



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC SUIT NO. 1818 OF 2002**

**SIMON KAMANU.....PLAINTIFF**

**VERSUS**

**MWANGI JAMES NJEHIA.....1<sup>ST</sup> DEFENDANT**

**JANETTA WANJIKU MWANGI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The following facts are not in dispute in this suit:

1. The parcel of land known as L.R No. 8226/14, I.R 30856 (hereinafter referred to as “the suit property”) was registered in the name of the plaintiff as the proprietor thereof on 19<sup>th</sup> April, 1977;
2. The suit property was transferred to one, Mary Murugi John, deceased (hereinafter referred to as “the deceased”) on 29<sup>th</sup> June, 1994;
3. The deceased transferred the suit property to the defendants on 20<sup>th</sup> December, 1994.

What is in dispute is whether the transfer of the suit property from the plaintiff to the deceased and subsequently from the deceased to the defendants was lawful. In his plaint dated 16<sup>th</sup> December, 2002, the plaintiff averred that he was at all material times the lawful registered owner of the suit property. The plaintiff averred that by an instrument of transfer dated 23<sup>rd</sup> June, 1994 allegedly executed by him in favour of the deceased, he allegedly transferred the suit property to the deceased. The plaintiff averred that he neither sold nor executed an instrument of transfer in respect of the suit property in favour of the deceased. The plaintiff averred that in Nairobi Resident Magistrate’s Court Criminal Case No. 1274 of 2000, the court found the purported agreement for sale between the plaintiff and the deceased and the purported instrument of transfer that the plaintiff allegedly executed in favour of the deceased in respect of the suit property to be forgeries.

The plaintiff averred that by a sale agreement dated 15<sup>th</sup> December, 1994, the deceased purported to sell the suit property to the defendants at a consideration of Kshs.4,000,000/= and subsequently executed an instrument of transfer dated 20<sup>th</sup> December, 1990 in their favour in respect of the property. The plaintiff averred that since he did not transfer the suit property to the deceased, the deceased had no title in the suit property that she could transfer to the defendants. The plaintiff averred that the alleged sale and transfer of the suit property by the deceased to the defendants were fraudulent, illegal and unlawful. In the particulars of fraud, the plaintiff averred that the defendants knew or ought to have known that the deceased did not have any title in the suit property which was capable of being passed to them and that the discrepancy in the purchase price indicated in the agreement for sale and the transfer pointed to the fact that the transaction was not genuine.

The plaintiff sought a declaration that the purported transfer of the suit property from him to the deceased and from the deceased to the defendants were illegal, null and void and incapable of passing a good title to the defendants; an order cancelling the defendant’s title to the suit property and re-transferring the property to him and an injunction restraining the defendants from interfering with his quiet possession of the property or from in any other manner dealing with the suit property.

In their statement of defence and counter-claim filed on 25<sup>th</sup> February, 2003, the defendants denied the plaintiff’s claim over the suit property and averred that they purchased the suit property from the deceased in December, 1996 at a consideration of Kshs.4,000,000/=. The defendants averred that when they acquired the suit property, the deceased was the registered proprietor thereof. The defendants denied that they acquired the suit property fraudulently. The defendants averred that they held a good title to the suit property and that the reliefs sought against them had no basis. In their counter-claim, the defendants claimed from the plaintiff a sum of Kshs.300,000/= being the costs that they incurred in replacing the beacons which they had placed on the suit property which were unlawfully removed by the plaintiff on 19<sup>th</sup> February, 2002 when he allegedly trespassed on the suit property. The defendants also sought exemplary damages for trespass and malicious damage to property.

At the trial, the plaintiff adopted his witness statement filed on 2<sup>nd</sup> October, 2017 as his evidence in chief. He told the court that he was the owner of the suit property. He stated that when he acquired the suit property, he was residing in the state of California, U.S.A. He stated that when he is alleged to have transferred the suit property to the deceased in 1994, he was residing in the U.S.A. He denied having transferred the suit property to the deceased. He stated that when he learnt of the alleged transfer of the suit property to the deceased, he asked his brother to visit the lands office and find out what was happening. He stated that his brother found out that the advocate who was alleged to have handled the purported sale and transfer of the suit property by him to the deceased was one, A. N. Ngunjiri Advocate. He stated that when confronted on the issue, the said advocate denied any knowledge of the transaction and wrote to the lands office over the same. The plaintiff stated that he was not able to come to Kenya immediately to attend to the matter and in the meantime, the deceased transferred the suit property to the defendants. He stated that it was not until the year 2000 that he came back to Kenya and lodged a complaint against the defendants at Kasarani Police Station that led to the arrest and prosecution of the 1<sup>st</sup> defendant. He stated that at that time, the deceased had already passed on in 1998. He stated that although the 1<sup>st</sup> defendant was acquitted in the criminal case, the Magistrate made a finding that the purported sale of the suit property by the deceased to the defendants was fraudulent and it is following that finding that he instituted this suit for the recovery of the suit property. The plaintiff told the court that the deceased was his sister and that in his absence she kept the title for the suit property on his behalf.

