



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 1189 OF 2007

CHARLES GATHUMA MUNGE..... PLAINTIFF

VERSUS

PETER ICHARIA MUNGE.....1ST DEFENDANT

ICHAMU INVESTEMENTS LTD2ND DEFENDANT

JUDGMENT

The Plaintiff initiated this suit by a plaint dated 3rd October 2003 which was amended on 6th August 2007 and further amended on the 1st December 2008. The further amended plaint formed the basis of the plaintiff's evidence at the trial which opened on 20th February 2013 when the plaintiff testified.

By the further Amended Plaint the plaintiff seeks the following orders against the Defendants:-

- a. Orders of specific performance that the Defendant do purchase for the plaintiff a property within Runda area of Nairobi of equal value as the suit property.
- b. In the alternative, the Defendant do pay to the plaintiff the market value of the suit property being Kshs.15,000,000/- or such amount as the court may determine at the time of the determination of the suit herein.
- c. In the further alternative the registration of the suit premises in favour of the Defendant be cancelled for want of consideration.
- d. Costs and interest on the value of the suit property from the date of agreement.
- e. Such other and further orders as to this court may seem just to grant.

The Plaintiff and the 1st Defendant are brothers and the plaintiff contends that by an agreement entered into between the parties in or about October 2000 the plaintiff agreed to transfer the suit property being land Reference Number **9104/204** Whispers Estate Nairobi to the Defendant on the terms that the Defendant would purchase for the plaintiff land of equivalent value within the Runda Estate in Nairobi and/or in default of such purchase the plaintiff was to pay for the suit property at the prevailing market value. The plaintiff further contends the Defendant neglected and/failed to honour his part of the bargain and instead the 1st Defendant procured the transfer of the suit property fraudulently and through misrepresentation as particularized under paragraph **6A** of the further Amended plaint and further the 1st Defendant acting in collusion with the 2nd Defendant fraudulently transferred the suit property to the 2nd Defendant during the pendency of this suit as particularized under paragraphs **7A** of the further amended plaint.

In consequence the plaintiff seeks the transfer in favour of the 2nd Defendant to be cancelled on account of having been procured fraudulently and/or the Defendants in the alternative be ordered to pay to the plaintiff the market value of the suit property which on 12th July 2008 had been valued at Kshs.15,000,000/- and/or in lieu thereof the Defendants be ordered to procure for the plaintiff property of equal value within the same locality as the suit property.

The Defendant by the further amended Defence dated 10th February 2009 denies all the allegations of fraud set out in paragraphs **6A** and **7A** of the plaint and puts the plaintiff to strict proof. The 2nd Defendant filed its defence dated 3rd August 2009 and contends that contrary to the allegations by the plaintiff it is the registered proprietor of the suit property having acquired the same for valuable consideration from the 1st Defendant. The 2nd Defendant contends that to the extent that the suit against it is founded on fraud, the same is statute barred by virtue of section 26 of the limitation of Actions Act Cap 22 Laws of Kenya. The 2nd Defendant further denies the allegations of fraud attributed to it and puts the plaintiff to strict proof and further contends that there having been no contract between the plaintiff and the 2nd Defendant the plaintiff is non suited as against the 2nd Defendant.

The hearing in this case opened before me on 20th February 2013 and by the time the hearing closed a total of 2 witnesses testified. The plaintiff testified as **PW1** and the 1st Defendant testified as **DW1** on his own behalf and on behalf of the 2nd Defendant in respect of which he is a director.

The Plaintiff testified that the 1st Defendant was his younger brother whom he assisted in bringing up. The plaintiff testified that as his brother required a parcel of land where he could put up his permanent residence he offered and agreed to give to the 1st Defendant his plot **L.R.91204/204 located at Whispers Estate Gigiri off United Nations Avenue Nairobi**. In his evidence in Chief the plaintiff adopted his witness statement dated 16th February 2012 and filed in court on 17th February 2012. The plaintiff admitted that there was no written agreement between him and the 1st Defendant and the agreement alluded to was oral. The terms of the oral agreement according to the plaintiff was that he agreed to transfer the suit property to the 1st Defendant on the condition that the 1st Defendant would at an appropriate time, when the 1st Defendant was stable financially, purchase for the plaintiff land of equal value within the Runda Estate.

