



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
E.L.C NO. 1472 OF 2014

PETER MUIRURI KAMAU

PLAINTIFF

VS

MARY MWIHAKI KAMAU

DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit on the 21st November 2014 seeking Judgement against the Defendant for: -
 - (a) A declaration that the defendant's actions are illegal and fraudulent and that the resultant title deed issued in LR. NO. MUGUGA/MUGUGA/2717 in favour of the Plaintiff and the defendant jointly was acquired illegally, is rooted in fraud and is null and void.
 - (b) A declaration that the Plaintiff is the sole bonafide owner of the land known as LR. NO. MUGUGA/MUGUGA/2717 and that the defendant has no legitimate proprietary right over the suit property.
 - (c) An order directing the Chief Land Registrar to cancel the title deed of L.R MUGUGA/MUGUGA/2717 issued jointly to the Plaintiff and the Defendant and in its stead the Plaintiff be registered as the Sole owner and a title deed to him do issue.
 - (d) A permanent injunction restraining the Defendant whether by herself, servants, agents and/or anyone acting under her from dealing, constructing, alienating, trespassing, interfering, charging and/or any other way dealing with LR. NO. MUGUGA/MUGUGA/2717.
 - (e) An order evicting the Defendant from LR. MUGUGA/MUGUGA/2717.
 - (f) Costs of the suit.
 - (g) Any other relief that the honourable Court may deem just and fit to grant.
2. The Plaintiff states that he is aged 96 years old and at all material times prior to 17th April 2013 was the sole registered owner of LR No. MUGUNGA/MUGUNGA/2717 (suit land).
3. That the Defendant unlawfully and in breach of trust obtained the title of the suit land and transferred it without his consent to the joint names of himself and the Defendant. He has listed particulars of fraud and breach of trust and undue influence on the part of the Defendant in the Plaintiff.
4. The Defendant has denied the Plaintiffs claims in her defence filed on 18th June 2015 and specifically

the breach of trust and fraud and has urged the Plaintiff to strictly prove his claims. The Defendant has filed a Counterclaim wherein she claims that she is a purchaser for value and is entitled to specific performance of the contract which she claims to have entered into with the Plaintiff legally.

The Plaintiffs Case

5. The Plaintiff claims to be the registered proprietor of the land prior to 17th April 2013. He avers that he is a widower with no children and ailing. That he employed the Defendant early 2013 to perform house chores at a daily wage of 300/=. That the Defendant while working in his house had unrestricted access to his house. That he kept the title of the suit land in a box in his house and the keys of the metal box were at all times with those of house. That there are times that he would leave the keys with the Defendant.

6. That the Defendant took to reporting to work late and at the request of the defendant allocated her a space to build a temporary house around June 2013 to facilitate early attendance to her duties. That unknown to him this was part of the scheme to defraud him of his land.

7. That later he discovered that the Defendant had without his knowledge and consent transferred his land to himself and the Defendant. That he carried out a search at the lands office which disclosed that the title was indeed in the joint names of the Plaintiff' and Defendant, it having been transferred in April 2013. He avers that he is 107 years, and he does not know how to read and write. That he did not enter into any agreement of sale with the Defendant. He did not apply for Land Control Board; he did not attend to the lawyer's office to sign agreement nor to give instructions on the preparation of the sale agreement, transfer preparation or the sale of his land; that he did not receive any monies in form of purchase price or otherwise from the Defendant in respect to his land;

8. That when he confronted the Defendant, the Defendant admitted that the title is now in the joint names of the Plaintiff and the Defendant. That she too was now an equal and joint owner of his land.

9. That the Defendant took advantage of his old age, ill health and with the access to his house believed that the Defendant must have removed the title and effected the transfer of the land to their names jointly against his will and consent. That he reported the forgery to the CID offices in Kiambu.

