



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 574 OF 2012

PAUL NGANGA KURIA.....PLAINTIFF

VERSUS

EARNEST MWANIKI KARIUKI.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

This suit was commenced by way of a Plaint dated and filed on 4th September 2012 in which the Plaintiff sought for Judgment to be entered against the Defendants for:

- a. A permanent injunction restraining the Defendants from using, letting out, charging, transferring or in any other way interfering with the Plaintiff's quiet possession, use and enjoyment of the parcel of land known as Nairobi/Block 119/3393 (hereinafter referred to as the "suit property").
- b. An order compelling the 2nd Defendant to reverse the transfer of the suit property and reinstate it to the Plaintiff.
- c. General and special damages for breach of contract.
- d. Costs and interest.
- e. Any other relief that this Honourable Court deems fit to grant.

The Pleadings

In the Plaint, the Plaintiff stated that he is the lawful owner of the suit property. He further stated that on 18th March 2011, he entered into an Agreement for Sale of the suit property to the 1st Defendant. He further stated that on 4th August 2011, the 2nd Defendant transferred the suit property to the 1st Defendant with no reference to him. He further stated that he never signed a Transfer as he has never been paid the purchase price for the suit property. He further stated that the 1st Defendant used forged documents to transfer the suit property into his name as a result of which he is facing criminal proceedings in Kiambu Chief Magistrates Criminal Case No. 2276 of 2012. He also stated that on 17th August 2011, the 1st Defendant illegally used the suit property to obtain a loan of Kshs. 11 million from the Development Bank. He further stated that he had suffered loss and irredeemable harm by the actions of the Defendants hence this suit.

The 1st Defendant filed his Statement of Defence and Counterclaim dated 24th October 2012 and filed on 25th October 2012 in which he stated that he is the current registered proprietor of the suit property, having purchased it from the Plaintiff. He further stated that the Plaintiff duly executed the relevant Transfer document as was required of him in the Agreement for Sale. He added that in the Agreement of Sale, it was not a term that the Plaintiff be paid the entire purchase price before he could sign the Transfer document. He averred that the suit property was transferred to him with the full knowledge of the Plaintiff. He denied that the suit property was transferred to him using forged documentation and further stated that he has not been adjudged guilty in Kiambu CMCC No. 2276 of 2012 before which the law presumes him innocent until proved guilty. He added that he is the one who has suffered and continues to suffer loss and damage as a result of the Plaintiff's breach of contract as the Plaintiff has failed, refused and or neglected to give him vacant possession of the suit property. He stated that this suit is aimed at having the court shield the Plaintiff from discharging his contractual responsibility towards the 1st Defendant hence the same is brought in bad faith, is mischievous and should therefore be dismissed with costs.

In the Counterclaim, the 1st Defendant prayed for Judgment in his favour against the Plaintiff for:

1. An order directed at the Plaintiff to hand over to the 1st Defendant vacant possession of the suit property.
2. Lost rental income calculated from 18th January 2012 until the date of hand over of vacant possession of the suit property to the 1st Defendant.
3. Costs of the Plaintiff's suit and the Counterclaim.
4. Interest on 2 and 3.

The 1st Defendant further stated that vide a written Sale Agreement dated 18th March 2011, the Plaintiff agreed to sell and he agreed to purchase the suit property situated at Githurai 44 Estate Nairobi at a purchase price of Kshs. 7 million. He further stated that it was inter alia stipulated in the said agreement that:

- a) That the purchase price would be paid by the 1st Defendant putting up a deposit of Kshs. 100,000/- on or before 23rd March 2011 and the balance of Kshs. 6.9 million upon or at the time of completion.
- b) The balance of the purchase price to wit Kshs. 6.9 million would be financed by a bank.
- c) The suit property was sold with vacant possession being delivered at the completion.
- d) At the time of execution of the agreement or soon thereafter, the Plaintiff was to deliver completion documents to the joint advocate amongst them the original title and a transfer of the suit property duly signed and or executed by the Plaintiff in favour of the 1st Defendant.

