



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 547 OF 2002

JOYCE WANGECHI KIBOI.....PLAINTIFF

VERSUS

JECINTA MUTHONI MBURU.....1ST DEFENDANT

JOHNSON M. KURIA.....2ND DEFENDANT

JUDGMENT

Through amended plaint dated 19th March, 2007, the plaintiff sought judgment against the defendants jointly and severally for:

1. A declaration that the Title No. Kiambu Municipality/Block 5 (Kiamumbi)/2181 and Title No. Kiambu Municipality/Block 5 (Kiamumbi)/2182 are invalid to the extent that they seek to extinguish Title No. Kiambu Municipality/Block 5 (Kiamumbi)/337.
2. A permanent injunction restraining the defendants from entering, trespassing, remaining on the suit land, evicting any tenants from the suit premises or in any other manner compromising the unfettered interest of the plaintiff in the property.
3. General damages for harassment and damage to property.
4. Costs of the suit and interest at court rates.

The plaintiff averred that at all material times she was the legal owner of all that parcel of land known as Title No. Kiambu Municipality/Block 5 (Kiamumbi)/337(hereinafter referred to as "Plot No.337") measuring approximately 0.1028 hectares. The plaintiff averred that in the year 2001 she decided to sell a portion of Plot No. 337 and the 1st defendant expressed interest in purchasing the same. The plaintiff averred that using trickery and fraudulent language, the 1st defendant managed to obtain the original title deed for Plot No. 337 from the plaintiff and with the advice and direction of the 2nd defendant caused the said parcel of land to be subdivided into two portions namely, Title No. Kiambu Municipality/Block 5 (Kiamumbi) /2181 (hereinafter referred to as "Plot No. 2181") and Title No. Kiambu Municipality/Block 5 (Kiamumbi)/2182 (hereinafter referred to as "Plot No.2182"). The plaintiff averred that the defendants collected the original title deed from her without informing her of what they intended to do with the same, booked the Land Board meeting without her knowledge or consent before she had entered into an agreement for sale with the 1st defendant, instructed a surveyor to prepare land mutation forms in which it

was indicated that the 1st defendant and she were proprietors of Plot No.337, fraudulently caused the creation of Plot No. 2181 and Plot No. 2182 and caused or attempted to cause Plot No. 2182 to be registered in the name of one, Benson Muniu Karanja.

The plaintiff averred that the 2nd defendant with whom she had no dealing, threatened her tenants on Plot No. 337 to vacate the said property and proceeded to demolish her rental buildings occasioning her massive loss and damage. The plaintiff averred that negotiations had taken place between her and the 1st defendant and the 1st defendant had agreed to purchase a portion of Plot No. 337 at a consideration of Kshs. 295,000/- payable by installments. The plaintiff averred that it was agreed between her and the 1st defendant that the said agreement would be formalized. The plaintiff averred that she requested the 1st defendant to put her proposals with regard to the said portion of Plot No. 337 in writing. The plaintiff averred that the 1st defendant fraudulently insisted that she wanted to see and confirm if the title for the said property was genuine. The plaintiff in good faith acceded to this request and released the original title deed for the suit property to the 1st defendant. The plaintiff averred that the titles for Plot No. 2181 and Plot No. 2182 which the defendants obtained fraudulently should be cancelled. The plaintiff averred that she is ready to refund to the 1st defendant any monies that she secretly deposited in her bank account.

The 1st and 2nd defendants filed separate statements of defence to the plaintiff's claim. In her statement of defence and counter-claim dated 26th April, 2007 which was amended orally in court on 2nd February, 2015, the 1st defendant averred that the title for Plot No. 337 was extinguished on 7th November, 2001 upon subdivision. The 1st defendant denied that she obtained the original title deed for Plot No. 337 fraudulently and caused the said parcel of land to be subdivided into two portions without the plaintiff's knowledge or consent. The 1st defendant denied that the 2nd defendant had threatened the plaintiff's tenants and proceeded to demolish the plaintiff's rental houses. The 1st defendant averred that it is the plaintiff who gave the said tenants notice to vacate the said premises pursuant to the agreement for sale she had entered into with the plaintiff. The 1st defendant admitted that she entered into an agreement with the plaintiff to purchase a portion of Plot No. 337 at a consideration of Kshs. 295,000/- payable by instalments.