10. That part of the terms of the Agreement stated to be paid in kind by the Defendant caring for the Plaintiff for the rest of his life through the provision of food, Clothing, footwear, medical needs and generally to ensure he lives a healthy and comfortable life. He contends that he is able to take care of himself through his savings and that he has been paying the Defendant a daily wage of Kshs. 300/=.

11. In particular he denies signing the Agreement of sale dated 10th April, 2013 (in any case he contends' that he does not know how to read or write, neither sign documents; that he only thumb prints), did not apply for the Land Control Board Consent that is indicated nor thumbprint it; did not obtain the Land Control Board consent dated 4th April 2013; did not thumbprint the acknowledgment of payment of cash in the sum of Kshs.50,000/= dated 11th April 2013; did not attend to the lawyers office as alleged on the 10th and 11th April 2013; did not receive any monies in the lawyers office in the sum of Kshs 50,000/- did not thumb print the undated transfer purporting to transfer his undivided share of his land to the Defendant; He neither provided his documents to wit the identification number (ID) card PIN and Photographs to the Defendant.

12. That the only contention he can make is the Defendant forged the thumbprints on the documents. That the Defendant must have accessed his personal documents and used them without his knowledge and consent since she had access to his house and the box where he kept the documents including the title.

13. The Plaintiff called one witness; Winnie Wambui Mwangi to testify during the hearing. She stated that she is married to the Plaintiffs nephew. That they lived with the Plaintiff on the same land until the period between January – August 2013 when she travelled for business engagements elsewhere. On her return around the month of August 2013 found out that the Defendant and her family were residing on the

land. On inquiry, the Defendant admitted that he had bought the land from the Plaintiff. But on inquiring from the Plaintiff, the Plaintiff denied ever selling the land to her. The Plaintiff stated that the Mabati shelter she lived in was only temporary to enable her report to work punctually. That the Defendant produced the copies of the alleged agreement for sale which detailed the terms. That she advised the Plaintiff to carry out a search on the land at the registry where they discovered that indeed the land had been transferred to the Plaintiff and defendant to hold jointly. That in overall, she did not witness the transaction between the plaintiff and the defendant. She denied that she was interested in the land.

14. That on the strength of the denial by the Plaintiff, she advised the Plaintiff to report the matter to the police at Kikuyu. She obtained copies of documents used in the transfer except the actual transfer form which was said to be missing.

15. She further contended that the Plaintiff was 107 years and did not know how to read and write and was doubtful if indeed he signed the Agreement for sale. That she did not believe that the Plaintiff had sold the land to the Defendant. That even if he did sell the land, which is denied, the value of the land in the neighborhood was higher than Kshs 100,000/- purportedly paid to the plaintiff. She however did not produce any valuation report to support her averments.

The Defendants case

16. The Defendant called her first witness Stephen Gitau Advocate who testified that the Plaintiff and Defendant appeared before him on 10th April 2013 and on their request prepared a sale Agreement. That the parties signed the agreement in his presence on identification, after which he witnessed their signatures. He admitted that he did not sign a certificate to certify that he explained to the Plaintiff the meaning of the agreement. That he noted the purchase price of the land was Kshs 100,000/-.

17. Further that he prepared a transfer which the defendant signed while the Plaintiff did thumbprint. That he neither prepared the certificate of thumbprint nor was he concerned why he had signed the agreement for sale but thumbprinted the transfer form.

18. That he witnessed the payment in cash of Kshs 50,000/- to the Plaintiff and prepared a certificate of acknowledgement by the Plaintiff. He confirmed that the Plaintiff and Defendant had by this time obtained the Land Control Board consent which stated the nature of the transaction as transfer of undivided share. That he did not attend to the registration of the transfer and left it to the parties. He admitted that he is holding the original title in his custody which bears the joint names of the Plaintiff and Defendant on the instruction of the parties. He stated that he charged legal fees in the sum of Kshs 5000/- though he did not produce any receipt for the same on cross examination.

