference Numbers Ruiru/Kiu Block 4/2006, 2008, 2009, 2010, 2011, 2012, 2041, 2042, 2043, 2044, 1723 and 1726 in accordance with the agreement dated 15th June, 2007 between the plaintiff and the 2nd defendant.
5. There shall be no orders in respect of Land Reference Numbers Ruiru/Kiu Block 4/2038, 2039 and 2045 which are registered in the names of persons who are not parties to this suit.
6. The defendants shall pay the plaintiff's costs of the suit.

Delivered and Dated at Nairobi this 27th day of September 2018

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr.Nyantika h/b for Mr. Wang'a for the Plaintiff

Ms. Mwalozi h/b for Mr.Kamau for the 1st Defendant

N/A for the 2nd Defendant

Mr. Kiragu h/b for Ms. Mshila for the 3rd Defendant

Catherine Court Assistant