



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 31 OF 2014

(FORMERLY KERUGOYA ELC 25 OF 2014)

RAEL NJURA NJUE (As administrator of the estate of

NJUE KAMANJA (Deceased).....1ST PLAINTIFF

JOSEPH GICOVI NJUE.....2ND PLAINTIFF

VERSUS

MOFFAT WACHIRA.....1ST DEFENDANT

PETER G. KIMANI.....2ND DEFENDANT

JOHN NG'ANG'A KIMANI.....3RD DEFENDANT

ESTHER WAIRIMU KIMANI.....4TH DEFENDANT

CYRUS MAINA KAMAU.....5TH DEFENDANT

PAUL WAWERU.....6TH DEFENDANT

MARGARET WAMBUI THIONG'O.....7TH DEFENDANT

PETER NJAU MACHARIA.....8TH DEFENDANT

SAMUEL MUTITU NDUMIA.....9TH DEFENDANT

JUDGEMENT

1. By an undated plaint (hereinafter the “original plaint”) filed on 23rd March 1996 the original Plaintiff, Njue Kamanja (hereinafter “Kamanja”) sued the 1st Defendant, Moffat Wachira Kibuiku for recovery of *Title No. Gaturi/Weru/636* (hereinafter called the “suit property”).

2. It was pleaded by the Plaintiff in the original plaint that at all material times the 1st Defendant was his friend and that he (the 1st Defendant) had tricked him into signing various documents concerning the suit property without the Plaintiff knowing that they were “land documents.” The particulars of when and where those transactions took place were, however, not provided.

3. It was further pleaded that when the Plaintiff came to discover that the suit property was registered in the name of the 1st Defendant, the Plaintiff looked for the 1st Defendant in connection with the ownership of the suit property but the latter allegedly refused to talk to him.

4. It was the Plaintiffs’ further case that at all material times he was in possession and occupation of the suit property and that he had developed it without any interference from the 1st Defendant. The Plaintiff denied ever selling the suit property to the 1st Defendant.

5. It would appear from the record that sometime in 1998 Kamanja passed on and his wife Rael Njura Njue was substituted as his legal representative, vide an amended plaint filed on 27th April 2000.

6. The amended plaint stated that sometime in 1978, Kamanja's title deed for the suit property got lost. It was further stated that when Kamanja visited the Land's office in 1996, he was informed that he had transferred the suit property to the 1st Defendant. It was pleaded that the said transfer of the suit property to the Defendant was fraudulent and illegal as it was done without the knowledge and or consent of Kamanja. Four (4) particulars of fraud were pleaded against the 1st Defendant.

7. The Plaintiff, therefore, sought the following reliefs against the 1st Defendant in the amended plaint;

- a. A declaration that the purported transfer of LR Gaturi/Weru/6365 to the Defendant was null and void.
- b. Cancellation of the registration of LR Gaturi/Weru/636 in the name of the Defendant.
- c. Restoration of the land records of LR Gaturi/Weru/636 as they were before 4th October 1998.
- d. That the Defendants be compelled by order of this honourable court to sign all necessary documents transferring the suit land to Plaintiff failure to which the Executive Officer be mandated to execute all the necessary documents to transfer the suit land to Plaintiff.
- e. A declaration of any subsequent transfer and or subdivision of LR Gaturi/Weru/636 or any other transaction as null and void.
- f. Any other relief that this honourable court may deem just and fit.

8. Sometime in 2009, the Plaintiff obtained leave to re-amend the amended plaint and to include Joseph Gicovi Njue as the 2nd Plaintiff. The re-amended plaint was filed on 26th February 2009. In the amended plaint, the Plaintiffs added the 2nd – 9th Defendants as parties to the suit. The 2nd – 9th Defendants had apparently brought the various parcels created out of the subdivision of the suit property by 1st Defendant. The Plaintiffs also added more particulars of fraud against the 1st Defendant. The Plaintiffs further added one more relief seeking an order for the Defendants to be compelled to sign all necessary documents to effect transfer of the suit property to the Plaintiffs in default of which the Executive Officer of the court should execute all such documents.

9. In his written statement of defence dated 29th October 1998 and filed on 30th October 1998, the 1st Defendant raised two objections to the suit. First, he pleaded that the suit did not disclose a reasonable cause of action. Second that the suit was statute-barred under the **Limitation of Actions Act (Cap 22)**. It was further pleaded that he had lawfully acquired the suit property on 4th October 1978 and lawfully disposed of it on 16th April 1998. He, therefore, urged the court to dismiss the suit with costs.

