



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ENVIRONMENT AND LANDS' COURT CASE NO. 415 OF 2013

KIBUCHI NGIRINU.....PLAINTIFF

VERSUS

CHARLES MURIUKI GAKOTHO.....DEFENDANT

RULING

KIBICHU NGIRINU, hereinafter referred to as the Plaintiff, took out the Plaint dated 30th March 2009 in which he sued **CHARLES MURIUKI GAKOTHO**, hereinafter referred to as the Defendant, whereof he prayed for judgment in the following terms:

- a. **A declaration that the Defendant holds land parcel No. Mwerua/Kanyokora/639 in trust for the Plaintiff.**
- b. **Termination of the aforesaid trust by re-transfer of land parcel No. Mweura/Kanyokora/637 back to the Plaintiff.**
- c. **Costs of the suit with interest.**

The Defendant filed a defence to deny the Plaintiff's claim.

The Plaintiff testified and summoned two witnesses to testify in support of his case. It is the Plaintiff's evidence that in the year 1991, he approached the Defendant to advance him money to purchase a Posho Mill. The Plaintiff averred that the defendant who worked with Kenya Commercial Bank Ltd advised him to transfer to him his land i.e. L.R.no.Mwerua/Kanyokora/637 to enable him use it as security to secure a loan from his employer, Kenya Commercial Bank Ltd and thereafter the amount would be used to purchase a Posho Mill and a plot at Chuka Township. The Plaintiff said he bought the idea and proceeded to transfer the aforesaid parcel to the defendant. A Posho mill was purchased and installed on the Plaintiff's land. Martha Wangu (PW3), the Plaintiff's daughter claimed she protested against the deal between the Plaintiff and the Defendant because the same was not reduced into writing but her protest was ignored. Jane Wambui Kibuchi Ngirinu (PW2) the Plaintiff's wife, corroborated the evidence of the Plaintiff. The Plaintiff produced several documents relating to the purchase of a Posho Mill in favour of the Plaintiff and the Defendant. All the correspondences were authored by the Defendant. PW3 is in occupation of L.R.no.Mwerua/Kanyokora/637, the suit premises.

The Defendant on his part testified alone in support of his case. He produced two agreements claiming to be a bonafide purchaser of the suit land. The first agreement is dated 18th September 1990 and the second agreement is dated 15th April 1991. The two agreements centres around the loan of Kshs.75,000 advanced to the Defendant by Kenya Commercial Bank Ltd. It is not in dispute that the purchase of the Posho Mill and the transfer of the suit land were done at the same time. It is also not in dispute that the

loan from Kenya Commercial Bank which was advanced to the Defendant using the suit land as a collateral was used to purchase the Posho Mill. According to the Plaintiff, he had no intention of transferring ownership of his land to the Defendant but he solely wanted to facilitate the processing of the loan from Kenya Commercial Bank Ltd. It is the Plaintiff's evidence that, that is the reason why the Defendant has not taken possession and occupation of the suit land for the last 21 years. The Plaintiff further averred that the Defendant and his wife continued to receive weekly repayments to settle the outstanding loan with Kenya Commercial Bank Ltd. The Plaintiff also alleged that the Defendant used his privileged position in society to mislead him into executing a sale agreement making the Posho mill and the suit land to be interrelated. The Plaintiff urged this court to find that the intention of the parties was not to confer absolute ownership of land to the defendant but was meant to be temporary for purposes of obtaining a loan in favour of the Plaintiff and that the suit land would ultimately revert back to the Plaintiff.

After a careful consideration, of the evidence and the submissions, the following issues arose for determination:

- 1. Whether the Plaintiff had himself fraudulently registered as the proprietor of the suit land?**
- 2. Whether or not the Plaintiff is entitled to the orders sought?**

In paragraph 6 of the Plaintiff specifically pleaded the particulars of fraud on the part of the Defendant as follows:

- a. Making the Plaintiff to execute two (2) Sales of Land Agreements when there was no such an Agreement.**
- b. Causing the Plaintiff to sign two (2) contradiction agreements.**
- c. Failing to give the Plaintiff copies of the aforesaid agreement until February 2009 when the Plaintiff summoned the Defendant before the clan elders demanding for his title deed back.**
- d. Purporting to have paid the entire purchase price in a self defeatist agreement which clearly outlined the alleged mode of paying the balance.**

The Plaintiff was enjoined by law to present credible evidence to establish the particulars of fraud. A critical look at the Plaintiff's evidence reveals no particulars of fraud which can be attached to the Defendant. There is credible evidence that the Plaintiff together with his wife (PW2) and the Defendant attended the Land Control Board meeting to obtain the necessary consent to transfer the land to the Defendant. The Plaintiff did not explain to this court as to why he opted to transfer title to the suit land to the Defendant yet he would instead have pledged the same title as security to the bank for purposes of obtaining a loan himself. There is no evidence to show that he was not qualified to be advanced money by the bank. According to the evidence of PW2, her daughter (PW3) refused to attend the Land Control Board meeting at Baricho when she learned that the Plaintiff meant to sell the suit land to the Defendant. What comes out clearly is that PW2 and PW1 knew what they were doing hence the Plaintiff cannot purport to pretend that he innocently signed bundles of documents to part away with his property. I have examined the agreements executed by the parties. The agreement is witnessed by Bernard Ng'ang'a the Plaintiff's family friend and neighbour and also witnessed by the District Officer Loitoktok before being presented to the Land Control Board. I have come to the conclusion that the family knew that the Plaintiff wanted to sell his land to the Defendant but they appear not to have approved but nevertheless the Plaintiff went ahead to conclude the transaction to their chagrin. In my view, the particulars of fraud were not proved hence no trust was created in favour of the Plaintiff. The evidence tendered appear to have completely destroyed the Plaintiff's case. In paragraph 9 of the Plaintiff avers that he received Kshs.50,000 and a further sum of Kshs.17,000 which he claimed he fully refunded. However, the evidence produced by the Defendant shows that the Plaintiff actually received Kshs.147,000. The question which begs to be answered is what was the purpose of the money if the Posho Mill and its installation cost is Kshs.75,000? Why refund the money and still proceed to receive more money from the Defendant. PW2 did not give cogent evidence to establish that she indeed refunded money to the

Defendant. In fact, her evidence created more confusion. She did not know how much money was actually to be refunded to the Plaintiff. There is an allegation that the Defendant used the money to purchase a plot in Chuka. The Defendant countered this allegation by showing documents that the plot in Chuka had long been purchased after the suit property. In sum, I see no trace of fraud on the Defendant's part.

The remaining question as to whether the Plaintiff's suit can be sustained is easy to answer. It is clear in my mind that the Plaintiff has failed to prove his case to the required standard on a balance of probabilities. The Originating Summons is ordered dismissed with costs to the Defendant.

Dated, Signed and delivered in open court this 21st day of February, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Mr. Kiboi h/b for Mr. Muhoho for Plaintiff

N/A for the Defendant but with Notice