



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge v Gitau & 4 others (Environment & Land Case 513 of 2017)
[2023] KEELC 15917 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15917 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 513 OF 2017**

JG KEMEI, J

FEBRUARY 23, 2023

BETWEEN

JOSEPH NDUNGU NJOROGE PLAINTIFF

AND

GEOFFREY GITERU GITAU 1ST DEFENDANT

LAND REGISTRAR, KIAMBU 2ND DEFENDANT

SECRETARY- GITHUNGURI LAND CONTROL BOARD 3RD DEFENDANT

GITHUNGURI DAIRY & COMMUNITY SACCO LIMITED ... 4TH DEFENDANT

G K GATERE T/A G K GATERE & CO ADVOCATES 5TH DEFENDANT

JUDGMENT

1. The Plaintiff filed suit on the 5/5/2017 against the defendants seeking the following orders;
 - a. A mandatory order of injunction restraining the 1st Defendant either by himself, his relatives, servants, assigns, agents, tenants, employees and/or anybody else acting upon his express instructions from accessing, trespassing, entering, cultivating, charging, selling, disposing, holding possession and/or in any manner interfering with the Plaintiffs peaceful possession of the suit property and an immediate order be granted ordering the 1st Defendant to give vacant possession of the suit property unconditionally.
 - b. A mandatory declaration that the suit property was prematurely sold before the expiry of the agreed 7 months and further that the transfer was done fraudulently, illegally and using a corrupt scheme as there no existing sale agreement between the parties, neither was a consent to transfer the suit property and/or genuinely acquired or issued from the Lands Control Board Githunguri, as provided by law.



- c. An order that the 1st Defendant act of transferring the suit property to himself before expiry of the agreed 7 months was illegal, fraudulent and using a corrupt scheme and against the terms of agreement made between him and the Plaintiff and as such the same be invalidated and the title issued to him on 23rd August 2016 be cancelled and the same be issued to the Plaintiff.
 - d. An order that pursuant to the illegal transfer, dispossession, wastage, trespass and letting out, of the suit property, the Defendant be ordered to compensate the Plaintiff for general damages and mesne-profits and the sum given herein be used to offset the Defendant's debt due from the Plaintiff.
 - e. Any other orders the Court may deem fit to grant in the interest of justice.
2. It is the Plaintiff's case that at all material times to the suit, he was the registered owner of the suit land parcel No Githunguri/githiga/1169 (suit land).
 3. That vide a Memorandum of Understanding (MOU) dated the 18/1/2016 the Plaintiff and the 1st Defendant mutually agreed that the Plaintiff owed the sum of Kshs 4,551,000/- to the 1st Defendant arising from a frustrated motor vehicle business deal which sums were due and payable within a period of 7 months from the date of the MOU. The suit land was to be held by the 5th Defendant as security pending the repayment of the debt. It was also a term of the MOU that in the event of default the land would be sold at the current market rates to offset the debt with the balance of the proceeds being given to the Plaintiff.
 4. It is his averment that the 1st Defendant transferred the land to himself without informing him, a position that he discovered upon carrying out a search at the land's office. Under para 23 of the Plaintiff he particularized instances of fraud on the part of the defendants in the manner in which the land was illegally, unlawfully and fraudulently transferred to the 1st Defendant without spousal consent, Land Control Board consent; selling the land at below market price and keeping the full sale proceeds contrary to the terms of agreement; charging the title to the 4th defendant to secure the sum of Kshs 4.5 Million.
 5. Further that the 5th Defendant released the title to the Plaintiff contrary to the terms of the agreement between the parties and that the plaintiff has now rented out the premises to third parties thus depriving him of the quiet enjoyment of the suit land.
 6. The 1st and the 5th Defendants denied the plaintiff's claim through their joint statement of defence filed on the 19/10/2017 where they contended that the transfer of the land was pursuant to the MOU dated the 18/1/2016 following the default of the payment of Kshs 4,551,000/- in favour of the 1st Defendant by the plaintiff. They denied any acts of fraud illegality and or misrepresentation and sought to put the plaintiff in strict proof. Further that the Plaintiff voluntarily and without any misrepresentation executed the requisite documents in favour of the 1st Defendant in compliance with clause e) of the MOU. That the Plaintiff released the title and other relevant documents to the 1st Defendant once he failed to comply with the terms of the MOU within 7 months.
 7. The 2nd and 3rd Defendants did not enter appearance nor file defence despite evidence of service upon them.
 8. The 4th Defendant filed its statement of defence on the 4/8/17 and whilst denying the claim of the plaintiff contended that the suit land was lawfully charged to it on the 6/10/16 to secure the sum of Kshs 4.5 Million advanced to the 1st Defendant as a loan and without any notice of any adverse claims



