



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KISUMU

ELC NO. 829 OF 2015

RUTH A. OGEMBO.....PLAINTIFF

VERSUS

JAGDIP BHAGWADAS MORPARIA.....1ST DEFENDANT

KHIMJI K. CHABADIA.....2ND DEFENDANT

JUDGMENT

By a plaint dated The plaintiff 18th March 2011 the plaintiff herein filed this suit against the defendants seeking for the following orders:

- a) A declaration that the registration of the 1st and 2nd defendants as the proprietor of the property known as KISUMU MUNICIPALITY/BLOCK 10/91 was obtained by fraud, illegally and thus null and void and passed no title to them.
- b) An order that the register be rectified and the names of the defendants be deleted from the register and in their place be substituted with the plaintiff's name.
- c) General and aggravated damages for trespass and fraud.
- d) Costs of the suit and interest thereon at court rates
- e) Any other or further remedy this court deems just and expedient to grant.

The plaintiff contemporaneously with the plaint filed a notice of motion seeking for a temporary injunction stopping the defendants from interfering or dealing with the suit land. Counsel recorded a consent on 15th June 2011 stopping any further dealings with the suit property until the suit is heard and determined.

PLAINTIFF'S CASE

This matter came up for hearing and PW1 stated that the plaintiff who is his sister donated a power of attorney since she resides and works in United Kingdom. The same was to enable her case proceed on to its conclusion. PW1 produced the power of attorney as Exhibit 1 and was received and paid for at the lands office on 25/11/2013 under presentation book number 345 of 11/2013 and vide receipt No. 3316997.

PW1 also adopted his witness statement dated 18th March 2011 and a further one filed on 22nd March 2011. It was the plaintiff's evidence that the purported ID card that was used to register the transfer indicates that it belongs to Ruth Atieno Ogendo who was born in 1962 while the sister was born on 12th September 1960 as per the copy of her passport produced in court as an exhibit.

PW1 further testified that they went to the Registrar of Persons and wrote a letter dated 2nd August 2011 of which they got a response vide a letter dated 30th May 2012 indicating that the particulars on the ID card was not issued by the Registrar of Persons .

PW1 also stated that he inquired from Kenya Revenue Authority to find out the details of the PIN certificate No. A002796167A in respect of Ruth Atieno Ogendo that was used to register the transfer and he was told vide a letter dated 27th October 2011 that it does not exist in the KRA data base. The witness also produced copies of the plaintiff's passport to show that the dates when the agreement was executed and payments made the plaintiff was not in the country. The witness further testified that the plaintiff has the original lease in respect to Kisumu/Municipality Block 10/91 together with the certificate of lease in her possession.

The plaintiff therefore urged the court to cancel the transfer as it was fraudulently obtained and the register be rectified.

On cross-examination by the defendant's Counsel he confirmed that he had a power of attorney to act on behalf of the plaintiff who is his sister living in the UK. He also stated that they reported the matter to the police about the fraud but they do not know what the outcome of the case was.

The defence case.

The defence called one witness who is the 1st defendant. He said that he was approached to buy the land by one Ruth Atieno Ogendo who wanted to sell her the land. He then did a search and thereafter an agreement dated 20th February 2010 for a consideration of KShs. 2.2million which he paid in full. He said he relied on the documents he got from lands office but was never shown any title deed by the said Ruth Atieno Ogendo. He then had the land transferred to them for purposes of development.

DW1 produced a bundle of documents which included a search certificate from the land's registry dated 16th February, 2010 to ascertain ownership which indicated that the owner was one Ruth Atieno Ogendo. He produced documents to support his assertions. Amongst the documents he produced was a payment to one John Kennedy Odundo whom he paid as an agent who connected him to the seller.

DW1 stated that the purchase price was KShs.2.2 million as per the agreement but in the transfer form which he used to transfer the land he indicated the purchase price as KShs.1 million. Further, he listed as his witnesses the said Ruth Atieno Ogendo, the land agent John Kennedy Odundo, Evans Mochama advocate who witnessed the agreement but none were called to testify. He confirmed that he does not know if the person they dealt with as the vendor exists or not. On being asked by the court whether he had ever traced the lady he dealt with since this matter came up, he confirmed that he had never been able to trace her at all.

