



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC. CASE NO. 2486 OF 1997

(FORMERLY HCCC NO. 2486 OF 1997)

OPEN HIRE LIMITED.....PLAINTIFF

-VERSUS-

DAVID MURIUKI KABERERE.....1ST DEFENDANT

ANNE WAITHERERO MURIUKI.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff claims that it purchased the land known as Nairobi Block 82/2380, in Green Field Estate (“the Suit Property”) from the Defendant vide an agreement dated 17/4/1997 at the agreed price of Kshs. 1.5 million. The Plaintiff claims that the 1st Defendant executed a transfer of lease in favour of the Plaintiff and subsequently a certificate of lease was issued to the Plaintiff dated 24/9/1997.
2. The Plaintiff’s claim against the Defendant is that the Defendant’s family or agents have had possession of the Suit Property to the exclusion of the Plaintiff from 24/9/1997 and have denied the Plaintiff free access and peaceful and quiet enjoyment of the Suit Property. The 1st Defendant died.
3. In the Amended Plaintiff dated 24/11/1997, the Plaintiff sought a declaration that the Defendant was not entitled to enter or trespass on the Suit Property and, a permanent injunction to restrain the Defendant by himself or his family or agents from entering the Suit Property or in any way interfering with the Plaintiff’s peaceful and quiet enjoyment and use of the Suit Property. It also sought an order directing the Defendant or his agents to give vacant possession of the Suit Property to the Plaintiff.
4. In the Amended Defence and Counterclaim dated 12/11/2003, the Defendant denied the Plaintiff’s claim and further denied receiving the sum of Kshs. 1.5 million from the Plaintiff as consideration for the purchase of the Suit Property. The Defendant claimed that he borrowed Kshs. 750,000/= from Mr. Minju Kariuki which was repayable in three months.
5. He claimed that Mr. Minju Kariuki asked him to deposit the title for the Suit Property as security for the repayment of the loan. The Defendant denied executing the sale agreement and transfer in respect of the Suit Property. The Defendant pleaded particulars of fraud against Minju Kariuki and the Plaintiff in the execution of the sale agreement and the transfer which he claimed were fraudulent and were procured through misrepresentation of facts.
6. The Defendant denied that the plaintiff had a good title to the Suit Property and urged the court to cancel the Plaintiff’s title in its counterclaim. The Defendant denied dealing with the Plaintiff. He counterclaimed a declaration that the transfer of title over the Suit Property to the Plaintiff was irregular, null and void and should be cancelled. He also sought a permanent injunction to restrain the Plaintiff or its agents from entering or trespassing onto the Suit Property or interfering with the Defendant’s peaceful and quiet enjoyment and use of the Suit Property.
7. The Plaintiff’s director, Minju Kariuki gave evidence before Koome J. on 15/11/2011. He produced the Plaintiff’s Memorandum and Articles of Association together with the certificate of incorporation. It was his evidence that the 1st Defendant approached him in April 1997 and expressed his desire to sell his residential house at Green Field Estate to raise Kshs. 1.5million for a project. He stated that they went with the 1st Defendant to Mercy Kanyara Advocates who was to prepare the sale agreement. He claims he carried cash to the office of Mercy Kanyara following the 1st Defendant’s request to have the purchase price paid in cash. He stated that they signed the sale agreement and the transfer for the Suit Property with the 1st Defendant, which the advocate witnessed.

8. He learnt that a caution had been registered against the Suit Property by the 2nd Defendant on 9/7/1997. The Plaintiff also lodged a caution against the Suit Property as the purchaser. The Defendant was given notice to show cause why the caution lodged against the Suit Property should not be removed. On the 2nd Defendant's failure to appear before the Land Registrar, the caution was removed, the land was transferred to the Defendant and a new title issued on 24/11/1997. The Plaintiff's director denied the allegation of fraud made by the Defendant. He maintained that the 2nd Defendant's lodged a caution when she learnt that her husband wanted to sell the land. The director asked the court to dismiss the counterclaim. He sought vacant possession, general damages and legal costs.