The plaintiff's further evidence is that he on the strength of the aforesaid oral agreement authorized the release of the completion and original title documents from his Advocates **M/S Ramesh Manek Advocates** to the 1st Defendant's Advocate to facilitate the transfer of the property and that the 1st Defendant collected the title documents from the plaintiff's advocates on 27th October 2000. The plaintiff admitted having executed the transfer of the property in favour of the 1st Defendant but denies that he was paid and/or received the sum of **Kshs.1,000,000/-** indicated as the consideration in the transfer.

The plaintiff further testified that the 1st Defendant failed and/or neglected to honour the terms of their agreement and that instead of buying the plaintiff a property of equivalent value as had been agreed the 1st Defendant caused the suit property to be transferred to the 2nd Defendant a company owned and associated with the 1st Defendant during the pendency of this suit. The plaintiff asserts the transfer to the 1st Defendant was procured fraudulently and by misrepresentation by the 1st Defendant as the 1st Defendant never had any intention of honouring the terms of the oral agreement. Thus the plaintiff testified that the transfer from the 1st Defendant to the 2nd Defendant was equally fraudulent and aimed at defeating the plaintiff's claim in the instant suit.

The 1st Defendant made a witness statement dated 6th July 2012 and filed in court on 9th July 2012 which he relied upon as his evidence in chief and as evidence on the part of the 2nd Defendant. It was the 1st Defendant's evidence that he and his elder brother the plaintiff herein had been doing business together since 1985 and that in or about October 2000 the plaintiff offered to sell his property **L.R. NO. 9104/204**

Gigiri Nairobi to the 1st Defendant at the consideration of **Kshs.1,000,000/-** and that the plaintiff authorized his lawyers **Ramesh Manek Advocates** who were holding the title documents to release the same to the 1st Defendant on 27th October 2000.

It is admitted that the plaintiff and the 1st Defendant on or about 6th December 2000 together went to the firm of **Kipkenda Lilan & company Advocates** where the plaintiff voluntarily signed the transfer where he duly acknowledged receipt of the purchase price in the presence of Mr. **Paul Koech Advocate**. The signed transfer was consequently registered and the property duly registered in the 1st Defendant's name on or about 14th December 2000. The 1st Defendant contends there was no further term other than the agreed purchase price of Kshs.1,000,000/- which he states he paid to the plaintiff.

The 1st Defendant further testified that he was a bonafide purchaser for value and denied there was any fraud and/or misrepresentation as alleged on his part by the plaintiff. The 1st Defendant averred that as the registered owner of the suit property he had a right to deal with the property as he deemed fit and that the purported "**caveat Emptor**" notice published in the Daily Nation of 8th August 2005 had no legal effect. The 1st Defendant contended that the 2nd Defendant acquired the property from him and that at the time of the acquisition the plaintiff had no interest in the suit property and at the time there was no court order restraining the 1st Defendant from dealing with the suit property and thus the 2nd Defendant acquired a valid title. The 2nd Defendant contends there is no privity of contract between it and the plaintiff to entitle the plaintiff to bring this action against it and asserts that the plaintiff has no cause of action against it and the suit against it ought to be dismissed with costs.

