



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 376 OF 2013

DCF ENGINEERING COMPANY LIMITED.....PLAINTIFF

VERSUS

JOHARI VENTURES LTD.....1ST DEFENDANT

MARYANNE NJERI NJOROGE t/a

NJOROGE NYAGA & CO ADVOCATES.....2ND DEFENDANT

JUDGMENT

1. In their final submissions to Court, the Defendants argued:-

“Your lordship in the foregoing ruling by Justice Mabeya, it is almost clear who the fraudsters in this unfortunate transactions were, the lands officers at Kajiado Lands Registry and Mr. Gathii.

Despite the learned Judges guidance and observation on this important issue at such an early stage of the proceedings in this matter the Plaintiffs did amend their Complaint but never joined the said lands officers who signed lands searches, transfers and titles produced in this Court and the said Mr. Gathii as parties.”

2. If this Court agrees with the above proposition then the action brought by DCF Engineering Company Ltd (DCF or the Plaintiff) must fail.

3. By an agreement dated 21st November 2012, Johari Ventures Ltd (Johari or the 1st Defendant) agreed to sell and DCF agreed to purchase land described as Kajiado/Kaputiei-North/45337 at a price of Kshs.22,500,000.00. It is common ground that the full consideration was paid as per the terms of the agreement.

4. DCF’s case is that it later turned out that the entire transaction was fraudulent and the actual owner of the land is one Kiriinya Mukira who was not aware of the transaction. On his part Mr. Mukira, through a written statement filed herein on 7th August 2014, informed Court that on 17th August 1998 he bought 18 acres of land in Kitengela area from one Jeffrey Robin Mein (Mein). That land was described as Kajiado/Kaputiei-North/2966 (LR. 2966) whose title he picked from Kajiado Lands Registry on 4th September 1998.

5. In a twist of events, on September 2013, Mr. Mukira was called by a Mr. Kiragu of CID Nairobi Investigating a complaint by one Florence Soila Ngossor (Ngossor). Ngossor had lodged a complaint that some people were selling her land, LR No. 2966, without her knowledge. Those investigations later revealed that Ngossor had sold the land to Mein. Mein, remember, is the individual who had sold the land to Mukira.

6. In the course of those investigations, Mukira was shown fake titles which were said to be subdivisions of LR 2966, one of which belonged to DCF. This caused him to lodge a complaint with the Chief Land Registrar. His testimony is that upon investigations, the Chief Land Registrar concluded that the land belonged to him and through a letter of 16th October 2013 instructed the Land Registrar Kijiado to expunge all the fake titles and entries in the green card and to reconstruct his title. To effect the changes, the Registrar gazetted the intended changes in Kenya Gazette Notice No. 14294 of 1st November 2011 and after 60 days the record was reconstructed.

7. It is the case of DCF that no title passed from Johari to it and assails the Defendants for misrepresentation and breach of contract whose particulars are set out in paragraph 14 of its the amended pleadings:-

“Particulars of misrepresentation and breach of contract on the part of the Defendants:

- (i) Entering into an agreement for the sale of the property to the Plaintiff knowing too well that it was not the legal and registered owner of the property.
- (j) Obtaining and presenting false and or forged documents to the Plaintiff with the sole intention of defrauding the Plaintiff.
- (k) Causing the Plaintiff to incur very high costs in the transaction knowing too well that the transaction was null and void.
- (l) Obtaining money from the Plaintiff with knowledge that no good title would be passed to the Plaintiff in exchange there for.
- (m) Colluding to obtain money from the Plaintiff under the pretext that the ownership of the property was genuine.
- (n) Failing to have utmost good faith in the course of the transaction.
- (o) Failing to meet the terms, conditions and obligations under the contract.
- (p) Offering for sale a property which was non-existent.”