9. On the cheques dated 26/5/1997, 19/5/1997 and 4/6/1997, he stated that the cheques which were for about Kshs. 1 million were returned to Mr. Kaberere. Mr. Kariuki stated that the cheque dated 27/6/1997 for Kshs. 1,373,000/= issued by Kaberere related to another sale transaction in Kitengela area which the director was entering into as an individual. He stated that the cheque bounced.

10. The Plaintiff told Mercy Kanyara, the advocate who handled the conveyance transaction to give evidence. She stated that Mr. Kaberere asked her to act for both parties in the sale transaction. She drew a sale agreement which both parties executed in her presence on 17/4/1997. Mr. Kaberere deposited the documents of title with her firm for purposes of preparing and effecting the transfer in favour of the Plaintiff. She stated that she prepared the transfer and explained the contents to Mr. Kaberere who signed it in her presence. The transfer was executed by the Plaintiff and she lodged it for registration at the Lands Office.

11. She confirmed that she was summoned to appear before the Land Registrar, Nairobi with Mr. Kariuki, to explain the circumstances of the transfer of the Suit Property during the hearing of the objection lodged by the 2nd Defendant. The Defendant did not appear and the Land Registrar confirmed that the transfer was regular and proceeded to register it.

12. She denied that there had been any fraud in the transaction as alleged by the 1st Defendant. The Plaintiff produced copies of the sale agreement, transfer of lease, certificate of lease issued over the Suit Property and copies of the cheques for Kshs. 135,000/=, 665,000/= and 200,000/ dated 26/5/1997, 19/5/1997 and 9/6/1997 respectively. The cheques were issued in favour of Minju Kariuki. She also produced copies of the caution and notices of the caution dated 9/7/1997 and 22/7/1997. She produced a copy of the notice issued by the Land Registrar on 23/7/1997 inviting 2nd Defendant to appear at the Lands Registry on 25/7/1997 at 2.00 pm for specific clarification failing which the caution which she had lodged against the suit land would be removed by the Land Registrar.

13. She produced a copy of the 1st Defendant's letter dated 24/7/1997. In that letter, Mr. Kaberere stated that Mr. Minju Kariuki had lent him some money on the strength of the title over the Suit Property and that he had signed some blank documents for Mr. Minju to fill in the other details later. He stated in the letter that Mr. Minju was charging interest at 30% per month contrary to the agreement and that he had actually borrowed the sum of Kshs. 750,000/= and that the market value of his property at that time was Kshs. 4 million. The letter also stated that the caution lodged by his wife would stay to protect his wife's interest and those of her children but that he was trying to sort out the issue with her. Mr. Kaberere denied having any dealings with Open Hire Ltd, the Plaintiff herein.

14. The Plaintiff produced the letter dated August 1997 written the 2nd Defendant in which she reiterated that her husband had informed her that he had borrowed Kshs. 750,000/= from Mr. Minju which he was to repay with interest at the rate of 30%. She expressed her willingness to repay Mr. Minju's money if Mr. Minju agreed that the interest was 30% per annum. The letter dated 10th September, invited the 2nd Defendant to appear before the Registrar on 24/9/1997 at 10.30 a.m. to show cause why the caution should not be removed. It is endorsed by hand on the letter that it was received on 30/11/1997 at 11.30 a.m.

15. The Defendant died and was substituted by the 2nd Defendant who gave evidence. She stated that she never heard that her husband was selling the plot and that in 1997 she was living in the house on the Suit Property with her children. She knew Mr. Minju Kariuki through her husband but did not know the Plaintiff. She placed a caution when she heard that the house was being sold.