10. The 2nd – 8th Defendants filed a joint defence dated 21st March 2009 through the firm of Fatuma Wanjiku & Co Advocates. They denied the Plaintiffs' claim in its entirety and averred that there was no cause of action against them. They further stated that they were purchasers for value of portions of the suit property without notice of any irregularities. They also pleaded that they could not be held legally liable for any alleged fraud on the part of the 1st Defendant since no fraud was alleged against them.

11. The 9th Defendant, on his part, filed a written statement of defence dated 28th July 2009 in person. He denied all the material allegations in the re-amended plaint. He denied knowledge of the matters alleged and contended that the suit was bad in law, frivolous, vexatious and abuse of the court process.

12. At the hearing hereof, only the Plaintiffs testified after which they closed their case. There was an objection by the 9th Defendant to the 2nd Plaintiff testifying on the basis that he had not been described in the re-amended plaint and that his claim was not pleaded. He was considered as a stranger to the suit. The court overruled the objection and allowed him to testify and reserved the reasons to be given in the judgement. The record of proceedings shows that the 2nd Plaintiff was joined as a party pursuant to leave granted by the court. Thereafter, the re-amended plaint was filed on 27th March 2009 and there was no indication of any objection having been taken thereafter to challenge his status in the proceedings.

13. If the 2nd Plaintiff's claim was not well pleaded or articulated in the re-amended plaint that can be considered as a procedural flaw which does not go into the root of the case. There was no prejudice caused to the Defendants by such deficient pleading. In any event, the 2nd Plaintiff has no claim separate from that of the 1st Plaintiff who is his mother. This is simply a case of the widow and her son seeking recovery of property which they believed belonged to the deceased. The court is further of the view that the 2nd Plaintiff could be taken as the 1st Plaintiff's witness without prejudice to the Defendants.

14. The 1st Plaintiff's case was that she was seeking recovery of the suit property which belonged to her late husband, Kamanja. It was her evidence that Kamanja never sold the suit property to the 1st Defendant at any time and that the 1st Defendant had fraudulently transferred the suit property to himself in 1978. She adopted her witness statement dated 30th May 2011 as her sworn testimony and asked the court to cancel the transfer of the suit property which is now in the hands of the 2nd – 9th Defendants.

15. The 2nd Plaintiff's evidence was similar to that of the 1st Plaintiff. He asserted that his late father did not sell the suit property to the 1st Defendant hence he did not understand how the 1st Defendant acquired the same from Kamanja. He stated that the said transfer was

discovered in 1996 when Kamanja wanted to subdivide and distribute the suit property amongst his sons. The alleged fraud was reported to the CID in 1996 but he did not know the outcome of the investigations. He contended that the signatures on the transfer document and application for consent of the Land Control Board (LCB) did not belong to his father. However, neither the 1st Plaintiff nor the 2nd Plaintiff made reference to the loss of the title deed for the suit property as pleaded in the re-amended plaint.

16. In his witness statement dated and filed on 27th May 2013, the 1st Defendant stated that sometime in 1974 he bought the suit property from the late Kamanja at a cost of Ksh 15,000/-. It was his case that when Kamanja failed to transfer it expeditiously, he cautioned the land on 19th December 1974. He later on withdrew the caution when Kamanja agreed to effect the transfer. He stated that the consent of the LCB was obtained after which he was registered as proprietor on 4th October 1978. In 1998, he sub-divided the suit property and sold the subdivisions to the 2nd – 9th Defendants. He asserted that he was unable to trace some of the documents relating to the sale due to passage of time.

17. Upon the close of the Plaintiffs' case, the Advocates for all the parties agreed to have the witness statements of the 2nd – 9th Defendants admitted as their evidence without calling them as witnesses. The Advocates all agreed to have all the documents in the Defendants' list of documents admitted as their respective exhibits. The court accordingly recorded and adopted the consent of the parties and granted the parties an opportunity to file their written submissions.

18. The record shows that the Plaintiffs filed their written submissions on 18th April 2018 and the 9th Defendant on 19th February 2018 whereas the 2nd – 8th Defendants filed theirs on 10th September 2018.

19. There is no indication on record to show that the parties filed an agreed statement of issues for determination. The court shall, therefore, frame the issues for determination on the basis of the pleadings, evidence and documents on record as stipulated under **Order 15 Rule 2 of the Civil Procedure Rules**.

