



**Ngugi v Towett & 3 others (Environment & Land Case  
385 of 2016) [2017] KEELC 2786 (KLR) (17 May 2017) (Ruling)**  
*David Maina Ngugi v William Kibowen Towett & 3 others [2017] eKLR*  
Neutral citation: [2017] KEELC 2786 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 385 OF 2016**

**M SILA, J  
MAY 17, 2017**

**BETWEEN**

**DAVID MAINA NGUGI ..... PLAINTIFF**

**AND**

**WILLIAM KIBOWEN TOWETT ..... 1<sup>ST</sup> DEFENDANT**

**IRENE CHEROP TOWETT ..... 2<sup>ND</sup> DEFENDANT**

**GARAM INVESTMENTS AUCTIONEERS ..... 3<sup>RD</sup> DEFENDANT**

**NAKURU COUNTY LANDS REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

(Application for injunction; plaintiff having had a sale agreement with 1st defendant which he claims was never completed; plaintiff alleging that he never executed transfer forms to the 1st and/or 2nd defendant; plaintiff stating that the title documents were left with an advocate; property transferred to 2nd defendant and charged to the 5th defendant; default occurring and bank moving to sell the property in exercise of its statutory powers of sale; plaintiff seeking to stop the sale on allegation that the suit properties were transferred to 2nd defendant by fraud; bank alleging that the suit is a result of collusion between the plaintiff and the 1st and/or 2nd defendant; prima facie case; proof of fraud beyond mere balance of probabilities; save for the mere allegation that he did not execute the documents no other evidence to support fraud; no explanation as to why plaintiff did not repudiate the agreement with 1st defendant; the advocate who is claimed to have kept the title documents not disclosed and not confronted by the plaintiff as one would expect; no report made to the police of the fraud; no evidence to show that the signatures in the documents of transfer are not the plaintiff's signatures; no prima facie case of fraud demonstrated; possible that there is collusion between plaintiff and the 1st and/or 2nd defendants; application dismissed with costs)



1. This suit was commenced by way of plaint filed on 21 September 2016. The plaintiff has pleaded that he owns the land parcels described as Njoro/Ngata Block 1/6355 and Njoro/Ngata Block 1/6356 (hereinafter "the suit properties"). He has stated that on 23 December 2014, he entered into a sale agreement with the 1st defendant for the sale of these parcels at a consideration of Kshs. 3,500,000/=. According to their agreement, the vendor was to pay a deposit of Kshs. 500,000/= and pay the balance in two phases payable before 23 May 2015. The title documents were to be retained by their mutual advocate until both parties fulfill their obligations under the contract. The plaintiff has averred that the 1st defendant only paid a sum of Kshs. 200,000/= in cash and a cheque of Kshs. 300,000/= which was dishonoured. He then started paying off the dishonoured cheque in instalments. It is averred that he has yet to clear the balance of Kshs. 3,000,000/=. On 19 September 2016, the plaintiff has stated that he came across a newspaper advertisement through which the two properties were offered for sale by way of public auction. A scrutiny of the advertisement revealed to him that the properties were registered in the name of the 2nd defendant. He made inquiries at the office of the Land Registrar, Nakuru, (the 4th defendant) and realized that there were transfer forms and consents which bore his name but were never executed by him. The property was then charged to the 5th defendant ("the bank"). It is his position that the properties were transferred by fraud on the part of the 1st and 2nd defendants. He has also claimed that no spousal consent was ever obtained before the transfer to the 2nd defendant. In the suit the plaintiff has asked for a declaration that he is the owner of the suit properties, a cancellation of the title of the 2nd defendant and a permanent injunction to restrain the defendants from any dealings with the suit land.
2. Together with the suit, the plaintiff filed an application for injunction seeking to stop the intended auction sale, which was a sale by chargee commissioned by the 5th defendant. The 3rd defendant is the auctioneer who was instructed to undertake the sale. In his supporting affidavit, the plaintiff has reiterated more or less what he has pleaded in his plaint. He has annexed copies of the sale agreement that he alleges to have had with the 1st defendant and a copy of the advertisement for the sale that was scheduled for 22 September 2016. I did issue interim orders stopping the sale when the applicant came before me ex-parte in the first instance.
3. Save for the Land Registrar, Nakuru, the 4th defendant, all other parties entered appearance but only the bank filed a replying affidavit, sworn by Wainaina Francis Ngaruiya, its legal head, to oppose the application for injunction. He has deposed that in the month of May 2015, the 2nd defendant approached the bank for financing and offered the suit properties as security. The bank conducted due diligence and confirmed that the titles were good titles and that the 2nd defendant was the registered proprietor. A charge was then registered over the properties to secure the sum of Kshs. 3,990,000/=. The 2nd defendant was to pay off the loan in monthly installments of Kshs. 148,395/= but neglected to do so. A demand letter was sent on 24 August 2015 calling for the arrears which continued to remain unpaid. A statutory notice was then sent on 11 January 2016. Other requisite notices were issued which did not elicit any response. The bank then decided to sell the properties in exercise of its statutory powers of sale culminating in the advertisement for sale. The bank has averred that there is no way it could have known of any claim over the suit properties as none was registered. It is a stranger to the agreement between the plaintiff and 1st defendant. Its view is that this case is an afterthought if not a collusion between the 1st and 2nd defendant. It is contended that the bank is within its rights in selling the charged properties.
4. I have considered the application alongside the submissions of counsel. The application before me is one for injunction. To succeed in such an application, one needs to establish a prima facie case with a probability of success and also show that he stands to suffer irreparable loss if the application is not allowed. If the court is in doubt, it will decide the application on a balance of convenience. These



