



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 301 OF 2011

MBUTHIA MACHARIA.....PLAINTIFF

VERSUS

ANNAH MUTUA NDWIGA MUTUA.....1ST DEFENDANT

COMMISSIONER OF LANDS, NAIROBI..2ND DEFENDANT

JUDGMENT

The Plaintiff brought this suit vide a Plaint dated 21st June 2011 seeking for:-

1. A declaration that the Plaintiff is the legal and bona fide lessee of all that parcel of land known as L.R. No. 209/7963/62 registered in the Registry of Titles at Nairobi as Number I.R 30840/1 (hereinafter referred to as the “suit property”) and that consent to transfer the suit property was unlawfully, fraudulently and illegally obtained by the 1st Defendant hence the suit property ought to revert to the Plaintiff.
2. An order of permanent injunction restraining the 1st Defendant either by herself, her servants, agents and or whomsoever in any means howsoever from selling, alienating for sale, transferring to 3rd parties or in any way dealing with the suit property.
3. An order that the 2nd Defendant do nullify and/or cancel the transfer and issue of the Certificate of Lease to the suit property in the name of the 1st Defendant and have the same restored in the name of the Plaintiff within fourteen days from the date of the judgment and in the alternative the Deputy Registrar of this court do execute relevant documents to effect the restoration and or transfer in the name of the Plaintiff.
4. Costs and interest of the suit.

PLEADINGS

In the Plaint, the Plaintiff stated that sometimes on 1st December 1980, he leased the suit property from the City Council of Nairobi (as it then was) and was issued with an original Certificate of Lease to hold the same for a term of 99 years from 1st January 1973. He stated further that he constructed rental houses

which he let out to willing tenants at an agreed rent and whereat he also resided. He added that he came to know the 1st Defendant as she was a tenant in one of the houses within the suit property whereof they formed a close friendship with the 1st Defendant regularly visiting him at his house and assisting him with small household chores. He stated further that unknown to him, the 1st Defendant went through his personal items and stole the original title for the suit property. He further stated that it is when he thought about his children who are to inherit his properties due to his old age did he notice that he original Certificate of Lease to the suit property was missing. He added that all efforts to trace the Certificate of Lease for the suit property did not bear any fruits. He then stated that being apprehensive of this loss, he decided to conduct a search on the suit property to verify that no dealings had been done when he was shocked to see the search results which showed that the suit property had been transferred to the 1st Defendant without his knowledge and consent. He added further that upon conducting a more intensive search, he came to learn that the 1st Defendant had misled officers of the 2nd Defendant that she was his daughter and that the transfer was a gift to her. He further indicated that the suit property was transferred to the 1st Defendant using his forged signature. The Plaintiff further claimed that he did not have any intention of transferring the suit property to the 1st Defendant and that there was no relationship between the two of them to justify the fraudulent transfer of the suit property. He stated further that he had suffered loss for he had been denied the right to deal with the suit property, he had been denied the right to give his inheritance to his rightful beneficiaries in his old age and there was the threat that the 1st Defendant may deal with the suit property through sale, transfer and or in any manner creating an encumbrance to the suit property. He reported the matter to the police and lodged a caveat to secure his interest as the rightful proprietor. The Plaintiff listed the following particulars of fraud against the 1st Defendant:

1. Misrepresenting that the Plaintiff transferred the suit property to the 1st Defendant.
2. Misrepresenting to the 2nd Defendant that consent to transfer documents had been signed by the Plaintiff.
3. Misrepresenting to the 2nd Defendant that there existed a land transaction between her and the Plaintiff.
4. Obtaining transfer of the suit property through misrepresentation, misleading and cheating the 2nd Defendant that the documents for the application of the transfer were valid.
5. Wrongfully and unlawfully through deceit causing the transfer documents to be forged in her favour.
6. Wrongfully and illegally causing the transfer of the suit property into her name and no legal and or any manner of claim whatsoever.

In her Defence and Counterclaim dated 11th February 2015, the 1st Defendant denied the allegations of the Plaintiff contained in his Plaint. She stated that she was the Plaintiff's second wife since the year 2000 and that they had lived together as husband and wife in the suit property and were blessed with one child. She further averred that the suit property was lawfully transferred to her by the Plaintiff on 30th April 2008 by way of a gift. In her Counterclaim, the 1st Defendant stated that she was the legal owner of the suit property but was thrown out of it in the year 2010 by the Plaintiff's three sons and that those sons had been in occupation of the suit property since then. She further averred that the said sons took away her household goods and left her and her children destitute while they continue to receive rental income therefrom thereby depriving her of her only livelihood. She also stated that she was wrongfully arrested for lying to the police that the title documents to the suit property were lost and that she had forged documents and as a result she was arrested and held at Langata women's prison only to be released on 7th May 2012. She prayed for judgment against the Plaintiff for:-

- a. An order dismissing the suit
- b. Eviction orders to be made against any person in illegal occupation of the suit property.
- c. For a declaratory order to be made to the effect that the 1st Defendant is the lawfully registered owner of the suit property.
- d. A permanent injunction against the Plaintiff, his sons and their agents and representatives from trespassing on the suit property.
- e. That the Plaintiff be ordered to pay costs of these proceedings.

