



**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**WILLIAM OKWOMI NGERESA .....PLAINTIFF**

**VERSUS**

**ANDREW WAFULA MUNIAFU..... 1ST DEFENDANT**

**MILDRED WAFULA .....2ND DEFENDANT**

**JUDGMENT**

*“The Plaintiff’s claim against the defendants jointly and severally is therefore for an order for cancellation or nullification of any purported land sale agreement between the defendants and the late Guilford Muigai deceased over land parcel number Bungoma municipality 478, an order that the defendants be evicted from the suit land, a declaration that the defendants ought to pay the plaintiff outstanding rent up to date and a permanent injunction restraining the defendants, themselves, their agents and or authorized servants and or their representatives who may be claiming through them from interfering, alienating, evicting or wasting the plaintiff’s land or in any other way interfering with the suit land.”*

*“The defendants claim against the plaintiff is for a declaration that the plaintiff having sold the plot herein to the said Arnold Guilford Mungai and having received the full consideration and granted vacant possession has no right or claim over the said property, a declaration that the defendants having bought the said property from the said Arnold Guilford Mungai (deceased) and there being no claim from his estate, the defendants are entitled to the use, occupation and enjoyment of the said property as bonafide purchasers for value and an order directing the plaintiff to forthwith transfer plot no. BUNGOMA MUNICIPALITY/478 into the defendants’ names and in default thereof, the executive officer of this honorable court to do so.”*

4. The plaintiff stated that before Mr. Muigai died on 23<sup>rd</sup> July 2009, they had entered into an oral agreement that he refunds the deceased the money for the property agreed at Kenya shillings One million one hundred thousand only (Kshs. 1,100,000/=). Later after the death of Mr Muigai he got into a written agreement with Lucy Wanjiru Njenga (PW2) and refunded the purchase price as shown in the documents produced as pex. 6 and 7. PW2 was issued with a limited grant – pex. 9 and earlier appointed as executor of the “Will” dated 1<sup>st</sup> January 2006 produced as pex 8 therefore in the plaintiff’s view she had authority to transact business with him.

6. Lucy Wanjiru Njenga testified as PW2. She is the sister to Mr. Muigai– deceased. She was issued with a limited grant of letters of administration of the estate of Muigai on 7<sup>th</sup> March 2013 which she produced in evidence as pex. 9. The deceased had two sons who were left under her care. Before his death, PW2 said Mr. Muigai lived in Bungoma town on a plot registered in the name of the plaintiff. That the deceased left a “Will” which she produced as pex. 8. Further that the person staying in one of the houses in the suit property started claiming purchasing rights although she never saw him/them

during the funeral arrangements of Mr. Muigai which were held within the suit premises. They did not show her any documents regarding the sale nor disclose how much they bought the plot for. She began negotiating with the plaintiff with the result that the plaintiff agreed to refund the purchase price plus some interest because the title was still in his name. She confirmed receiving the sum of Kenya shillings one million one hundred thousand on behalf of the estate of Muigai- deceased and no one from her family has complained.

8. The 2<sup>nd</sup> defendant testified as **DW1**. She lives in Bungoma town within the suit property. She had an agreement with Guilford Muigai- deceased on 2005 for sale of part of the plot. The portion sold was measuring 0.02325 with a 2 bedroomed house unit developed on it. The agreed sale price was Kenya shillings Three hundred seventy five thousand (Kshs. 375,000/=). She produced the agreement as *Dex. 1*. A deposit of Kshs, 150,000/= only was paid on execution and the balance paid in installments as per the bundles of documents produced as *Dex. 2*. She took possession of the sold house in January 2006 after the previous tenant was given notice to give vacant possession as indicated in the letter produced as *Dex.3*. She did not secure registration into her name because of the outstanding rates. She produced correspondences from the municipality, Wasilwa & Co. advocates and receipts of payment of rates as *Dex. 4,5,6,7, and 8* respectively.

