



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 748 OF 2015

DAYA GAURI SHANTILAL JETHVU.....PLAINTIFF

=VERSUS=

1. KENNEDY NYAMWANGA

2. THE DISTRICT LAND REGISTRAR- KISUMU

3. THE COMMISSIONER OF LANDS

4. HON. ATTORNEY GENERAL.....DEFENDANTS

JUDGEMENT

BACKGROUND

1. By a Plaint dated 6th September 2010 and filed herein on 16th September 2010, the Plaintiff Daya Gauri Shantilal Jethvu prays for Judgment against the four Defendants herein jointly and severally for:-

(a) A Refund of Kshs 2.1 million together with interest at bank rate from the date of filing this suit till payment in full.

(b) Costs of this suit together with interest at Court rates.

(c) Any other remedy this Honourable Court (may) deem fit and just to grant in the circumstances.

2. It is the Plaintiff's case that on or about 24th August 2009, the 1st Defendant- Kennedy Nyamwanga, masquerading as Washington Edward Omondi Ogotu, sold to the Plaintiff land parcel Number Kisumu/Municipality/Block 10/76 at a consideration of Kshs 2,100,000/= which amount the Plaintiff duly paid to the 1st Defendant and the said parcel of land was thereafter duly registered and a Certificate of Lease was issued in the Plaintiff's name.

3. Subsequent to the said registration and issuance of title, the Plaintiff moved to the said land whereupon she deposited stones and commenced construction of a building. In the course of the said construction the real Washington Edward Odhiambo Ogotu appeared and accused the Plaintiff of trespassing into his land. The registration of the Plaintiff as holder of the title was subsequently reversed.

4. The Plaintiff contends that the 1st Defendant convinced and/or colluded with officers of the 2nd and 3rd

Defendants and thereby fraudulently caused the Plaintiff to believe that the 1st Defendant was the registered owner of the said land. It is her case that as a result of the said fraud, she has suffered loss and damage hence the orders being sought herein.

5. Despite Service of Summons through an Advertisement in the Daily Nation of 14th February 2011, the 1st Defendant did not enter appearance and/or file Defence to the Plaintiff's claim. Interlocutory Judgment was accordingly entered against him on 11th March 2011.

6. On their part, the 2nd, 3rd and 4th Defendants aver that any action they took in regard to the suitland was lawful, procedural and devoid of any irregularities. It is further their case that they cannot be held liable for the fraudulent acts of and misrepresentation by the 1st Defendant.

THE PLAINTIFF'S CASE

7. At the hearing hereof, the Plaintiff testified as PW1 and called one witness. In her testimony, the Plaintiff told the Court that prior to signing of the Sale Agreement, she did a search at the 2nd Defendant's office which search revealed that the suitland belonged to one Washington Edward Omondi Ogutu. Thereafter she went ahead and executed a Sale Agreement dated 24th August 2009 with the seller who identified himself as the said Washington Edward Omondi Ogutu. She paid the seller a total of Kshs 2,100,000/= as the purchase price to the property. Thereafter, they went through all the formal procedures including valuation and payment of stamp duty after which she was issued with a title deed in her name.

8. PW1 told the Court that later on the police told them following a complaint made, that the land was fraudulently transferred to them by a person who was not the real owner. The 2nd Defendant thereafter went ahead to cancel the title-deed which had been issued in her name.

9. On his part PW2 Hidesh Jethwa Shantilal a son to the Plaintiff told the Court that on or about 24th August 2009, they were shown a plot in Milimani, Kisumu. Through an agent, they were introduced to a man who introduced himself as Washington Edward Omondi Ogutu. They went with him to see the land. Thereafter, they carried out a search at the Lands Office which revealed that the land was in the name of Washington Edward Omondi Ogutu.

10. PW2 stated that after the search, they settled on a selling price of Kshs 2.1 million and they proceeded to a lawyer's office where a Sale Agreement was prepared and they paid the purchase price. The land was thereafter transferred to his Mother's name.

