



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 92 OF 2013

SAI OFFICE SUPPLIES LIMITEDPLAINTIFF

VERSUS

ROSEMARY ALIVISTA LUSENO.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

The Plaintiff's Case

The Plaintiff avers that it entered into an agreement for sale dated 29th August, 2008 with Cowan Holdings Limited, (“the vendor”), pursuant to which the said vendor agreed to sell to it all that parcel of land known as L.R No. 3734/94 (I.R No. 22456) (“the suit property”) for a consideration of Kshs.40,000,000/=. Further, that after carrying out all due diligence and confirming that the vendor was at the time the registered proprietor of the suit property, it paid the said purchase price of Kshs.40,000,000/= on 4th August 2008, and on 7th November 2008 the vendor executed a transfer in its favour and also executed a Discharge of a Charge that was registered against the suit property. The Plaintiff thereupon paid stamp duty in the sum of Kshs.1,600,010/= in respect of the transfer which was registered on 18th December 2008.

The Plaintiff further avers that soon thereafter, it notified the City Council of Nairobi of the said change of ownership and consequently, the said Council issued it with demands for payment of rates for the years 2009, 2010 and 2011, which rates the Plaintiff duly paid. The Plaintiff states that subsequent to the registration of the transfer in its favour, it charged the suit property to I & M Bank as security for various borrowings. Further, that the suit property was still charged to I&M Bank as at the date of filing this suit.

The Plaintiff claims that sometimes in the month of March 2012, it discovered that the City Council of Nairobi had issued the rates demand note in respect of the suit property the 1st Defendant. Upon making enquiries, the Plaintiff obtained a certificate of title indicating that the 1st Defendant was the registered proprietor of the suit property. The said title was allegedly issued to the 1st Defendant on 8th January 2009, after the registration of the transfer in favour of the Plaintiff. The Plaintiff avers that at no time has it sold or transferred the suit property to the 1st Defendant, and that in the circumstances, the title allegedly held by the 1st Defendant was fraudulently obtained and is a forgery.

In addition, the Plaintiff avers that at the time of the issuance of the purported title to the 1st Defendant, the suit property was not available for allocation because it was registered in the Plaintiff's name. The Plaintiff therefore avers that the manner in which the 1st Defendant obtained the purported title over the

suit property infringes on the Plaintiff's rights under Article 40 of the Constitution.

The Plaintiff also claimed that as the custodian of all documents relating to land, the Commissioner of Lands and the Registrar of Titles ought to have put in place measures to ensure that the Plaintiff's rights over the suit property were not interfered with. Further, that by purporting to allocate or issue a title to the 1st Defendant in respect of suit property when it was not available for allocation, the Commissioner of Lands and the Registrar of Titles acted negligently.

The Plaintiff therefore prays for judgment against the Defendants for:

- a. A declaration that the Plaintiff is the only lawful and legitimate proprietor of the Property L.R No. 3734/794 (I.R No. 22456).
- b. A declaration that the purported transfer of the property L.R No. 3734/794 (I.R No. 22456) to the 1st Defendant was illegal, null and void.
- c. An order for delivery up and cancellation of the Certificate of Title issued to the 1st Defendant over the Property L.R. No. 3734/794 (I.R 22456);
- d. An injunction to restrain the 1st Defendant, her agents, servants and/or employees from entering, remaining upon, disposing, alienation, encumbering, charging, interfering, transferring or in any other way howsoever dealing with the Property L.R No. 3734/794 (I.R No. 22456).
- e. General and/or exemplary damages.
- f. Costs of and incidental to this suit on a full indemnity basis plus interest thereon; and
- g. Any other or further relief that this Honourable Court may deem fit and just to grant in the circumstances.