The plaintiff produced as exhibits the documents that were attached to his list of documents dated 27<sup>th</sup> September, 2017 filed in court on 2<sup>nd</sup> October, 2017. The exhibits included, copies of the certificate of title of the suit property, the transfer dated 23<sup>rd</sup> June, 1994 allegedly executed by the plaintiff in favour for the deceased, a statement by Antony Nahashon Ngunjiri advocate dated 2<sup>nd</sup> May, 2000, agreement for sale dated 15<sup>th</sup> December, 1994 between the deceased and the defendants, a letter dated 25<sup>th</sup> November, 1994 addressed to the Commissioner of Lands by A. N. Ngunjiri & Co. Advocates, a letter dated March, 2001 by the plaintiff to the Commissioner of Lands, the charge sheet, proceedings and judgment made in the Chief Magistrate's Court at Nairobi Criminal Case No. 1274 of 2000.

The 1<sup>st</sup> defendant gave evidence on his own behalf and on behalf of the 2<sup>nd</sup> defendant who was his wife. The 1<sup>st</sup> defendant told the court that the plaintiff was unknown to him and that he met him for the first time in court. The 1<sup>st</sup> defendant adopted his witness statement filed on 17<sup>th</sup> October, 2017 as his evidence in chief. He stated that before they purchased the suit property from the deceased, they did a search that confirmed that the property was registered in the name of the deceased. He stated that after purchasing the property they took possession. He stated that he was not aware how the deceased acquired the suit property. He told the court that he was charged in relation to the suit property with eight (8) counts of forgery of which charge he was acquitted. He stated that the criminal case revolved around fraud in relation to the suit property but the same did not concern their title. He denied that they were trespassers on the suit property. He urged the court to dismiss the plaintiff's suit and to allow their counter-claim.

After the close of evidence, the advocates for the parties made closing submissions in writing. The plaintiff filed his submissions and further submissions on 8<sup>th</sup> February, 2018 and 16<sup>th</sup> July, 2018 respectively. The defendants filed their submissions on 23<sup>rd</sup> February, 2018. I have considered the pleadings, the evidence on record and the submissions by the advocates for the parties. The parties did not agree on the issues for determination by the court. In my view, the following are the issues that arise for determination in this suit:

- 1. Whether the plaintiff was the first registered proprietor of the suit property;**
- 2. Whether the defendants acquired the suit property lawfully;**
- 3. Whether the plaintiff is entitled to the reliefs sought in the plaint;**
- 4. Whether the defendants are entitled to the reliefs sought in their Counter-claim;**
- 5. Who is liable for the costs of the suit?**

Whether the plaintiff was the first registered proprietor of the suit property:

A copy of the Certificate of Title dated 19<sup>th</sup> April, 1977 in respect of the suit property that was produced in evidence by the plaintiff which appears at page 5 of P Exh.1 shows that the plaintiff was the first registered owner of the suit property having been registered as the leasehold proprietor of the property for a term of 951 years with effect from 1<sup>st</sup> January, 1953. There being no evidence before me to the contrary, it is my finding that the plaintiff was the first registered owner of the suit property.