or defect of the title. Further that the Plaintiff has not raised any cause of action against it and sought to move the Court to have the suit against it struck out.

The evidence

9. PW1 – Joseph Ndungu Njoroge testified and relied on his witness statement dated the 3/8/17. He also produced a bundle of documents marked as PEX 1-5.
10. He admitted being indebted to the tune of Kshs 4,551,000/- to the 1st Defendant. That he failed to pay the sum within the stipulated period of 7 months. That pursuant to the MOU which both parties executed, he surrendered the original title to the 1st Defendant, executed the Land Control Board application and transfer form. That he did not give his Personal Identification Number and photograph to the 1st Defendant. That the land was transferred to the 1st Defendant on the 23/8/16 and charged to the 4th Defendant on the 6/10/16.
11. Further he stated that the transfer of the land to the 1st Defendant was not with his knowledge and consent and that he discovered it on the 26/10/2016 upon carrying out searches at the Land Registry. That on discovery he did not raise any protest against the 1st Defendant with the Land Registrar, the Police and or the local Land Board. Infact, he stated that shortly thereafter he entered into another transaction with the 1st Defendant with respect of the sale of another parcel of land namely 1124 which land had been charged to Jamii Bora Bank. That the house on the suit land stretches over both parcels 1169 and 1124. He stated that he did not give spousal consent. Neither did he attend the Land Control Board to procure the consent. That the dispute is over the suit land and not parcel 1124 for whose transaction was concluded.
12. DW1 - Geoffrey Giteru Gitau testified and relied on his witness statement dated the 3/5/2019 and relied on the exhibits marked as DEX No 1-24 in support of his case. That the suit land was valued at Kshs 6 Million on the 29/9/16 – see the Valuation Report. That he purchased another parcel of land 1124 from the 1st Defendant. That the Plaintiff handed over the title to the 5th Defendant. That he obtained Land Consent Board consent for the transfer of the suit land to his name. That he transferred the land following the default of payment by the 1st Defendant. Later he charged the suit land to the 4th Defendant. The witness had difficulty explaining to the Court the date he appeared before the Land Control Board given that the date on the consent is not legible. He explained to the Court that the suit land has not been sold because the Plaintiff filed the current suit in Court.
13. DW2 – Nelson Kinyanjui Muhoro relied on his witness statement dated the 24/5/19. His evidence largely dwelled on his presence as a witness to the MOU between the Plaintiff and the 1st Defendant in the office of the 5th Defendant. That he worked with the 1st Defendant as his personal driver.
14. DW3 – Solomon Mugi introduced himself as a registered valuer who was instructed to value the suit land by the 4th Defendant for purposes of a charge.
15. DW4- James Njau stated that he works for the 4th Defendant as the credit Manager and relied on his witness statement dated the 13/7/2017 as his evidence in chief. That on application and after due diligence the 1st Defendant was advanced a loan in the sum of Kshs 4.5 Million. He denied any acts of fraud and that the 4th Defendant was not made aware of any interest of the Plaintiff. That though the account is regularly serviced, the sum of Kshs 200,000/- is still outstanding as per their records.
16. DW5 - George Kangethe Gatere introduced himself as an Advocate of the High Court of Kenya of 30 years standing. He relied on his witness statement dated the 17/10/2017 as well as the Replying Affidavit sworn on the 3/5/17 as his evidence in chief. That he acted for both parties in the drafting of the MOU dated the 18/1/2016. Later he also acted for the two parties in the agreement dated the