19. The Defendant finally gave evidence and admitted that she was employed by the Plaintiff in February 2013. That her duties were house chores and at that time she lived in the neighbourhood and would report to the Plaintiffs house for duty. That she was paid a daily wage of Kshs 200/= by the Plaintiff.

20. That on the 4th April 2013 she and the Plaintiff agreed orally to sell the land to her. The same day they proceeded to Land Control Board offices where they filled the forms and obtained the Land Control Board consent. That on 10th April 2013 they proceeded to the office of Stephen Gitau Advocate and instructed the advocate to prepare an agreement for sale and indeed signed the same on the same day. That on the same day she paid a deposit of Kshs 50,000/= in accordance with the agreement which amount was acknowledged vide an acknowledgement of payment dated the 10th April 2013. That the transfer was registered on 17th April 2013 in the land registry at Kikuyu.

21. That pursuant to the completion of the transaction she started development on her portion of the land pending the subdivision of the property. She contended that she accompanied the plaintiff to the Land Control Board office lawyer's office and the lands office because there was no family member to do so. She stated that the Land Control Board form was filled by the Plaintiff and according to her and in her estimation of the plaintiff, he was able to read and write. That it was the Plaintiff's choice to either sign

documents or thumb print the documents.

22. That she paid Kshs 100,000/- using funds sourced from the proceeds of sale of a family property. That she paid Kshs 50,000/- on the 10th April 2013 and another Kshs 50,000/- on the 11th April 2013. That the agreement provided for addition form of payment which is termed the “2nd aspect” which entailed caring for the plaintiff and meeting his expenses relating to clothing, food and medicare for the rest of his life. That though the agreement provided for subdivision, the same has not been done to date. She confirmed that she stopped working for the Plaintiff in 2015. That though she was summoned by the police to explain the transaction, she has never been charged with any forgery or fraud in respect of the same.

23. She urged the Court to find that the transaction was lawful and that she is a bonafide purchaser who purchased the suit property from the Plaintiff without any knowledge of fraud and for consideration hence she is entitled to possession of 0.04 Ha of the land. That the land should be subdivided and a title for the portion transferred to her.

24. She implored the Court to allow her prayers in the counterclaim and order the plaintiff to transfer her 0.04 ha to her and in default the Land Registrar be directed to remove the caution burdening the land, carry out subdivisions and transfer the portion in her favour.

Issues and analysis

25. The issues are summarized as follows;-

Whether the Plaintiff and the defendant entered into a valid agreement for sale of LR No MUGUGA/MUGUGA/2717.

Whether the Defendant was a Bonafide purchaser.

Whether the Defendant is entitled to the prayers in the counterclaim.

26. Did the parties entered into a valid agreement for sale of LR No MUGUGA/MUGUGA/2717. It is common ground that the Plaintiff was the registered owner of the suit property upto and until the 17th April 2013. It is also admitted as evidenced in Court that the Plaintiff is aged. He stated his age at approximately 107 years. It is not in dispute that the Plaintiff is a widower, old and sickly and lived alone as he had no children. It is not in contention that the Defendant was employed by the Plaintiff to do house duties such as cooking, cleaning etc.

27. It is trite law that he who alleges must prove. The Plaintiff has pleaded fraud, breach of trust and undue influence and the responsibility to so prove his pleas in evidence rests squarely on his shoulders. The plaintiff has challenged the defendants’ registration as joint owner of the suit property and assets that such registration was procured by fraud, breach of trust and undue influence on the part of the defendant. On her part, the defendant has put up the defense of Bonafide purchaser for value without any notice. The burden of proof and establishment of fraud is therefore on the plaintiff.

28. Black Law Dictionary, 10th Edition defines fraud as consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.

29. In the case of **Okere Vs Kiiyukia (2007) 1 EA 304 and Katende Vs Haridas & Company Limited (2008) 2 EA** fraud cases must be specifically pleaded and proved. The standard of proof is higher than on

balance of probability though not as high as proof beyond reasonable doubt.