Whether the defendants acquired the suit property lawfully:

It was not disputed that the defendants are the current registered owners of the suit property having acquired the same from one, Mary Murugi John ("deceased") on 20<sup>th</sup> December, 1994. What is in contention is whether the defendants' acquisition of the suit property was lawful. The plaintiff testified that he did not sell the suit property to the deceased and that the purported agreement for sale and instrument of transfer that were allegedly executed by him in favour of the deceased were forgeries. The plaintiff testified that he was at all material times resident in the U.S.A and as such he could not have executed any transfer in favour of the deceased at the time. The plaintiff averred that when he came back to Kenya, he made a report to the Police concerning the fraudulent transfer of the suit property to the deceased and subsequently to the defendants following which report the 1<sup>st</sup> defendant and one, Emilia Mbaire were arrested and charged with the offence of making false documents, forgery and uttering false documents in Nairobi Chief Magistrate's Court Criminal Case No. 1274 of 2000 (hereinafter referred to as "the Criminal Case"). The plaintiff averred that at the hearing of the criminal case, A. N. Ngunjiri advocate who was alleged to have prepared and witnessed the execution of the instrument of transfer of the suit property by the plaintiff to the deceased denied the said document and told the court that his purported signature in the document was a forgery. The plaintiff submitted that in the said criminal case, the court made a finding that the purported transfer of the suit property by the plaintiff to the deceased was fraudulent. The plaintiff submitted that since the purported transfer of the property to the deceased was fraudulent, the deceased had no valid title to the

suit property that she could transfer to the defendants.

The plaintiff submitted that the fraudulent transfer of the suit property to the deceased should be cancelled. The plaintiff submitted further that the purported transfer of the suit property by the deceased to the defendants should similarly be cancelled since the deceased had no valid title that she could transfer to the defendants. The plaintiff cited the case of Arthi Highway Developers Ltd. v West End Butchery Limited & 6 Others (2015) eKLR and submitted that a person who holds a fraudulent title cannot pass the same.

On their part, the defendants submitted that this court cannot determine whether the suit property was transferred to the deceased lawfully or not because the deceased passed away before the filing of this suit and the plaintiff did not deem it necessary to join her legal representative as a party to the suit. The defendants submitted that in the absence of the deceased's legal representative in the suit, the court cannot determine the issue of the alleged fraudulent transfer of the suit property from the plaintiff to the deceased. The defendants submitted further that the issue as to whether the transfer of the suit property to the deceased was fraudulent had been determined by a court of competent jurisdiction in the criminal case which found no evidence of forgery or fraud on the part of the defendants, the deceased and the deceased's daughter, Emilia Mbaire. The defendants submitted that there was nothing fraudulent in the transfer of the suit property from the deceased to them since the property was registered in the name of the deceased as the owner thereof when she sold and transferred the same to them.

The defendants submitted that they purchased the suit property for valuable consideration without notice of any defect in the deceased's title. The defendants submitted that failure by the plaintiff to join the estate of the deceased as a party to this suit was fatal to his claim because since the deceased is not a party to the suit, the allegation that she did not have a valid title to pass can only be assumed which cannot be a basis for any valid finding by this court. The defendants submitted that the certificate of title that they held in respect of the suit property was conclusive evidence that they were the absolute and indefeasible owners of the property. The defendants submitted that the sanctity of their title was protected under Sections 25 and 26 of the Land Registration Act, 2012.

I wish to determine as a preliminary issue the contention by the defendants that failure by the plaintiff to join the legal representative of the deceased as a party to the suit was fatal to his claim. The defendants contended that, in the absence of the legal representative of the estate of the deceased in this suit, the court would not be able to determine what transpired between the plaintiff and the deceased. I find no merit in this argument. Order 1 Rule 9 of the Civil Procedure Rules provides as follows:

**“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”**

The plaintiff's claim is against the defendants and not against the deceased. The plaintiff has claimed that the defendants acquired the suit property that was previously owned by the plaintiff illegally through acts of fraud and forgery. What I need to determine is whether the plaintiff has proved his case against the defendants. The fact that the plaintiff or the defendants have not joined a necessary party to the suit cannot bar the court from determining the rights of the parties before it.

Having disposed of that issue, I will now consider whether the defendants acquired the suit property lawfully. The suit property was registered under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). Section 23(1) of the said Act provides as follows:

**“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”**

Section 2 of the Registration of Titles Act states as follows with regard to fraud:

**““Fraud” shall on the part of person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person whose interest he knowingly and wrongfully defeats by the registration.”**

Section 23(1) of the Registration of Titles Act has been reproduced in Section 26(1) of the Land Registration Act, 2012 which has been cited by the defendants in support of their submission that their title to the suit property is indefeasible. What the court needs to determine is whether the plaintiff has established that the defendants acquired the suit property through acts of fraud. The defendants have contended that they are bona fide purchasers of the suit property for valuable consideration without any notice of the defect if any in the title that was held by the deceased. In the case of Lawrence Mukiri v Attorney General & 4 Others [2017] eKLR the court cited with approval the Uganda Court of Appeal Case of Katende v Haridar & Company Ltd.[2008]2E.A173 in which the court defined what amounts to “a bona fide purchaser” as :

