



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CIVIL CASE NO. 301 OF 2010

(CONSOLIDATED WITH 369 OF 2011)

TABITHA WOTHAYA NDIGIRIGI.....PLAINTIFF

VERSUS

MOHAMMED MUTUKU MUTISYA NZIOKI.....1ST DEFENDANT

JOSEPH MACHUKA OKARU.....2ND DEFENDANT

MAIMA NYAKINYWA MOHAMMED.....3RD DEFENDANT

JOYCE TERESA AKINYI OCHIENG.....4TH DEFENDANT

RICHARD KABIRU NGUNJIRI.....5TH DEFENDANT

JUDGEMENT

1. Tabitha Wothaya Ndigirigi, the Plaintiff in **E.L.C. Case No. 301 of 2010** filed suit against the 1st to 4th Defendants seeking revocation of the sale and transfer for L.R. No 209/12734 (“the Suit Property”). She also sought to have the original title deed over the Suit Property presented to court together with the original certificate of registration of Toika International Company for cancellation of all entries which were made without her consent in default of which the Deputy Registrar of the court is to execute a transfer in her favour. She further sought a permanent injunction to restrain the 3rd and 4th Defendants from dealing with the Suit Property together with general damages, costs of the suit and interest.

2. The 5th Defendant, Richard Ngunjiri Kabiru filed **E.L.C. Case No. 369 of 2011** against Tabitha Wothaya Ndigirigi seeking a permanent injunction to restrain Tabitha Wothaya Ndigirigi or her agents from demolishing, entering into, trespassing or in any manner interfering with his quiet possession of the same Suit Property as well as special damages of Kshs. 2.5 million, general and exemplary damages and costs of the suit. He claimed that he was the registered and beneficial owner of the Suit Property which Tabitha Wothaya Ndigirigi invaded on 16/7/2011 in the company of a rowdy gang of unidentified men; brought down and damaged his perimeter fence and also demolished an unfinished structure erected on the suit land. Richard Ngunjiri urged that Tabitha Ndigirigi’s actions constituted trespass.

3. The two suits were consolidated and proceedings were taken in **E.L.C. Case No. 301 of 2010**. Tabitha Wothaya Ndigirigi testified at the hearing. She formed a business name by the name of Toika International Company on 9/4/2005 with Mohammed Mutuku Mutisya Nzioki and Joseph Machuka Okaru whom she sued as the 1st and 2nd Defendants in ELC Case No. 301 of 2010.

4. Toika International Company was allocated the Suit Property on 9/12/2005. The title over this parcel of land was granted to Tabitha Wothaya Ndigirigi, Mohammed Mutuku Mutisya Nzioki and Joseph Machuka Okaru trading as Toika International Company on 6/6/2006.

5. The suit land was transferred to Naima Nyakinywa Mohammed and Joyce Teresa Akinyi Ochieng for Kshs. 3.2 million on 29/12/2006. Another transfer was registered against the suit land on 17/6/2011 to Richard Kabiru Ngunjiri, the 5th Defendant. The copy of search shows that the suit land was charged to CFC Stanbic Bank Limited for Kshs. 12 million on 23/12/2014 and a caveat was registered against the same land by the Registrar of Titles claiming an interest under Section 55(1) (f) of RTA – repealed under Section 76 of the Registration Act No. 3 of 2012. The caveat was registered on 5/10/2015.

6. Tabitha Ndigirigi learnt in July 2009 that the suit land had been transferred to Naima Nyakinywa Mohammed and Joyce Teresa Akinyi

Ochieng whom she did not know. She also noted that Toika International had been transferred to these two persons and a new bank account opened by the two persons who are the 3rd and 4th Defendants fraudulently and without her knowledge. She reported the matter to the police and challenged the documents through which the suit land was transferred to the 3rd and 4th Defendants. She denied that the signature on the transfer was hers or the PIN number which she claimed were forged. She maintained that the 1st and 2nd Defendants transferred the Suit Property without her consent while she was sick in hospital and had left the Suit Property under their care as co-owners of Toika International.

