



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 1974 OF 2000

SAMUEL MBURU KAGO..... PLAINTIFF

VERSUS

JULIUS MAINA MUCHINA.....1ST DEFENDANT

MARY NYOKABI GAKURU.....2ND DEFENDANT

THE COUNTY GOVERNMENT OF NAIROBI.....3RD DEFENDANT

JUDGMENT

This suit was brought by Jesse Muchina Mbugua (hereinafter referred to as “the deceased”) on 28th November 2000. The deceased died on 19th May, 2003 and was substituted in this suit by his legal representative Samuel Mburu Kago (hereinafter referred to as “the Plaintiff”) on 17th May 2004. The original plaint was amended on 20th November, 2008. In his amended plaint dated 20th November, 2008, the Plaintiff averred that on or about 17th November, 1993 the 3rd Defendant leased to the deceased all that parcel of land known as Plot No. B- 115 Sector 2 Umoja Innercore measuring 12 by 21 meters (hereinafter referred to as “the suit property”) on terms and conditions which were contained in the instrument of lease. The Plaintiff averred that the deceased complied with all the terms of the said lease by paying the consideration and subsequently rates and land rent to the 3rd Defendant as and when the same fell due.

The Plaintiff averred that on or about 12th September, 1997 the 1st Defendant without the consent or knowledge of the deceased purported to sell the suit property to the 2nd Defendant. The Plaintiff averred that following the purported sale, the 1st Defendant purported to assign his interest in the agreement for sale which he purported to have had with the 3rd Defendant in respect of the suit property to the 2nd Defendant. The Plaintiff averred that the purported sale of the suit property by the 1st Defendant to the 2nd Defendant and subsequent assignment of the purported agreement which the 1st Defendant is alleged to have had with the 3rd Defendant in respect of the suit property to the 2nd Defendant was fraudulent null and void. The Plaintiff averred that the 1st Defendant had no proprietary interest in the suit property which he could convey to the 2nd Defendant. The Plaintiff averred further that the 1st Defendant used a false identification to sell the suit property to the 2nd Defendant.

The Plaintiff averred that on or about 14th April, 2000 the 3rd Defendant illegally approved a building plan which had been presented to it by the 2nd Defendant for the development the 2nd Defendant wanted to carry out on the suit property after which approval the 2nd Defendant unlawfully entered the suit

property and committed acts of waste by erecting and/or constructing thereon an incomplete three storey permanent building.

The Plaintiff averred that on 6th November 2001, the 3rd Defendant unlawfully procured the registration of the 2nd Defendant as the owner of the suit property and changed the plot reference number for the suit property to Nairobi/Block 83/14/143 (also referred to as “the suit property”). The Plaintiff sought judgment against the Defendants jointly and severally for:

- (i) A declaration that the sale agreement dated 12th September, 1997 between the 1st and 2nd Defendant and the subsequent assignment dated 19th July, 2000 between the Defendants are null and void.
- (ii) A declaration that the certificate of lease issued on 6th November, 2001 to the 2nd Defendant in respect of the suit property is null and void.
- (iii) In the alternative, compensation for the value of the suit property and general damages for trespass.
- (iv) An order compelling the 3rd Defendant to revoke the lease it granted to the 2nd Defendant and to re-issue the same to the Plaintiff.

The 1st Defendant did not enter appearance. The 2nd Defendant filed amended statement of defence on 4th December 2008 in which she denied the Plaintiff’s claim in its entirety. The 2nd Defendant averred that she was the lawful owner of the suit property. The 2nd Defendant averred that she purchased the suit property from the 1st Defendant who had owned the same from the year 1978. The 2nd Defendant averred that if at all there was a lease agreement between the deceased and the 3rd Defendant, the same was a nullity for want of title. The 2nd Defendant denied that she acquired the suit property fraudulently. The 2nd Defendant averred that she acquired the suit property lawfully after following the due process and denied that she was a trespasser thereon. The 2nd Defendant denied that the Plaintiff was entitled to any compensation for the suit property.

The 3rd Defendant filed a re-amended defence on 16th February, 2016 in which it also denied the Plaintiff’s claim in its entirety. The 3rd Defendant averred that the 2nd Defendant was the lawful owner of the suit property having acquired the same from the 1st Defendant. The 3rd Defendant denied that the suit property was transferred and registered in the name of the 2nd Defendant fraudulently or through misrepresentation. The 3rd Defendant averred that the Plaintiff is not entitled to any compensation from the 3rd Defendant

The hearing of the suit commenced before Okwengu J. (as she then was) on 24th November, 2010. Okwengu J. heard the Plaintiffs case in full after which the parties asked for adjournment. The matter was thereafter listed for further hearing on several occasions but for one reason or the other the same did not take off. The matter came up before me on 30th June 2016 for defence hearing. On that day, Mr. Oyugi appeared for the Plaintiff while Mr. Njuguna appeared for the 3rd Defendant. There was no appearance for the 2nd Defendant. Mr. Oyugi informed the court that the Plaintiff had closed his case and that the matter was coming up for the hearing of the defence case. Mr. Njuguna on his part told the court that the 3rd Defendant wished to close its case without calling any evidence. Since the Plaintiff’s case was closed and the 3rd Defendant did not wish to tender any evidence, the court after satisfying itself that the 2nd Defendant was served with a hearing notice marked the 2nd and 3rd Defendants’ cases as closed and directed the parties to make closing submissions in writing. The Plaintiff and the 3rd Defendant filed their written submissions as directed by the court. The 2nd Defendant did not file submissions. The parties had agreed on issues for determination by the court and had filed a statement of

agreed issues on 21st June, 2007. The issues which were agreed upon by the parties were as follows:-

(i) Whether the allocation of the suit property by the 3rd Defendant to the deceased in 1993 was valid?