**“.....a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:**

- (a) He holds a certificate of title;**
- (b) He purchased the property in good faith;**
- (c) He had no knowledge of the fraud;**

**(d) The vendor had apparent valid title;**

**(e) He purchased without notice of any fraud;**

**(f) He was not a party to any fraud.”**

In Black's Law Dictionary 8<sup>th</sup> Edition, a bona fide purchaser is defined as:

**“One who buys something for value without notice of another claim to the property and without actual or constructive notice of any defect in or infirmities, claims or equities against the sellers title, one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”**

On the material before me, I am not satisfied that the defendants were bona fide purchasers of the suit property. In the criminal case, the court found the instrument of transfer through which the suit property was purportedly transferred to the deceased to have been a forgery. The court was satisfied that the plaintiff herein was out of the country when the purported transfer was executed. A. N. Ngunjiri Advocate who purportedly prepared the said instrument of transfer and witnessed the execution thereof by the deceased and the plaintiff denied the document and his signature on the said document that he told the court was forged. The 1<sup>st</sup> defendant herein and his co-accused in the criminal case were acquitted of the charges that were brought against them not because the court did not find the transfer to have been forged but because the court did not find sufficient evidence connecting them to the forgery. The criminal court stated that **“From the evidence of these two witnesses alone the court is convinced that this was not a genuine transfer.”** (Emphasis added). Commenting further on the instrument of transfer, the court stated that, **“The court as earlier discussed has no doubt that this indeed was a false document but did the two accused or either of them actually utter this false document or present it to the officer at the lands office”** (Emphasis added).

Something which is not genuine or which is false is something which is not real. This means that the purported transfer through which the suit property was conveyed to the deceased was a forgery or fake. Since the said instrument of transfer was a forgery, it could not confer upon the deceased a valid interest in the suit property.

The question that I wish to pose at this stage is whether the defendants were aware or had notice of the deceased's acts of forgery or fraud before they purchased the suit property. My answer to this question is in the affirmative. Among the documents which the plaintiff produced in evidence as part of P Exh. 1 was a statement by A. N. Ngunjiri Advocate. In the statement, A. N. Ngunjiri who is now deceased and could not give evidence in this case stated that on 9<sup>th</sup> November, 1994 he received a letter from the plaintiff together with a copy of a purported transfer which was alleged to have been witnessed by him. He stated that his signature in the purported transfer was a forgery and that the purported transfer had several glaring errors on the face thereof. He stated that when the plaintiff called him subsequently, he told him that he was not involved in the preparation of the purported transfer.

Mr. Ngunjiri stated further that on 8<sup>th</sup> December, 1994, the 1<sup>st</sup> defendant went to his office with a lady and asked him to certify that the purported transfer had been drawn and witnessed by him. He stated that since he had been alerted of the fraudulent transfer, he locked the 1<sup>st</sup> defendant and the said lady in his office and sought the help of the police to have them arrested. He stated that he released the two in the evening when the police failed to turn up. A. N. Ngunjiri gave evidence in the criminal case and was cross-examined by the 1<sup>st</sup> defendant's advocate.

In his evidence in cross-examination in this suit, the 1<sup>st</sup> defendant denied at first that he went to the office of A. N. Ngunjiri Advocate. However, when pressed, he later admitted that he had gone to A. N. Ngunjiri's office with Emilia Mbaire who was his co-accused in the criminal case and that they were locked up by the said advocate. He also admitted that what A. N. Ngunjiri stated in the statement that I have referred to earlier was correct. He confirmed that the incident at the office of Mr. Ngunjiri took place on 8<sup>th</sup> December, 1994 before the suit property was transferred to them on 20<sup>th</sup> December, 1994. He told the court that he did not take any action against Mr. Ngunjiri for locking him up and that he did not even report the incident to the police.