The 1st defendant averred that the negotiations she held with the plaintiff culminated in an agreement for sale which was signed by both parties. The plaintiff averred that following the subdivision of Plot No. 337, a portion thereof namely, Plot No. 2181 was transferred to her name while the remaining portion, namely, Plot No. 2182 was transferred to one, Benson Muniu Karanja. The 1st defendant denied that she made payments to the plaintiff's bank account secretly. The 1st defendant averred that the plaintiff furnished her with her bank account details and all payments made to the said account were on the plaintiff's instructions and pursuant to the agreement for sale between her and the plaintiff.

In her counter-claim, the 1st defendant averred pursuant to negotiations between her and the plaintiff, she entered into an agreement for sale with the plaintiff dated 7th November, 2001 of an agreed ½ portion of Plot No. 337 at a consideration of Kshs.295,000/- which was inclusive of the 1st defendant's portion of the survey fees. The 1st defendant averred that pursuant to the said agreement, she paid to the plaintiff a sum of Kshs. 65,000/- in cash on 7th November, 2001 and deposited a further sum of Kshs. 145,000/- in her bank account on the same day. The 1st defendant averred that between 7th November, 2001 and 9th March, 2002 she made further deposits to the plaintiff's bank account totaling Kshs. 85,000/-.

The 1st defendant averred that prior to the execution of the said agreement for sale, the plaintiff had instructed a surveyor to survey and subdivide the suit property into two equal portions through mutation forms which were signed by the plaintiff, the 1st defendant and the said surveyor. The 1st defendant averred that as soon as the new titles for the subdivided plots were ready, the 1st defendant fraudulently collected the 1st defendant's title and held the same as a lien against the balance of the purchase price. The 1st defendant averred that she had paid to the plaintiff the full purchase price for the portion of Plot

No. 337 which was sold to her and took possession of the said property. The 1st defendant sought judgment against the plaintiff by way of a counter-claim for, a declaration that her registration as the proprietor of Plot No. 2181 was lawful, an injunction directing the plaintiff to surrender the title for the said parcel of land to her and costs of the suit.

The 2nd defendant filed his amended statement of defence on 2nd May, 2007. The 2nd defendant denied the allegations of fraud and particulars thereof made against the 1st and 2nd defendants in the amended plaint. The 2nd defendant averred that he was not privy to the dealings between the plaintiff and the 1st defendant. He denied that he had threatened the plaintiff's tenants and demolished the plaintiff's rental premises. The 2nd defendant averred that he was aware of the payments that were made by the 1st defendant to the plaintiff through her bank account and in cash. The 2nd defendant denied that monies were secretly deposited in the plaintiff's bank account. The 2nd defendant denied that the plaintiff suffered loss and damage as a result of the alleged demolition of her premises.

The plaintiff filed a reply to the 1st defendant's amended defence and defence to the 1st defendant's amended counter-claim on 8th May, 2007. The plaintiff denied that the title for Plot No. 337 was extinguished following the subdivision of the said property. The plaintiff averred that she is a stranger to Benson Muniu Karanja to whom Plot No. 2182 was allegedly transferred to. The plaintiff denied the 1st defendant's counter-claim in its entirety. The plaintiff denied that she entered into a formal agreement for sale with the 1st defendant that was witnessed by Frank S.G. Gitau Advocate. The plaintiff also denied that she had instructed a surveyor to subdivide Plot No. 337. The plaintiff averred that she was a stranger to the mutation through which Plot No.337 was subdivided. The plaintiff denied that she collected the 1st defendant's title from the land office fraudulently. The plaintiff also denied that the 1st defendant has been in occupation of the suit premises.