5/10/16 in respect to parcel 1124. That the 1st Defendant was to transfer the land to himself in the event of breach of the MOU. He stated that both parties are literate, understood the transaction having explained in particular the MOU to both parties before they executed it. That the parties executed the transfer, Land Consent Board application in his presence. That the 1st Defendant obtained the Land Control Board consent. That he was aware that the Land Control Board consent was obtained, the land was transferred to the 1st Defendant and finally the title registered in his name. That he prepared a spousal consent and handed over to the Plaintiff as well as the copies of PIN, and passport size photos for the Plaintiff and the 1st Defendant. With respect to the processing of the title he informed the Court that he was not involved.

17. At the close of the hearing the parties elected to file written submissions. The firm of Omuganda Brian & Co Advocates filed on behalf of the Plaintiff while the L W Wahome Advocates filed for the 4th Defendant. The 1st and 5th Defendants failed to comply with the directions of the Court with respect to the filing of written submissions. I have read and considered the submissions on record.
18. The issues for determination are; whether the Plaintiff has proved his case; who meets the costs of the suit.
19. It is not in dispute that the Plaintiff owes the 1st Defendant the sum of Kshs 4, 551,000/-. To secure the payment of the said debt the parties entered into a MOU dated the 18/1/2016 whose terms were set out as follows;
 - a. That Joseph Ndungu Njoroge do hereby undertake to refund Geoffrey Giteru Gitau a sum of Kshs. 4,551,000/- amount which is refund of the purchase price, interest and monies incurred by the latter from Auctioneers charges in respect of motor vehicle registration number KBX 571T which Geoffrey Giteru Gitau paid on behalf of Joseph Ndungu Njoroge.
 - b. That the said sum of Kshs. 4,551,000/- shall be paid by Joseph Ndungu Njoroge to Geoffrey Giteru Gitau within seven (7) months from the date hereof.
 - c. That Joseph Ndungu Njoroge do hereby surrender Original Title Number Githunguri/githiga/1169 to Geoffrey Giteru Gitau pending compliance of paragraph No. 2(b) hereinabove.
 - d. That at the time of the execution hereof, Joseph Ndungu Njoroge do execute application forms for Land Control Board in order to procure consent to transfer land parcel number Githunguri/githiga/1169 in favour of Geoffrey Giteru Gitau.
 - e. That if Joseph Ndungu Njoroge breaches paragraph number 2(b) hereinabove, Geoffrey Giteru Gitau will be at liberty to transfer the aforesaid land parcel number Githunguri/githiga/1169 in his favour with a view of selling the same in order to recover Kshs. 4,551,000/- amount being owed by Joseph Ndungu Njoroge to him.
 - f. That in the event that the aforesaid land parcel number Githunguri/githiga/1169 is sold due to default on the part of Joseph Ndungu Njoroge as envisaged by paragraph No. 2(e) hereinabove the same shall be sold as per the market value of the day and the proceeds realized as a result of the sale shall be used to offset the debt of Kshs. 4,551,000/- and the remainder thereof shall be paid to Joseph Ndungu Njoroge without undue delay.
 - g. That the cost of this Memorandum of Understanding shall be borne by the parties equally.



20. The Plaintiff's case is anchored on fraud. *Black's Law Dictionary* defines fraud as follows;
- “Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”
21. Fraud is a serious allegation which must not only be pleaded but proved on a high standard higher than that of standard of probabilities but lower than beyond reasonable doubt. It was incumbent upon the Plaintiffs to prove fraud, the same cannot be inferred by the Court.
22. It is trite that fraud must be pleaded and proved in evidence and the same cannot be left to the Court to infer from the facts led in evidence. See the case of Fraud must be pleaded and proved to the required standard by anyone who alleges fraud in a case. The former Court of Appeal for Eastern Africa in R.G. *Patel versus Lalji Makanji* (1957) EA 314 stated as follows:
- “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.”
23. Section 26 of the Registered *Land Act* provides ways in which a title may be impeached. It states as follows;
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
24. The dispute of the parties is pivoted around their agreement as contained in the MOU dated the 18/1/2016. It is trite that parties are bound by their bargains and a Court of law ought not rewrite an agreement for the parties or improve a bad bargain. This was the holding of the Court in the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR where the Court stated;
- “A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved”.
25. Para 24 of the Plaintiff enlists particulars of fraud on the part of the Defendants as follows;
- “The Plaintiff states that the fraudulent acts of the Defendants jointly and severally did deprive him of his property and occasion him great losses which must be compensated as