20. In the opinion of the court, the following issues arise for determination in this suit;

- a. Whether the 1st Defendant acquired the suit property fraudulently or by way of purchase from the late Kamanja.
- b. Whether the Plaintiffs' suit is statute barred under the Limitation of Actions Act (Cap 22).
- c. Whether the Plaintiffs have a reasonable cause of action against the 2nd – 9th Defendants.
- d. Whether the Plaintiffs are entitled to the orders sought in the re-amended plaint.
- e. Who shall bear the costs of the suit.

21. The 1st issue is whether the 1st Defendant acquired the suit property from Kamanja fraudulently or through purchase. The Plaintiffs pleaded that the 1st Defendant acquired the suit property fraudulently and pleaded several particulars of the alleged fraud in paragraph 5B of the re-amended plaint. The pleaded particulars were;

- a. The Defendant caused the land records to be altered and L.R. Gaturi/Weru/636 to be registered in his name without the knowledge and consent of the proprietor Njue Kamanja.
- b. The Defendant by his secretive and illegal action excluded Njue Kamanja and or his successors from rightful ownership of LR Gaturi/Weru/636.
- c. The Defendant unlawfully converted the interests of Njue Kamanja and or his successors in the above said land to be the Defendant.
- d. The Defendant presented fraudulent documents to the Land Registrar so as to cause LR Gaturi/Weru/636 to be illegally and or irregularly transferred to him.
- e. That the 1st Defendant fraudulently got the suit land transferred to himself without Land Control Board Consent.
- f. That the 1st Defendant forged the late Njue Kamanja's signature on the application for Land Control Board Consent.

22. The 1st Plaintiff in her evidence simply stated that the late Kamanja did not sell and had no intention of selling the suit property. In her view, the 1st Defendant must have acquired the suit property fraudulently. She did not either in her witness statement dated 30th May 2011 or her oral testimony in court lead evidence on any of the particulars of fraud contained in the re-amended plaint.

23. The evidence of the 2nd Plaintiff touched on at least two particulars of fraud. He asserted that the signature appearing on both the transfer form and application for LCB consent were forgeries. He stated that he was familiar with the signature of his late father and that those two signatures were not his. He also contended that the consent of the LCB was obtained long after the transfer had been registered in favour of the 1st Defendant. He denied that his late father had sold the suit property to the 1st Defendant and asserted that the transfer was fraudulent.

24. When the 2nd Plaintiff was testifying on the issue of Kamanja's signature, the 1st Defendant's counsel raised an objection thereto. The court overruled the objection and reserved the reasons till delivery of the judgement. The Plaintiffs having pleaded that the 1st Defendant had presented fraudulent documents to facilitate the transfer of the suit property into his home, were entitled to lead evidence thereon. The 2nd Plaintiff, although not an expert in the area of handwriting, had laid a sufficient basis for his opinion. He testified that he had lived with his late father for many years and had seen him sign documents by simply writing his name. The probative value of such evidence is, however, a totally different issue.

25. The court has assessed the entire evidence on the issue of fraud and the particulars of fraud. As was held in the case of ***Koinange & 13 Others Vs Koinange [1986] KLR 23***, allegations of fraud must be strictly proved. They must be proved on a standard higher than a mere balance of probabilities but not as high as beyond reasonable doubt.

26. The court is not satisfied that the particulars of fraud have been proved to the required standard. The Plaintiffs did not tender any report from a handwriting expert or document examiner on the alleged forgery of the late Kamanja's signature. The Plaintiffs did not provide specimen signatures of the late Kamanja made at a time when there was no active or contemplated litigation touching on the genuineness of the signature. The only specimen which was provided was that of an affidavit which was executed after the filing of the instant suit. It may well be the case that the 2nd Plaintiff may have seen his late father sign some documents during his lifetime but the probative value of such evidence may not be conclusive on the issue. The 2nd Plaintiff was about 10 years old at the time of the alleged sale and Kamanja's signature may have changed over the years.

27. The court has found no evidence on record that the transfer of the suit property was undertaken before the consent of the LCB was granted. The documentary evidence on record indicates that the consent of the LCB was issued on 11th May 1978 whereas the transfer was registered on 4th October 1978. The date of 11th May 1976 appearing on the transfer form is the date the transferor and the transferee are said to have signed the form. It was not the date when the consent of the LCB was obtained as contended by the 2nd Plaintiff.

28. It is rather surprising that neither the 1st nor the 2nd Plaintiff appeared to have seriously pursued the issue of criminal investigations of the alleged forgery of Kamanja's signature and consequent transfer of the suit property. Although the 2nd Plaintiff stated that a report was made to the Divisional Criminal Investigation Office in 1996, he did not know the outcome of the investigation. That is quite strange given that they were evicted from the suit property more than 20 years ago. One would have thought that they would be interested in getting to the bottom of the alleged fraud especially after suffering the inconvenience of eviction.