10. The witness testified that she has never received any demand notice from Muigai's family for payment of rent. **DW1** said she had no dealings with the plaintiff hence she did not see any reasons to show him the sale agreement they had with Mr Muigai- deceased. She put a perimeter wall and chain link fence for security purposes and the plaintiff has never told her of his intention to access the premises. She is living on the plot as a purchaser and not a tenant. The unit previously occupied by Mr. Muigai is vacant. She stood by the contents of their reply to the demand letter (*Pex. 11*). It was false for the plaintiff to say the original lease was lost since he had given it to Mr. Muigai. She does not agree to the order seeking to revoke the agreement between Mr. Muigai and herself. They do not owe the plaintiff any rent as they had no tenancy agreement with him. She asked the court to sustain their agreement as this is their only home. She prayed for an order directing the plaintiff to cause the title to the suit property to be registered into their names then they negotiate with the estate of Muigai – deceased on purchase of the remaining house. She also stated that PW2 has never showed them any document that she has authority to manage the estate of Mr. Muigai. Finally she also prayed for costs of this suit.

12. The 1<sup>st</sup> defendant testified as **DW2**. He adopted his two statements i.e the one filed in court and the other recorded before the police as his evidence. He said **DW1** is his wife and he was a witness to the sale transaction between her and the late Guilford Muigai. **Dw2** confirmed the evidence of **DW1** that before they moved into this house there was a tenant by the name Susan Muyale. Mr. Muigai – deceased released to them the original agreement (*Pex.1*) and original certificate of lease for the suit property. They agreed with Muigai to buy the remaining house later. DW1 continued that one time he was called by the CID – Bungoma who asked him if he was aware about the sale of the suit house. His answer to the CID officer was positive. He was surprised when he got a demand note (*pex. 10*) for rent. Their agreement with Muigai – deceased has not been annulled as he is yet to receive such notice from the estate of the deceased. In the letter from the plaintiff (*Dex 4*) stated that the plaintiff had given the late Muigai all documents to facilitate transfer (*dex. 5*) He urged the court to award them their legally acquired  $\frac{3}{4}$  of the suit plot.

14. The plaintiff submitted on the facts which were not in dispute i.e the plaintiff is still registered as owner of the suit property. He sold the plot to the late Muigai who took possession immediately. It is also not in dispute that Muigai passed on before transferring the title to his name. He asked the court to determine whether the agreement between him and Muigai- deceased was complete and authentic. He also urged the court determine if the agreement between Muigai and the defendants was valid and complete. Lastly he asked the court to determine who the rightful owner of the suit property is. They relied on the case law of **Amrital vs. City Council of Nairobi – Nbi KLR (E & L) 1 89** and section 31 of the Registered Land Act (*repealed*).

i. Whether the plaintiff sold plot no. Bungoma Municipality 478 to ARNOLD GUILFORD MUIGAI

iii. Whether the agreements between the defendants and ARNOLD GUILFORD MUIGAI were tainted with fraud and whether the same should be canceled and or annulled?

v. Whether there existed tenancy relationship between the plaintiff and the defendants herein?

16. I have considered all the evidence adduced on record and the parties written submissions. I do find the following questions as arising for determination by this court;

b). Did Lucy Wanjiru have capacity to dispose of the interest of the estate of Muigai in the suit property?

d). Is the tenancy relationship between the plaintiff and the defendants proved.

f). who should bear the costs of this suit.

The plaintiff has not denied they had a sale agreement with Mr. Muigai – deceased concerning sale of his property Bungoma Municipality/ 478. He admits receiving the agreed purchase price in full. He admits surrendering the original certificate of lease and vacant possession of the suit property to the deceased. He admits further that the only reason the transfer into Muigai's name was not undertaken is because there were outstanding rates on the plot. The plaintiff produced as *pex 3a* a document dated 18<sup>th</sup> Dec 2001 which showed the rates due on the suit plot was Kshs. 30123/=, *pex 3b* gave new rates payable annually at Kshs. 8330/= and *3c* dated 7.7.2011 rate demand notice showing the rates outstanding was 6,284/. In *pex 4*, rates demanded on 18<sup>th</sup> Sept 2007 was Kshs 19389/=. *Pex 5* is payment requests dated 1.7.2011 and 26.1.2010 which showed payments were made on the dates indicated.