The Plaintiff's only witness at the hearing of the suit was its director, Kartik Shirishbhai Patel, (PW1). He filed a statement dated 18th January 2013 which he adopted as his evidence, and wherein he reiterated the foregoing facts. PW1 also produced various exhibits in support of the Plaintiff's case. A certified copy of the Plaintiff's title to the suit property was produced as exhibit 1, and PW1 explained that the original title is charged to, and is with I&M Bank. He also produced a letter dated August 4th 2008 forwarding the purchase price to the vendor, as well as a copy of the payment cheque as Exhibit 2(a) and 2(b). A copy of the sale agreement entered into with Cowan Holdings Limited dated 29th August 2008 was also produced as the Plaintiff's Exhibit 3.

The valuation for stamp duty was the Plaintiff's Exhibit 4, and the paying-in slips for the stamp duty were produced as the Plaintiff's Exhibit 5(a) and 6(b). PW1 also produced the payment for the registration of the sale agreement as Exhibit 6(a) and 5(b); the discharge of charge over the suit property as Exhibit 7; the paying in slips for the said discharge as Exhibit 8(a) and 8(b); the rates clearance certificate issued to the vendor as Exhibit 9; the transfer dated 7th November 2008 of the suit property executed by Cowen Holdings Ltd and the Plaintiff as Exhibit 10; the entry of the transfer as against the title to the suit property on 18/12/2008 as its Exhibit 11; the application for registration of the transfer as Exhibit 12; a memorandum from the Chief Valuer of City Council of Nairobi dated 13/2/2009 showing the Plaintiff as the new owner of the suit property in the valuation roll as Exhibit 13; and the rate demands from the City Council Of Nairobi for the years 2009 – 2011 as Exhibit 14.

PW1 in his evidence in chief explained that in 2012 when the Plaintiff asked for the rate demand from the City Council of Nairobi, it was issued with a demand note in the name of the 1st Defendant. Upon inquiring on how the name had changed to the 1st Defendant, the Plaintiff got documents from the City Council of Nairobi showing a transfer of the property to 1st Defendant by the Plaintiff, and a title in the name of the 1st Defendant issued to her on 8th January 2009. He produced the said title in the 1st Defendant name as the Plaintiff's Exhibit 19, the rates demand by the City Council of Nairobi to the 1st Defendant as Exhibit 16, and the purported transfer as Exhibit 17. PW1 also produced as Exhibit 18 a copy of the title to the suit property at the time of the purported transfer, showing no such entry and also showing the subsequent entry of a charge to I&M Bank.

The witness produced various correspondence on the purported transfer and registration of the suit property to the 1st Defendant, namely a letter written by the Plaintiff's lawyers to the Chief Land Registrar dated 16th March 2012 which he produced as Exhibit 19; a letter written by the said lawyers to the Nairobi City Council dated 21st March 2012 which he produced as Exhibit 20; and a response from the lands office in a letter dated 13th April, 2012 stating that the deed file for the suit property had been placed in safe custody which was produced as Exhibit 21.

PW1 testified that there was no further communication from the lands office, and that the Plaintiff's Advocates wrote another letter to the Commissioner of Lands dated 28th September 2012 to confirm the validity of its title, which letter was confirmed as received by the Commissioner of Lands on 1st October 2012. He produced the letter as Exhibit 22. Further, that the Plaintiff's Advocates then issued a notice to the Attorney General's Chambers dated 28th September 2012 pursuant to section 13A of the Government Proceedings Act, which was acknowledged by the State Law Office as received on 1st October 2012, and which PW1 produced as Exhibit 23.

A demand letter dated 28th September 2012 sent to the 1st Defendant by registered post together with the evidence of registration was produced by PW1 as Exhibit 24. Lastly, a copy of a letter written by the Attorney General's office addressed to the Ministry of Lands dated 8th October 2012, and copied to the Plaintiff's lawyers was produced as the Plaintiff's Exhibit 25. PW1 reiterated that the Plaintiff has never transferred the property to any person, has constructed on the said property, and that no one has ever claimed the property.

