



Njoroge & 3 others v Magondu; Land Registrar, Nanyuki (Interested Party) (Environment & Land Case 55 of 2021) [2023] KEELC 22564 (KLR) (6 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22564 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE 55 OF 2021
AK BOR, J
DECEMBER 6, 2023
FORMERLY NYERI ELC CASE NOS. 12 AND 30 OF 2019 (O.S)**

BETWEEN

**ALEX M. KARANJA NJOROGE 1ST PLAINTIFF
EDWIN MUNYANGA MATHENGE 2ND PLAINTIFF
NANCY NJERI MACHARIA 3RD PLAINTIFF
ROBERT NJORORO MICHUKI 4TH PLAINTIFF**

AND

LOISE WANGARI MAGONDU DEFENDANT

AND

LAND REGISTRAR, NANYUKI INTERESTED PARTY

JUDGMENT

1. The 1st to 3rd Plaintiffs filed Originating Summons Number 12 of 2019 dated 10/5/2019, while the 4th Plaintiff filed Originating Summons Number 30 of 2019 at the Nyeri Environment and Land Court (ELC) seeking a determination on whether the Defendant stood as trustee to the Plaintiffs by virtue of the agreements entered into for the sale of portions of the land known as Nanyuki/Marura/Block 2 (Kariunga) 263 and Nanyuki/Marura/Block 2 (Kariunga) 264 (“the suit property”), and whether a vesting order should issue appointing W. Kevin Michuki as the only trustee to oversee the Plaintiffs’ interests in the suit property.
2. The 1st and 2nd Plaintiffs swore separate but nearly identical affidavits in which they deponed that on 5/7/2013 they entered into sale agreements with the Defendant for the sale of 10 acres out of either of the two parcels comprised in the suit property at the agreed sum of Kshs. 2,300,000/=. They deponed



that the suit property formed part of the Estate of the late Francis Magondu Githinji who was the registered proprietor and that the Defendant was the administratrix of his estate through letters of administration issued in Nyeri High Court Succession Cause No. 650 of 2001. One of the terms was that Kshs. 1,000,000/= was to be paid upon execution of the agreements which they both claim to have paid via two banker's cheques each, the 1st Plaintiff's from Equity Bank Limited and the 2nd Plaintiff's cheques were drawn by the Co-operative Bank Limited, during execution before R. Wanjiru Nderitu, Advocate at her offices within Nyeri Town.

3. The 1st and 2nd Plaintiffs deponed that the effect of the execution of the agreement was to create a trust in which the Defendant became their trustee. They stated that they were weary of their beneficial interest because of the delay in the confirmation of the grant in Nyeri Succession Cause No. 650 of 2001 and the fact that in Nyeri ELC Case No. 9 of 2014- *David Kinyua Mwai & 8 others v Loise Wangari Magondu*, the Defendant had donated a power of attorney to her son, Stephen Magondu, to act on her behalf.
4. In their witness statements accompanying the application, the 1st and 2nd Plaintiffs elaborated that together with one Tirus Njoroge Michuki, they had a meeting on 5/7/2013 at the office of Muteithia Kibira Advocates with the Defendant and her two sons Joseph Githinji Magondu and Stephen Mwai Magondu in which they were informed that the late Francis Magondu Githinji had two wives and that the two families would share the suit properties equally with each family receiving one piece.
5. They were informed that the land they were purchasing would be carved out of either of the suit properties depending on the confirmation of the grant. After making their initial payments as per the sale agreement, the matter was delayed owing to the failure to confirm the grant in Succession Cause No. 650 of 2001 which delayed because of the proceedings in Nyeri ELC Case No. 9 of 2014. These statements formed the evidence of the 1st and 2nd Plaintiffs at the hearing of the suit.
6. The 4th Plaintiff testified and adopted affidavit as his evidence in the case. He stated that he met the Defendant and her sons at the offices of Muteithia Kibira Advocates and was informed that the land in question was the subject of the succession cause. He agreed to purchase 20 acres of the property for Kshs. 4,600,000/= at Kshs. 230,000/= per acre. He told the court that he paid Kshs. 1,700,000/= upon execution of the agreement and the remainder was payable after completion of the contract. The transaction was delayed because the grant was not confirmed owing to the proceedings in Nyeri ELC Case No. 9 of 2014 in which the Defendant had donated her power of attorney to her son, Stephen Mwai Magondu.
7. The Plaintiffs filed their submissions dated 6/6/2023. They referred to the considerations which a court ought to take into account when determining whether parties sought to create a trust and referred to the decision in *Knight v Knight* [1840]3 Beav 148. They quoted part of the decision, but they did not furnish a copy of that decision to the court.
8. They submitted that from the foregoing, what would inform the court to reach its decision were the certainty of intention of the parties, the certainty of the subject matter and the certainty of objects. The Plaintiffs relied on *Halsbury Laws of England*, 4th Edition at paragraphs 649 and 650 on the point that while it is preferable to use the word 'trust', the court may be guided by the tenor of the instrument which does not use the word trust. They urged the court to consider the preamble of the sale agreements in question and clause 4 which mentions that verification of the physical location of the land to be excised would be determined once the grant was confirmed.
9. The Plaintiffs submitted that the language of the contracts was clear as to the intention of the parties towards the portions of land in question. They argued that the land was held in trust for them until