(ii) Whether the 2nd Defendant acquired a valid title to the suit property from the 1st Defendant?

(iii) Whether the deceased made the necessary payments to the 3rd Defendant for the suit property and whether such payments were valid?

(iv) Whether the lease agreement between the deceased and the 3rd Defendant was valid?

Whether the approval of the 2nd Defendants building plans was lawful?

(vi) Whether the construction which was undertaken by the 2nd Defendant on the suit property was lawful?

(vii) Whether the Plaintiff is entitled to the reliefs sought?

I have considered the pleadings which were filed herein by the parties and the evidence on record. As I have mentioned earlier in this judgment, the Defendants did not tender any evidence before this court to controvert the evidence that was given by the Plaintiff in support of his case. The Plaintiff produced in evidence an agreement for lease dated 17th November 1993 between the deceased and the 3rd Defendant. Under that agreement, the 3rd Defendant agreed to lease to the deceased the suit property at a consideration of Kshs.29,920/= on terms and conditions contained in the said agreement. The agreement was executed by the 3rd Defendant and the deceased. In Clause (b) of the recital part of the said agreement, the 3rd Defendant acknowledged receipt of the sum of Ksh. 29,920/= which was made by the deceased as consideration for the lease. The Plaintiff led evidence that apart from paying the said consideration, the deceased also paid land rent and rates to the 3rd Defendant. The Plaintiff produced in evidence a bundle of receipts in proof of these payments. On the material before me, I am satisfied that the deceased acquired the suit property lawfully. The 3rd Defendant who had denied entering into an agreement for lease with the deceased did not tender any evidence to challenge the agreement for lease dated 17th November 1993 which was produced by the Plaintiff in evidence as Exh. 3. The 3rd Defendant did not produce any evidence to show that the said agreement was not signed by the Mayor and Town Clerk of the 3rd Defendant or that the same was not sealed by the seal of the 3rd Defendant. The 2nd Defendant had also contended that the 1st Defendant from whom she purportedly purchased the suit property had acquired the same from the 3rd Defendant in the year 1978 and as such the property was not available for leasing to the deceased in the year 1993. Neither the 2nd Defendant nor the 3rd Defendant tendered any evidence to show that the 1st Defendant had at any one time owned the suit property. No evidence was placed before the court to show that the 1st Defendant and the 3rd Defendant entered into an agreement for lease or a lease agreement in the year 1978 or at all in respect of the suit property. There is no evidence that the 1st Defendant owned the suit property or that he had any interest therein. It follows therefore that the 1st defendant had no interest in the property which he could pass to the 2nd Defendant. The 2nd Defendant did not therefore acquire a valid title to the suit property from the 1st Defendant. In the absence of any evidence as to how the suit property which the 3rd Defendant had agreed to lease to the deceased moved from the deceased to the 1st Defendant and subsequently to the 2nd Defendant, the allegation by the Plaintiff that the whole transaction was fraudulent is not far-fetched. It is telling that the 1st Defendant who purportedly sold the suit property to the 2nd Defendant did not defend the suit. PW 1 told the court that the identity card number [...] given by the 1st Defendant in the purported agreement which he entered into with the 2nd Defendant did not belong to him but to one, Stella Ndunge Mutua who is the holder of identity card number [...]. If the transaction between the 1st and 2nd Defendant

was genuine, I can see no reason why the 1st Defendant would use falsified identification in the transaction. Since 2nd Defendant did not have a valid title over the suit property, it was wrong for the 3rd Defendant to approve plans for the development which she wanted to commence on the suit property. The 2nd Defendant's entry onto the suit property was also unlawful because the property belonged to the deceased and she had no authority from the deceased to enter the premises or to carry out any construction hereon. No evidence was led as to the value of the suit property. In any event, it was not an issue in dispute between the parties in these proceedings. It is not necessary for me in the circumstances to pronounce myself on the same.

On the last issue, I am satisfied that the Plaintiff has proved his case against the Defendants on a balance of probability. I therefore enter judgment for the plaintiff against the Defendants jointly and severally in terms of prayers (aA), and (bA) of the amended plaint dated 20th November 2008. The Plaintiff shall have the costs of the suit.

Delivered and Dated at Nairobi this 27th day of June, 2017

S. OKONG'O

JUDGE

In the presence of

Mr. Manyara for the Plaintiff

N/A for the 1st Defendant

Ms. Gathara for the 2nd Defendant

N/A for the 3rd Defendant

Kajuju Court Assistant