11. Thereafter the buyers went to the suit premises and commenced the construction of a perimeter fence. Someone then appeared claiming he is Washington Edward Omondi Ogutu and that the plot belonged to him. PW2 stated that this was a totally different person from the man they had purchased the land from. PW2 thereafter reported the matter to the police. After the police conducted their investigations, they wrote to the Lands Office on 2/10/2009 asking them to reverse the transfer to the original owner of the land. The name of PW2's mother was thereafter removed from the Register. Someone has since put up a complete building on the land they had bought.

12. During cross-examination, PW2 stated that the 1st Defendant whom he later came to know as Kennedy Nyamwanga was pretending to be Washington. The 1st Defendant has since gone underground and cannot be found. PW2 further told the Court that there is a criminal case facing the agent who introduced him to the fraudulent seller. The agent called Mike is still underground prosecution. PW2 further stated that they had sued the Government because they are the one who gave them the title and later cancelled it. He testified that the Lands Office should have known the procedure and detected the fraud before it happened.

THE DEFENDANT'S CASE

13. The Defence called one witness. DW1- George Orwaru Nyangweso is the Land Registration Officer, Kisumu. He told the Court that his duties are to keep all land records and to sign all documents appertaining thereto.

14. DW1 testified that from the Green Card kept in their office L.R. No. Kisumu/Municipality/Block 10/76 measuring approximately 0.0348 Ha was first registered in the name of one Okello Samuel Geoffrey Onyango on 1st July 1978. Later on 12th September 2008, it was transferred to Washington Edward Omondi Ogutu. The records further showed that at some point, the land was transferred to the Plaintiff. That entry was however later cancelled following an investigation by the police. It was on 2nd October 2009 when the police wrote informing them that the entry was fraudulent.

15. DW1 told the Court that following the cancellation, the tile deed which is still in possession of the Plaintiff should have been returned but this appears not to have been done. He further testified that when the title reverted to the previous owner, the Plaintiff lodged a caution thereon on 13th November 2009 claiming an interest as a purchaser. The caution was later removed. PW2 testified that the 1st Defendant does not appear in the records at the Lands Office and they never allowed him to do anything as they do not know him. The land is currently owned by one Lalji Ramji Patel.

16. On cross-examination, DW1 stated that he did not know if the Plaintiff was given a hearing prior to the cancellation of his title. It was however his testimony that his office has power to cancel a Certificate of Lease in the event of a fraud. In conclusion, DW1 told the Court that their office acts on the papers as presented. There was no way of knowing that documents are fraudulent but the moment any fraud was detected, they moved to amend the records accordingly.

ANALYSIS OF THE EVIDENCE

17. In her testimony before the Court, the Plaintiffs stated that they met a person who was introduced to them as Washington Edward Omondi Ogutu who apparently had some land to sell situated within Milimani in Kisumu. When they carried out a search on the concerned L.R. No. Kisumu/Municipality/Block 10/76 that was the name of the registered owner. It was their case that on the basis of this confirmation, they proceeded to enter into a Sale Agreement and paid the purchase price of Kshs 2.1 million to the 1st Defendant who turned out not to be the real owner of the suitland.

18. It was the Plaintiff's case that they could not have known that the 1st Defendant was masquerading as the real owner since she had no real particulars of the real owner of the suitland. It was therefore their case that the Defendants colluded to mislead them. At paragraph 8 of the Plaint, the Plaintiff lists the particulars of fraud as follows:-

- i. The 1st, 2nd and 3rd Defendants colluded to mislead the Plaintiff that the 1st Defendant is Washington Edward Omondi Ogutu when he was not.*
- ii. The 1st, 2nd and 3rd Defendants colluded to mislead the Plaintiff that the 1st Defendant is the owner of land parcel No. Kisumu/Municipality/Block 10/76.*
- iii. The 2nd and 3rd Defendants misled the Plaintiff to believe that the 1st Defendant is the owner of land Parcel No. Kisumu/Municipality/Block 10/76 when he was not.*
- iv. The 3rd Defendant proceeded to give consent to the 1st Defendant to transfer the (suitland) to the Plaintiff knowing quite well that the said land does not belong to the 1st Defendant.*
- v. The 2nd Defendant proceeded to register the (suitland) in the name of the Plaintiff knowing quite well that the 1st Defendant purporting to transfer the same to the Plaintiff is not the owner thereof.*
- vi. The 2nd and 3rd Defendants deliberately failed to disclose to the Plaintiff that the 1st Defendant*

was masquerading as Washington Edward Omondi Ogutu the registered owner of the (suitland).