The parties at the direction of the court filed written submissions in support of their respective positions and contentions. On behalf of the plaintiff it was submitted that the nature of the transaction between the plaintiff and the Defendant was that of a constructive trust. The plaintiff referred the court to the definition of constructive trust in the Black's Law dictionary where it is defined as a "**Legal concept created by the courts against one who by fraud wrongdoing, or any other unconscionable conduct either has obtained or holds legal right to property which he ought not to in good conscience keep and enjoy**". The plaintiff further referred to various court decisions to illustrate the situations where constructive trust may be held to be applicable (see **Hussey -vs- Palmer (1972) 3 ALLER, Lipkin German (a firm) -vs- Karpnale Ltd & Ano. (1992) 4 ALL ER, Yaxley -vs- Gotts & Ano. (C.A) 2000, L.N. -vs- S.M.M. (2013) eKLRand Hogson -vs- Marks (1970) 3 WLR (Ch.D)**). It is the plaintiff's submission that to the extent that the plaintiff did not prove that he had paid for the property by adducing any evidence of payment he cannot claim that he was a bonafide purchaser of the suit property. If the 1st Defendant had not paid for the property and the property was transferred to him then as per the submission by the plaintiff he would only have held the property as a trustee for the plaintiff and he would be under an obligation to restore the property or its equivalent value to the plaintiff. Otherwise the 1st Defendant would be unjustly enriched if restitution is not made to the plaintiff. The plaintiff further submits as the transfer to the 1st Defendant was obtained fraudulently and through misrepresentation the same was voidable at the instance of the plaintiff and that any consequent transfer by the 1st Defendant was null and void and could not pass any interest.

On the part of the 1st Defendant it was submitted that to the extent that the plaintiff's suit was founded on an alleged oral agreement with the 1st Defendant there was by reason of section 3(3) of the Law of contract Act Cap 23 Laws of Kenya no cause of action disclosed as there was no contract in writing as required under the said provision of the law. Section 3(3) of the Law of contract Act prior to the amended in 2002 provided thus:-

"No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded or some memorandum or note thereof is in writing and signed by the party to be charged or by some person authorized by him to sign it".

The 1st Defendant in his submission acknowledges that he had not pleaded the non compliance with

section 3(3) of the Law of contract Act but avers the issue being a point of law and a jurisdictional issue can be raised at any stage during the trial and refers the court to the case of **Manji –vs- US International University & Another. (1976-80) vol 1 KLR 229** where the late Madan Judge explained the position thus:-

“Mr. Salter submitted that statute must be pleaded as a bar to the relief being sought by the plaintiff which has not been done in this case. True it is not pleaded, it was referred to in arguments by Mr. Le Pelley. It may be the English Law that the statute must be pleaded. I do not understand such to be law in Kenya. I understand that a point of law unless expressly required to be pleaded by statute which subsection (3) does not, maybe raised at the trial”.

The court of Appeal in the case of **Ratilal Gova Samaria & Another –vs- Allied Industries Ltd (Nairobi Civil Appeal NO. 203 of 2002)** unreported declined to enforce a contract that had failed to comply with section 3 (3) of the Law of Contract Act. The court of appeal upheld the Commissioner of Assize’s finding that where there is no written agreement and no meeting of the minds (**adidem**) on the terms of the agreement there can be no enforceable agreement and upheld the dismissal of the suit.

In the instant case there is no dispute that there was no written agreement as between the plaintiff and the 1st Defendant. The plaintiff indeed has admitted in evidence there was only an oral agreement between him and his brother, the 1st Defendant. The plaintiff and the 1st Defendant however do not agree what the terms of the oral agreement were. The plaintiff insists the terms included he (the plaintiff) agreeing to transfer the suit property to the 1st Defendant on the understanding that the 1st Defendant was to at some future date purchase for the plaintiff a property of equivalent value in Runda. The plaintiff’s evidence is that he on the basis of that agreement voluntarily executed a transfer of the suit property to the 1st Defendant. The 1st Defendant however maintains that the plaintiff agreed to transfer the suit property to him (the 1st Defendant) at the consideration of **Kshs.1,000,000/-** which he duly paid to the plaintiff and the plaintiff duly transferred the property to him. The plaintiff in his evidence also stated he agreed to transfer the property to the 1st Defendant since he wanted his brother to have a place to put up his residence. It is indeed instructive that the 1st Defendant duly developed a residence on this same property and was as at the time of the trial residing therein.

Having regard to the rival assertions of what the terms of the alleged agreement were it is not difficult to appreciate why the law demands that all contracts respecting any disposition of any interest in land should be evidenced in writing and signed by the party to be charged. If the plaintiff and the 1st Defendant’s agreement had been reduced into writing the question of what the terms were would not arise. As it is now the court may never know what the terms of the agreement were. There is absolutely no basis to believe one party and not the other.