30. The Plaintiff has denied transferring his land to the Defendant at all. He has gone further to deny ever obtaining Land Control Board consent, signing the agreement of sale, transfer, receiving any consideration in form of 100,000/=. He denies the terms of the agreement dated 10th April 2014 and calls it a forgery.

31. He has explained that the Defendant had unlimited access to his house and the box in which he kept the keys and that he used to leave all the keys to the house with the Defendant. He has explained that it is his belief that the Defendant took advantage of his advanced age and removed the title, personal documents and used them to effect the transfer of his land to herself. The Plaintiff gave evidence rather convincingly that he does not know how to read or write which evidence was corroborated by PW 2. It is important to note that the agreement for sale was signed and the other documents were thumb printed.

32. It is the Defendant's evidence that with the oral agreement in place, she and the Plaintiff went to the Land Control Board office and obtained the Land Control Board Consent the same day. The Plaintiff denies this. She claims that the Plaintiff filled the forms at the Land Control Board office. Having concluded that the Plaintiff could not read or write it is unbelievable that he could fill the forms. No evidence has been tendered to signify that indeed a meeting of the land control board was held. A land control board consent is not an item that you can pick from a shop shelf. There is no evidence that the application was paid for. A close scrutiny of the form shows that it is undated; does not state which Land Control Board the consent was being applied for, the name of the Land Control Board office is missing. The nature of transaction is transfer of undivided share in the land and on the signature part there are two thumbprints. There is no evidence that the thumbprints belong to the Plaintiff as there is no certification to confirm the same.

33. There are glaring omissions on the letter of consent itself which I shall point them out. It does not refer to any application meaning there was no application made. It has no consideration declared. From a cursory look, it appears as though the handwriting is similar both on the application and the letter of consent. In that regard, its authenticity is put into question. No evidence was led to show that the requisite fees was paid. The Land Control Board consent was obtained the same day of the oral agreement. No extra ordinary circumstances have been explained for the expediency.

34. It is not lost on me that Section 6 of the Land Control Act Cap 302 provides that the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act. Having found that the validity of the Land control board consent presented in Court is in doubt, the transaction is rendered void.

35. Section 3 of the Law of Contract Cap 23 states as follows;

“The No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) The contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

It is the evidence of the defendant the transaction was initiated by an oral agreement with the plaintiff on the 4th April 2013 and based on the same they sought and obtained a land control board consent the same day. That the oral agreement was later reduced into writing 6 days later before a lawyer. I shall analyse

the agreement later.

36. The agreement provided for additional consideration in kind that is to say that the defendant would care for the plaintiff for his lifetime by feeding, clothing, provision of medical care at the expense of the Defendant. The actual figure was not quantified for these provisions which would obviously be substantive given the health and age of the plaintiff. The question that begs an answer is how this term of the contract was going to be performed? How is the lifetime of the plaintiff measured or ascertained? The relationship between the plaintiff and the defendant was that of employer – employee. What happens if the employment was determined, (as it finally was)? Would she be available to continue providing the care? If the termination happens, how did the parties intend that the balance of the consideration be treated? Suppose the defendant dies before the plaintiff? The point is this type of consideration for the purchase of the land does not show with certainty how it was going to be performed. It is difficult to say that the parties had a meeting of minds. The plaintiff has denied that he needed this type of care; he asserts that he was and is able to take care of himself.

37. The defendant states that she paid Kshs 100,000/- from proceeds of sale proceeds of a family land that was sold. That on receipt, she banked the money in her account at Equity bank. However, she does not give evidence on the details of the family land; no details of her bank details or evidence of any banking before or after sale of the land or evidence of withdrawal of Kshs 50,000/-. There is also no evidence that the cash was paid at the advocates office either. This places the payment of consideration, if any, in doubt.