Upon cross-examination by the Advocate for the 2nd Defendant, PW1 stated that its claim against the 2nd Defendant was for cancellation of the title issued to the 1st Defendant. He also stated that the Plaintiff had suffered loss, as it had to stop development for two months after discovering the fraudulent transfer to the 1st Defendant, while at the same time repaying its loan to the bank with interest.

The Plaintiff's counsel also relied on submissions filed in court dated 1st August 2013.

The Defendants' Case

The 1st Defendant did not enter any appearance nor file a Defence after the Plaintiff effected service of the court process upon her with the leave of the court by way of an advertisement published in the *Daily Nation* newspaper of 24th January 2013. Interlocutory judgment was subsequently entered against the said Defendant on 4th April 2013.

The 2nd Defendant on its part filed a Statement of Defence dated 10th June 2013 wherein it denied the Plaintiff's allegations and put it to strict proof thereof. In particular, the 2nd Defendant denied that it was privy to the agreement made between Cowan Holdings Limited and the Plaintiff, and that the Office of the Attorney General is not an agent of, nor does it act for or on behalf of City Council of Nairobi. Further, that that the alleged forgeries, if any, were conducted without its notice, omission or collusion. The 2nd Defendant averred that the mandate of the Lands Office is limited to verifying the authenticity of documents supplied to them and registering the same, and that the availability of property for allocation is not usually within its purview. The 2nd Defendant also alleged negligence on the part of the Plaintiff in not exercising due diligence and ensuring that it dealt with the registered owner of the suit property.

The 2nd Defendant did not call any witness to give evidence, but its counsel filed submissions dated 16th September 2013.

The Issues and Determination

Arising from the evidence given by the parties, it is not disputed that the Plaintiff did enter into a sale

agreement on 29th August, 2008 with Cowan Holdings Limited for the purchase of the suit property, which property was subsequently transferred to it and the transfer registered against the title on 18th December 2008. It is also not disputed that a title to the suit property was subsequently issued to the 1st Defendant on 8th January 2009. This court in light of the foregoing facts finds that the issues for determination are as follows:

- a. Whether the issue of the title to the suit property to the 1st Defendant was fraudulent and negligent.
- b. Whether the Plaintiff is entitled to the reliefs sought.
- c. Which party should bear the costs of these proceedings.

I shall proceed to consider the issues in the order in which they appear:-

Whether the issue of the title to the suit property to the 1st Defendant was fraudulent and negligent

The Plaintiff on this issue submitted that it has brought evidence of its ownership of the suit property. Further, that no evidence was led by the Defendants to controvert the evidence adduced by the Plaintiff. The Plaintiff relied on the decision of the courts in the following authorities for the position that where a Defendant fails to appear in court and/or to challenge or controvert evidence of ownership of land brought by the Plaintiff, then the Plaintiff is deemed to have proved his or her case on a balance of probabilities :-

- a. **James Gichure Kionga v. Patrick Ngotho Muraguri, HCCC No. 180 of 1999.**
- b. **James Kasyula Mutua v. Fontana Enterprises Limited, HCCC No. 462 of 2001.**
- c. **John Ng'ang'a Gathegi v. Chief Land Registrar & Another, HCCC No. 1647 of 2002.**
- d. **Joel Kiprono Koskei v. Jane Koskei, HCCC No. 96 of 2004**
- e. **Philomena Warigia Waweru v. Patrick Mbugua & 4 others, HCCC No. 269 of 2000.**

The Plaintiff contended that in the face of the overwhelming evidence of the Plaintiff's entitlement to the property, the failure by the 1st Defendant to prove her alleged claim to the property coupled with the failure by the 2nd Defendant to adduce any evidence to controvert the Plaintiff's claim, leads to the conclusion that the alleged title to the 1st Defendant is but a forgery.