8. One claim by DCF is for Kshs.23,813,870.00 made up as follows:-

- a. Kenya Shillings Twenty Two Million Five Hundred Thousand (Kshs. 22,500,000.00) being the purchase price for the land;**
- b. Kenya Shillings Four Hundred and Fifty Thousand (Kshs. 450,000.00) being the duly assessed Stamp Duty;**
- c. Kenya Shillings Five Hundred and Fifty Thousand (Kshs. 550,000.00) being legal fees paid to the Defendant’s Advocates;**
- d. Kenya Shillings Sixteen Thousand Two Hundred (Kshs. 16,200.00) being the amount paid to County Council of Olekejuado being the levy for change of user of the property from Agricultural to Light Industry user;**
- e. Kenya Shillings Sixty Eight Thousand One Hundred and Seventy (Kshs. 68,170.00) being charges for Planning Services;**
- f. Kenya Shillings Twenty Nine Thousand Five Hundred (Kshs. 29,500.00) being further Stamp Duty**
- g. Kenya Shillings Two Hundred Thousand (Kshs. 200,000.00) being Agents Commission.**

9. DCF also claims general damages for breach of contract and costs of the suit.

10. Maryanne Njeri Njoroge (Maryanne or the 2nd Defendant) is an advocate of the High Court of Kenya practicing under the name and style of M. N. Njoroge & Company Advocates. In her other life she is a director of Johari. Her co-director is Edith Sidondo. The Court is told that Johari's principal business is buying and selling of real property and offering advice on financial management. The Defendants give a chronology on how Johari acquired LR. 45337.

11. That sometimes in November 2011, the Defendants were introduced by an agent, one Amos, to a piece of land in Kisaju area of Kitengela which was up for sale. Although the land was 18 acres, Johari was interested in purchasing six acres only. Eventually, the 1st Defendant met the owner of the land, one Geoffrey Ndungu Gathii (Gathii). That in their meeting Gathii identified himself with ID No. xxxx and his PIN certificate. He also had the original title to LR. No. 2966. It was agreed that Gathii would subdivide the property and sell six acres of it to Johari at Kshs.2,000,000/= per acre.

12. In the transaction that followed, Kimani Kahiro & Associates represented Gathii while Maryanne acted for Johari. Maryanne carried out all due diligences which included a search at Kajiado Land Registry. The search revealed the land to belong to Gathii and it had no encumbrance.

13. Gathii and Johari entered into a sale agreement dated 24th November 2011 and Johari paid the full purchase price of Kshs.12,000,000/=. The land it bought from Gathii is what Johari sold to DCF. Johari's case is that it lawfully bought the land just as it did lawfully sell it to DCF. It avers that at the time it sold the land, it had a good title duly issued by the District Land Registry Kajiado and the sale to the Plaintiff was in utmost good faith.

14. The Court perceives this matter to be rather straightforward. From the evidence, it is difficult to find any wrongdoing on the Defendants. Johari is as much a victim as DCF. Yet it is common ground that LR 45337 was carved out of LR 2966. Emerging as well is that LR 45337 no longer exists after the register in respect to LR 2966 was reconstructed. The land that the Plaintiff bought from the 1st Defendant is no longer available to the Plaintiff.

15. The real issue has to be to whom must the Plaintiff turn to make up for the loss. In this regard the Court agrees with the proposition of Kiage J A in Civil Appeal No.327 of 2014 Kenya National Highway Authority v Shalien Masood Mughal where he stated:-

“I therefore agree, as has been suggested by Waki, J. A, that a party offended by the misdeeds be -they fraudulent or negligent-that have the effect of making his otherwise good title of no effect is at liberty to seek appropriate compensation. In this case I would think the person or persons responsible for the misrepresentations and/or misdeeds that led to a hollow title ought squarely to bear that blame.”

16. The Plaintiff asks the Court to find that the compensation must come from the Defendants. For the Defendants they propose that it is the land officers at Kajiado and Gathii who should take responsibility and assail the Plaintiffs from failing to heed the advice of Hon. Justices Mabeya and Kariuki supposedly given in interlocutory rulings in this matter.