I am satisfied from the foregoing that the defendants were aware before they entered into the agreement for sale with the deceased on 15<sup>th</sup> December, 1994 in respect of the suit property that the deceased held a fraudulent title. I don't believe the evidence that was given by the 1<sup>st</sup> defendant that he received no information when he visited the firm of A. N. Ngunjiri Advocate that the title held by the deceased had a problem. The court cannot believe that a person of the 1<sup>st</sup> defendant's caliber, a whole veterinary doctor can walk into an advocate's office without knowing why and then get locked up from 2:30 p.m. to 5:30p.m. by the said advocate without being told or knowing the reason. And more interesting is that even after being released without being told why he was locked up he did not take any action against the advocate. I am convinced that the defendants were well aware of the deceased's questionable title and assisted her in perpetrating the fraud whose intention was to deny the plaintiff his rights over the suit property.

I have also noted from the certificate of title that the defendants attached their bundle of documents filed in ELC No. 1536/2013 (now settled) at page 33 that although the agreement for sale had indicated that the defendant's purchased the suit property from the deceased at Kshs.4,000,000/=, the transfer in their favour that was registered on 20<sup>th</sup> December, 1994 showed that they purchased the property for Kshs.1,500,000/= only. The defendants did not give any reasonable explanation for this discrepancy which shows that the defendants under declared the value of the suit property in the instrument of transfer so as to defraud the collector of stamp duty of the duty that was payable on the transaction. The defendants did not also place any documentary evidence before the court showing that they paid the purchase price whatever it was for the suit property.

From the totality of the foregoing, it is my finding that the defendants were not bona fide purchasers of the suit property from the deceased. The defendants were aware or had notice of the deceased's fraudulent title and knowingly assisted her in perpetrating the fraud by agreeing to purchase the suit property. The defendants do not therefore have indefeasible title over the suit property. I am in agreement with the

plaintiff that the deceased had no title over the suit property that she could pass to the defendants. Her title that was a product of forgery and fraud was null and void and conferred upon her no proprietary interest in the suit property that she could pass to the defendants.

Whether the plaintiff is entitled to the reliefs sought in the plaint:

The plaintiff has proved that he is the lawful owner of the suit property and that the property was acquired by the defendants with full knowledge of his interest and of the fact that deceased who sold the property to them had a fraudulent title. The plaintiff is entitled to the reliefs sought in prayers (a) and (b) of the plaint. With regard to prayer (b), I would allow it in part to the extent of cancelling the title held by the defendants. I would not be able to order the defendants to transfer back the suit property to the plaintiff because having acquired a fraudulent title they have no title to transfer back to the plaintiff. Like that of the deceased, the title held by the defendants over the suit property is null and void.

Whether the defendants are entitled to the reliefs sought in the counter-claim:

The defendants did not tender any evidence in proof of the special damages in the sum of Kshs.300,000/= that they have claimed from the plaintiff. The law on special damages is that the same must be pleaded with the necessary particulars and strictly proved. The defendants neither particularised such damages nor proved them at the trial. The defendants had also sought exemplary damages for trespass and malicious damage to property. From my findings above, the defendants did not prove that the plaintiff trespassed on the suit property. I have made a finding that the plaintiff was the lawful owner of the suit property and that he was illegally dispossessed of his land through fraudulent machinations of the deceased to which fraud the defendants had notice. The foregoing being my view on the defendant's counter-claim, I find no merit in the same.

Who is liable for the costs of the suit?

Costs follow the event. No reason has been given to warrant a departure from this well established rule. The plaintiff has succeeded in his claim and as such he entitled to the costs of the suit. Since the plaintiff did not file a defence to the counter-claim (I have not seen any on record), I will not award him the costs of the counter-claim.

Conclusion:

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

1. I declare that the purported instrument of transfer of L.R No. 8226/14 ("the suit property") from the plaintiff to the deceased was a forgery and was incapable of passing any title to the deceased and subsequently to the defendants who derived their title from the deceased.
2. The purported transfer of L.R No. 8226/14 to the defendants is hereby cancelled.
3. The defendants shall surrender to the plaintiff the certificate of title in respect of L.R No. 8226/14 in their possession within 30 days from the date hereof.
4. The Land Registrar shall restore the name of the plaintiff in the register and certificate of title of L.R No. 8226/14 as the owner of the property.
5. There shall be a permanent injunction restraining the defendants from interfering with the plaintiff's quiet possession of the suit property.
6. The plaintiff shall have the costs of the suit.
7. The defendants' counter-claim is dismissed with no order as to costs.

**Delivered and Dated at Nairobi this 1<sup>st</sup> day of November, 2018**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in the presence of:**

Mr. Muriithi holding brief for Kamere for the Plaintiff

No appearance for the Defendant

Catherine - Court Assistant