



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 361 of 2010

ROSKY TRADERS LIMITED ..... PLAINTIFF

V E R S U S

1. GETRUDE CHAO WAITA ..... 1<sup>ST</sup> DEFENDANT

2. MARY WARUGURU WAITA ..... 2<sup>ND</sup> DEFENDANT

3. REGISTRAR OF TITLES ..... 3<sup>RD</sup> DEFENDANT

### JUDGEMENT

#### The Parties and Pleadings

1) These proceedings are about the ownership of land situated in the posh area of Nyali within the Mombasa Municipality and described as LR No. 3209/Section 1 MN (hereinafter '**the suitland**'). The main protagonist are the Plaintiff which is a limited liability company duly incorporated in Kenya and Mary Waruguru Waita ('**Mary**'). Also at the center of the controversy is Getrude Chao Waita ('**Getrude**') who is the mother of Mary. On the outer lane and said to be a Nominal Defendant is The Registrar of Titles, Coast who would give effect to the order and decree of the Court should the Plaintiffs claim triumph.

2) The claim was instituted by way of a plaint dated 30<sup>th</sup> August 2010 and filed about one and a half months later on 12<sup>th</sup> October 2010. In it the Plaintiff claims that he bought the suit property from Getrude, the registered owner, at a consideration of Kenya shillings 8 million. It is unable to complete the transfer of the suit property to itself because of the existence of a caveat lodged by Mary in the register to the title. The Plaintiff also claims to be in possession of the property. In the end the Plaintiff seeks the following prayers-

(i) **A declaration that the suit land [L.R. No. 3209 Section 1 Mainland North] has been validly sold by the first defendant to the plaintiff and that the Plaintiff is entitled to specific performance of the said sale by making of an entry in the register and on the title document in the prescribed manner upon registration of the transfer instrument dated 28<sup>th</sup> December 2007 executed in favour of the Plaintiff.**

(ii) **A declaration that the transfer instrument purportedly executed by the first**

**defendant in favour of the second defendant in respect of L.R. No. 3209 Section 1 Mainland North is a sham and legally un-registrable and unenforceable; and an order is issued directed to the Registrar of Titles, Coast [third Defendant] to remove the caveat lodged by the second Defendant against L.R. No. 3209 Section 1 Mainland North and immediately register against the title the transfer in favour of the Plaintiff.**

**(iii) The second Defendant is ordered to pay general damages to the Plaintiff for delay in registration of the transfer instrument in favour of the Plaintiff due to wrongful and illegal caveating and encumbering of the suit land.**

**(iv) The second Defendant is ordered to bear the costs of this suit and for the removal of the caveat lodged against L.R. No. 3209 Section 1 Mainland North.**

3) This claim was not resisted by Getrude who in undated but signed pleading filed on 25<sup>th</sup> November 2011 confirmed her wish that the suit property be transferred to Plaintiff. She prays that Mary who she alleges is the impediment to the transaction be condemned to pay costs of this suit.

4) Mary opposed the Plaintiffs cause through an amended written Statement of Defence and Counterclaim which was filed pursuant to leave granted by Court on 31<sup>st</sup> October 2011. Mary avers that she purchased the suit property from Getrude in 2004 and a transfer of 18<sup>th</sup> January 2005 executed in her favour by Getrude. This is how she put it in paragraph 19 of the counterclaim-

**“The 2<sup>nd</sup> Defendant then paid the sum of Kshs. 1,000,000/- to the 1<sup>st</sup> Defendant and processed the Title Deed which she handed over to M/s Kamoti & Company Advocates to transfer the same to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant had also duly executed the Transfer in favour of the 2<sup>nd</sup> Defendant.”**

5) She challenges the purported sale to Plaintiff. Ultimately, by way of counterclaim, she seeks the following orders-

**(a) A declaration that the 2<sup>nd</sup> Defendant is the owner of the property known as Plot No. 3209/1/M.N CR No. 36455.**

**(b) An order against the 1<sup>st</sup> Defendant to transfer the property known as Plot No. 3209/1/M.N CR. No. 36455 to the 2<sup>nd</sup> Defendant.**

**(c) Loss of rent from 1<sup>st</sup> January 2005 to date of Judgment.**

6) The Counterclaim is opposed by both the Plaintiff and Getrude. Their assault on the Counterclaim is not dissimilar. Abridged, the position taken is that-

- There was no contract of sale between the Getrude and Mary.
- The suit property was the subject to **Civil Suit No. 72 of 2003** at the time of the purported sale and the sale would be counter the doctrine of lis pendens.
- Getrude further denies that the suit property was part of the estate of her late husband Francis Waita Mbaki (**the Deceased**).

7) The 3<sup>rd</sup> Defendant neither entered appearance nor filed Defence to either the Plaintiffs suit or Mary's Counterclaim.