On the issue of fraud alleged against the 1st and 2nd Defendants by the plaintiff the 1st Defendant has submitted that the plaintiff has not proved fraud against the Defendants to the required standard. The court of appeal in the case of **Ratilal Gordhanbhai Patel –vs- Lalji Makanji (1957) EA 314** established the threshold on the burden of proof required in Civil cases founded on fraud when the court observed thus:-

“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....”.

In the case of **Koinange & 13 others –vs- Koinange (1986) KLR 23** the Judge relied on the decision in the **Ratilal G. Patel case (Supra)** and held as follows:-

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.**
 - 3. Much of the plaintiff's evidence of the alleged fraudulent intent and forgery on the part of the defendant was hearsay or at best circumstantial and not conclusive. The evidence therefore fell short of the required standard of proof".**

In the present suit the parties are not agreed on what the terms of the alleged agreement were. The allegations of fraud alleged by the plaintiff as against the 1st Defendant are founded on the fact of the terms of the alleged verbal agreement between the plaintiff and 1st Defendant being what the plaintiff claims they were. The terms of the agreement as outlined by the plaintiff are not admitted by the 1st Defendant. The 1st Defendant states that the agreement was that the plaintiff was to transfer the parcel of land to him upon being paid **Kshs.1,000,000/-** being the agreed consideration. The 1st Defendant states he paid the consideration and the plaintiff acknowledged payment upon signing the transfer of the property which clearly showed the plaintiff was by executing the transfer acknowledging having received payment. The 1st Defendant was categorical that he paid the sum of Kshs.1,000,000/- to the plaintiff on various occasions before the Transfer was signed but no receipts were issued to him.

The plaintiff admits he voluntarily executed the transfer and therefore there cannot be as at that point any issue that the signing of the transfer was obtained fraudulently. The fulcrum of the plaintiff's assertions of fraud and/or misrepresentation is the terms of the alleged verbal agreement which the plaintiff in the absence of any evidence in writing as envisaged under section 3 (3) of the Law of contract Act Cap 23 Laws of Kenya cannot establish and/or prove. In essence the plaintiff is asking this court to enforce a verbal contract that is not in writing and whose terms cannot be ascertained. The contract that the plaintiff seeks to rely on in my view would be a disposition of an interest in land within the meaning of section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya and would mandatorily require to be in writing for the plaintiff to found this suit on it.

Section 3(3) of the Law of Contract Act provides:-

(3) 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 part signing has been attested by a witness who is present when the contract was signed by such party.

The above provision was incorporated in the Act following the amendment to the Act but in 2002 but even prior to the amendment evidence in writing was required in all contracts for dispositions of interests touching land except where a party to the contract had in part performance of the contract taken possession of the land and was in possession. In the instant suit there is no evidence in writing of the contract and neither is the plaintiff in possession of the suit premises.

I have carefully reviewed the plaintiff's submissions as they relate to the 1st Defendant having been constituted a trustee on the basis of the principles governing resulting trusts but with respect I am unable to agree with the submissions as once again the decision turns on what were the terms of the alleged agreement. The plaintiff in my view has not proved and/or established the terms were what he claims they were.

The case against the 2nd Defendant turns very much on whether the transfer from the plaintiff is held to

have been fraudulent. If the transfer is held to have been fraudulent then there would be the issue whether or not the 1st Defendant could pass a good title to the 2nd Defendant having regard to the circumstances. As I have come to the conclusion having regard to the facts and evidence that the transfer by the plaintiff to the 1st Defendant was not fraudulently procured it follows that the plaintiff cannot properly impugn the transfer by the 1st Defendant to the 2nd Defendant and I will therefore not consider the several allegations of fraud levelled against the 2nd Defendant as the same are incapable of proof in the absence of having settled and/or agreed terms of the agreement.

I need however to consider the claim by the 2nd Defendant that the claim against it to the extent that it is founded on fraud is statute barred as the transfer to it was effected on 30th August 2005 and it was not enjoined to these proceedings until 3rd December 2008. It is true that an action founded on fraud ought to be instituted within 3 years from the date the fraud is committed and/or within 3 years from the date the fraud is discovered. In the instant case there is no clear evidence as to when the plaintiff came to learn of the transfer to the 2nd Defendant. The 3 year period would run from the date the plaintiff learnt of the registration of the transfer in favour of the 2nd Defendant and in the absent of such evidence I decline to hold that the suit against the 2nd Defendant is statute barred.