At the trial, the plaintiff gave evidence and closed her case without calling any witness while the defendants gave evidence and called one witness. The plaintiff stated as follows. She came to know the defendants in the year 2001 when she wanted to subdivide Plot No. 337 so that she could sell a portion thereof. The defendants expressed interest in the portion of Plot No.337 that she wanted to sell. The defendants requested her for original copy of the title deed for Plot No. 337 so that they could go and do a search on the title. She handed over the said title deed to the defendants who failed to return the same to her. What followed was that the 1st defendant brought to her a draft agreement for sale which she did not sign. The defendants thereafter disappeared for a very long time and when they surfaced, they claimed that Plot No. 337 belonged to them and sought to evict her therefrom. The defendants claimed that Plot No. 337 had been subdivided into two portions one of which belonged to the 1st defendant while the other belonged to the 2nd defendant. To cover for their misdeeds, the defendants deposited some money into her bank account.

When the defendants came to see her they had already subdivided Plot No. 337 into two portions. She did not sign the mutation form pursuant to which the said parcel of land was subdivided. She also neither applied for Land Control Board Consent nor appeared before the Land Control Board. She stated that the signature in the purported agreement for sale dated 7th November, 2001 which the defendants have claimed that she signed resembles her signature but the same is not her signature. She stated that she neither saw the agreement nor signed the same. What she saw was a handwritten draft agreement that was brought to her house by the 1st defendant.

She stated that when she conducted a search on the title of Plot No. 337, she discovered that the defendants had already transferred her land to their names. That is when she decided to file a suit against the defendants. When she came to court she sought and obtained an order for the maintenance of status quo. Despite this order, the defendants still went ahead and demolished her rental houses on the suit premises. She is still occupying a portion of the suit premises. The last time she did a search, Plot No. 2181 was registered in the name of the 1st defendant while Plot No. 2182 was registered in her name. The plaintiff produced a number of documents as exhibits in support of her case.

The 1st defendant (PW1) told the court that she is the wife of the 2nd defendant. She came to know the plaintiff when she sold to them land. When they wanted to purchase land to put up family residence, she was given the task of looking for land suitable for that purpose. She went to a land agent who introduced her to the plaintiff. The plaintiff agreed to sell to her a half portion of Plot No. 337 which was owned by the plaintiff. The plaintiff showed her the land and the title deed for the same. She reported to the 2nd defendant about the plaintiff and the land she was selling. The 2nd defendant went and saw the land. He thereafter prepared a hand written agreement which they presented to the plaintiff. The plaintiff looked at the said draft agreement and made some amendments to it. The plaintiff inserted her name in the agreement together with her identity card number. She also changed the purchase price from Kshs. 280,000/- to Kshs. 295,000/-. They accepted the amendments that the plaintiff made to the draft agreement for sale. Since Plot No. 337 was agricultural land, they went to the Land Control Board and obtained consent to subdivide and transfer a portion of Plot No. 337 to her. The plaintiff and she signed the application for land control board consent at the Survey Office at Kiambu. The Land Control Board granted the necessary consents on 2nd October, 2001. After the said consents were granted, they came back to the surveyor who prepared a mutation form on 5th November, 2001 for partitioning Plot No. 337 into two portions. After Plot No. 337 was partitioned, the draft sale agreement as amended by the plaintiff was typed. The plaintiff then took her to the office of her the advocate, one, Frank Gitau at Kiambu before whom they executed the said agreement for sale on 7th November, 2001.

After the subdivision of Plot No. 337, Plot No. 2181 was registered in her name while Plot No. 2182 remained in the name of the plaintiff. The agreed purchase price was Kshs. 295,000/- on which a sum of Kshs. 210,000/- was paid as a deposit. The deposit was paid upon the signing of the agreement for sale. Of the said sum of Kshs. 210,000/- a sum of Kshs. 65,000/- was paid to the plaintiff in cash while the sum of Kshs. 145,000/- was deposited in her bank account at Family Bank. It was after they had paid the deposit in full that the plaintiff agreed to sign the agreement for sale. It was agreed that the balance of the purchase price in the sum of Kshs. 85,000/- was payable to the plaintiff within three (3) months in installments. The said amount was paid to the plaintiff in full through her bank account the particulars of which was provided by the plaintiff.