38. The plaintiff has denied signing or thumbprinting the sale agreement, Land control board consent form, transfer etc. The defendant and the joint advocate has stated that the plaintiff signed in their presence. At this point, the burden of proof shifts to the defendant who seeks to rely on the documents being denied by the plaintiff to prove that indeed he signed them and that the transaction is lawful. Nothing would have resolved this matter easily that calling a document examiner to verify the signatures of the plaintiff if indeed he signed the same. In the case of **Kimotho Vs Kenya Commercial Bank (2003) 1 EA 108** the Court held;-

“ failure by a party to call as a witness any person whom he might reasonably be expected to call if that persons evidence be favourable to him, may prompt a Court to infer that the persons evidence would not have helped the party’s case”. This is the natural and reasonable inference that can be made in this circumstance.

39. It was the duty of the defendant to call a document examiner to prove the signatures. She did not. She however sought to rely on the documents to prove her claim of ownership. Other than the advocate stating that the dumb printing was done in his office, there is no evidence that the signature and thumbprint belongs to the plaintiff. The advocate’s evidence saying he did not prepare a certificate certifying that the plaintiff signed the document; that the document was signed by him in his presence, more so that the plaintiff is old and he confirmed that he spoke to the plaintiff in Kikuyu language and the agreement for sale, acknowledgement of payment and the transfer are in English. This scenario places in doubt whether the plaintiff signed the documents and when.

40. I have noted that the Land control board consent is for undivided share while the interest being purchased in the agreement of sale is 0.04 ha, a portion of the land which required subdivision to be carried out to delineate and register the portion in the name of the defendant. At the time of the agreement survey of the land had not been done. The title however indicates that the land measuring 0.089 ha is owned by the defendant and the plaintiff jointly. This differs from what is stated in the agreement. Barring any other explanations, the identification of the land being sold is not certain; the interest being sold in the land control board application, the agreement of sale and the transfer and finally represented in the title are all at variance. Given that the plaintiff has denied the transaction, it is for the defendant to show that she bought the whole land and not the ½ share comprised in the agreement of sale. No evidence was led to clarify the uncertainty surrounding this which in my view goes to the root of the title/interest being acquired as well as whether there was a meeting of minds of the parties.

41. The transfer is even telling in its form and substance; The defendant did produce a copy of the transfer which has the following shortcomings; the consideration is missing; it is undated; advocates certificate certifying the identity of both transferor and transferee is undated; The place for registration is blank undated and carries no endorsement/signature of the Land Registrar to signify registration. Clearly, this is not a valid transfer. It is not capable of conveying any interest in land. In conclusion, there was no agreement validly entered nor any transfer registered capable of transferring an undivided share or any interest whatsoever from the plaintiff to the defendant.

42. The Agreement for sale of 0.04 Ha of the suit property and not undivided share as stated in the Land Control Board. This shows that there was no meeting of the minds thus no agreement by the parties as to the actual interest being conveyed. The agreement provided that the purchase price is Kshs 100,000/-to be paid immediately in the sum of Kshs 50,000/- and the balance of Kshs 50,000/- to be paid upon demarcation of the land. It is the Defendants evidence that the first deposit was paid on 10th April 2013 when the Agreement was signed and the balance was paid the following day 11th April 2013. Why would the Defendant pay the Plaintiff before a condition precedent which is subdivision of other land is complied with? It was in her interest that the land is subdivided so that the portion she purchased, if she did, would be transferred to her there is no amendment of the agreement for sale to capture such change of term. The Defendant also stated that she funded the purchase price from family funds but was unable to give any evidence regarding the source or any documentation to support the averment. She has testified that the Plaintiff on receipt of the second instalment deposited the cash in his account at Family bank. No evidence was led to demonstrate that any funds were indeed deposited into the plaintiffs account if any at Family Bank. Nothing is far from the facts; my conclusion is that no consideration passed to the plaintiff and the evidence of the Defendant together with the certificate of acknowledgement is not only empty but unbelievable. In conclusion where consideration is not tendered, the agreement of sale remains a nullity.