The 1st Defendant averred that in strict compliance with the Sale Agreement, he paid the Plaintiff a deposit of Kshs. 100,000/-. He further stated that the Plaintiff furnished him, through the duly appointed advocates, with all the necessary completion documents and the suit property was transferred to him. The 1st Defendant further averred that he applied for and was granted a loan of Kshs. 11 million by the Development Bank of Kenya, with the title to the suit property being offered as security and a legal charge thereon being registered in favour of the bank, full facts thereof being well within the Plaintiff's knowledge. The 1st Defendant further averred that in breach of the Sale Agreement, the Plaintiff failed and was unable to hand over vacant possession of the suit property to pave way for the payment or release of the balance of the purchase price to him. He further stated that on 6th October 2011, he and the Plaintiff agreed to extend the time for handing over vacant possession to 9th January 2012 after which the Plaintiff was to be paid the balance of the purchase price. He stated that the Plaintiff failed to hand over vacant possession and on 18th January 2012, they agreed that the Plaintiff be paid Kshs. 200,000/- being part of the purchase price to facilitate the Plaintiff in evicting the tenants from the suit property. He added that further to this and at the Plaintiff's request, the Plaintiff was paid a further Kshs. 300,000/- on 13th February 2012 to facilitate eviction of the tenants and hand over vacant possession of the suit property to the 1st Defendant. The 1st Defendant further averred that on 10th April 2012, he paid the Plaintiff a further Kshs. 200,000/- on the understanding that the balance would be paid upon handover of the suit property to him. The 1st Defendant averred that he has at all material times been ready, willing and able to pay the Plaintiff's entitlement of the purchase price at the time of handover of vacant possession of the suit property to him. He further stated that the Plaintiff has to date been in breach of the Sale Agreement and the addendums thereto by failing to hand over vacant possession of the suit property to him which state of affairs has caused him loss and damage as he has to service the loan by the Development Bank of Kenya with interest without enjoying use of the suit property. He added that there are developed rental premises on the suit property with an income which he continues to lose owing to the Plaintiff's failure to hand over vacant possession thereof.

The 2nd Defendant filed their Statement of Defence dated 10th June 2012 and filed on 13th June 2013 stating that it was not a party to the Sale Agreement entered into between the Plaintiff and the 1st Defendant. The 2nd Defendant also denied all allegations of fraud on his part and averred that the alleged transfer was conducted procedurally. The 2nd Defendant also denied any unprocedural dealings with the suit property on his part and stated that the 1st Defendant was well aware of the forgeries and knowingly presented the forged documents to the Lands Office.

The Evidence

The hearing of this suit commenced on 19th March 2014 when the Plaintiff, Paul Nganga Kuria, gave his evidence. The Plaintiff told the court that he is the owner of the suit property and that he wanted to sell the same to the 1st Defendant. He testified further that both he and the 1st Defendant entered into a Sale Agreement dated 18th March 2011, a copy of which he produced in court. He told the court that they agreed at a purchase price of Kshs. 7 million but the same has never been paid to him. It was his testimony that they agreed that the suit property

would be sold with vacant possession after receipt of the full purchase price. He told the court that to date, he has not been paid the full purchase price. He further told the court that he gave the 1st Defendant his title document to go and do a search. It was his testimony that he never signed the Transfer document used by the 1st Defendant to transfer the suit property to himself and the signature thereon is a forgery. He stated that he reported the forgery to Kasarani Police Station and a criminal case was commenced against the 1st Defendant. He further stated that he never allowed the 1st Defendant to take a loan with his title. He stated further that he received a sum of Kshs. 100,000/- being a commitment fee from the 1st Defendant so that he does not sell the suit property to anyone else. He further stated that he waited for the 1st Defendant to pay him the balance of the purchase price until the completion time had lapsed. He then stated that the lawyer told him that they needed vacant possession of the suit property before they could release the balance of the purchase price to him. His testimony was that he received a further Kshs. 200,000/- to move out of the suit property. He stated that in total, he has received Kshs. 800,000/- for the suit property from the 1st Defendant. He then stated that he got a new buyer for the suit property and when he went to conduct a search, he found that the suit property was in the name of the 1st Defendant and had been charged to the Development Bank of Kenya for Kshs. 11 million. It was his testimony that upon this discovery, he went to their joint advocate, Joseph Nzioki Mwanthi, and demanded to be paid in full for the suit property. He stated that the 1st Defendant could not be traced and he reported the matter to Kasarani Police Station CID Department. He stated further that the documents used in the transfer of the suit property into the name of the 1st Defendant were taken to the Government Document Examiner and the report done is before the criminal court. It was his testimony that the Transfer dated 24th June 2011, a copy of which he produced, is the one which was used to transfer the suit property to the 1st Defendant. His testimony was that he did not sign it and the signature appearing thereon is a forgery. He further testified that he never gave his permission for the suit property to be charged to the bank. He told the court that he wishes to have that transfer reversed and the suit property to revert back into his name. He further told the court that he is willing to refund the Kshs. 800,000/- which he has received for it back to the 1st Defendant. He further told the court that he would not accept the balance of the purchase price. He confirmed that he is still living on the suit property together with his tenants. In cross-examination, he told the court that the Attorney General was not a party to the Sale Agreement between him and the 1st Defendant. He further confirmed that he gave his original title, his ID, PIN and photos to the joint advocate Joseph Nzioki Mwanthi to conduct a search but not to do a transfer. It was his evidence that the Attorney General was not guilty of any wrongdoing.

