



REPUBLIC OF KENYA



**Ndung'u v Waithunguri & 3 others (Environment & Land Case
39 of 2020) [2023] KEELC 17518 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17518 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 39 OF 2020**

MN GICHERU, J

MAY 24, 2023

BETWEEN

MARGARET WATIRI NDUNG'U PLAINTIFF

AND

PETER KINUTHIA WAITHUNGURI 1ST DEFENDANT

MWANANCHI CREDIT LIMITED 2ND DEFENDANT

THE LAND REGISTRAR, NGONG 3RD DEFENDANT

NATIONAL LAND COMMISSION 4TH DEFENDANT

JUDGMENT

1. The Plaintiff's claim against the Defendants is as follows:-
 - a. An order that the Plaintiff has never transferred any interest whatsoever in LR Ngong/ Ngong/58839 to the first Defendant hence revoking and or cancelling the title issued to the first Defendant by the third Defendant for the suit land and a declaration that the same belongs to the Plaintiff and the same be registered by the third Defendant in the names of the Plaintiff.
 - b. An order directing the 4th Defendant to compensate the Plaintiff as per the compensation obtained through compulsory acquisition of the suit land.
 - c. A declaration that the second Defendant's actions were propagated through a fraud.
 - d. A permanent injunction restraining the first, second and third Defendants and/or their agents from transacting in any manner whatsoever and/or alienating in the suit land.
 - e. General damages at court rates.
 - f. Costs of the suit.



- g. Any other relief the court deems fit to grant.
2. The Plaintiff's case is as follows. She is the registered owner of the suit. It is a subdivision of LR Ngong/ Ngong/2377 which belonged to her deceased husband.
- In the year 2014, she obtained a loan of Kshs. 500,000/- from the second Defendant using the title deed to the suit land as security for the loan. She was unable to service the loan. She then approached the first Defendant for assistance. She entered into an oral agreement with the first Defendant who was to assist her in settling the loan. She would repay him within 90 days after collecting her title deed from second Defendant.
3. The first Defendant has now refused to release the Plaintiff's title deed. In addition, it has come to the Plaintiff's knowledge that the first Defendant has fraudulently transferred the suit land to himself and obtained a loan using the suit land as security.
4. The fourth Defendant has initiated a compensation of Kshs. 16, 323, 790/- to the first Defendant for compulsory acquisition of the suit land instead of the compensation being made to the Plaintiff who is the rightful owner. The Plaintiff has placed a caution against the suit land. It is for the above stated reasons that the Plaintiff filed this suit.
5. In support of her case, the Plaintiff filed the following evidence.
- i. Her witness statement dated 6/7/2020.
 - ii. Copy of title deed for the suit land in her name dated 12/2/2013.
 - iii. Copy of title deed for the suit land dated 29/4/2015 in the name of the first Defendant.
 - iv. Copy of mutation form for LR Ngong/ Ngong/52854.
 - v. Copy of award to the first Defendant for the suit land.
 - vi. Copy of certificate of official search dated 7/6/2018 showing the first Defendant as the registered owner of the suit land.
 - vii. Copy of letter by the Plaintiff dated 2/10/2017 addressed to Managing Director Kenya Railways reporting the dispute over the suit land.
 - viii. Copy of letter by deputy County Commissioner to the Land Registrar requesting for a caution over the suit land.
 - ix. Copy of the Plaintiff's loan statement with the second Defendant dated 4/4/2015.
 - x. Copy of letter by the second Defendant dated 14/4/2015 to the first Defendant giving the loan balance of Kshs. 671,483.58 as at 14/4/2015.
 - xi. Copy of valuation report for the suit land dated 17/8/2018 giving the value of the land at Kshs. 5, 525,000/-.
 - xii. Other relevant documents.
6. The third Defendant filed a written statement of defence dated 25/2/2021 generally denying the Plaintiff's claim and averring that it is mandated by law to register documents presented at the registry so long as they comply with the law.
7. The first Defendant did not file a defence in this case. He chose to rely on his replying affidavit in Petition No. 004 of 2020 in which he is the petitioner. The other parties in that case are Mark



Osiche Ouma and the National Land Commission as the Respondent while the Plaintiff herein is the interested party.

