



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 394 OF 2014

(FORMERLY HCCC NOS. 324 OF 2013 & 185 OF 1996)

JONATHAN NZIOKA MUTISO.....PLAINTIFF

VERSUS

NZUKI MWINZI.....1ST DEFENDANT

KENYA NAITONAL ASSURANCE

COMPANY (2001) LIMITED.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff filed **Nairobi HCCC Number 185 of 1996** claiming that he bequeathed his title over Nairobi/Block 82/100 (“the Suit Property”) to the 1st Defendant to hold in trust for him and his son by a trust deed dated August 1988, and that in breach of trust, the 1st Defendant caused the Suit Property to be transferred to his name after he discharged the charge in favour of Savings and Loan Bank Limited on 25/10/1988. On the same date, the 1st Defendant caused another charge to be registered against the Suit Property in favour of the 2nd Defendant. The Plaintiff claimed that prior to this the 1st Defendant was his tenant in the Suit Property paying monthly rent of Kshs. 3,000/=. The 1st Defendant stopped paying him rent from June 1990 claiming that the Suit Property belonged to him.

2. The Plaintiff sought declarations that the 1st Defendant fraudulently transferred the Suit Property to his name in breach of trust, and that the 1st Defendant held the Suit Property in trust for him. Further, the Plaintiff sought an order directing the 1st Defendant to pay rent arrears that have accrued since June 1990 to date at the prevailing market rates.

3. In the Amended Defence filed in court on 8/2/2011, the 1st Defendant averred that he purchased the Suit Property from the Plaintiff in 1988. At the time of purchase, the Suit Property was charged to Savings and Loan (K) Limited and he claimed that it was agreed that the proceeds from the purchase were to be applied to offset the Plaintiff’s loan. He obtained the loan from the 2nd Defendant to enable him purchase the Suit Property and the loan proceeds were applied to defray the Plaintiff’s loan with Savings and Loan (K) Limited. The 1st Defendant claimed that he was unable to redeem the loan facility owed to the 2nd Defendant due to the existence of this suit. He added that the 2nd Defendant had clogged his equity of redemption and refused to supply statements of account to him. The 1st Defendant contended that the 2nd Defendant’s right to exercise its statutory power of sale over the Suit Property was time barred.

4. In its Amended Defence, Notice of Claim Against Co-Defendant and Counterclaim filed in court on 11/8/2014, the 2nd Defendant denied that its right to exercise the power of sale over the Suit Property was time barred and averred that the principal sum secured through the Suit Property together with interest stood at Kshs. 20,500,595/= as at 9/8/2011. The 1st Defendant was an employee of the 2nd Defendant. He requested the 2nd Defendant to advance him a loan of Kshs. 305,000/= to purchase the Suit Property whose

title was to be used as security for the loan. The 1st Defendant was expected to repay the loan amount through instalments. The 2nd Defendant counterclaimed the sum of Kshs. 20,500,595 from the 1st Defendant together with interest at the commercial rate of 15% per annum to be calculated from 9/8/2010 until payment in full.

5. The Plaintiff gave evidence. He produced a copy of the trust deed dated 1988 vide which the 1st Defendant agreed to hold the interest in L.R. No. 212/3/227 as trustee for the Plaintiff and Sammy Ndunda Nzioka. He stated that in breach of the terms of the trust deed in which the 1st Defendant knowingly misrepresented the land details as L.R. No. 212/3/227 instead of Nairobi/Block 82/100 when he drew the trust deed, the 1st Defendant fraudulently transferred the Suit Property to his name. He stated that at the time he bequeathed the title document over the Suit Property to the 1st Defendant to hold in trust, the 1st Defendant was his tenant in the Suit Property paying Kshs. 3,000/= per month. He stopped paying rent in June 1990. The Plaintiff filed **RMCCC No. 8373 of 1991** seeking rent arrears but later withdrew that suit.

6. The Plaintiff stated that he did a search on 14/8/1995 at the lands registry and learnt that the 1st Defendant had transferred the Suit Property to his own name. He produced a copy of the discharge of charge drawn by Savings and Loan Kenya Limited over the Suit Property which was registered on 25/10/1988. He also produced a copy of the transfer of lease showing that he transferred his lease interest to the 1st Defendant on 25/10/1988. He also produced a copy of the application for registration in respect of the discharge of charge, transfer and charge over the Suit Property. The certificate of lease issued to the 1st Defendant on 25/10/1998 shows that a charge was registered over the Suit Property in favour of the 2nd Defendant for Kshs. 305,000/=. He also produced a copy of the letter from the Kenya Commercial Bank Limited which forwarded this sum together with other documents relating to the Suit Property to Wambugu & Company Advocates. Part C of the copy of the abstract of title being the encumbrances section shows that a charge was registered in favour of Saving and Loan Kenya Limited for Kshs. 105,000/= on 26/9/1979. The charge was discharged on 25/10/1988 and a new charge registered in favour of the 2nd Defendant on the same day. The certified copy of the register is dated 10/4/1992. He produced a copy of the certificate of official search dated 14/8/1995 which shows that the Suit property is registered in the 1st Defendant's name and charged to the 2nd Defendant. He produced a copy of the caution which he caused to be registered against the Suit property on 15/5/1996.

7. He conceded on cross-examination that he had charged the Suit Property to Savings and Loan Bank but maintained that the bank was not involved in the discharge of charge. He stated that he paid the loan slowly and did not finish repaying it. He later stated that he thought he finished paying the loan although he did not have documents in court to confirm this. The 1st Defendant did not act for him in the transaction. He later came to learn that the 1st Defendant borrowed money from the 2nd Defendant and paid the last instalment to Savings and Loan Bank without the Plaintiff's knowledge. Sammy Ndunda Nzioka gave evidence along the same lines as the Plaintiff.

