



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND AT THIKA

MISC APPLICATION NO. 13 OF 2021 (OS)

IN THE MATTER OF ORDER 37 RULE 3 OF THE CIVIL PROCEDURE RULES, 2010 AND SECTIONS 1A, 1B, 3A AND SECTION 63 OF THE CIVIL PROCEDURE ACT, CHAPTER 21 LAWS OF KENYA

AND

IN THE MATTER OF LR NO 10874/1172 (ORIGINAL NO 10874/17/14)

BETWEEN

PETER KIARIE MURIGI.....PLAINTIFF

AND

PETER WAINAINA.....1<sup>ST</sup> DEFENDANT

PENINA NJERI KIARIE.....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

1. Vide the Originating Summons dated 26/4/2021 the Plaintiff/Applicant prayed for Orders THAT;

a. Spent.

b. Spent.

c. The Honorable Court be pleased to order the Defendants to enter appearance in this matter and show cause why they should not execute a fresh Land Control Board Consent Application form as well as a fresh Transfer Form relating to L.R No. 10874/1172 (Original number 10874/17/14) Thika in order to effect the transfer of L.R No. 10874/1172 from the Defendants to the Plaintiff.

d. In default of appearance and show cause by the Defendants, the Honorable Court be pleased to:

i. Grant a vesting order over L.R No. 10874/1172 (Original number 10874/17/14) Thika to the Plaintiff.

ii. Grant leave to the Deputy Registrar of the Environment and Land Court to execute fresh Land Control Board Consent Application and Transfer forms relating to L.R No. 10874/1172 (Original number 10874/17/14) Thika, and any additional document required for the transfer of the said property to the Plaintiff, for and on behalf of the Defendants.

iii. Grant an order directing the Registrar of Lands to register the Plaintiff as the owner of L.R No. 10874/1172 (Original number 10874/17/14) Thika in the place of the Defendants.

e. The Honorable Court be pleased to make such further orders as are just and fair in the circumstances of this case.

f. Costs be in the cause.

2. The Summons are premised on the grounds on the face of it and the supporting Affidavit of **Peter Kiarie Murigi**. That the Applicant purchased the parcel of land known as L.R 10874/1172 (originally 10874/17/14) hereinafter referred to as the suit land vide a sale agreement dated 10/8/2006. That he took possession of the suit land and awaited its subdivision as it formed part of the larger parcel of land known as

10874/17. That the Defendants executed the transfer form and Land control board consent application form to effect transfer of the suit land to the Applicant and obtained the said consent which was annexed as PKM8. That however the transfer was not transferred in his name as the consultant he commissioned to help him process the title lost all the documents he had supplied him. That efforts to trace the Defendants to have them sign the documents afresh have been in vain hence the application.

3. Pursuant to leave granted by this Court for substituted service, the Defendants were served through the Standard Newspaper of 25/5/2021 and a return of service filed on 9/6/2021. They did not enter their appearance nor oppose the claim.

4. The Applicant filed his submissions dated 3/11/2021 through the firm of KRK Advocates LLP. He rehashed the background of the suit and purchase and the developments carried out thereon. That the purchase price was agreed at Kshs. 1.0M which he paid in two installments. That despite service of the suit papers, the Defendants neither entered appearance nor responded to the Applicant's claim hence the Applicant's claim is unopposed.

5. Order 37 rule 3 of Civil Procedure Rules provides;

**“3. Summons by vendor or purchaser of land [Order 37, rule 3.]**

**A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).”**

6. In order to answer the question whether the application is merited, I shall consider the documentary evidence on record. It is not in dispute that the Court is being asked to determine the question of specific performance in relation to the contract of sale of land dated the 10/8/2006 between the Applicant and the Respondents. It has not been stated whether the existence or validity of the said contract is in issue.

7. Having said that, the agreement of sale on record is dated the 10/8/2006. It is between the Applicant as the Purchaser and Joseph Njenga Ranji on the one hand and George Mararo Njenga on the other hand (both described as the Vendors). The land subject of the sale is 2 acres, a portion comprised of title No 60993, LR No 10874 and said to be registered in the names of Moses Kiarie Ranji (deceased) and Peter Wainaina as joint proprietors holding in trust for their other siblings. Further the agreement provided the consideration of the land as Kshs 1 million of which Kshs 500,000/- was acknowledged as at the time of the execution of the agreement and the balance was payable upon transfer.

8. Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies with the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Though the originating summons are not opposed, the Applicant bears the onus to prove his case rests and the burden does not shift even if the application is undefended.

9. The Applicant has taken out an originating summons against the Respondents claiming that he purchased the suit land from them. That they have declined or failed to transfer the land to him and seeing that at 87 years old, he wishes to have the same registered in his name. The Applicant has failed to show the nexus between the sellers of the land and the Respondents. It is on record that the Respondents executed the agreement of sale as witnesses and not vendors of the suit land. It is therefore unfounded for the Court to order specific performance against the Respondents who for all intents and purposes are strangers to the contract of sale.

10. The other reason the application must fail is that the Applicant failed to place before the Court the particulars of the title he purchased. He averred that he purchased 2 acres out of a larger parcel of 52 acres being Land Reference No 10874/17. The alleged title was neither tabled before the Court nor the title for L.R No 10874/17/14 (as shown in the copy of transfer dated the 18/12/2009) nor the L.R NO 10874/1172 shown in the Land Control Board consent dated the 5/12/13. These set of affairs creates doubt in the mind of the Court as to which title is to be transferred to the Applicant.

11. Further despite the Applicant's averment that the land belonged to Moses Kiarie Ranji, deceased and Peter Wainaina and that the Ms Penina Njeri Kiarie is an administrator, nothing was placed before the Court in form of confirmation of grant of letters of administration to support this position. In addition, the tenure of the proprietorship of the original owners was not disclosed as to whether it was joint or tenancy in common or the nature of trusteeship held by the proprietors on behalf of the vendors.

12. For the above reasons the Court finds that the application is incompetent and the same is struck out with no orders as to costs.

13. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 17<sup>TH</sup> DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Ms. Njuguna holding brief for Kuria for Plaintiff

1<sup>st</sup> Defendant – absent

2<sup>nd</sup> Defendant - absent

Ms. Phyllis – Court Assistant