The Plaintiff also submitted that it had conclusively demonstrated that its title to the property was registered way before the alleged title in the name of the 1st Defendant was registered, and urged this Court to be guided by the decision in **Alberta Mae Gacie v. The Attorney General & 4 Others, HCCC No. 522 of 2000** that were the issuance of a title, and/or transfer and transmission of a title does not follow laid down legal procedures the such issuance, transfer or transmission is null and void and of no effect.

The 2nd Defendant on its part submitted if indeed there was fraud committed and a second title issued in respect of the suit property, the same did not emanate from its clients office. Further, that the Plaintiff being aware of the distinct nature of the Office of the Attorney General and of the City Council of Nairobi deemed it fit to lay the blame on an innocent party and letting the instigator of the alleged fraud go scot free. Furthermore, that the Plaintiff sought assurance from the Ministry of Lands that the suit property is duly registered in its company's name, and that the said Ministry indeed wrote to it confirming that they had placed the deed file to the suit property in safe custody as requested, and did everything possible in the circumstances.

The 2nd Defendant sought to distinguish the decisions in **Nakuru HCC 180 of 1999 - James Gichure Kionga vs Patrick Ngotho Muraguri** and **Nairobi HCC 463 of 2001 - James Kasyula Mutua vs Fontana Enterprises Limited** and submitted in this regard that it fully participated in this suit by responding to the summons to enter appearance as well as filing a defence which is duly on record. Regarding the facts and findings of the Court in **Mombasa HCC 522 of 2000 - Alberta Mae Gacie vs The Attorney General & 4 Others**, the 2nd Defendant submitted that acts by the Ministry of Lands

officials in that case are totally distinct from the allegations leveled against the Commissioner of Lands in the present case.

Further, that in the said case the Registrar of Titles transferred property while having evidence of impediments, whereas in the instant case the suit property has not been transferred to any persons, and the title held by the 1st Defendant is most likely a forgery as she chose not to participate in the matter despite notice. In addition in the present case the Ministry of Lands had communicated to the Plaintiff that they had placed the deed file in safe custody.

I have given careful consideration to the arguments made. This Court also notes that fraud is defined by **Black's Law Dictionary Ninth Edition** at page 731 as "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment". It has also been held in **Mutsonga –vs- Nyati 1984 (KLR) 425** and in **Koinange & 13 Others vs. Koinange (1986) KLR 23** in this respect that allegations of fraud must be strictly proved, and though the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than on a balance of probabilities. The onus of discharging this burden is on the party alleging the fraud.

The Plaintiff has brought evidence to show the processes leading to the registration of the suit property in its name, including the sale agreement dated 29th August, 2008 entered into with Cowan Holdings Limited with respect to the purchase of the suit property; the payment by the Plaintiff of the purchase price of Kshs 40,000,000/=; the executed transfer of the suit property by the said parties; and the application for registration of the transfer and the entry of the said transfer in favour of the Plaintiff against the title to the suit property on 18th December 2012. The Plaintiff has therefore in my view, proved its ownership of, and entitlement to the suit property.

The 1st, and 2nd Defendants on the other hand produced no evidence of any processes or allocation leading to the issuance and registration of a title in the 1st Defendant's name on 8th January 2009, and it is noteworthy in this respect that not only does the Plaintiff deny executing any transfer of the suit property in favour of the 1st Defendant, but also that the 2nd Defendant admits that the title by the 1st Defendant is most likely a forgery. The very existence and issuance of a second title to the 1st Defendant with respect to the suit property after the said property had been transferred to the Plaintiff and in the absence of any supporting documents is also in my view a misrepresentation of facts made by the Defendants.

In addition, the existence of two different titles with respect to the same property, and with all the necessary endorsements made thereon is in itself evidence of participation in a forgery and negligence on the part of the officials in the Ministry of Lands who were the custodians and issuers of titles, and also on the part of the 1st Defendant who did not appear or bring any evidence to explain how she obtained title to the suit property.

