



**Ndegwa (Suing as the Legal Representative of the Estate of Jedidah
Wanjiku Ndegwa - DCD) v Jonada Services Limited (Land Case
216 of 2016) [2023] KEELC 89 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 89 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
LAND CASE 216 OF 2016
FM NJOROGE, J
JANUARY 19, 2023**

BETWEEN

**JOHN GITAHU NDEGWA (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF JEDIDAH WANJIKU NDEGWA - DCD) PLAINTIFF**

AND

JONADA SERVICES LIMITED DEFENDANT

JUDGMENT

1. The plaintiff herein commenced the present suit by way of a plaint dated 16/6/2016 filed through Munene Chege & Co Advocates. In that plaint he sought the following prayers:
 - a. A declaration that the late Jedidah Wanjiku Ndegwa was legally incapacitated due to mental illness at the time of the alleged execution of the transfer instruments of all that parcel of land known as Nakuru Municipality Block 2/490 and hence the said transfer was fraudulent and illegal.
 - b. A declaration that the plaintiff is the rightful and legal owner of all that parcel of land known as Nakuru Municipality Block 2/490.
 - c. Cancellation of the title deed of all that parcel of land known as Nakuru Municipality Block 2/490 in the names of the defendant and reversion of the title deed to the estate of the late Jedidah Wanjiku Ndegwa (deceased).
 - d. A permanent injunction (pending the hearing and determination of this suit and temporary injunction) restraining the defendant either by itself, servants or agents from trespassing, interfering, alienating, disposing, occupying, constructing and or dealing in any other way whatsoever with all that parcel of land known as Nakuru Municipality Block 2/490.



- e. A declaration that the purported transfer effected on 1/11/2007 of Nakuru Municipality Block 2/490 by the defendant is fraudulent illegal null and void;
 - f. General damages for loss of user;
 - g. Payment of mesne profits from time of occupation;
 - h. Costs and interest of this suit.
2. In the body of the plaint the plaintiff's claim is that Jedidah Wanjiku Ndegwa was the registered owner of the suit land; that she established a school on the suit land; that in October 2004 she was diagnosed with an ailment that resulted in mental illness which left her mentally incapacitated; that her sister Jelieth Wanjira Karuri took her into her home for care and nursing as she needed full-time nursing care; that she was subsequently admitted to a hospital where she died on 21/7/2013; that prior to her death, Jelieth had been appointed as the managed and guardian of her person and estate under the provisions of the [Mental Health Act](#) Cap 248 vide HC Misc Appl No 23 Of 2011; that in 2005 while Jedidah was still ailing and was under incapacitation Jelieth illegally and fraudulently and without any colour of right caused the suit land to be transferred to the defendant and that the defendant took possession of the suit, land without following the due process hence the present suit.

Defence

3. The defendant filed its defence on 26/4/2017 through Lawrence Mwangi & Mwangi Advocates. It denied the plaintiff's claim and stated that it acquired the suit land legally from Jedidah and procured its registration in its name; that its title is indefeasible and so the prayer for cancellation thereof is unfounded. It also stated that a previous suit regarding the subject matter herein, to wit, Nakuru Civil Suit No 278 Of 2005 was dismissed. Jurisdiction of the court was also denied.

Reply to defence

4. The plaintiff filed a reply to defence on 23/5/2017 in which he denied the contents of the defence and reiterated the contents of his plaint. He also denied that the previous suit that is Nakuru Civil Suit No 278 Of 2005 was the same as the present suit. He further reasserted that this court has jurisdiction to hear and determine this suit.

Evidence of The Plaintiff

5. PW1, Rachel Njeri Kangethe, a consultant Psychiatrist and lecturer at a local university testified on 9/6/2022. Her evidence was that she prepared a report dated 24/7/2009 and she produced that report as P.Exh 1(a); that from the year 2004, Jedidah experienced cognitive decline; some of the symptoms she exhibited were that she sometimes got lost while going to her school and failed to recognize people; a CT scan was conducted on her and she was diagnosed to be suffering from brain atrophy and dementia/alzheimer's disease which comprises of deterioration of the brain; that at the time of PW1's evaluation of Jedidah in 2009, she was under the care of Jelieth and PW1 also spoke to and obtained some information about the patient from Jelieth. According to PW1's evidence, dementia manifests itself in three stages: the early stage that lasts about 4 years; the middle stage that lasts about 10 years and the late stage that can last 3 years or more depending on the quality of support the patient gets. The witness averred that though she examined Jedidah in 2009, she was able to determine from established scientific knowledge about the progression of dementia/alzheimer's disease that she was at the end of the middle stage. In 2004 therefore she was at the middle of the middle stage which consists of moderate dementia and severe dementia; that her early stages of dementia were experienced between 1995-1998. According to the witness during the middle of the middle stage the memory is so impaired to the extent that a



patient can not make any rational decisions; according to the witness the mismanagement evident at her school in 2004 and poor financial decision making were evidence of Jedidah's illness. Memory loss in dementia-affected patients is preceded by poor decision making and in that condition they can be taken advantage of by other people.