8. In the replying affidavit, the first Defendant says that he purchased the suit land from the Plaintiff for Kshs. 5,000,000/- which he paid in full on 21/4/2015. She then executed the transfer form. At the time that he bought the suit land, the Plaintiff had charged it to the second Defendant whom she owed Kshs. 1.5 million. He paid this amount to the second Defendant.
9. Annexed to the affidavit are the following documents.
 - i. Copy of agreement for the sale of the suit land dated 21/4/2015.
 - ii. Copy of Plaintiff's ID and PIN
 - iii. Copy of application for consent of Land Control Board for transfer of suit land which is undated.
 - iv. Copy of an undated transfer form for the suit land.
 - v. Copy of title deed in the name of the first Defendant deed dated 29/4/2015.
 - vi. Copy of letter dated 13/4/2015 by the Plaintiff to the second Defendant saying that the first Defendant will pay Kshs. 600,000/- on her behalf.
 - vii. Receipt showing that the first Defendant paid Kshs. 670,000/- to the second Defendant's account with Family Bank, Corporate Branch on 24/4/2015.
 - viii. Copy of discharge of charge for the suit land dated 29/4/2015.
 - ix. Acknowledgement that the first Defendant has recovered the original title deed for the suit land from the firm of A.S. Kuloba and Wangila Advocates on 24/4/2015.
10. At the trial on 2/6/2022, only the Plaintiff and the first Defendant testified. The Plaintiff maintained that she was not selling her land and only wanted to save the land from the second Defendant when the first Defendant offered to help.

On the other hand, the first Defendant said that he paid Kshs. 671,483.58 to the bank on behalf of the Plaintiff. He then paid her Kshs. 1 million cash because she did not have an Identity Card to transact in the bank. He again paid her Kshs. 2 million in cash on 28/4/2015 in his office along Langata road. The balance was later deposited in the Plaintiffs account with Equity Bank.
11. Counsel for the parties were to file and serve written submissions by 30/3/2023 but by the time I am writing this judgment on 19/5/2023, no such submissions have been filed.
12. I have carefully considered all the evidence adduced in this case by the Plaintiff and the first defendant including the witness statements, documents and the first Defendant's replying affidavit dated 1/7/2021. I find that the following issues arise.
 - i. Was the agreement between the Plaintiff and the first Defendant oral or was it written?
 - ii. Did the first Defendant pay the Plaintiff a total of Kshs. 5 million?
 - iii. What are the most just orders to make in this case?
13. On the first issue, I find that the agreement between the Plaintiff and the first Defendant was in writing. It was not oral. The first Defendant has proved that there was a written agreement between him and the



Plaintiff. This agreement is annexed to the first Defendant's replying affidavit dated 1/7/2021. Under Sections 97 and 98 of the Evidence Act, written agreements prevail over oral ones.

14. On the second issue, I find that the first Defendant has not proved that he paid the Plaintiff the agreed purchase price of Kshs. 5 Million. All that he has proved is that he paid Kshs. 670,000/- into the second Defendant's account at Family Bank and nothing more. I do not believe that the first Defendant paid any cash to the Plaintiff at any time. If he paid that kind of money to her as he claims that he did, he should at the very least have a witness to the payment and an acknowledgement by the Plaintiff. He would also have a bank statement to show the account from which he withdrew the money. In the case of the money allegedly deposited into the Plaintiff's Equity Bank Account, the first Defendant should have evidence of it in form of deposit slips. As it is now, we only have his word against that of the Plaintiff and I believe the Plaintiff when she says that she got nothing from the Defendant.
15. In addition to the above, the first Defendant has not proved that any consent was obtained from the Land Control Board for the transfer of the suit land. He has not proved that he paid any stamp duty for the transaction. Without all this evidence, I find that the transfer of the suit land to the Plaintiff is tainted with illegality, failure of procedure and corruption for failure to pay the agreed consideration. I find the entire transaction null and void.
16. On the final issue, I find that the only thing that the first Defendant is entitled to is a refund of the Kshs. 670,000/- that he paid on behalf of the Plaintiff together with interest at the rate of 14 per cent. For the above stated reasons, I enter judgment for the plaintiff against the first Defendant as follows.
 - i. Transfer of the suit land to the first Defendant is hereby revoked.
 - ii. Suit land to be registered in the name of the Plaintiff.
 - iii. Plaintiff to refund to the first Defendant Kshs. 670,000/- with interest at 14 per cent from 24/4/2015 till the date of payment in full.
 - iv. Costs of the suit to the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 24TH DAY OF MAY, 2023.

M.N. GICHERU

JUDGE