### **The Evidence**

8) The Plaintiffs key witness was Peter Kinyua Muchendu (**Muchendu**). He told Court that he was the joint owner of the Plaintiff Company with his wife. He is also a Director of that Company. Muchendu says that he had in his personal capacity bought the suit property from the Deceased in the belief that the suit property belonged to him. To give effect to that purchase he filed **Mombasa High Court Civil Suit No. 72 of 2003 Peter Kinyua Muchendu –Vs- Getrude Chao Waita** (hereinafter '72 of 2003'). He later discovered that the suit property belonged to Getrude and by a consent of 7<sup>th</sup> December 2006 in **HCC 72 of 2003** he agreed to vacate the suit property. This was not to be as Getrude on 20<sup>th</sup> July 2007, agreed to sell the property to the Plaintiff at the sum of Kshs. 8,000,000/-.

9) That sale was reduced into a written document dated 20<sup>th</sup> July 2007 (PExhibit 7). It was the testimony of both Muchendu and Moses Mwakisha (PW2) that although the sale was to be complete within 90 days of the execution of the agreement the parties thereto could by mutual consent agree to an extension. Extension was agreed and payment of the purchase price surpassed the timeline of 90 days. The purchase price was said to have been paid as follows-

20.7.2007	-	Kshs. 1,560,000 (cheque)
25.10.2007	-	Kshs. 3,500,000 (cheque)
9.09.08	-	Kshs. 400,000 (cash)
6.10.2008	-	Kshs. 200,000 (cash)
3.04.2009	-	Kshs. 150,000 (cash)
14.05.2009	-	Kshs. 100,000 (cash)
16.06.2009	-	Kshs. 1,550,000 (cheque)
12.06.2009	-	Kshs. 400,000 (cheque)
16.06.2009	-	Kshs. 200,000 (cash)

Save for Kshs. 1,550,000/- paid on 16<sup>th</sup> June 2009 directly to Getrude the rest was paid through Moses Mwakisha & Co. Advocates (Copies of receipts issued were produced as PExhibit 3 and copies of cheques as PExhibit 4). PW2 confirmed this transaction and told Court that he paid over the consideration to the Getrude. Getrude acknowledged receiving the consideration sums.

10) PW2 prepared the two sale agreements in triplicate and attested to its execution. That on the agreements the Plaintiff affixed its seal. He however conceded that the one produced in Court (PExhibit 7) was not duly sealed.

11) It was PW2's further testimony that he was instructed by the Plaintiff to offer a small token to Mary so that she could remove the caveat which was frustrating the transfer of the property in favour of the Plaintiff. The small token turns out to be Kshs. 1.5m which is about a quarter of the purchase price. He was aware that the Mary had made some payments in respect to rates of the suit property.

12) Getrude testified on 17<sup>th</sup> May 2010. She is an elderly lady and was emotional in her testimony. She recognizes the sale to the Plaintiff and acknowledges that she received the purchase price of Kshs. 8 million from it. Just as she did in her pleadings, she admitted the Plaintiff's claim.

13) Getrude told a story of how the Deceased had constructed a house on the suit property. She insisted that the property belonged jointly to herself and Deceased. The Deceased passed away in 1996 by which time no title to the suit property had issued. At the time of the Deceased's death Muchendu was a tenant in the suit property but he stopped paying rent upon the death of the Deceased. A dispute arose and

culminated in Litigation (**72 of 2003**).

14) During the pendency of that suit, she testified, Mary offered to pay the balance of some monies required to process the title. That indeed Mary did so and a title issued in her name (Getrude) but given to Mary. It was her testimony that notwithstanding numerous promises Mary failed to surrender the title to her. That as the original title was required in the dispute in **72 of 2003**, Mary's lawyer surrendered the title to her son George. She denies selling the property to Mary or telling the rest of the family of the Deceased that she had given the property to Mary. She denied signing any transfer in favour of Mary.

15) Mary took to the witness stand on 5<sup>th</sup> June 2012 and was the longest witness there. She is a resident of Canada and a daughter to the Deceased and Getrude. She was aware of Muchendus claim in **72 of 2003**. As that litigation was ongoing, the family of the Deceased was alerted that Muchendu was making approaches on a Mr. Bedan Njoroge (**Bedan**), the original allottee of suit property, seeking that Bedan sells the property to him. To forestall this, the family agreed to have the title processed in Getrudes name. To hasten this process which was taking time, Mary assisted in paying the charges and fees required. The title was eventually acquired and surrendered to Mr. Munyao, an Advocate representing Getrude in **CMCC No. 72 of 2003**.