The parties submitted that the transfer by the 1st Defendant to the 2nd Defendant was fraudulent having been made during the pendency of the present suit. The doctrine of Lis pendens embodied under section 52 of the Transfer of property Act (repealed) is intended to have properties the subject of suits preserved until the suits are heard and determined. In practice however it is incumbent on the party likely to be affected by any disposition of the suit property to seek injunctive orders from the court and/or to cause a caveat to be registered by the Land Registrar prohibiting any transactions and/or dealings concerning the land in dispute to protect his interest in the property.

Thus in our jurisdiction the court acts as a check to prevent frivolous and unmeritorious suits being filed to inhibit dealings with land. In meritorious cases the court issues injunctive orders pending the hearing and determination of the cases on merit. In the present case the record shows the plaintiff did infact file an application for injunction which was not prosecuted such that at the time the suit property was transferred to the 2nd Defendant there was no order of injunction and thus the 1st Defendant was at liberty to deal with the property. Nonetheless as I have held the transfer by the plaintiff to the 1st Defendant cannot be impugned on account of any fraud it follows that the 1st Defendant could validly deal with the suit property as he pleased and in the premises it is my view the doctrine of Lis pendens would have no application.

Upon evaluation of the pleadings, the evidence and submissions by the parties the issues that stand to be determined by the court as follows:-

- 1. Whether the plaintiff's suit as pleaded discloses a cause of action in law against the Defendants.**
- 2. Whether the transfer of the suit property from the plaintiff to the 1st Defendant was fraudulent as alleged and if so whether a constructive trust was created in favour of the plaintiff over the suit property.**
- 3. Whether the suit as against the 2nd Defendant is statute barred.**
- 4. Whether the plaintiff is entitled to the reliefs sought.**
- 5. What orders should be made as to costs.**

On the first issue I have upon evaluation of the evidence and the submissions by the parties come to conclusion that the verbal agreement relied upon by the plaintiff failed to meet the requirements of section 3(3) of the Law of Contract Act and thus the plaintiff cannot properly found his action on this alleged agreement which was unwritten. It is my holding that the terms of the alleged agreement have not been established and/or determined. The terms are uncertain and vague and in my view are incapable of being enforced and I therefore hold the plaintiff's suit discloses no cause of action in law against the Defendants.

On the second issue I hold that the plaintiff has not proved the transfer to the 1st Defendant of the suit property was fraudulent. The plaintiff voluntarily executed the transfer in which he acknowledged having been paid and having received the sum of Kshs.1,000,000/-. Under section 97(1) of the evidence Act Cap 80 Laws of Kenya the plaintiff is estopped from denying and/or impugning the contents of the instrument of transfer which he executed. No fraud was proved as against the 1st Defendant to the standard required. In the circumstances no constructive trust can arise and I consequently disallow the claim of a constructive trust in favour of the plaintiff.

On the third issue I observed earlier on that there is no clear evidence as to when the plaintiff became aware that the suit property had been transferred to the 2nd Defendant to enable the court to make a finding as to when the time for purposes of limitation started running. I therefore have no basis to find and hold the suit as against the 2nd Defendant statute barred and I decline to so hold.

In the premises it follows that I have in the result come to the finding and holding that the plaintiff has failed to prove his case on a balance of probabilities against the Defendants and I accordingly order the same dismissed against both Defendants.

As regards costs I have considered the special circumstances of this case which pities the elder brother against the younger brother on the one part and the same younger brother and his wife as the directors and shareholders of the 2nd Defendant on the second part Considering the family affiliations I will exercise my discretion not to burden any party with costs of the suit and I order that each party will bear their own costs of the suit.

Judgment dated, signed and delivered at Nairobi this...20th ...day of...May.....2014.

J. M. MUTUNGI

JUDGE

In presence of:

.....For the Plaintiff

.....For the Defendants