



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KITALE
LAND CASE NO. 166 OF 2016

JANET BOCHERE WAMOTO.....PLAINTIFF

VERSUS

ELIZABETH NABANGALA WEKESA

(Suing as the administrator of the Estate of the late

GEORGE ANZILALLE IMBUCHI).....DEFENDANT

J U D G E M E N T

1. The plaintiff in this case filed the suit on 16/11/2016 vide a plaint dated 14/11/2016. There was no appearance and defence filed for the defendant though she was served with the plaint and summons on 18/11/2016 as stated in the affidavit of service of Jackson Nyongesa Simiyu sworn on 20/12/2016 and filed on the same day. This suit therefore went for formal proof on 12/4/2017 when the plaintiff alone gave evidence. Her evidence went unchallenged.
2. The plaintiff's evidence supported the claim in her plaint to a great extent. She stated that on 27/6/2016 she entered into an agreement with the defendant for a lease of **80 acres** of land at Endebses for the purpose of farming. The defendant and the plaintiff agreed on the consideration of **Kshs.8,000/= per acre** which totaled to **Kshs.640,000/=**. The lease was a renewable lease of **1 year**. The plaintiff intended to farm on the land from **January, 2017 - December, 2017** in the first instance to cover the first period of the lease. The lease, signed by both parties was produced as "**P. Exhibit 1**". It shows it was signed between the plaintiff and the defendant. It was made by Ms. Kidiavai & Co. Advocates. It is attested to by Dennis M. Wanyama, Advocate and it is dated **27/6/2016**.
3. By that lease agreement the defendant appears to hold out that she is the Administrator of the Estate of the late George Anzigalle Imbuchi who owned **LR. No. 5335/10** and that she has the authority to lease out the said land to the plaintiff a portion of 80 acres thereof. By that agreement the defendant undertook to ensure that the plaintiff shall have quiet possession and enjoyment of the said portion of 80 acres. The witnesses to the said agreement are listed as Julius A. Onyango ID No. 9466343 and Edwin Kevolwe Imbuchi ID No.28400876.
4. Evidence of payment of consideration was also produced in the form of a copy of Bankers Cheque No. 011531 for Kshs.500,000/= dated **27/6/2016**. On the same date the cheque was made, the plaintiff said, she also paid Kshs.60,000/= to the defendant in cash. These sums were acknowledged by the defendant and upon the execution of the lease agreement by both parties. The balance of Kshs.80,000/= was to be paid on or before **30/7/2016**.

5. According to the plaintiff, the defendant and her agent one Mr. Onyango took her to view the land at Endeless and the plaintiff liked the land hence the lease agreement. Both parties visited the lawyer's office for the execution of the lease agreement.

6. After the execution of the lease the plaintiff learnt by chance that the land did not belong to the defendant. This discovery came soon after the transaction subject matter of this suit at a time when a friend of the plaintiff was seeking land for farming and the plaintiff referred him to the defendant.

7. When the plaintiff, the defendant and her friend went to view the land, the plaintiff's friend happened to know that the land did not belong to the defendant. He said that "either the owners of the land have sold" or the plaintiff had "been conned". To these statements, the defendant responded by insisting that her husband had always owned the land.

8. It was a day after this incident that the plaintiff reported the matter to the police. The police accompanied the plaintiff to a village headman who confirmed that the land belonged to the Gumo family and that he had never heard of the defendant. The matter at this point turned into a police case and the defendant was arrested and later released on a police bond. The plaintiff averred that she had tried to obtain a refund from the defendant but in vain, hence this suit.

9. In her plaint the plaintiff seeks several orders. The plaintiff has pleaded that the defendant did not have any right or capacity to lease out the land yet she held herself out as one having such capacity. The defendant did not even come to court to oppose the suit.

10. In my view the main issues for determination in this suit are

(a) whether the defendant made fraudulent misrepresentations which led the plaintiff into entering into the said lease agreement and

(b) if the plaintiff suffered damage.

11. It has been pleaded by the plaintiff that the land did not exist and that the defendant did not have authority to lease the land she showed the plaintiff.

12. It is clear that the defendant did not put the plaintiff into possession of the suitland. The matter has progressed into a police case in which the defendant has been released on bond, according to the plaintiff's evidence. The defendant has also failed or neglected to repay the sums paid despite the fact that she had no land to lease to the plaintiff. I therefore find that the defendant made fraudulent misrepresentations to the plaintiff which caused the plaintiff to enter into the lease agreement with the defendant and that the said lease agreement is liable to be declared null and void and the money paid thereunder refunded to the plaintiff as prayed.

13. The fact that the lease agreement is invalid does not bar the plaintiff from obtaining damages for fraudulent misrepresentation. I adopt the reasoning followed by the **Hon. Seron J. in the case of Moses Gakuru Thuo & Another -vs- Kenya National Assurance Co. [2001] eKLR (HCCC No. 142 of 2005 - Mombasa)**. However, the plaintiff in the current case has not sought any special damages and therefore none will be awarded. This court will only assess the general damages payable for fraudulent misrepresentation.

14. In the submissions filed on behalf of the plaintiff the court is urged to award her such general damages as the court in its discretion may deem just. Having considered the pleadings and evidence in this case, I find that the defendant's conduct is that of a fraudster out to defraud the plaintiff of her hard earned money. It is conceivable that billions of shillings have been obtained from trusting persons like the plaintiff by fraudsters nationwide. In most cases this has probably robbed honest citizens money meant for genuine investment that could have benefited them and the country and placed it in the hands of spendthrift criminals. In the current case the plaintiff will not realize the profits she had intended by her investment of KShs.560,000/= in the year 2017. The court considers this a loss of opportunity that cannot

be recovered given the reliance on the seasons for productive rain-fed farming. This court therefore assessed the general damages awardable to the plaintiff at Kshs.350,000/=.

15. In conclusion, judgement is therefore entered against the defendant in the following terms:-

a. A declaration that the lease agreement dated 27/6/2016 between the plaintiff and the defendant is null and void *ab initio*.

b. An order that the defendant do refund to the plaintiff the sum of Kenya Shillings Five Hundred and Sixty Thousand [Kshs.560,000/=] with interest thereon at the rate of 18 per cent per annum from the date of the filing of this suit till the date of such refund in full.

c. Kenya Shillings Three Hundred and Fifty Thousand [Kshs. 350,000/=] being general damages for fraudulent misrepresentation.

d. Interest on general damages at 18 per cent per annum.

e. The costs of this suit shall be borne by the defendant and there shall be interest on such taxed costs at court rates till payment in full.

Signed, dated and delivered at Kitale on this 29th day of May, 2017.

MWANGI NJOROGE

JUDGE

29/05/2017

Before - Mwangi Njoroge Judge

Court Assistant - Isabellah

Mr. Bisonga for the Plaintiff

Judgement read in open Court.

MWANGI NJOROGE

JUDGE

29/05/2017