Plaintiff's Submissions

Counsel for the plaintiff submitted that it is clear that the sale and transfer of the plaintiff's parcel of land was done using forged documents which in itself a crime. He stated that the person who allegedly sold the land to the defendants is a criminal who forged documents, government official documents from Registrar of persons and from Kenya Revenue Authority.

Counsel urged the court to find that the documents used in the conveyance of the said parcel of land were forgeries and as such could not legally confer any interest in the said land.

Secondly, that the plaintiff never transferred any of her interest on the suit parcel of land and any purported transfer is null and void as the plaintiff still has her original lease and the certificate of lease in her name.

Counsel therefore urged the court to enter judgement in favour of the plaintiff as prayed together with general damages for trespass since the defendants have admitted to having moved onto the suit property and that they denied the plaintiff an opportunity to develop the land.

Defendant's submissions

Counsel reiterated the defendant's evidence and stated that the issues for determination are as follows:

1. Whether the defendants lawfully purchased the suit property to acquire a good title in the property.
2. Who bears the burden of proving fraud.
3. Whether the plaintiff's physical presence was mandatory during trial to ascertain the identity of the parties.
4. Whether the plaintiff has proved fraud to the required standard of proof
5. Whether the land register should have been enjoined as party in order to effectively and competently deal with all the issues of fraud in this suit.

Counsel submitted on the first issue that the land system which is based on the Torrens system in which the government is deemed to keep correct and accurate information and records on the land parcels and as such it is sensible and as a custom that to ascertain the ownership as well as claims against the land parcel a party conducts a search at the lands registry as an act of due diligence.

It was therefore Counsel's submission that the defendants herein conducted the necessary due diligence by conducting a search at the land's registry that revealed the owner of the land parcel KISUMU MUNICIPALITY/BLOCK/10/91 as Ruth Atieno Ogendo. The defendants placed reliance upon this information and purchased the suit property at a purchase price of KShs.2.2 million, the vendor therein transferred the suit property in their favour through the transfer registered on the 23/2/2010 and the defendants thereafter registered as proprietors of the suit property upon payment of the necessary taxes on the KShs.1 million as per the government valuer's report. Counsel cited Section 24 (b) of the Land Registration Act states that:

“the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

He therefore submitted that the defendants followed the due process laid down by the law in entering into the agreement for sale and upon registration of the defendants as the proprietors of the suit property through the instrument of transfer; the defendants acquired true and lawful ownership/proprietary rights in the suit property from the vendor and issued with the certificate of lease from the land's registry which was presented as evidence by the defendants.

Further that the plaintiff has the burden of proving the existence of fraud and must avail all the necessary evidence to discharge this burden. Counsel further posed some questions that how possible could a non-existent person, as claimed by the plaintiff, execute and donate a Power of Attorney to Isaac Mbech Odero? and if the donor of the Power of Attorney is non-existent, is the instrument valid in the face of the law? Why did the plaintiff not physically attend court and testify? Did the plaintiff's team deliberately conceal the physical identity of the plaintiff, under the pretext that she was overseas, knowing very well that the defendants could actually positively identify the plaintiff in court as the person they dealt with under the sale agreement? Does the plaintiff, Ruth Atieno Ogembo really exist? and could the same Ruth Atieno Ogembo of ID. No. 4882484 who donated power of attorney to Isaac Mbeche Odero be the same as the person who sold the land-the subject matter of this suit to the defendant.

On the issue as to whether the plaintiff has proved fraud to the required standard of proof Counsel submitted that fraud is extremely and a very serious allegation and the standard of proof of fraud was stated in the case of **Ratilal Gordhanbai Patel – Vs – Lalji Makanji [1957] EA 314** cited with approval by the Court of Appeal Judges in the case of Denis Noel Mukhulo Ochwada & Another –v- Elizabeth Murungari Njoroge & Another [2018] eKLR that:

“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.”

Counsel therefore urged the court to dismiss the plaintiff's suit with costs to the defendants.

Analysis and determination

The issues for determination are very clear in this case. The glaring one is whether the defendants fraudulently transferred the suit land in their names, and whether they are innocent bona fide purchasers for value without notice.