DW1 stated that after the plaintiff was paid the full purchase price, she started demanding more money. She demanded that she be paid additional sum of Kshs.15,000/- which demand was turned down. The plaintiff's demand for Kshs.15,000/- was contained in her letter dated 22nd March, 2002. Before writing the said demand letter, the plaintiff placed a caution on the title for Plot No. 2181 on 19th March, 2002. The plaintiff's statutory declaration that she made in support of the caution was commissioned by Frank S.G. Gitau advocate who had witnessed the agreement for sale dated 7th November, 2001. DW1 stated that she acquired Plot No. 2181 lawfully. She produced a number of documents in evidence as exhibits.

The 2nd defendant (DW2) corroborated the evidence of DW1. He stated that he is the one who made the payment of Kshs.210,000/- to the plaintiff as a deposit of the purchase price. He deposited Kshs. 145,000/- to the plaintiff's bank account at Family Finance Building Society (now Family Bank) and paid a sum of Kshs. 65,000/- to the plaintiff in cash. They raised the said sum of Kshs. 210,000/- by withdrawing a sum of Kshs. 182,000/- from his bank account at Post Bank on which they added a sum of Kshs.28,000/- which they had in cash. He stated that he paid the balance of the purchase price to the plaintiff through her bank account. He stated that he did not use his position as a police officer to acquire the suit property from the plaintiff fraudulently. DW2 produced a number of documents in evidence as exhibits.

The defendant's last witness was No. 231371, Senior Superintendent of Police John Muinde (DW2). DW2 told the court that he is a document examiner with professional training in forensic document examination. He holds a Bsc Degree from Moi University and has attended several trainings on document examination. At the time of giving evidence, he was the head of Forensic Examination Unit at the Directorate of Criminal Investigations. He told the court that, he received a letter from the defendants' advocates on record on 22nd April, 2013 requesting the Directorate of Criminal Investigations to examine a number of documents and give an opinion on the same. The documents that were forwarded to the

Directorate of Criminal Investigations which contained disputed signatures of the plaintiff were, agreement for sale dated 7th November, 2001, Mutation Form No. 127608 and Application for Consent of Land Control Board. In addition, the defendants' advocates on record furnished them with comparison samples in original form which contained known signatures of the plaintiff, Joyce Wangechi Kiboi. These samples were, the verifying affidavit sworn on 27th March, 2002 and a supporting affidavit sworn on 12th April, 2002. He did examination of the said documents at the Directorate of Criminal Investigations Laboratory and made findings. He examined and compared the disputed signatures of the plaintiff with the plaintiff's known signatures. He concluded that the disputed signatures and the undisputed signatures were made by the same person. DW3 produced his report in court as an exhibit.

After the close of evidence, the court directed the parties to make closing submissions in writing. I have carefully considered the pleadings, the evidence adduced by the parties and the submissions on record. The parties did not agree on the issues for determination by the court. From the material before the court, the following in my view are the issues that arise for determination in this suit:

1. Whether the 1st defendant acquired the parcel of land known as Title No. Kiambu Municipality/Block 5(Kiamumbi)/2181 (Plot No. 2181) from the plaintiff fraudulently?
2. Whether the defendants trespassed onto the plaintiffs parcel of land known as Title No. Kiambu Municipality/Block 5(Kiamumbi)/337 (Plot No. 337) and caused loss and damage?
3. Whether the plaintiff is entitled to the reliefs sought in her amended plaint?
4. Whether the plaintiff collected the title deed for Title No. Kiambu Municipality/Block 5(Kiamumbi)/2181 (Plot No. 2181) which belonged to the 1st defendant from the land office fraudulently?
5. Whether the 1st defendant is entitled to the reliefs sought in the counter-claim?

The first issue:

The onus was upon the plaintiff to prove the acts of fraud pleaded against the defendants. In the case of, Virani t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Co. Ltd [2004] 2 E.A KLR 269, the Court of Appeal held that:

“Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt”.

In the case of Kampala Bottlers Ltd. vs. Damanico (UG) Ltd. East Africa Law Reports [1990-1994] E.A141(SCU), the Supreme Court of Uganda held that,

“To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters.”