the property had a market value of Kshs. 10,000/- while the debt owed to the 1st Defendant was just Kshs. 4,551,000/-.”

26. I shall now address the issue raised by the plaintiff to the effect that the whole transaction of transferring the land to the 1st Defendant was illegal fraudulent and unlawful. The Plaintiff alleges fraud because of lack of spousal consent; PIN and photographs on the transfer; nonpayment of stamp duty and registration fees, forged land control board consent, transfer was processed speedily.
27. The 4th Defendant in response submitted that the Plaintiff's case should fail because of want of proof. That the Plaintiff cannot allege fraud forgery and illegality without adducing evidence to prove the same, noting that fraud must be strictly proved.
28. With respect to the spousal consent, DW5, the joint lawyer led unchallenged evidence that he prepared the spousal consent and handed over to the Plaintiff for execution. The 1st Defendant on the other hand has emphatically stated that the spousal consent was presented before the land board and that explains how he obtained the Land Control Board consent. It was the duty of the Plaintiff to procure the spousal consent and he cannot be heard to turn around and attempt to benefit from his own wrong if indeed he chose not to submit one. I note that the copy of the spousal consent was not presented before Court but taking that the Land Control Board consent was procured there is likelihood that the same must have been presented before the board as it is a requirement. Furthermore there is no spouse contesting the same. The Plaintiff has not explained why for example he could not get the consent and in any event a party cannot be allowed to withhold a documents and seek to sue them to advance his case. That would be setting a bad precedent that would unnecessarily hamper land transactions.
29. The Plaintiff led evidence and presented a LCB consent which the Plaintiff sought to impeach on grounds that the same was issued on a Sunday. Further that he was not invited for the meeting. The provisions of the *Land control Act* under Section 8 (1) provides as follows;

“An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto.”
30. The emphasis on the above law is that either party may obtain land control board consent. In this case the parties had duly executed the application forms and left them with the 1st Defendant. I see no fault in the consent having been obtained by the Plaintiff. In the absence of any cogent evidence adduced by the Plaintiff I find no reason to impeach the consent on record on grounds of forgery. He who alleges must prove, the Plaintiff failed to prove forgery.
31. On whether the transfer instrument was forged and whether the speed within which it was processed pointed to fraud, I have reviewed the documents presented before Court and note that the Plaintiff does not deny that he signed the transfer and left them with the 1st Defendant. The transfer is dated the 19/8/2017, which is outside the 7 months he was required to pay the debt in favour of the 1st Defendant. The transfer was registered in favour of the 1st Defendant on the 23/8/2016. I find no evidence led on the two issues to show that there was any fraud. I also find no other circumstances that if read together with the speed of the transaction would point to an inference of fraud in the circumstances of this case. I say so because the agreement gave the 1st Defendant the liberty to transfer the land to himself if default happens after 7 months. The land was transferred on the 23/8/2016, outside the 7 months.
32. The Plaintiff has accused the 5th Defendant of releasing the title to the Plaintiff without notice and or consent before the expiry of 7 days. DW5 explained to the Court that he left the title with the Plaintiff,



a position that the Plaintiff admits. Para c of the MOU was not explicit on who was to hold the title pending the payment of the debt. Neither was it explicit on the conditions that the title was to be held. It was to be held pending compliance with para 2 b of the MOU. I find no ground to fault the 5th Defendant on this.