- the grant in the succession proceedings was confirmed which is when the Defendant would perform the other obligations imposed on her by the agreements.
10. With regards to certainty of subject matter, they relied on *Halsbury's Laws of England* at paragraph 653 which states that the property affected by the trust must be capable of being ascertained. The Plaintiffs contended that under the sale agreements, the trust in question falls over all the land known as Nanyuki/Marura/Block 2 (Kariunga) 263 and 264 each measuring 28.3 hectares which were amalgamated subsequent to the agreement to form Nanyuki/Marura/Block 2 (Kariunga) 2450 measuring 56.6 hectares or 139.86 acres.
 11. It was contended that the amalgamation was an attempt to defeat the trust in force. It was urged that the amalgamation does not distinguish the trust, since it simply morphed into a trust for 45 acres out of Nanyuki/Marura/Block 2 (Kariunga) 2450 which is the result of the amalgamation of the suit properties. The Plaintiffs argued that the subject matter of the trust was certain and they urged the court to consider Section 4 of the *Trusts of Land Act* which provides for the safety and protection of a purchaser.
 12. The Plaintiffs relied on paragraph 655 of *Halsbury's Laws of England* which requires the objects of a trust to be ascertained and submitted that the beneficiaries must be properly ascertained and their share of the trust property shared out. They argued that they were the beneficiaries of the trust as set out in the sale agreements, pursuant to which 10 acres each were sold to the 1st and 2nd Plaintiff, 5 acres to the 3rd Plaintiff and 20 acres to the 4th Plaintiff. They surmised that the objects of the trust were clearly set out and that they do not suffer from uncertainty.
 13. The Plaintiffs referred to paragraphs 659-661 of *Halsbury's Laws of England* on the criteria for completeness of the trust and exchange of valuable consideration and submitted that the present trust is complete because the Plaintiffs paid consideration to the Defendant and her family for the purchase of the suit properties as shown by the sale agreements.
 14. The court notes that the sale agreement between the 3rd Plaintiff and the Defendant was not annexed. It is not in dispute that all the four agreements between Plaintiffs and the Defendant were drawn by Muteithia Kibira Advocates and had similar terms, with the main difference being the amounts of consideration payable for the different portions of land.
 15. The issue for determination is whether the Defendant stands as trustee for the Plaintiffs with respect to the suit property which they claim to have purchased from the Defendant. The Defendant failed to enter appearance despite being served. She was served by substituted means in the Daily Nation of 16/3/2023 following the order of the court made under order 5 rule 17 of the *Civil Procedure Rules* 2017.
 16. The sale agreements which the Plaintiffs relied on were executed in February and July 2013. The Plaintiffs do not seem to have taken any steps in the transaction including issued the notice to complete pursuant to clause 14 of the sale agreements.
 17. The Plaintiffs claim that the two parcels of land comprising the suit property were amalgamated yet from the copies of the cards it is only the card for parcel number 263 which was closed on combination to form new number 2450. No such entry was made on the card for parcel number 264. The Plaintiffs did not present copies of the green card for parcel number 2450 which would give an indication as to whether the land has been distributed among the beneficiaries pursuant to the succession cause that they referred to. The Plaintiffs did not ascertain the status of the succession cause yet that would have shown the status of the distribution of the assets of the estate of the deceased.



18. The court notes that the copies of the cards give the names of the proprietors as John Gikandi Magondu and Loise Wangari Magondu yet the recital of the sale agreements gives the name of the vendor's late husband as Francis Magondu Githinji. This raises doubt as to whether the two parcels of land formed part of the assets of the estate of the Defendant's late husband since his name does not appear on the land records. The sale agreement indicated that the portions the Plaintiffs were purchasing would be excised once succession was completed.
19. The Plaintiffs failed to establish that the Defendant stands as their trustee by virtue of the agreements entered into for the sale of portions of the suit property. The court declines to issue the vesting orders sought to oversee the Plaintiffs' interests in the property in question.

DELIVERED VIRTUALLY AT NANYUKI THIS 6TH DAY OF DECEMBER 2023.

K. BOR

JUDGE

In the presence of: -

Mr. Kelvin Michuki for the Plaintiffs

Ms. Stella Gakii- Court Assistant

No appearance for the Defendant