The plaintiff has not placed any evidence before the court pointing at the defendants' alleged acts of fraud. I am not persuaded on the material before me that the 1st defendant acquired Plot No. 2181 fraudulently. The evidence before the court shows that the 1st defendant entered into negotiations with the plaintiff for the purchase of a portion of Plot No. 337 which was owned by the plaintiff. After negotiations, the 1st defendant prepared a draft agreement for sale which was presented to the plaintiff for approval. The plaintiff perused the draft agreement for sale and approved the same with amendments. The amendments were accepted by the 1st defendant. The purchase price was agreed at Kshs. 295,000/-. The mode of payment was also agreed upon. After the parties had agreed on the terms of the sale agreement, they applied to the Land Control Board for consent to subdivide Plot No. 337 and to transfer a portion

thereof to the 1st defendant. The Land Control Board issued consents for the subdivision of Plot No. 337 and for the transfer of a portion thereof to the 1st defendant. After the said consents were issued, the plaintiff and the 1st defendant went to a surveyor whom they instructed to subdivide Plot No. 337 into two equal portions. The surveyor prepared a mutation for the subdivision of Plot No. 337 which was signed by the 1st defendant and the plaintiff. The subdivision of Plot No. 337 gave rise to Plot No. 2181 and Plot No. 2182. After the subdivision was completed, the 1st defendant and the plaintiff entered into an agreement for sale dated 7th November, 2001 on the terms and conditions which they had agreed on. The agreement was duly executed by both parties before an advocate.

The 1st defendant thereafter paid to the plaintiff a sum of Kshs. 210,000/- as a deposit on the date of execution of the agreement. She thereafter paid the balance of the purchase price in the sum of Kshs. 85,000/- in accordance with the terms of the agreement for sale. The defendants produced in evidence, handwritten draft agreement for sale, mutation forms for the subdivision of the Plot No. 337, applications for Land Control Board Consents, the consents that were issued by the Land Control Board, the agreement for sale dated 7th November, 2001, evidence of payment of the deposit of Kshs. 210,000/- and evidence of payment of Kshs. 85,000/- being the balance of the purchase price. The plaintiff admitted that she perused the draft agreement for sale and made amendments to it. The plaintiff denied however that, she applied for consent of the Land Control Board, signed the mutations forms for the subdivision of Plot No.337 and the agreement for sale dated 7th November, 2001. The plaintiff claimed that they had not agreed on the purchase price and that the monies that were paid to her by the defendants were deposited secretly to her bank account by the defendants to sanitize their acts of fraud.

I am unable to believe the plaintiff's assertions. During her testimony, the plaintiff struck me as a very enlightened and intelligent woman. The 1st defendant in her testimony told the court that the plaintiff is a former employee of Central Bank of Kenya. The plaintiff did not deny this fact. I have noted from a copy of the extract of the register for Plot No. 337 which was attached to the defendants' list of documents dated 1st November, 2006 filed in court on 8th November, 2006 that the plaintiff had charged the said property to Central Bank of Kenya on 2nd July, 1996 to secure a sum of Kshs. 220,000/-. The plaintiff was therefore not a gullible person whom the defendants could take advantage of. The defendants produced a Forensic Document Examination Report (Dexh.12) whose findings were that the plaintiff did sign the applications for Land Control Board Consent, the Mutation Forms for the subdivision of Plot No. 337 and the agreement for sale dated 7th November, 2001. According to the evidence by the defendants the payments of the purchase price were made to the plaintiff between 7th November, 2001 and 9th March, 2002. From the evidence on record, a substantial part of the purchase price was paid to the plaintiff through her bank account. The plaintiff did not deny that she is the one who supplied the defendants with the details of her account. The plaintiff did not also tell the court why she did not reject and return to the defendants the payments which she claimed to have been made to her through her account secretly. The defendants produced in evidence a letter written by the plaintiff to the defendants on 22nd March, 2002(Dexh.8) over the sale transaction that she had with the 1st defendant in respect of Plot No. 337. This letter was written a few weeks after the plaintiff had received the last payment of the purchase price. The plaintiff did not deny writing this letter. In this letter, the plaintiff did not at all deny that she had entered into an agreement for sale with the 1st defendant. The plaintiff did not also claim that she had not received the purchase price in full. In the letter the plaintiff demanded a further sum of Kshs. 15,000/- from the 1st defendant which she referred to as a refund.