33. The Plaintiff has alluded to the 1st Defendant having employed intimidation and harassment tactics to cajole him to enter into the MOU. This was denied by the 1st Defendant. In the absence of any evidence in support of fraud, coercion, misrepresentation undue influence having been pleaded and proved, I find that nothing turns on this empty allegation.
34. It is the Plaintiff's case that he was not consulted or made aware when the suit land was being transferred to the 1st Defendant. Interalia, that the transfer of the suit land was premature. Looking at the terms of the MOU, it is clear that there was no provision to notify the Plaintiff. In any event the Plaintiff has admitted breach of the said agreement with the consequence that the suit land was to be transferred to the 1st Defendant, an act agreed by the parties.
35. The Plaintiff has admitted that he did not fulfil his obligations within the stipulated 7 months or at any other time. In other words, the Plaintiff is and has been in default since the 19/8/2016 to date.
36. The Plaintiff has argued that the 1st Defendant transferred the property to himself in contravention of the terms of the agreement that it should be sold to a 3rd party. The 1st Defendant's response is that he transferred the property upon default of the Plaintiff in paying the debt. Para b of the MOU required the Plaintiff to pay the sum of Kshs 4,551,000/- to the Plaintiff within a period of 7 months from the date of the MOU. The MOU is dated the 18/1/2016 and 7 months ended on the 19/8/2016. According to the evidence on record the land was transferred on the 23/8/2016, a period outside the 7 months. Para 2 (e) of the MOU provides that in the event of default the 1st Defendant will be at liberty to transfer the land in his favour with a view to selling the same to recover the debt. There was no agreement on notice to the Plaintiff. In the absence of any clause on notice, the 1st Defendant cannot be said to have transferred the land without notifying the Plaintiff. Having freely entered into the MOU the Plaintiff had consented to the agreement and the said MOU did not provide for seeking permission before the transfer.
37. I find that the plaintiff has not denied that he executed the MOU, surrendered the original title willingly to the Defendant, signed the transfer forms agreed that if he defaults the 1st Defendant was at liberty to transfer the land to himself with a view of selling the same in order to recover the sum of Kshs 1,551,000/- being owed to him; This far I find that the transfer of the land to the 1st Defendant was in accordance with the MOU.
38. Having found that the transfer of the land to the 1st Defendant was done in accordance with the MOU, I find no ground to grant a mandatory injunction against the 1st Defendant on the ground that the same was not established to warrant injunctioning the 1st Defendant. I say this for two reasons; the Plaintiff is and remains in default; secondly the parties are at liberty to move to the next stage which is to sell the land to a 3rd party to recover the debt and pay the Plaintiff the balance if any as contemplated in the MOU.
39. From the evidence led by both parties it is not disputed that the land has not been sold to a third party. It has only been transferred to the 1st Defendant and therefore the issue of under price or market price does not arise at this stage. I note that the DW4 led evidence that the land was charged to the 4th Defendant to secure the sum of Kshs 4.5 Million, which amount has been regularly serviced leaving a balance of Kshs 200,000/-. Clearly the action of the 1st Defendant in charging the land was not contemplated by the MOU. In my view it suffices to state that the land is now held in the name of the



1st Defendant as contemplated by the parties in the MOU. The next stage is to sell the land to a third party for purposes of recovering the debt owed by the Plaintiff to the 1st Defendant and pay the balance of the sale price to the Plaintiff, if any. The MOU was silent on how long the 1st Defendant would hold the land in his name. I say no more save to state that I find no grounds to impeach the title held by the 1st Defendant. I also find that it was transferred in accordance with the MOU of the parties.

40. In the end I find that the Plaintiff has not proved his case on a balance of probabilities.

41. Final orders & disposal

a. The Plaintiff's suit is dismissed.

b. The costs of the suit are in favour of the 1st, 4th and 5th Defendants being payable by the Plaintiff.

42. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 23RD DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Omuganda for Applicant/Plaintiff

1st – 5th Respondents/Defendants - Absent

Court Assistants – Esther / Kevin