16) That in 2005 Getrude and Mary's siblings offered to sell the house to her at Kshs. 1,000,000/- in appreciation for her effort in processing the title. Present were Mary's two late sisters Jane and Grace, and her husband. She paid the purchase price to Getrude in the presence of her two sisters and a transfer was thereafter prepared by Paul Munyao & Co. Advocates. She claims that the transfer was signed in her favour by the Getrude. An attempt to produce this transfer was objected to by Counsel for the Plaintiff. Upon that objection Counsel for Mary indicated to Court that he would call the marker to produce it. This never happened. And so although marked for identification the transfer was never produced as an Exhibit. The implication of this will become apparent as the Court discusses its determination.

17) Mary testified how she was shocked to find out that the Getrude had hatched a scheme with the help of her brother George to have the title surrendered to Getrude. She learnt of this when she got word that Getrude was in the process of selling the land to Muchendu. She confronted Muchendu who denied any intention of purchasing the property. To protect her interests she lodged a caveat in the register of the property. This was before Getrude and the Plaintiff had entered into their agreement. Mary doubts that Getrude had authority to sell property that belonged to the Deceased's estate without consulting her as a beneficiary.

18) Mary reiterated that it was a family decision that the title be registered in the name of Getrude. She nevertheless insisted that the property belonged to the Deceased's estate. She was not aware whether the property was one of the listed assets of the Deceased estate in **Succession Cause No. 92 of 1997 (In the Matter of The Estate of Francis Waita Mbaki)**. Shown the Certificate of Grant in that Cause, she conceded that it was not included in the assets of the Deceased. She explained this non-inclusion by stating that at that time of processing the grant certain members of the family did trust that Stephen who was a co-administrator of the Deceased's estate could protect the family interest as he was in clandestine discussions with Muchendu.

19) She emphasized that she was laying a claim as a purchaser where the vendor was Getrude. She was hard put to explain why she would be dealing with someone who did not truly own the property. She explained that the entire family of the Deceased had entrusted Getrude with the land and was aware of the sale to her.

20) Mary was well aware that the suit property and another were not included as assets to the Deceased asset and had raised this concern in family meetings held at their rural home of Sagana. This was in February and March of 2011. She denies being involved in the proceedings leading to the Confirmation of Grant and alleges that her signature in those proceedings was forged. She also told Court she had taken steps to revoke the confirmed letters.

21) DW3 (**Esther Kimatu**) and DW4 (**Michael Chaka Nyanje**) were formal witnesses working in the registries of The High Court at Mombasa. They were called to produce, and did so, the original files to **HCC 72 of 2003 Peter Kinyua Muchendu –Vs- Getrude Chao Waita** (DExhibit 4) and **Succession Cause No. 92 of 1997 (In the matter of the Estate of Francis Waita Mbaki)** (DExhibit 5).

### **The Submissions**

22) At the close of taking of evidence the Court invited parties to put in written submissions and to highlight them orally if they so wished. I will abridge the submissions of the Plaintiffs and Mary's Counsel. Getrude sat out.

23) The Plaintiff saw this as a straightforward matter and made the following points-

- The Plaintiff is a purchaser for value.
- The Plaintiff dealt with the registered owner of the property.
- The registered owner recognizes the sale.
- The purported sale to Mary was a nullity as there was no contract as recognized by the Law of Contract Act.
- If accepted that the suit property was property to the estate of the Deceased then the sale to Mary would still be a nullity as it affronts the provisions of The Law of Succession Act as the transaction happened before the letters of Grant to the Deceased estate had been confirmed.

24) For Mary it was argued as follows-

- The Plaintiff was well aware about the controversy involving the ownership of the property and was not a purchaser for value without notice.
- Getrude did not have capacity to sell the property to the Plaintiff as she held it as trustee for the estate of the Deceased. A fact well known to the Plaintiff.
- The property being part of assets belonging to the Deceased estate the sale to the Plaintiff was a nullity and the Plaintiff would not avoid the implications of Section 45 and 55 of The Law of Succession Act.
- She thought that she had proved the counterclaim and had contributed her resources to defend HCC 72 of 2007 and paid towards the processing of the title. That indeed the family of the Deceased made a decision to give the property to her.

### **The Court's Determination**

25) The issues that need to be resolved so that the rival

claims herein may be answered do not seem very involved. This, in my view, are-

- (i) Did Getrude have legal capacity to sell the property to either the Plaintiff or Mary?
- (ii) Is the alleged sale to Mary (which is said to have come first) valid?
- (iii) Is the alleged sale to Plaintiff valid?

26) It is not in dispute that Getrude is the registered owner of the suit property. She holds a Grant (DExhibit 1) in her favour from the Government for a term of 99 years from 1<sup>st</sup> April 1979. Although this

Court was told that the original allottee to the land was Bedan, it is not clear how the land passed from him. It was however the testimony of Getrude that her Deceased husband told her that he had bought the property from Bedan. She nevertheless maintained that the property belonged jointly to her husband and herself.