The second witness (PW2) was Peter Wainaina Kairu. He told the court that he grew up with the Plaintiff and was also his neighbor at Githurai 44 where the suit property is located. He further told the court that he visited the Plaintiff in Kitengela with the aim of getting some financial assistance. He further testified that the Plaintiff told him that he had no money as the joint advocate was holding the money for the sale of the suit property. He further testified that he accompanied the Plaintiff to the office of the joint advocate Joseph Nzioki Mwanthi, who informed them that the transaction of sale was irreversible as the suit property had already been transferred to the 1st Defendant. He further stated that they conducted an official search at the Lands Office and true to word, the search results showed that the suit property had been transferred to the 1st Defendant. It was his further testimony that they applied for a copy of the Transfer document used in the transfer and the Plaintiff averred that the signature appearing thereon was not his but a forgery.

In the absence of the 1st Defendant at the hearing and at the request of the Plaintiff's Advocates, the 1st Defendant's case was deemed as closed. The 2nd Defendant did not call any witnesses.

The Issues for Determination

The following are the issues arising in this suit for determination by this court:

1. Whether or not to reverse the transfer of the suit property to the 1st Defendant and reinstate the same in the name of the Plaintiff.
2. Whether or not to issue an order of permanent injunction restraining the Defendants from using, letting out, charging, transferring or in any other way interfering with the Plaintiff's quiet possession, use and enjoyment of the suit property.
3. Whether or not to award the Plaintiff general and special damages for breach of contract.
4. Determine who is to bear the costs of this suit.

The Determination

1. Whether or not to reverse the transfer of the suit property to the 1st Defendant and reinstate the same in the name of the Plaintiff.

The Plaintiff acknowledged that he entered into the Sale Agreement with the 1st Defendant for the purpose of selling the suit property to the 1st Defendant. He however claims that he did not sign the Transfer form which was used by the 1st Defendant to transfer the suit property to himself. The Plaintiff alleges that his signature was forged by the 1st Defendant. He mentions a report by the Document Examiner which confirms that his signature was forged but did not produce it in this suit. The Plaintiff told the court that the suit property is currently registered in favour of the 1st Defendant and is charged to the Development Bank which extended a loan of Kshs. 11 million to the 1st Defendant.

Section 26(1) of the **Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

From this legal provision, it is clear that the only way that the Plaintiff can successfully challenge the 1st Defendant’s title to the suit property is to demonstrate on a balance of probabilities that the title was acquired through fraud or misrepresentation to which the 1st Defendant was a party or was acquired illegally or through a corrupt scheme. The Plaintiff conceded that he gave over his original title, PIN and ID to their joint lawyer for the purpose of conducting a search on the suit property and not for transferring the suit property to the 1st Defendant. The Plaintiff claims that his signature on the Transfer form was forged by the 1st Defendant. In the case of **Ratilal Gordhanbhai Patel –vs- Lalji Makanji (1957) EA 314**, the Court of Appeal established the threshold on the burden of proof required in civil cases founded on fraud when the court observed that,

“There is one preliminary observation which we must make on the learned Judge’s treatment of this evidence: he does not anywhere in the judgment expressly direct himself on the burden of proof or on the standard required. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required...”

Further, in **Koinange & 13 others –vs- Koinange (1986) KLR 23**, the Judge relied on the decision in the **Ratilal G. Patel case (Supra)** and held that,

1. It is a well established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud in this case the plaintiffs had the burden of proving and they had to discharge that burden.

2.

3. Whether or not to award the Plaintiff general and special damages for breach of contract.

Again, arising from the finding of this court that the suit property lawfully belongs to the 1st Defendant, this court declines to award the Plaintiff the general and special damages sought after.

4. Determine who is to bear the costs of this suit.

This court therefore proceeds to dismiss this suit with no order as to costs.

SIGNED AND DATED AT NAIROBI BY LADY JUSTICE MARY M. GITUMBI THIS 17TH DAY OF OCTOBER 2018

MARY M. GITUMBI

JUDGE

DELIVERED AT NAIROBI BY JUSTICE BERNARD EBOSO THIS 22ND DAY OF OCTOBER 2018

BERNARD EBOSO

JUDGE