principles are time tested and were laid down in the case of *Giella vs Cassman Brown* (1973) EA 358. In order to arrive at a conclusion of whether or not a prima facie case has been laid down, it is inevitable that a preliminary assessment of the case be made following what the parties have tabled at this stage of the proceedings. This is deduced from the pleadings and affidavits filed.

In this suit, the plaintiff herein claims that he does not know how his land was transferred to the 2nd defendant who later charged it to the bank. He has however revealed that he did enter into a sale agreement with the 1st defendant but he was never paid by the 1st defendant. It will be noted that he has averred that the title documents were deposited with their mutual advocate pending completion of their contract. Now, this "mutual advocate" where the documents were deposited is not disclosed either in the pleadings or the affidavit in support which to me is rather curious.

5. The plaintiff has further contended that he never executed the transfer documents and that the signatures which appear therein are not his signatures. Save for that mere statement, there is nothing to support that allegation. There is no report of a document examiner or any other material that would supplement this allegation. The case of the plaintiff is based on fraud. Proof of fraud as stated by the East African Court of Appeal in the case of *Patel vs Makanji* (1957) EA 314, may not be as heavy as beyond reasonable doubt but something more than a mere balance of probabilities is required. This holding was upheld by the Kenyan Court of Appeal in the case of *Urmila w/o Mahendra Shah vs Barclays Bank International Ltd & Another* (1976-80) 1 KLR 1168.
6. When a party alleges fraud, one has to table cogent evidence of the same. It is not merely enough to allege it. I am aware that I am not dealing with the case after a hearing but the plaintiff needed to table, even at this stage of the proceedings, some evidence which point at the alleged fraud. I am not persuaded that in the instance of this case, the mere statement that "I did not execute the document" is sufficient to demonstrate, prima facie, a case of fraud against the defendants. I say so, because the plaintiff has not elaborated what he did after allegedly not being paid the balance of the purchase price by the 1st defendant. He has deposed that in their sale agreement, the 1st defendant was to pay a deposit of Kshs. 500,000/= but only paid cash of Kshs. 200,000/= and his cheque for Kshs. 300,000/= was dishonoured. He has deposed that this sum of Kshs. 300,000/= was paid in instalments and that no more funds have been forthcoming from the 1st defendant to pay the balance of Kshs. 3,000,000/=.
7. I observe that this sale agreement was executed on 23 December 2014. The plaintiff states that he saw the advertisement in the newspapers on 19 December 2016. It will be noted that it is two years after the sale agreement. It is not usual for a seller of a property to remain unpaid for two years without cancelling the sale agreement. The agreement itself states that the balance of the purchase price was to be paid on or before 23 May 2015. The plaintiff has claimed that he pursued the balance but the 1st defendant kept house. That is in fact the more reason to repudiate the agreement. Any prudent seller would have seen for himself that the purchaser is never going to make good the balance and proceed to cancel the agreement.
8. I already mentioned that the plaintiff stated that the title documents were left at the offices of an undisclosed advocate. The plaintiff has not given any information on whether or not he went to confront this advocate, whoever it may be, to inquire on how his titles were transferred to the 2nd defendant. Again, you would expect the prudent ordinary man to do so, if indeed the transfer was truly done fraudulently. Fraud is a serious thing and you would even expect a report to be made to the police of such fraudulent transfer. None has happened in this case.
9. I have seen the documents of transfer annexed by the plaintiff and which the plaintiff denies executing. I see that the documents bear the name of an advocate who attested to the signatures. If indeed the plaintiff did not sign the documents, you would expect him to have attempted to get answers from the



advocate who attested the documents. No attempt has been shown in this case, and no explanation given, as to why the plaintiff never thought of seeking out the said advocate for him to give a narrative of how come his signature appears in the documents.

10. In addition, I have seen the consent to transfer the suit properties to the 2nd defendant. The plaintiff has not tabled any evidence that he was not present at the Land Control Board meeting or that the consent issued is forged.
11. It is not hard to see why the bank is of the view that this suit may be a result of collusion between the plaintiff and the 1st and/or 2nd defendant.
12. From the foregoing, it is apparent that I am not convinced that the plaintiff has established a prima facie case of fraud against the defendants. I am not in doubt and therefore need not consider the balance of convenience. I therefore proceed to dismiss this application with costs to the 5th defendant. For the avoidance of doubt, the interim orders stopping the auction sale are hereby lifted. In other words, the bank is at liberty to proceed with the intended sale by chargee if it so wishes.
13. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAKURU THIS 17<sup>TH</sup> DAY OF MAY 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of:**