16. She stated that Mr. Minju was supposed to give her husband Kshs. 750,000/= to campaign for political office which sum they were to refund with interest. She produced copies of the cheques dated 26/5/1997, 19/5/1997 and 4/6/1997 drawn in favour of Minju Kariuki, for Kshs. 135,000, 665,000/ and 200,000/= respectively which she claimed were the refund of the loan which Mr. Minju had advanced to her husband. She produced a copy of the cheque counter leaf dated 27/6/1997 for Kshs. 1,372,000/= indicated to have been paid to Minju Kariuki by her husband. She stated that that sum was the accrued interest. She denied receiving the Land Registrar's letter to show cause on whether the caution should be removed or that the meeting that took place on 24/9/1997. She claimed she had attended the meeting on 25/7/1997 called by the Registrar who asked her to write a letter.

17. On cross examination she stated that she knew Minju in 1997 and that he had been to their house twice. Minju was friends with her husband. She did not know if Minju had loaned her husband any money prior to sale agreement. She did not attend the meeting between her husband and Minju in Makadara where they were to discuss the refund. She did not know whether the cheques her husband claimed to have taken to Minju were banked and paid. She stated that the signatures on the sale agreement and the transfer of lease produced by the plaintiff were not her late husband's signature. She stated that she had lived with her husband for 37 years and was familiar with his signature. She did not refund any money to Minju because she claimed that her husband had already refunded the money he had borrowed.

18. Parties filed submissions. The Plaintiff submitted that the 2nd Defendant did not adduce any evidence to prove the fraud she alleged against the Plaintiff.

19. The issues for determination are whether Minju Kariuki acted fraudulently in the sale of the Suit property; whether the sale agreement and transfer of the Suit Property to the Plaintiff were forgery; and whether the removal of caution placed by the 2nd Defendant and registration of the property in favour of the Plaintiff was lawful.

20. The 2nd Defendant denied that her husband neither entered into the sale agreement with the Plaintiff nor did he sign the transfer in respect of the Suit Property. Her testimony was that her husband borrowed a loan of Kshs. 750,000/= from Minju Kariuki, who she admitted was her

husband's friend. She did not adduce any evidence of this loan of Kshs. 750,000/=. She relied on the copies of the cheques which she claimed were in repayment of the loan advanced to her husband. There is no evidence to show that the cheques were indeed banked and paid. She stated that the cheque counter leaf for Kshs. 1, 372, 000.00 was on account of the interest on the loan granted to her husband. She did not adduce evidence to show how this sum was arrived at and failed to prove that the cheque for Kshs. 1, 372, 000.00 was given to Minju Kariuki and was paid on presentation to the bank.

21. The court notes that the transfer document which the 1st Defendant executed was a form and not a blank document as he claimed in his letter of 24/7/1997 Mr. Minju had given him to sign.

22. The court prefers the evidence of Mercy Kanyara, the Advocate who carried out the conveyance transaction. The advocate stated that the sale agreement and transfer were executed by the 1st Defendant in her presence. She also appeared before the Land Registrar when the Registrar sent a notice for the 2nd Defendant to show cause why the caution she had lodged should not be removed.

23. The 1st Defendant had an opportunity to challenge the transfer of the Suit Property to the Plaintiff during his lifetime. He could have lodged a formal complaint against the advocate who handled the conveyance transaction of the Suit Property to the Plaintiff if he never entered into the sale transaction and did not execute the documents as he claimed in his letter dated 24/7/1997. He could also have filed suit to challenge the transaction. The Defendant filed a counterclaim on 12/11/2003 yet he knew by October 1997 that the Suit Property had been transferred to the Plaintiff when the 2nd Defendant failed to appear before the Land Registrar to show cause why the caution placed by the 2nd Defendant against the Suit Property should not be discharged.

24. The court finds that the Plaintiff has proved its case on a balance of probabilities and grants prayers A, B, C and E of the Amended Plaint dated 24/11/1997. The Defendants' counterclaim is dismissed with costs to the Plaintiff.

25. The Defendants are directed to give vacant possession of the Suit Property to the Plaintiff within 120 days of the date of this judgement.

Dated and delivered at Nairobi this 6th day of November 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Wanjama for the Plaintiff

Mr. Owaga for the Defendant

Mr. V. Owuor- Court Assistant