6. Upon cross-examination of PW1 by Mr Lawrence Mwangi for the defendant she stated that she attended to Jedidah while she was at the Melchizedek Hospital where she had admission rights; that Jedidah was admitted in that hospital in 2007 and she attended to her in 2009; that she also had access to Jedidah's medical file records and nursing notes; that it was Jelioth who called her into the matter and who orally gave her a history of the patient's case; that she was informed that Jedidah had been married and then separated, hence her being under the care of her sister Jelioth who took her to Nairobi as there was allegedly no-one to take care of her in Nakuru.
7. PW2, John Gitahi Ndegwa, the plaintiff, also testified on 9/6/2022 and adopted his witness statement filed on 6/7/2021. His evidence resembled the contents of the plaint. He added that at the time of the diagnosis made out in respect of Jedidah, he and his sisters were still young and hence the deceased was taken to Nairobi for care and nursing by Jelioth, their aunt, but she died in July 2013. He averred that the deceased was mentally incapacitated as at 2004; that she had no legal capacity to execute transfer instruments; that the deceased never appeared before any advocate named Olaly Cheche to execute any purported transfer forms as she was residing at Nairobi at the time of the purported the execution; that no stamp duty was paid for the transaction; that no statutory consents were procured for the transaction and that the necessary procedures under the law were not followed. He produced in evidence various documents used in the transfer of the suit land to the defendant. According to PW2, by 4/7/2005 which was the date of the transfer of lease purportedly executed by the deceased and by the date 2/11/2007 when the transfer, having been rejected earlier, was resubmitted for registration at the land registry, the deceased was ill and in Nairobi. He also averred that Jedidah could not have obtained the consent to transfer because she was still ill and resident at Nairobi at the time it was purported to have been obtained. He stated that Jedidah had no capacity to enter into an agreement; that evidence of her illness was evident in her conduct: the witness stated that she was forgetful, for example, she would forget her handbag in the car and seek it in the house; when shown a gazette notice dated 29/10/2004 advertising loss of the certificate of lease over the suit land, he averred that Jedidah could not have managed to follow up such an advertisement as she was unwell at the time of the gazette notice and that the defendant must have been behind the placing of that advertisement in the gazette as it had an interest in the suit land. PW2 stated that he was not aware of any money paid to Jedidah by Kamere, an advocate from Nairobi, yet Kamere had married PW2's aunt called Gladys, and the purported agreement between the deceased and the defendant does not state that the deceased received any money from the defendant.
8. Upon cross-examination by Mr Mwangi he stated that his mother used to pay school fees for him; that he lived with two girls in their house in Shabab Estate Nakuru which his mother also owned; that he used to conduct taxi business normally called "boda boda" on a bicycle and made snacks normally called "mandazi" for sale; that in 2004 Jedidah used to have a car; that his father also lives in Shabab estate in another home; that he is not aware whether his parents were divorced; that Jelioth never assisted him; that Kamere is his mother's uncle; that PW2 was not involved in the sale agreement over the suit land; that he was not aware that the land was charged to a bank and that his mother was in hospital from the year 2004; that he does not know who paid the hospital bill or the amount so paid. At that point the plaintiff's case was marked as closed. Since the defendant never appeared on the next date set for the defence hearing, the defendant's case was marked as closed without any evidence being called on its behalf and a time frame given for the filing of submissions.



Submissions

9. The plaintiff filed his submissions on 1/11/2022 and the defendant on 18/11/2022. I have considered those submissions in preparing this judgment.