19. I have carefully looked at the particulars above vis-a-vis the evidence availed before this Court. I did not hear the two witnesses for the Plaintiff state that the 2nd and 3rd Defendants are the ones who misled the Plaintiff on the identity of the owner of the suitland. According to PW2, an agent known as Mike presented a person who was introduced to them as Washington Edward Omondi Ogutu. After the introduction during the lunch break at his office, PW2, Mike and the person purporting to be the owner of the land proceeded to Milimani where they were shown a piece of land. Thereafter they went to the 2nd Defendant's office and conducted a search which revealed that the land was owned by a person by the same names- Washington Edward Omondi Ogutu.

20. It did not escape this Court's mind that neither PW1 nor PW2 carried out any scrutiny and/or due diligence to establish that the person introduced to them by Mike actually had documents identifying him as Washington Edward Omondi Ogutu. As the person who dealt closely with the fraudster, PW2 ought to have cross-checked the identity of the person who was presented to him as the owner of a parcel of land which he intended to sell. Neither in his recorded statement filed in Court in August 2011 nor in his oral testimony before me did he mention that he even saw the identity card of the would-be seller. From his testimony, it is him who took the person to the Lands Office and introduced him to the 2nd Defendant. I am therefore unable to understand how the 2nd Defendant could have misled the Plaintiff that the 1st Defendant was the person named Washington Edward Omondi Ogutu who was the real and genuine owner of the land in question.

21. While it is true that the Lands Office ought to have put more stringent measures to vet persons dealing in land, I must agree with DW1 that where a person presented documents bearing the name of the registered owner of the land, it would have been difficult to detect the fraud. In this regard, it was incumbent upon the Plaintiff to demonstrate to this Court that there was a step which the Defendants ought to have taken but which they did not in order to prove the allegations of fraud and/or collusion.

22. In the cause of the trial, it became evident that the 1st Defendant and the agent who connected the Plaintiff to the 1st Defendant had been charged in Court with a criminal offence resulting from the fraudulent transaction herein. While not much was adduced before me by way of evidence as to the nature and extent of the said proceedings, I think the fact that no one from the 2nd Defendant's office is facing similar charges is proof that the police did not find any or sufficient evidence of collusion between the 1st Defendant and the 2nd Defendant.

23. As it were, the Defendants were by law entitled to cancel the Plaintiff's registration the moment there was a detection of fraud. Article 40(6) of the Constitution provides that a title that has been unlawfully acquired cannot be protected. This is echoed at Section 26 of the Land Registration Act which provides thus:-

"26(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, procedurally or through a corrupt scheme.

24. Under section 26(1) (b) of the Land Registration Act aforesaid, it needs to be demonstrated that the title has been acquired illegally, unprocedurally or through a corrupt scheme. In such a case, it is not necessary that the title holder be guilty of any misfeasance; he may be an innocent party as the Plaintiff herein, but so long as the title is not procured legally or procedurally, or it is acquired through a corrupt

scheme, the title is impeachable.

25. Thus while it is apparent that the Plaintiff may have followed the correct procedures at the Lands Office, the person who purported to sell the land had no title to pass and the Certificate of Lease issued to him could not stand.

26. On the evidence placed before me, I did not find anything in the conduct of the 2nd, 3rd and 4th Defendants which was unprocedural or unlawful. In the absence of any evidence of collusion, I am unable to hold them liable for the fraudulent acts of, and misrepresentation by the 1st Defendant.

27. The upshot is that I find that the Plaintiff has proved his case as against the 1st Defendant and the same is allowed with costs.

28. The suit in so far as it concerns the 2nd, 3rd and 4th Defendants is however dismissed with costs.

Dated, signed and delivered at Kisumu this 24th day of October, 2017.

J.O. OLOLA

JUDGE