17. In a Ruling dated 8th November 2013, Mabeya J had observed:-

“[21] Further, it is clear from the annexure marked as “MNN2”, search results from the Kajiado land registry clearly showed that the owner of the property was Mr. Geoffrey Ndungu Gathi whereby the title deed to the property was issued on 10th August 2009. Moreover from the record, a search carried out by Ms Mutisya and Company Advocates the Plaintiff's Advocates in the transaction revealed that the 1st Defendant was registered as the owner of the property. I therefore agree with the Defendants' submissions that the officials at the Kajiado land's registry cannot escape blame as they issued ownership documents to several parties who placed reliance on their legitimacy. All the documents seem to have the signatures of a land official on the face of it. It is also patently clear to me that the history of the acquisition of the land by both the 1st Defendant and Plaintiff is convoluted and shrouded in mystery and merits a thorough investigation before any conclusive findings can be made. It is with a lot of concern that the real culprits and player in the fraudulent sale have not been joined in these proceedings. My view is that the concerned officers at the Kajiado Land Registry who executed the searches and the said Mr. Gathi would be the best people to unravel what exactly happened. Since however they are not parties nothing can be said or inferred about them.”

18. I agree with the Judge that the officers and Gathii would have been instrumental in revealing how LR No. 45337 was illegally curved out from LR. No. 2966. Yet I do not see a suggestion by the Judge as to who should have caused the joinder of these persons to the proceedings.

19. The contract of sale was between the Plaintiff and the 1st Defendant. As the land for which the consideration was paid did not in truth exist, then the contract failed. This fact was brought to the attention of the Defendants through a letter of 19th August 2013. In the letter the lawyers for the Plaintiff informs the Defendants that it had come to their attention that Mr. Gathii had forged the documents to the suit land and criminal charges had been preferred against him.

20. The lawyer further writes:-

“This fraud was confirmed by the lawyer of Geoffrey Ndungu Gathii vide their letter dated 05/08/2013 to yourselves and to S. M. Muhia Advocates.”

21. It seems to me that it was the responsibility of the 1st Defendant to seek indemnity from Gathii by joining him to these proceedings as third party. Order 1 Rule 15 of the Civil Procedure Rules provides the avenue for taking out third party proceedings. These were always available to the 1st Defendant. It is the 1st Defendant who had privity of contract with Gathii over non-existing land. It would be most unjust for the 1st Defendant to abandon the Plaintiff to its own fate when it was the 1st Defendant who was the initial victim to an untenable sale.

22. The Plaintiff has proved that the 1st Defendant should be liable for the loss it has suffered. As to damages, the Plaintiff has proved the following special damages:-

- a) Purchase price Kshs.22,500,000/=
- b) Stamp Duty Kshs. 450,000/=
- c) Legal fees Kshs.550,000/=
- d) Commission Kshs.200,000/=
- e) Fees for change of user Kshs.16,200/=
- f) Further Stamp Duty Kshs.29,500/=
- g) Fees on planning services Kshs.68,170/=

23. Regarding general damages, the Plaintiff’s advocate submits that the Plaintiff bought land for real estate development, for sale or rental. Further, that the property would probably have doubled in value. It is submitted that Kshs.20,000,000/= as general damages would be sufficient compensation.

24. The claim for general damages has not been proved. For a start the evidence does not support the submission that the Plaintiff had bought the land for purposes of real estate development. The Plaintiff sought and obtained change of user of the land from agriculture to light industry. On the value of the land, the Plaintiff did not produce a valuation in that regard.

25. Ultimately, the Court enters Judgment against the 1st Defendant for the sum of Kshs.23,813,870/= plus interest at Court rates from the date of filing suit and costs. The suit against the 2nd Defendant is dismissed with costs.

DATED AND SIGNED THIS 5TH DAY OF JULY 2021


F. TUIYOTT

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY 2021

D. S. MAJANJA

JUDGE

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