Determination

10. The main issues arising for determination in this suit are as follows:
- a. Whether the transfer of the suit land to the defendant and the title in the name of the defendant ought to be cancelled for reason of fraud;
 - b. Who ought to pay the costs of the present suit.
11. The principal question upon which the success of plaintiff's suit depends is whether he has proved fraud. In the case of *Abdulkadir Shariff Abdirahim & another v Awo Shariff Mohammed T/A A. S. Mobammed Investments* [2014] eKLR it was stated as follows by the Court of Appeal:
- “As was stated in *R. G. Patel Vs Lalji Makanji* (Supra), while allegations of fraud must be strictly proved, the standard of proof may not be so heavy as to require proof beyond reasonable doubt; what is required is something more than a mere balance of probabilities.”
12. There was no evidence called for the defendant's case but I agree with the defendant's submission and an undefended case does not guarantee the claimant automatic judgment against his adversary, a position that was also reiterated by the Court of Appeal in the case of Nairobi Civil Appeal No. 240 of 2011 *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR.
13. I find that the plaintiff has established by way of evidence that the deceased was diagnosed with a disease that occasioned her mental incapacity. However, that per se is not proof that the impugned transfer was fraudulent. Fraud must be particularized and specifically proved. Looking at the list of particulars of fraud in the plaint, they are as follows:
- a. That the deceased was incapacitated at the time of the transfer and that the defendant know of that fact;
 - b. That the defendant forged the signature of the deceased;
 - c. That the deceased never appeared before an advocate for execution of the transfer;
 - d. No stamp duty was paid;
 - e. The land control board consent was not obtained.
14. It is clear that the impugned transfer occurred before the deceased was diagnosed with dementia and it is only the opinion of PW1 that suggests that the disease existed long before the diagnosis. In fact, her finding based on her scientific knowledge was that the deceased could have been ill from as long ago as 1995 while the impugned transfer was executed in 2004. Under cross-examination by Mr Mwangi, she however qualified her evidence by stating that while she first attended to the deceased in the year 2009 the latter's conduct resembled a normal person's in all ways. Her report further states that the deceased's history did not reveal any prior psychiatric outpatient or hospitalizations treatment efforts. She also stated that many people may suffer from dementia over many years before any diagnosis is made. PW1 also stated in evidence that it is hard to gauge a patient's life expectancy based solely on the Alzheimer dementia's scientifically recognized stages as the length of each stage varies from person to person and that progression from stage to stage also varies in the same manner. The report by PW1



states that in May 2004 the deceased sold the suit property and the school business being run thereon to the defendant and that by then the business had incurred numerous debts and stood risk of auction. Later on in October 2004 Jedidah fell ill and experienced complaints of getting lost while going to work accompanied by episodes of confusion and soon thereafter a rapidly increasing loss of memory could be noticed. It was after those experiences that Jelioth and her family brought the deceased to Nairobi as there was no one in Nakuru to take care of her. It was PW1's evidence that after being brought to Nairobi, the deceased's mental health rapidly deteriorated to the extent that she could not feed or "toilet" herself hence necessitating her admission to a nursing home, first in Kikuyu, then Kawangware and lastly in Melchizedek hospital.

15. I find that the medical evidence adduced has several weak points. One is that while PW1 states that was attending to the deceased for the first time in the year 2009 the latter's conduct resembled a normal person's in all ways; it is this court's belief that that examination occurred long after the impugned transfer had been executed in 2004 and the court's presumption is that the deceased must have seemed relatively of more normal mental health in 2004 to the extent that an untrained eye such as that of Jelioth may not have informed the observer that she was unwell. Secondly, Jelioth may be exonerated from any knowledge of any mental illness on the deceased's part since the same report states that the deceased's history did not reveal any prior psychiatric outpatient or hospitalizations treatment efforts. Indeed, I find no evidence adduced for the plaintiff that Jelioth knew the deceased was mentally ill by the time of the execution of transfer. Thirdly, PW1 also stated that many people may suffer from dementia over many years before any diagnosis is made and also that it is hard to gauge a patient's life expectancy based solely on the dementia stages as the length of each stage varies from person to person and also progression from stage to stage differs. This observation would obviously mean that in May 2004, the deceased may have been living a perfectly normal life in the perception of everyone around her, including her sister Jelioth. There was no medical report prepared in respect of the deceased in 2004 that was produced in court in this case. It is unsafe therefore to rely on the medical report made in the year 2009 as it opens up a legion of possibilities that leave the court uncertain as to whether the deceased was so incapacitated in 2004 that she could not competently execute the transfer over the suit land.
16. I therefore conclude on the foregoing grounds that the medical evidence adduced in this case insufficient to establish that the deceased was so incapacitated that as at May 2004 she was unable to make a rational decision to dispose of the suit property.
17. Regarding the allegation by the plaintiff that the defendant forged the signature of the deceased I find that there was no expert evidence adduced to that effect and I find that this allegation of fraud must summarily fail for that reason.
18. The allegation by the plaintiff to the effect that the deceased never appeared before an advocate for execution of the transfer is also partially answered by the examination of the first issue as to whether it has been proved that she had no capacity. I must go further and state here that the plaintiff never presented independent evidence that the deceased never appeared before that advocate for the execution of the transfer, or that the advocate did not go to her; the advocate was not called to indicate that the deceased never appeared before him, whether in Nakuru or in Nairobi. The allegation must also fail for lack of evidence.
19. Finally, I will address the issue as to whether the transfer should be nullified for the reason that stamp duty was not paid and that the land control board consent was not obtained for the transaction. I must first observe that these are claims regarding non-observance of formalities and they are not even remotely concerned with the issue of whether the deceased was incapacitated or the signature on the impugned transfer was forged. However, to be fair to the plaintiff, they must be examined for their



veracity. In assessing the truth of the said allegations, this court is aware of the provisions of the Evidence Act at Section 107 which state as follows:

“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.”

20. It is therefore the correct position in civil cases is that whoever alleges proves and the plaintiff must prove his case in this suit on a balance of probabilities. The fact that the defendant does not adduce any evidence is irrelevant.

21. Regarding the payment of stamp duty, it must be noted that the plaintiff does not state the stamp duty that was payable for the transaction but the copy of transfer of lease dated 4/7/2005 resubmitted for registration (P. Exh 3(a)) shows that stamp duty was assessed at Kshs 100,000/=. Since the transfer was finally registered this court must presume that all the necessary dues to the government were paid as required unless it is demonstrated otherwise. Failure to pay stamp duty may not be a fatal flaw in the agreement, after all. In the case of *Abel Odhiambo Were v Margaret Audi Ong'aro & another* [2014] eKLR the court observed as follows regarding failure to pay the required stamp duty:

“57. It appears that this rigmarole regarding whether stamp duty or the right amount thereof has been paid is not an isolated occurrence. In *Joseph Karua Ngareh v Mary Gathoni Kibara & 2 others* [2018] eKLR, Waithaka J found that the defendant could not show that the title she held could lawfully be issued to her before the requisite stamp duty had been paid in respect thereof, and that it was unprocedurally obtained and as such, incapable of being accorded the protection envisaged under Section 26 of the Land Registration Act, 2012.

58. In the case of *Nicholas Thuo Kabaiku v Serah Njeri Mbatia* [2021] eKLR, Bor J was faced with a situation where evidence was given that the Plaintiff remitted the full sum required for stamp duty to the advocate who acted for both parties in the sale and where there was nothing to prove that the Plaintiff participated in getting the transfer documents lodged at the lands office. His advocate lodged the transfer at the lands office for registration and was responsible for the underpayment of the stamp duty due on the transfer by understating the value of the land.

59. In the light of the foregoing this court finds no legal basis upon which the transfer to and title in the names of the 4th and 5th defendants can be cancelled, or upon which an order for transfer of the suit land to the plaintiffs may be made.”

22. It would appear that failure to pay stamp duty has elicited different holdings by courts in separate cases. This court is of the view that the gravity of the omission to pay stamp duty should depend on the unique circumstances of each particular case and the evidence available. For example, does it go to the core of the terms of the contract or is it merely a transgression against tax-collection authority laws which, whether deliberate or inadvertent, may be remediable by lien over the property till the tax is settled? In the present suit, I find no proof that stamp duty was not paid. There is no evidence that the defendant deliberately evaded payment of stamp duty. There was no evidence given that the defendant was involved in the lodging of the transactional documents for registration at the lands office. Indeed, the application for registration and the application for resubmission of those documents (P. Exh 3(b) and P. Exh 3(c)) respectively show on their face that the defendant's advocate's dealt with the processing



of the lease in the defendant's name. No officer from the lands office was summoned to give evidence in proof of non-payment of duty. In the event that any of the dues payable including stamp duty was not paid then that is an omission that can be corrected by the necessary government tax authorities by way of claiming any outstanding sum from the transferee and that anomaly is therefore not fatal to the transfer.

23. I will now address the land control board consent. Section 109 of the *Evidence Act* provides for proof of particular facts, and it states as follows:

“The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless provided by any law that the proof of fact shall lie on any particular person.”

24. It is the case that the plaintiff never gave evidence that would lead this court to conclude that the land control board consent was never obtained for the transaction. No officer from the lands office or the relevant land control board was summoned to establish that the documents were registered without any consent having issued first. This court must also presume that all necessary supporting documents were availed to the Land Registrar and that he registered the transfer only after ascertaining that the said documents were in order. Consequently, the allegation that no land control board consent was obtained can not stand.

Conclusion

25. The upshot of the foregoing analysis is that the plaintiff has failed to prove his claim to the appropriate standard as required by law and I hereby dismiss the plaintiff's suit with costs to the defendant.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 19TH DAY OF JANUARY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