Furthermore, the Government of Kenya and particularly the Ministry of Lands has the full responsibility to ensure the accuracy and authenticity of titles issued consequent to registration of any landed property, and this is the main basis for the provisions in the law for compensation and indemnity by the Government in the event of fraud or errors committed in the process. These provisions were previously found in section 144(I) of the Registered Land Act and section 24 of the Registration of Titles Act, which Acts have since been repealed. Elaborate provisions as to indemnity are now found in the Land Registration Act of 2012 in sections 81-84 thereof. It is for the foregoing reasons that I therefore find that the 1st and 2nd Defendants were privy to the fraudulent and negligent issuance of a title to the suit property to the 1st Defendant.

Whether the Plaintiff is entitled to the reliefs sought

It was the Plaintiff's argument on this issue that having succinctly demonstrated that it is the registered owner of the suit property, it is entitled to the declaration that it is the only lawful and legitimate

proprietor of the suit property, and that the purported transfer of the said property to the 1st Defendant was illegal, null and void. Further, that the existence of the forged title issued to the 1st Defendant is an affront to the Plaintiff's proprietary rights, and the Plaintiff urged this Court to order the delivery up and cancellation of the certificate of title issued to the 1st Defendant, in line with the pronouncement of the Court of Appeal in **Chauhan v. Omagwa, (1985) KLR 656**.

In addition, the Plaintiff submitted that it is entitled to quiet possession and enjoyment of the property, and urged this Court to issue a permanent injunction to restrain the 1st Defendant, her agents, servants and/or employees from entering, remaining upon, disposing, alienating, encumbering, charging, transferring or in any way howsoever dealing with the suit property.

Lastly, it was argued by the Plaintiff that its witness duly testified that the Plaintiff had to stop construction on the property for a period of two (2) months due to the nuisance of the rates demand note in the 1st Defendant's name, and has been forced to live with the anxiety of the forged title issued to the 1st Defendant. Further, that the 2nd Defendant's actions of permitting the issuance of the forged title and subsequent failure and refusal to investigate and cancel the forged title has further added to the Plaintiff's suffering. The Plaintiff submitted that in the premises is entitled to general and/or exemplary damages to be assessed by this Court.

The 2nd Defendant on the issue of the reliefs sought submitted that it was the Plaintiff's own testimony that it has not lost anything materially or otherwise as a result of the alleged existence of a second title, and that it had only suffered mental anguish. It was its submission that the claim for exemplary damages should therefore fall in its entirety.

The 2nd Defendant further argued that in a case such as this where the Plaintiff found its property registered in the name of someone else, it was incumbent upon it to commence investigations. However, that the Plaintiff instead came to court to seek a declaration. Further, that if the cancellation of the 2nd forged title was really important, the Plaintiff should have sought the assistance of the Land Fraud Department or the Criminal investigation Department so that the same could be confiscated for cancellation by the Court.

It was the 2nd Defendant's submission that the suit by the Plaintiff is a case fit for investigation by the police and not for adjudication by this court, as the ownership of property is not in dispute. Further, that it is in the interest of justice that the culprits and perpetrators of the falsified documents should be apprehended, and that the wasteful use of taxpayers money be averted through vexatious litigation.

Having considered the arguments made, I find that since the Plaintiff's evidence of its ownership of the suit property is not contested by the Defendants, it is therefore entitled to the declaration sought of ownership and any consequential orders arising from such ownership. The shortcomings on the part of the 2nd Defendant clients in the due performance of their duties and responsibilities cannot be allowed to be an excuse or bar to any party desirous of asserting their rights through the due process of law, and indeed such dereliction of duty once proved must be appropriately reprimanded.

