



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 410 OF 2010

DINESH JAMNADAS THAKKAR.....1ST PLAINTIFF

PREMILA DINESH THAKKAR.....2ND PLAINTIFF

=VERSUS=

DAMARIS NYAMBURA GAKUYO.....1ST DEFENDANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT

J U D G E M E N T

1. Up to 20/2/2008, the plaintiffs were the registered proprietors of the leasehold interest in **Land Title No. Nairobi/Block 82/1923**. On 20/2/2008, through a transfer of lease instrument dated 22/1/2008, the defendant, Damaris Nyambura Gakuya, procured the transfer of the suit property into her name. Subsequently, in 2009, the plaintiffs learnt that the defendant had procured title in her name and was in the process of selling the suit property to two different purchasers simultaneously. The plaintiffs contend that transfer of the suit property into the name of the 1st defendant was a fraud. It is the discovery of the transfer which triggered the present suit. Through a plaint dated 3/9/2010 and amended on 28/5/2017 the plaintiffs seek a cancellation of the certificate of lease issued to the 1st defendant, among other prayers.

2. The plaintiffs contend that they purchased the suit property in 1991 and hold both the original lease and the original certificate of lease. In late 2009, they were approached by one Benjamin Maingi Karimi seeking their confirmation that they had sold the suit property to the 1st defendant pursuant to an agreement dated January 2008. Shocked at the revelation, they conducted a search at the lands registry. The search revealed that indeed a transfer had been procured into the name of the 1st defendant. The plaintiffs contend that the 1st defendant is a stranger to them and they have never sold the suit property to her or to any other person. They further contend that the sale agreement, transfer, consent and all documents used to procure registration of the suit property into the 1st defendant's name are a fraud.

3. Pursuant to orders issued by the court, the 1st defendant was served with summons to enter appearance through notices in the Daily Nation and Taifa Leo Newspapers. The defendant neither entered appearance nor filed defence. The commissioner of lands too was served but he neither entered appearance nor filed defence. The suit proceeded for hearing as an undefended case.

4. **PW1- Dinesh Jamnadas Thakkar**, gave sworn testimony. He adopted his witness statement filed on 16/6/2016 as part of his evidence in chief. He testified that he is a joint proprietor of the suit property. He stated that in 2009 he was approached by one Benjamin M. Karimi who was purchasing the suit property from the 1st defendant. He immediately proceeded to the lands registry and obtained an official search which confirmed that indeed the suit property had been transferred into the name of the 1st defendant. In the course of investigations to establish how the suit property came to be registered in the

name of the 1st defendant, he established that the 1st defendant was facing a criminal charge of obtaining money through false pretences and had absconded after being released on bond. He obtained from the criminal investigation department copies of documents which the 1st defendant had used to procure the transfer into her name. He testified that the agreement for sale dated 15/1/2008 was fake because the signature on it was not appended by him. The photos on the transfer were not those of the plaintiffs. The signatures on the transfer were not those of the plaintiffs. The identity cards and the Kenya Revenue Authority PINs used were not those of the plaintiffs. In summary all the documents used to procure the transfer were fake. He produced the original lease dated 11/3/1991 and issued to the original lessee, Continental Developers Limited, original certificate of lease in the joint names of the plaintiffs dated 2/5/1991, certificate of official search dated 18/8/2010, among other documents. The original documents were examined by the court and released to the witness at the conclusion of his testimony. The court retained copies of the documents contained in the bundle.

5. The Registered Land Act (now repealed) was the substantive and land registration legal framework applicable to the suit property at the time the 1st defendant procured transfer into her name. Sections 38(1), 108(1) and 109(1) of the repealed Registered Land Act contained the following legal framework on disposition of interest in land.

“38(1) No. land, lease, or charge shall be capable of being disposed of except in accordance with this Act and every attempt to dispose of the land, lease or charge otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or effect any estate, right or interest in the land, lease or charge”

“108 (1) every disposition of land, a lease or a charge shall be effected by an instrument in the prescribed form or in such other form as the registrar may in any particular case approve and every person shall use a printed form issued by the registrar unless the registrar otherwise permits”

109 (1) every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the instrument”.

6. The above legal framework has been replicated with modifications in Sections 42, 43, 44 and 45 of the Land Registration Act, 2012. The legal ramifications of the framework in the repealed Registered Land Act was that a transfer executed by a person other than the registered proprietor was ineffectual, did not create or effect a valid interest in favour of the transferee and did not extinguish, transfer or vary the interest of the registered proprietor. In a nutshell, a transfer executed by a person other than the registered proprietor was a nullity and remains a nullity. I would, in addition, echo the Court of Appeal pronouncement in **Arthi Highway Developers Limited Vs West End Butchery Limited & 6 Others (2015) eKLR** to the effect that a title obtained fraudulently is an irredeemable fake. It does not confer any legal interest capable of protection under Section 26(1) of the Land Registration Act 2012.

7. Both the plaintiffs' case and evidence remain unchallenged. Evidence has been tendered to the effect that the plaintiffs were registered as proprietors of the suit property in May 1991. There is also uncontroverted evidence that the 1st defendant fraudulently procured a transfer of the suit property into her name on 20/2/2008 using fake transfer documents. That being the position, the transfer to the 1st defendant was and remains a nullity and ought to be cancelled forthwith. I am therefore satisfied that the plaintiffs have proved their case against the 1st defendant on a balance of probabilities. They deserve a cancellation of both the title issued to the plaintiff and the entry made in the register.

8. The plaintiffs named the commissioner of lands as the initial 2nd defendant. The plaint was amended upon an oral application to bring on board the National Land Commission in the place of the commissioner of lands. My view is that, in matters relating to titles and land registers, the proper party to be enjoined is the Chief Land Registrar. The statutory officer who ought to have been substituted in place of the commissioner of lands is the Chief Land Registrar. The non-inclusion of the Chief Land Registrar is, however, not fatal to the plaintiffs' suit.

9. In light of the foregoing, I hereby enter judgment in favour of the plaintiffs and against the 1st defendant in the following terms:-

(a) A declaratory order is hereby made to effect that the property known as Nairobi/Block 82/1923 rightfully belongs to the plaintiffs, Denish Jamnadas Thakkar and Premila Dinesh Thakkar.

(b) The entry made on 20/2/2008 in the land register of Title No. Nairobi/Block 82/1923 transferring the said property into the name of Damaris Nyambura Gakuya be and is hereby revoked and the Chief Land Registrar is directed to cause the same to be cancelled forthwith.

(c) The Certificate of Lease dated 20/2/2008 issued to Damaris Nyambura Gakuya pursuant to the entry made in the Land Register of Land Title No. Nairobi/Block 82/1923 registering Damaris Nyambura Gakuya as proprietor of the said property is hereby cancelled and the Chief Land Registrar is directed to make appropriate notes on the Land Register.

(d) The Plaintiffs shall have costs of this suit as against the 1st defendant.

Dated, signed and delivered at Nairobi on this 4th day of August 2017.

B M EBOSO

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court Clerk