From the evidence on record, we can deduce that the plaintiff went a great deal in trying to unravel the mystery of how a person could fraudulently transfer her suit parcel of land without her consent and authority. The plaintiff produced a letter from the Registrar of persons who disowned the identity card that was purportedly used to transfer the suit land as a fake. Further KRA also disowned the PIN certificate that was used to transfer the land and stated that it did not originate from them and that they did not have it in their data base.

The question is where did these documents originate from if the custodians of such documents already disowned them? Could there have been a scheme to defraud the defendants of hard their earned money?

The defendants claimed that they were bona fide purchasers for value without notice. For a person to rely on this doctrine, he must prove the following ingredients as was enunciated in the case of **KATENDE V HARIDAR & COMPANY LIMITED [2008] 2 E.A.173** where the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe 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 that:

- a) he holds a certificate of title;*
- b) he purchased the property in good faith;*
- c) he had no knowledge of the fraud;*
- d) he purchased for valuable consideration;*
- e) the vendors had apparent valid title;*
- f) he purchased without notice of any fraud;*
- g) he was not party to any fraud.”*

It is apparent from the evidence on record that the documents that were used in the transaction were a forgery. Nothing from the word go in the transaction was clean the documents having been disowned by the issuing authorities. This was a scheme by an imposter who tried an identity theft that almost bore fruit but was later busted.

PW1 gave evidence and produced a copy of the passport of the plaintiff which indicated a different date of birth and at the time the transaction took place the plaintiff was outside the country. Maybe the imposter was aware that the plaintiff was out of the country and thought she would not come back and notice that her title had been transferred illegally. Further that plaintiff's title was still intact with her and had not been surrendered for cancellation as is the procedure.

The defendant neither called the person who purportedly introduced him to the seller nor the seller as a witness to shed light on the issue. DW1 admitted that he only saw the seller once during the transaction and has never seen her again for many years. This was strange as if your transaction is being questioned in a court of law then it would be in your interest to fall back to the persons who were part of the transaction to explain either the anomaly or the authenticity of the title.

As Justice Munyao put it in the case of **Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR**

... it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.

I am in agreement with this view that the import of section 26 is to protect the real title holders and not people who have in one way or another fallen to the schemes of fraudsters. We are living in very precarious times with the digital age where individuals can fabricate documents which can pass without detection from the most diligent officers of the relevant agencies.

The questions that Counsel posed as to why the plaintiff did not appear in court for the case and whether it was to conceal her identity cannot be answered in the affirmative. With due respect to Counsel, the questions that Counsel was raising was tantamount to clutching on straws as the plaintiff had a water tight case.

Apart from discretionary powers, the court is further empowered under Section 80 (1) of the Land Registration Act, 2012 to 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.

On the issue as to whether the plaintiffs are entitled to general damages against the defendants, it is trite law that trespass to land is actionable per se (without proof of any damage). In the case of **Park Towers Ltd v. John Mithamo Njika & 7 others (2014) eKLR where J.M Mutungi J.**, stated:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ...”

The defendants stated that they even charged the property to Gurdian bank Ltd which shows that they had trespassed and were in use of the suit property. The plaintiff also stated that they were denied the opportunity to use the property due to the trespass and the court case. I find that the plaintiff will be adequately compensated by a sum of Kshs. 1,000,000/ (one Million Shillings) as general damages as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the Defendant's trespass

From the evidence I am in no doubt the defendant's title was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to the defendants were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (b) have been met and that the defendant's title is liable to be cancelled. I therefore proceed to cancel the defendant's title and make the following orders:

- a) A declaration is hereby issued that the registration of the 1st and 2nd defendants as the proprietors of the property known as KISUMU MUNICIPALITY/BLOCK 10/91 was obtained by fraud, illegally and therefor null and void.
- b) An order that the register be rectified and the names of the defendants be deleted from the register and in their place be substituted with the plaintiff's name.
- c) General damages for trespass of Kshs. One million.
- d) Costs of the suit.

DATED and DELIVERED at KISUMU this 7TH DAY OF **DECEMBER, 2018.**

M. A. ODENY

JUDGE

JUDGMENT READ, and SIGNED in open court in the presence of:-

Ms. Anyango for plaintiff, Mr. Abande for defendant and court assistant Joanne.

M. A. ODENY

JUDGE