On the relief sought of exemplary damages, the Plaintiff averred that it was prevented from proceedings with the construction on, and development of the suit property for two months after the discovery of the title issued to the 1st Defendant. However, no evidence of the loss incurred in this respect was provided, and it is trite law as held by the **Court of Appeal** in its decision in **Hahn -vs- Singh , (1985) KLR 716** that such special damage should not only be pleaded but also strictly proved. This court cannot therefore grant the Plaintiff compensation on account of this nature of damage.

As regards the prayer for general damages, this court has found that that the Plaintiff is the legal owner of the suit property. Being such legal owner, the Plaintiff is also entitled to general damages for damage or loss caused to the said property by the acts of the Defendants. The applicable measure of damages for injury caused to land in this respect is the diminution in value of the land, or cost of reinstatement of the

land. However, no evidence of such loss in the value of the suit property was brought by the Plaintiff. In the circumstances this court has no basis to determine the measure of general damages to be awarded, and can only grant nominal damages for the interruption of the Plaintiff's enjoyment of its property.

Who should bear the costs of these proceedings

It was the Plaintiff's contention on the issue of costs that it has demonstrated that it is the registered owner of the property, and has also demonstrated the failure by the Commissioner of Lands and Registrar of Titles to take any steps to verify and authenticate the ownership of the property upon discovery of the alleged title to the 1st Defendant. The Plaintiff relied on its demand letters dated 28th September 2012 (the Plaintiff's Exhibits 22 to 25), and states that it gave the Defendants an opportunity to make good its claim and avoid litigation, which they refused to do. Further, that during the hearing, the Defendants did not adduce any evidence to challenge the Plaintiff's claim, and that in the circumstances the Defendants should bear the costs of these proceedings.

The 2nd Defendant submitted that its client conducted themselves in accordance with the laid down procedures and should not be condemned to pay costs. Further, that the Plaintiff has the assurance that the Ministry of Lands has the custody of the deed file and it is secure, and to this extent, the Ministry discharged its duties as expected. It was the 2nd Defendant's contention that it has wrongfully borne the mistakes made by the City Council of Nairobi, whom the Plaintiff sought to shield from any blame whatsoever.

The applicable law on costs is found in section 27 (1) of the Civil Procedure Act (Cap. 21) which provides that costs largely follow the event, and this court is given discretion to determine which party will meet the costs and to what extent. The Plaintiff is accordingly entitled to the costs of this suit, since this Court has reached conclusions that are in its favour in the findings hereinabove.

The Orders

Arising from the above-stated findings and reasons, this Court finds that the Plaintiff has proved its case on a balance of probabilities, and accordingly enters judgment for the Plaintiff as against the Defendants as follows:

1. The Plaintiff herein, Sai Office Suppliers Limited, is hereby declared the lawful and legitimate owner and proprietor of the property known as L.R No. 3734/794 (I.R No. 22456).
2. The purported transfer by the Plaintiff of the property known as L.R No. 3734/794 to Rosemary Alivitsa Luseno, the 1st Defendant herein, is hereby declared illegal, null and void.
3. The 1st Defendant herein, Rosemary Alivitsa Luseno, is hereby ordered to forthwith deliver up the title issued to her with respect to the property known as L.R No. 3734/794 for cancellation.
4. The Land Registrar, Nairobi County is hereby ordered to forthwith cancel the title to the property known as L.R No. 3734/794 issued to Rosemary Alivitsa Luseno, the 1st Defendant herein, and registered on 8th January 2009, and to forthwith cancel any consequential entries on the said title.
5. The 1st Defendant, her agents, servants and/or employees be and are hereby restrained from entering, remaining upon, disposing, alienating, encumbering, charging, interfering, transferring or in any other way howsoever dealing with the property known as L.R No. 3734/794 (I.R No. 22456).
6. The Plaintiff is awarded nominal general damages of Kshs 100,000/= as against both the 1st and 2nd Defendants jointly and severally.
7. The 1st and 2nd Defendants shall jointly and severally bear the costs of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____10th ____ day of

_____June_____, 2014.

P. NYAMWEYA

JUDGE