43. In the case of **Macfoy Vs United Africa Limited (1961) 3 ALL ER 1169** Lord Denning expressed himself as follows.

“if an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”. In conclusion, my findings are that there was no valid agreement entered between the Plaintiff and Defendant. The burden of proof shifted to the defendant to prove that the transaction took place. She sought to rely on the documents that I have examined and which I find are wanting in many respects and hold that they are incapable of conveying any interest least of all to herself”.

44. There is evidence on record which was not controverted by the defendant that the plaintiff allowed the defendant to put a temporary structure on the land for purposes of her residing on the property to enable her attend to her chores early. That the defendant took advantage of this gesture by the plaintiff to house her on the property to bring her family to reside on the property because she had bought the property. In her pleadings and evidence, she explained that she was developing her part of the land that she had bought from the plaintiff. The plaintiff called this part of the undue influence and breach of trust. This evidence was corroborated by PW2 who on arrival found the defendant settled on the property.

45. Is the defendant a Bonafide purchaser for value without notice? The Uganda case of **Katende Vs Haridas & Company Limited (2008) 2 EA 174** defined a bonafide purchaser as thus;

“a Bonafide purchaser is 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 Bonafide doctrine he must prove the following; he holds a certificate of title; he purchased the property in good faith; he had no knowledge of the fraud; he purchased for valuable consideration; the vendors had apparent good title and he purchased without notice of any fraud”.

Applying the above test to the case at hand and the facts of the case the defendant holds a hollow title. No

evidence was led to proof that the consideration changed hands and having held as much, there was no consideration that passed and therefore no interest was conveyed to the defendant. The defendant was a party to the irregular and invalid transactions that transpired, though denied by the plaintiff and therefore cannot afford herself the defense of good faith nor can she be said that she was bereft of the knowledge of the vices. She was therefore a knowledgeable architect of the irregularities and illegalities that characterized the transaction and therefore the defense of bonafide purchaser for value without notice is not available to her.

46. Further Section 26 of Land Registration Act 2012 states as follows;

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

It is clear from the above that the law does not support illegal transactions. The defendant's title is being challenged on grounds of illegalities, fraud, undue influence, misrepresentation and on those accounts the Defendant cannot be said to be a bonafide purchaser.

47. Consequently, I find and hold that the Defendants prayers in the Counter claim shall fail in totality on grounds of illegality fraud and forgery.

48. The Plaintiff was a victim of the fraud of the Defendant, took advantage of his advanced age and ill health and the fact that his family members were not around to defraud him of his land. The totality of the evidence of the defendant and the advocate was that it was unbelievable. The evidence of the defendant is much tainted by her demeanor on trial and in the case of **Mohamed vs. Bakari & 2 others** “no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man”.

49. The totality of the analysis of the issues and the evidence in this case is that I find and hold that the Plaintiff has proved his case on a balance of probability and hereby make orders as follows;

- a) That the title deed issued in LR No. MUGUGA/MUGUGA/2717 in favour of the Plaintiff and Defendant jointly is hereby declared illegal, null and void.
- b) A declaration that the Plaintiff is the sole owner of the LR No. MUGUGA/MUGUGA/2717.
- c) The Land Registrar is hereby ordered to cancel the title LR No. MUGUGA/MUGUGA/2717 in the Joint names of the Plaintiff and Defendant and in its stead the plaintiff be registered as the sole owner and a title deed do issue to him.
- d) A permanent injunction restraining the Defendant whether by herself, servants, agents and or anyone acting under her from dealing constructing alienating, trespassing, interfering, changing and or dealing with the Plaintiff's land LR No. MUGUGA/MUGUGA/2717.
- e) Costs of this suit to be paid by the Defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND SEPTEMBER 2017

J.G. KEMEI

JUDGE