8. The 1st Defendant did not call any evidence. He came to court after the Plaintiff's witnesses had testified and applied for adjournment of the case to enable him prepare for the case. The Plaintiff and 2nd Defendant opposed the application for adjournment. The court ruled that the hearing of this case filed in 1996 was to proceed while noting that the 1st Defendant had not filed a witness statement despite having been in court on 20/3/2019 when the matter came up.

9. Tabitha Mumbi Mutero gave evidence on behalf of the 2nd Defendant. The 1st Defendant applied for a loan on 15/4/1998 to purchase a house through the 2nd Defendant's house loan scheme. The 2nd Defendant caused a report to be prepared on the Suit Property which showed that it was registered in the Plaintiff's name and charged to Savings and Loan Limited. The 2nd Defendant issued a letter of offer to the 1st Defendant on 12/7/1988 which he duly executed and returned to the 2nd Defendant. The 2nd Defendant instructed Wambugu and Company Advocates to prepare and register a charge over the Suit property in its favour. After the charge was registered, the 2nd Defendant forwarded the cheque for Kshs 305,000/= on 11/11/1988 to Wambugu & Company Advocates.

10. Ms. Mwaniki stated that the 1st Defendant's loan account fell into arrears when the 1st Defendant failed to service the account. The 2nd Defendant wrote to the 1st Defendant on 12/2/2008 giving him an opportunity to redeem his security at Kshs. 2,700,000/=. The 1st Defendant sought more time and sent a cheque dated 30/12/2008 for Kshs. 2,700,000/= which was returned unpaid by the bank because the account from which the cheque had been drawn was closed on 5/1/2009 before the cheque was cleared for payment. She stated that the 2nd Defendant had issued statutory notices of sale to the 1st Defendant.

11. She produced a copy of the application for the house loan scheme made by the 1st Defendant seeking the mortgage and the confidential questionnaire on the 2nd Defendant's notepaper. She also produced a copy of the transfer of lease from Continental Developers Limited to the Plaintiff registered on 22/6/1979. She produced a copy of the charge from Savings and Loan Kenya

Limited to the Plaintiff together with the discharge of charge registered against the Suit property on 25/10/1988 together with copies of the transfer of lease from the Plaintiff to the 1st Defendant and the charge dated 17/10/1988 registered in favour of the 2nd Defendant.

12. She produced letters written by the 2nd Defendant to the 1st Defendant on 12/2/2008, 1/4/2008, 22/5/2008 and 8/7/2008 imploring him to pay the outstanding mortgage debt. She produced copies of letters from the 1st Defendants dated 11/3/2008, 14/5/2008 and 22/7/2008 regarding the mortgage account. In the letter of 17/1/2009, the 1st Defendant requested the 2nd Defendant not to take any precipitate action as he made efforts to replace the dishonored cheques. The witness also produced a copy of the statement of account of the 1st Defendant showing the outstanding loan amount as at 9/8/2010 together with documents in respect of the auction of the Suit Property that was scheduled to take place on 8/2/2011.

13. The Plaintiff and 1st Defendant both filed applications for injunction in 2011 when the 2nd Defendant advertised the Suit property for sale in exercise of its statutory power of sale. In the ruling dated 20/9/2011, Mbogholi J. granted orders of injunction and directed parties to prepare the case for hearing.

14. The 2nd Defendant requested for judgement against the 1st Defendant in September 2014 when he failed to file a defence to the counterclaim. The court entered judgement against the 1st Defendant for Kshs. 20,500,595.15 on 11/11/2014 together with interest as prayed by the 2nd Defendant following which the 2nd Defendant issued a notice of entry of judgement to the 1st Defendant dated 29/1/2015.

15. The issue for determination is whether the court should issue the orders sought in the plaint or those sought by the 1st Defendant against the 2nd Defendant, noting that the court already entered judgement for the 2nd Defendant for the sum claimed in the counterclaim.

16. The Plaintiff and 2nd Defendant filed submissions which the court has considered. The 1st Defendant did not file written submissions. The Plaintiff submitted that he had proved his case and that the 1st Defendant who failed to testify in the suit had not challenged the allegations he made against him. He urged the court to grant the orders sought in the plaint.

17. The 2nd Defendant submitted that the Plaintiff had failed to prove his case on a balance of probabilities. That the Plaintiff had not established that a trust relationship existed between the Plaintiff and the 1st Defendant over the Suit Property. It added that the Plaintiff had failed to show the nexus between L.R. No. 212/3/327 and the Suit Property which was registered in April 1979. Further, that the Plaintiff had failed to show what documents he delivered to the 1st Defendant to hold as custodian. Further, he could not explain how the charge to Savings and Loan Bank Limited was discharged. It also urged the court to take note of the Plaintiff's admission that he had not fully paid the loan sum.

18. The Plaintiff failed to establish that a trust relationship existed between him and the 1st Defendant. The trust deed he produced does not relate to this suit land. He conceded that he charged the Suit Property to Savings and Loan Limited and that he did not repay the full loan amount. He did not prove that the 1st Defendant had let the Suit Property from him. He did not challenge the transfer of lease over the Suit Property which he executed on 17/10/1988 in favour of the 1st Defendant. He produced a copy of the transfer in evidence. The Plaintiff failed to prove his claim on a balance of probabilities, his suit is dismissed.

19. The 1st Defendant did not prove his claim against the 2nd Defendant, it is dismissed with costs to the 2nd Defendant.

Dated and delivered at Nairobi this 26th day of February 2020

K.BOR

JUDGE

In the presence of:-

No appearance for the Plaintiff and the 1st Defendant

Ms. R. Watitu holding brief for Mr. G. Mahinda for the 2nd Defendant

Mr. V. Owuor- Court Assistant



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)