7. The 2nd Defendant was arrested and prosecuted in connection with the forgery in **Criminal Case No. 2777 of 2010** in Kibera Law Courts. He was found guilty and convicted under Section 215 of Criminal Procedure Court. Tabitha produced a copy of the judgement where the court had considered the evidence of the expert witness had concluded in his report that Tabitha Ndigirigi did not author the signatures on the sale agreement. The document examiner's report observed that Tabitha's handwriting and signature were different from what was on the disputed sale agreement. An officer from Mbagathi Hospital testified in the criminal case and confirmed that indeed Tabitha Ndigirigi was admitted in that hospital on 9/1/2006 and discharged on 30/1/2006. She produced copies of the agreement of sale between Toika International Company and Naima Nyakinywa Mohammed and Joyce Akinyi Ochieng.

8. Aggrey Preston Ochieng Ogutu Advocate also gave evidence. He confirmed that he acted for Tabitha Ndigirigi, Mohammed Mutisya Musyoki and Joseph Machuka Okaru when they sold the Suit Property to Naima Nyakinywa Mohammed and Joyce Teresa Akinyi Ochieng. He stated that he witnessed Tabitha Ndigirigi, Mohammed Mutisya and Joseph Okaru sign the sale agreement and transfer of the Suit Property to Naima Nyakinywa Mohammed and Joyce Akinyi Ochieng on 2/2/2007. He stated that Tabitha Ndigirigi willingly gave him her passport photographs, copies of her identity card and PIN certificate to facilitate completion of the sale transaction.

9. He confirmed that he drew the sale agreement and the transfer documents and witnessed execution by all the parties. He also confirmed that he drew the sale agreement in the second transaction through which the 3rd and 4th Defendants transferred the suit land to the 5th Defendant. He stated that Tabitha Ndigirigi wrote her identity card number on the sale agreement when she went to execute the agreement in his office. The sale proceeds were paid directly and he did not witness the payments being made. The transaction was done in 2006 and he believed he must have seen the original title from which he extracted the details that he included in the transfer.

10. He confirmed that the business name was also being transferred to the 3rd and 4th Defendants. He stated that he was accompanied by the Plaintiff and the 1st and 2nd Defendants when they went to Sheria House to transfer the business name of Toika International to the 3rd and 4th Defendants. He claimed that the Plaintiff together with the 1st and 2nd Defendant went and signed the transfer form before the Assistant Registrar of Business Names after they had signed the sale agreement.

11. Richard Kabiru Ngunjiri gave evidence. He produced a copy of the agreement and transfer which showed that he bought the suit land from the 3rd and 4th Defendants. He produced copies of the proposed development he wanted to carry out on the suit plot together with unclear photographs of the fence which he claimed was destroyed at the instigation of the Plaintiff. He stated that he did not know that there was a dispute over the suit land before he bought it. The land was vacant when he bought it. He claimed he was an innocent purchaser who was given possession by the 3rd and 4th Defendants who sold him the land. He did due diligence which confirmed that the 3rd and 4th Defendants were the registered proprietors. He also called his caretaker to give evidence on the demolition of the structures which he believes was carried out by the Plaintiff.

12. Parties filed submissions which the court has considered. The Plaintiff submitted that the Suit Property was transferred by the 1st and 2nd Defendants to the 3rd and 4th Defendants without her knowledge while she was hospitalised at Mbagathi Hospital. She claimed she was not a party to the transaction and was never paid any money for the transfer. The Plaintiff claimed that the transfer to the 5th Defendant was done in disobedience of the orders issued by Lady Justice Nyamweya on 19/10/2011 prohibiting dealings with the suit land. No evidence was led on this issue. The Plaintiff ought to have moved the court if the court's orders were being disobeyed.

13. The Plaintiff makes an alternative submission that in the event that the court finds that the 5th Defendant was an innocent purchaser, then the court should direct that the Suit Property be registered in the joint names of the Plaintiff and the 5th Defendant. If not, the Plaintiff seeks to be paid ½ of the value of the Suit Property or 1/3 of its current value including damages as the 1st and 2nd Defendants had no capacity to transfer the Suit Property which ended up in the hands of the 5th Defendant who she claims holds an illegal title.