EVIDENCE

During the hearing of this suit, the Plaintiff, PW1, gave his evidence in court and stated that he did not understand what this case was about. He denied knowledge of the 1st Defendant and stated that he could not leave the suit property as it was his. He stated that the suit property did not belong to the 1st Defendant as she claimed. He further stated that the 1st Defendant changed the title to the suit property to her name. He stated further that he wants the suit property inherited by his sons and not by a stranger. On cross examination, the Plaintiff stated that he wanted the 1st Defendant evicted from the suit property. He denied having signed any affidavit of marriage or bequeathing the suit property to the 1st Defendant. He also stated that he did not have any children with the 1st Defendant. The Plaintiff closed his case.

On her part, the 1st Defendant, DW1, testified that she moved in with the Plaintiff in the year 2000 in the suit property as his wife and had one child with him. She stated that they had a traditional marriage where the Plaintiff paid her father Ksh 15,000/= as dowry. She further stated that the Plaintiff took her to a lawyer to have the marriage affidavit prepared. She further testified that they later did a church wedding in the year 2007 after his first wife died and were issued with a certificate of marriage. She stated that the documents of ownership of the suit property got lost and the Plaintiff accused her of stealing it. She stated that the documents got lost before the transfer to her was effected and that this was after the Plaintiff had been issued with a new title document. She also added that the Plaintiff transferred the suit property to her name as a gift after getting approval by the City Council of Nairobi (as it then was). She further testified of being evicted out of the suit property in 2010 by the Plaintiff's sons who now collect rent from the house she lived in. She stated that she was charged at the Makadara Law Courts for forging documents that were lost where the court found her guilty and sentenced her to a 6 months jail term which she served. She seeks the court to restore the suit property to her as she was unemployed and has children to bring up. On cross examination, the 1st Defendant stated that the Plaintiff brought her to the suit property to live with him from Korogocho where she used to live and that she was not a tenant as claimed.

ISSUES

I have considered the pleadings, the evidence in court and the documents relied upon by the parties. The issues arising in this suit for determination are as follows:

- a. Whether the transfer of the suit property from the Plaintiff to the 1st Defendant was fraudulent and whether the **1st Defendant and Plaintiff in the Counter-claim is entitled to be declared as the duly registered owner of the suit property.**
- b. Whether to issue an order that the 2nd Defendant do nullify and/or cancel the transfer and issue of the Certificate of Lease to the suit property in the name of the 1st Defendant and have the same restored in the name of the Plaintiff.
- c. Whether eviction orders should be issued against any person in illegal occupation of the suit property.

d. Whether a permanent injunction against the Plaintiff, his sons and their agents and representatives should be issued restraining them from trespassing on the suit property.

e. Who should bear the costs of this suit and Counterclaim.

DETERMINATION

a. **Whether the transfer of the suit property from the Plaintiff to the 1st Defendant was fraudulent and whether the 1st Defendant and Plaintiff in the Counter-claim is entitled to be declared as the duly registered owner of the suit property.**

It is conceded by the parties herein that the suit property was initially registered in the name of the Plaintiff but now stands in the name of the 1st Defendant. The Plaintiff alleges that the transfer of the suit property to the 1st Defendant was done without his knowledge or consent and the Plaintiff has accused the 1st Defendant of fraudulently transferring the suit property into her name by forging his signature and stealing the original Certificate of Lease thereof. On her part, the 1st Defendant has contended very strongly that the Plaintiff is the one who in fact transferred the suit property to her by way of gift. This case therefore turns on whether or not the 1st Defendant procured the transfer of the suit property into her name by way of fraud. As noted earlier, the Plaintiff listed the following particulars of fraud against the 1st Defendant:

1. Misrepresenting that the Plaintiff transferred the suit property to the 1st Defendant.
2. Misrepresenting to the 2nd Defendant that consent to transfer documents had been signed by the Plaintiff.
3. Misrepresenting to the 2nd Defendant that there existed a land transaction between her and the Plaintiff.
4. Obtaining transfer of the suit property through misrepresentation, misleading and cheating the 2nd Defendant that the documents for the application of the transfer were valid.
5. Wrongfully and unlawfully through deceit causing the transfer documents to be forged in her favour.
6. Wrongfully and illegally causing the transfer of the suit property into her name and no legal and or any manner of claim whatsoever.

All these particulars of fraud can be summarized to state that the Plaintiff alleges that the 1st Defendant forged his signature on the transfer documents used by the 1st Defendant to transfer the suit property into her name.