I am satisfied from the totality of the evidence before me that the 1st defendant did not acquire Plot No. 2181 from the plaintiff fraudulently as claimed by the plaintiff.

The second issue:

From the evidence on record, Plot No. 337 was subdivided on 9th November, 2001 and a portion thereof namely, Plot No. 2181 registered in the name of the 1st defendant. This was after the plaintiff and the defendant had entered into the agreement for sale on 7th November, 2001 and the plaintiff paid a total

sum of Kshs. 210,000/- as a deposit. According to clause 4 of the said agreement for sale, the 1st defendant was permitted to take possession of the portion of Plot No. 337 which she had purchased from the plaintiff immediately upon subdivision of Plot No. 337 and the payment of the aforesaid deposit. The plaintiff did not place any evidence before the court showing that the 1st defendant entered either Plot No. 337 or Plot No. 2181 before the subdivision of Plot No.337 or the payment of the deposit that had been agreed upon. There is no evidence before the court as to when the defendants made the alleged entry onto the suit premises. The plaintiff did not also place any evidence of the alleged destruction caused by the defendants. I have noted in clause 6 of the agreement for sale dated 7th November, 2001 that the plaintiff had undertaken remove the structures that she had put up on the portion of Plot No. 337 that was sold to the 1st defendant. It is not clear whether the plaintiff complied with this clause of the agreement. For the foregoing reasons, I am not satisfied that the defendants trespassed on the plaintiff's property and caused damage thereon.

The third issue:

From what I have set out above, the answer to this issue must be in the negative. It is clear from the foregoing that the plaintiff has failed to prove her claim against the defendants. The plaintiff is therefore not entitled to any of the reliefs she has sought in the amended plaint.

The fourth issue:

As I have already found hereinabove, the 1st defendant acquired Plot No. 2181 from the plaintiff lawfully. The 1st defendant entered into an agreement for sale with the plaintiff in respect of that property and paid the full purchase price. The 1st defendant was therefore entitled to be issued with a title deed for Plot No. 2181 having purchased and paid for the same. According to a certificate of official search dated 28th March, 2002(Dexh.6), the title for the Plot No. 2181 was issued on 9th November, 2001 in the name of the 1st defendant. That is the same day the title for Plot No. 2182 was issued in the name of the plaintiff. The plaintiff has not denied that she collected the title deed for Plot No. 2181 from the land office. The plaintiff did not give any justification for collecting a title deed which was in the name of the 1st defendant and in respect of a property the 1st defendant had already paid a substantial amount of money. Even if the plaintiff had collected and kept the said title deed as a lien for the balance of the purchase price that remained unpaid as at 9th December, 2001 when the said title deed was issued, the same should have been released to the 1st defendant when she completed the payment of the purchase price for Plot No.2181 on 9th March, 2002. That was before the suit herein and the counter-claim were filed. It is my finding therefore that the plaintiff collected and retained the title deed for the suit property illegally.

The fifth issue:

From what I have stated above, it is my finding that the 1st defendant has proved her counter-claim against the plaintiff and as such she is entitled to the reliefs sought in her counter-claim dated 26th April, 2007 as amended on 2nd February, 2015.

Conclusion:

In conclusion, it is my finding that the plaintiff's claim has no merit and the same is hereby dismissed as against both defendants. The 1st defendant's counter-claim against the plaintiff is proved. I therefore enter judgment for the defendants against plaintiff as follows:

1. I declare that the 1st defendant acquired the parcel of land known as Kiambu Municipality/ Block 5(Kiamumbi)/2181 lawfully.
2. A mandatory injunction is hereby issued directed at the plaintiff to deliver to the 1st defendant the original title deed for Kiambu Municipality/ Block 5(Kiamumbi)/2181 within fourteen (14) days from the