14. The issue for determination is whether the court ought to issue the prayers sought by the Plaintiff in E.L.C. Case No. 301 of 2010 or those sought by the Plaintiff in E.L.C. Case No. 369 of 2011. The Plaintiff in E.L.C. Case No. 301 of 2010 relied on the conviction of the 2nd Defendant on the offence of forging her signature on the sale agreement on transfer of the Suit Property. She urged the court to go by the findings of the learned magistrate in the criminal case.

15. The Plaintiff relied on **Arithi Highway Developers Limited v West End Butchery Limited and 6 others [2015] eKLR** in urging the court to find that there was fraud in the transfer of the Suit Property by the 1st and 2nd Defendants without involving her yet she was a co-owner of the land. The Plaintiff relied on the finding of fraud made by the learned magistrate against the 2nd Defendant in **Criminal Case No. 2777 of 2010** in Kibera Law Courts and the fact that no appeal was lodged against that decision.

16. The Plaintiff owned 1/3 of the suit land while the 1st and 2nd Defendants each owned 1/3 share in the same property. No finding of fraud was made against the 1st Defendant. The Advocate who gave evidence stated that the Plaintiff appeared before him and executed the sale agreement and also appeared before the Registrar of Business Names and executed the transfer form for Toika International Company. The evidence of the advocate who did the conveyance transaction over the Suit Property was not challenged by the Plaintiff. The 1st Defendant did not give evidence. Had he done so, he might have shed more light on what really transpired when the suit land was transferred.

17. The Plaintiff also relied on Article 40 (6) of the Constitution which does not protect property found to have been unlawfully acquired and

Section 26 (1) (b) of the Land Registration Act on the point that a title acquired illegally and unprocedurally should not be upheld.

18. The court has looked at Section 23 of the Registration of Titles Act. The certificate of title issued to the 5th Defendant upon the transfer is to be taken as conclusive evidence that he was the absolute and indefeasible owner of the land subject to the conditions contained in the title. A title was subject to challenge on the ground of fraud or misrepresentation to which the proprietor was proved to be a party. The Plaintiff did not lead any evidence to demonstrate that the 5th Defendant obtained the certificate of lease over the Suit Property through fraud or misrepresentation to which he was a party.

19. Based on this position of the law which was in force at the time the Suit Property was transferred to the 5th Defendant, the court is inclined to uphold the title held by the 5th Defendant as an innocent purchaser for value without notice. The Suit Property is charged to a bank which was not made a party to these proceedings. A caution is registered against the land by the Registrar of Titles who was also not called to give evidence.

20. The Plaintiff's recourse lies in pursuing her partners in Toika International, that is, Mohammed Mutuku Mutisya Nzioki and Joseph Machuka Okaru. The court directs the 1st and 2nd Defendants to pay to Tabitha Ndigirigi the sum of Kshs. 1.5 million which is assessed based on the sale agreement entered into between 1st and 2nd Defendants as partners in Toika International when they transferred the suit land to the 3rd and 4th Defendants on 18/3/2011. This takes into consideration the fact that the Plaintiff held 1/3 of the interest in both the Suit Property and the business name known as Toika International Company.

21. The Plaintiff, Tabitha Ndigirigi, is also awarded general damages in the sum of Kshs. 500,000/= against the 1st and 2nd Defendants. She is also awarded the costs of the suit in E.L.C. Case No. 301 of 2010 against the 1st and 2nd Defendants.

22. The court declines to award the 5th Defendant who was the Plaintiff in E.L.C. Case No. 369 of 2011 costs of that suit in light of the findings in E.L.C. Case No. 301 of 2010.

Dated and delivered at Nairobi this 11th day of October 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Owang' holding brief for Mr. Kahuthu for the Plaintiff

Ms. Thuku holding brief for Mr. Kabugu for the 5th Defendant

Mr. J. Okumu- Court Assistant

No appearance for the 1st to 4th Defendants