In the case of **Ratilal Gordhanbhai Patel –vs- Lalji Makanji (1957) EA 314**, the Court of Appeal established the threshold on the burden of proof required in civil cases founded on fraud when the court observed that,

“There is one preliminary observation which we must make on the learned Judge’s treatment of this evidence: he does not anywhere in the judgment expressly direct himself on the burden of proof or on the standard required. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required...”

Further, in **Koinange & 13 others –vs- Koinange (1986) KLR 23**, the Judge relied on the decision in the **Ratilal G. Patel case (Supra)** and held that,

1. *It is a well established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud in this case the plaintiffs had the burden of proving and they had to discharge that burden.*

2. *Allegations of fraud must be strictly proved and although the standard of proof may not be as to require proof beyond any reasonable doubt it ought to be more than on a balance of probabilities...*”

Has the Plaintiff proved the allegation of fraud against the 1st Defendant? The Plaintiff claimed that his title document got lost from his house and he suspected that the document was stolen by the 1st Defendant. He, however, did not indicate when the said document was stolen but he reported the lost title at Pangani Police Station on 8th November 2004. The lost title was later gazetted in the Kenya Gazette as No. 5590 dated 22nd June 2007 stating the title was lost and an interim title would be issued after 90 days. The new title must have then been issued sometime in October 2007. The transfer of the suit property was done on 13th May 2009. From the face of it the transfer document looks proper but the Plaintiff alleged that he did not sign the consent to transfer it. He claimed that that the signature appended on the transfer document was not his. He, however, did not take any steps to prove to the court that the signature appended on the document was not his by bringing a Document Examiner or other expert to prove that the signatures appended on the various documents used by the 1st Defendant to transfer the suit property into her name were not his. **Section 107 of the Evidence Act Cap 80** provides that:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

The court cannot determine on the face of a document which signature is genuine and which is forged in order to point out which signature belongs to the Plaintiff and in the absence of such evidence I find that the Plaintiff had not proved that the 1st Defendant was involved in any fraudulent scheme of transferring the suit property to herself as alleged. I find that the Plaintiff has been unable to link the 1st Defendant to the claim of fraud made against her.

In her evidence, the 1st Defendant stated that the Plaintiff transferred the suit property to her as a gift. From the documents in the court file it is apparent that the transfer of the suit property to the 1st Defendant was done after the Plaintiff had been issued with a new title document. It cannot be that the 1st Defendant used the lost title document to transfer the suit property to herself as alleged by the Plaintiff. Further, there are documents that the 1st Defendant produced such as the affidavit to bequeath property dated 15th June 2006, a letter signed by the Plaintiff dated 24th April 2004 and the transfer dated 3rd September 2008 all which show that the Plaintiff consented to having the suit property transferred to the 1st Defendant. The Plaintiff did not object to these documents during the hearing and did not produce contrary evidence to rebut that evidence. In the circumstances, the Plaintiff has failed to convince this court that the 1st Defendant was involved in fraud in transferring the suit property to herself. To the contrary, this court finds that the Plaintiff is the one who transferred the suit property to the 1st Defendant by way of a gift and I find that the 1st Defendant is the duly registered proprietor of the suit property.

b. Whether to issue an order that the 2nd Defendant do nullify and/or cancel the transfer and issue of the Certificate of Lease to the suit property in the name of the 1st Defendant and have the same restored in the name of the Plaintiff.

Having established that the 1st Defendant is the duly registered proprietor of the suit property, this court will not issue an order for the cancellation of the 1st Defendant’s Certificate of Lease. The Plaintiff is the one who duly transferred the suit property to the 1st Defendant and cannot turn around and say that he is still entitled to own the suit property.

c. Whether eviction orders should be issued against any person in illegal occupation of the suit

property.

In light of the foregoing findings, this court hereby issues an eviction order of any person who may be in occupation of the suit property which belongs to the 1st Defendant. This includes the Plaintiff's sons. Vacant possession of the suit property should be given to the 1st Defendant on the date of delivery of this Judgment.

d. Whether a permanent injunction against the Plaintiff, his sons and their agents and representatives should be issued restraining them from trespassing on the suit property.

As the duly registered proprietor of the suit property, the 1st Defendant is entitled to enjoy the rights of possession of the suit property to the exclusion of everyone else. In the circumstances, a permanent injunction against the Plaintiff, his sons and other agents and representatives is hereby issued restraining them from trespassing on the suit property. The Plaintiff and his sons should vacate the suit property within 45 days from the date of this Judgment failure to which they should be evicted.

In light of the foregoing, I hereby dismiss the Plaintiff's case and do enter Judgment in favour of the 1st Defendant as stated in the Counterclaim. Each party shall meet their own costs of this suit and counterclaim.

It is so ordered.

DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF JULY 2015.

MARY M. GITUMBI

JUDGE