29. In view of the court's finding on the allegations of fraud, the court is satisfied that the suit property was acquired by the 1st Defendant through purchase. The purchase may have taken place in 1974 or thereabouts when the 1st Defendant cautioned the suit property claiming an interest in it. Although a copy of the relevant sale agreement was not produced, it could be deduced from the copies of the transfer form and the consent of the LCB that the transfer to the 1st Defendant was on account of purchase.

30. The court does not agree with the Plaintiffs' submission that the sale of the suit property should be invalidated now because of alleged non-compliance with the provisions of the **Law of Contract Act (Cap 23)**. It must be remembered that the 1st Defendant is not seeking to enforce any agreement for the sale of land. He has no counterclaim in this suit. The sale contract was fully executed and perfected in consequence of which the suit property was transferred to the 1st Defendant who in turn sub-divided and sold it to third parties.

31. The 2nd issue is whether the Plaintiffs' suit was statute-barred under the **Limitation of Actions Act (Cap 22)**. Although this issue was pleaded by the 1st Defendant in his defence, it does not appear to have been pursued at the trial. The 1st Defendant's witness statement which was adopted as his evidence at the trial does not specifically raise the issue of limitation. There were no submissions filed by the 1st Defendant to canvass this issue either. The Plaintiffs pleaded in their re-amended plaint that they discovered that the suit property had been transferred to the 1st Defendant in 1996. That was their evidence at the trial and such evidence was not challenged. The court, therefore, finds that the 1st Defendant has failed to demonstrate that the suit was statute-barred under the law.

32. The 3rd issue is whether the Plaintiffs have a reasonable cause of action against the 2nd – 9th Respondents. The court has considered the pleadings and the entire evidence on record. The re-amended plaint does not attribute any fraud against the 2nd – 9th Defendants at all. The alleged fraud and the particulars of fraud were directed at the 1st Defendant only. There is no direct cause of action against the 2nd – 9th Defendants. The only reason why they were joined in the proceedings was because they were necessary parties. Their presence was necessary in the suit because of the nature of reliefs sought. The orders for cancellation of titles sought would obviously affect their proprietary interest in the various parcels of land which originally formed part of the suit property. It was, therefore, prudent to join them as necessary parties who may be affected by the judgement or decree.

33. In their defence, the 2nd – 8th Defendants pleaded that they were purchasers for value without notice of any irregularity in title. There was no reply to defence filed by the Plaintiffs to deny this line of defence. This line of defence was also not challenged at the trial hereof since the Defendants' witness statements were admitted by consent. The court, therefore, finds and holds that the 2nd – 8th Defendants were *bonafide* purchasers for value without notice of defect in title.

34. The 4th issue is whether or not the Plaintiffs are entitled to the orders sought in the re-amended plaint. Given that the Plaintiffs have failed to prove the alleged fraud against the 1st Defendant, it would follow that they are not entitled to the orders sought, or any one of them. The court is further of the view that even if the Plaintiffs had proved the alleged fraud against the 1st Defendant only, the court would not be entitled to cancel the titles of the 2nd – 9th Defendants in the absence of evidence of knowledge of, or involvement in, the fraud.

35. The provisions of **section 80 of the Land Registration Act, 2012** provide for rectification of the land register in the following terms;

“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

(2) The register shall not be rectified to affect the title of a proprietor unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.” (emphasis added).

36. There is no evidence on record to demonstrate that the 2nd – 9th Defendants were aware of or contributed to any fraud, mistake or omission in the registration of the 1st Defendant as proprietor. In fact, some of the Defendants did not purchase their parcels directly from the 1st Defendant. Some of them bought from persons who had acquired them from the 1st Defendant. In those circumstances, the titles of the 2nd – 9th Defendants are not impeachable.

37. The 5th and final issue relates to costs. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. In the premises, the Defendants shall be awarded costs of the suit.

38. The upshot of the foregoing is that the Plaintiffs have failed to prove their case against the Defendants to the required standard. Consequently, the Plaintiffs’ suit is hereby dismissed with costs to the Defendants.

39. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **20TH** day of **SEPTEMBER, 2018**.

In the presence of P.N. Mugo for the Plaintiffs, Mr Morris Njagi for the 1st Defendant, Ms Ngigi holding brief for Ms Fatuma for the 2nd – 8th Defendants and Ms Kiai holding brief for Mr Eddie Njiru for the 9th Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

20.09.18