19. **The validity of the agreement between the plaintiff and Lucy W. Njenga:**

**“Except so far as expressly authorized by this Act or by any other written Law, or by grant of representation under this Act no person shall for any purpose take possession or dispose of or otherwise intermeddle with any property of a deceased person.”**

21. The Plaintiff’s claim is premised on the fact that he has refunded the purchase price. That agreement has been declared void for lack of capacity by this court. In the circumstances, this court infers that the position obtaining prior to the refund remains. Under section 24 (b) of the Land Registration Act, registration vests in that person the leasehold interest described in the lease together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease. The inference drawn from the provisions of section 24 (b) is that registration does not confer on a person absolute interests. In this instance, the registration of the plaintiff was subject to the express agreement between him and the late Muigai. From the documentary evidence produced demonstrate that the plaintiff passed his interest in the suit property to the deceased although the deceased did not secure registration into his name. See also the provisions of section 43 (4) of the Land Registration Act. Although the law provides that the title passes on registration, there are instances where a presumption of a constructive trust can be implied to have been created by the parties. In my view, the plaintiff's name remaining as the registered owner was merely as trustee in favour of the late Mr Muigai *as* his interest in the property was relinquished by virtue of his actions thereby creating a constructive trust.

***“ a constructive trust arises where the property the subject matter of a constructive trust is held by a person in circumstances where it would be inequitable to allow him assert full beneficial ownership of the property.”***

23. **Did the late Muigai have any interests to sell to the defendants?**

24. It is also my humble opinion that an instance such as this allows the doctrines of equity to be invoked. The deceased although not the registered owner of the suit property had some interest in it

which interest he was capable of passing to 3<sup>rd</sup> parties and which he did pass to the defendants. In the case of **AMRITLAL VS CITY COUNCIL OF NAIROBI KLR (E&L) 1** cited by the plaintiff, the Court of Appeal held that specific performance could not issue against the City Council as it would be impossible for the City council to comply with that order since the title was held by the Government. In holding no 4 which was an obiter, *Law JA* held that the Government held the title to the suit land in trust for the City council and was bound to convey the transfer when required by the beneficial owner. This case recognized the existence of trust except the title was held by the Government and not an individual as in the instant case where an order of specific performance could not be enforced. The Court of Appeal in the Sawoyo case supra said the trust need not be entered into the register as the interest was protected by the proviso to **section 28** of the Registered Land Act (*repealed*) states “...**provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as trustee.**”

26. The plaintiff asked for the court to order the defendants to pay him rent arrears in respect of the suit premises. In his evidence in chief, the plaintiff did not endeavor to lead any evidence that he is entitled to any rents he is claiming. He admitted that he did not have any tenancy agreement between the defendants and him. He did not know when the defendants took over occupation of the premises. He was only claiming rent because he refunded the purchase price. PW2 also did not know if the defendants were paying any rents to Muigai. She did not disclose her source of information to verify the allegation that the defendants were paying a monthly rent of Kshs 5000/=. I am satisfied that defendants proved that they are in occupation of the suit premises as purchasers not as tenants. The plaintiffs failed to prove this claim and so it fails.

Section 24 (a) of the Land Registration Act, provides that registration confers on a person the absolute ownership of that land together with all rights and privileges appurtenant thereto. Section 28 of the same Act provides that all registered land shall be subject to the overriding interests listed therein without their being noted in the register (simila to the proviso to section 28 of the repealed Registered Land Act). This section takes away the absoluteness of interests given by section 24 (a). It is not in dispute that the plaintiff is still the registered owner of the suit property. The evidence led is that the late Muigai did not effect transfer of the property into his name because there were outstanding rates due to the municipality not because of any interest the plaintiff still held the property. In light of my findings above, although the certificate of title is in his name, he was not the rightful owner of the property. Since I have also found that their transaction with PW2 was null and void for lack of grant of letters of administration, I hold that the

holding the title in trust of the two. He is thus obligated to avail and execute the necessary documents to affect transfer to the said owners once a proper representative of the estate of Muigai is appointed.

**DATED and DELIVERED** in Bungoma this 29<sup>th</sup> day of October 2014.

**A .OMOLLO**

**JUDGE**