27)It was argued by the Plaintiff that the Grant afforded an indefeasible title to Getrude by dint of Sections 20 and 23 of The Registration of Titles Act Cap 281 Laws of Kenya (now repealed). But this may not be quite so. I start with Section 23 which reads as follows-

**1) The Certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all Courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.**

**2) A certified copy of any registered instrument, signed by the Registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.”**

My understanding of this provision of the Law is that A Certificate of Title issued by the Registrar gives an absolute and indefeasible title to a purchaser of the property upon a transfer or transmission of it by the proprietor. The Law protects a duly registered purchaser who has obtained transfer or transmission by the proprietor. A proprietor is defined in Section 2 of the Act to mean **“the person or Corporation registered under this Act as the owner of land or as a lessee from the Government.”** Assuming that the Deceased (alone or with Getrude) bought this land from Bedan, would this transaction fall within the provisions of Section 23? Perhaps not because Bedan was merely an allottee of land from the Government and was yet be registered under the Act as the owner or lessee of the suit land.

28)Section 20 of The Act was also cited by the Plaintiff.

It provides-

**“After the commencement of this Act and subject to the provisions of subsection (2) of Section 1 thereof, all land which is comprised in any grant issued after the commencement of this Act shall be subject to this Act, and shall not be capable of being transferred, transmitted, mortgaged, charged or otherwise dealt with except in accordance with the provisions of this Act, and an attempt to transfer, transmit, mortgage, charge or otherwise deal with it, except as so provided, shall be void and of no effect.”**

This provision of the Law reiterates that land comprised in a Grant issued after the commencement of the Act shall be subject to the Act and shall be dealt with in accordance with the provisions thereof. It does not purport to confer absolute and/or indefeasible ownership to the holder of the Grant.

29)My observations of the provisions of Sections 20 and 23 of The Act notwithstanding it bears repetition that Getrude holds a Grant in her favour and is the registered owner of suit property. Anyone challenging this would have to provide some tangible evidence to displace her position. The point driven by Mary is that the property was part of the estate of the Deceased. Mary was proactive in processing the registration of the property in the name of Getrude. She paid sums towards the process and was part of the people who followed it through. At that time, she says, it was imperative that the title be registered in the name of Getrude so as to defeat a design by Muchendu to take the property. The position of Mary is that when she purchased the property from the Getrude it was part of the asset of the Deceased as the entire family endorsed the sale. That is how she reconciles what would seem to be conflict between Getrude being the registered and absolute owner yet a trustee to the Estate.

30)In resolving this issue I have had to look at the proceedings in **Succession Cause No. 92 of 1997**

(DExhibit 5). A Certificate of Confirmation was issued in favour of the Getrude and her son Stephen Mbaki Waita on 19<sup>th</sup> May 2006. In the schedule of assets and distribution the suit property was not listed as part of assets to the estate. Infact looking at the entire succession proceedings from inception this property was not mentioned at all as part of the estate. Unlike what Mary told this Court, I was unable to find any evidence that she had challenged the Grant or Confirmation of the Letters. It seems to me that these succession proceedings buttresses Getrudes position that she is the true owner of suit property.

31)I have no doubt, and it was conceded by Getrude herself, that Mary contributed towards paying certain outgoings and monies required for processing of the title. However, I am unable to find any evidence that this alone displaces Getrude's stake to the property. No other member of the Deceased family was called to back the theory that Getrude was registered as the owner merely as a trustee for the estate. It would be incredible for this Court to countenance a situation where Mary recognizes Getrudes ownership for purposes of fighting a Court case (**Suit No. 72 of 2007**) and then resiles on it here, when it suits her. I reach the decision that Getrude was in Law the absolute and indefeasible owner of the suit property with the capacity to deal with it as she so wished.

32)In addition the purported sale to Mary is fraught with difficulties. Even if this Court was to accept her account of events, the sale would be a nullity as it does not comply with the provisions of Section 3(3) of the Law of Contract Act (Chapter 23 Laws of Kenya). This provides-

**“No suit shall be brought upon a contract for the disposition of an interest in land unless-**

**(a) the contract upon which the suit is founded-**

**(i) is in writing**

**(ii) is signed by all the parties thereto; and**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:**

**Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.”**

No written document in support of the transaction between Getrude and Mary was produced as evidence before me. The attempt to introduce a certain transfer was shot down by an objection of the Plaintiff's Counsel. No effort was made to reintroduce it. This hurdle is not surmountable because Getrude refuses to recognize this transaction and in the absence of a contract as required by the Law, Mary's claim must count for nothing. If some money was paid by the Mary to the Getrude then it can only be recovered as a Civil Debt.

33)Mary's position is not any better if the suit property was treated as part of the Deceased's estate. The sale to Mary is said to have happened in the year 2004 (as stated in paragraph 5 of her Defence) or 2005 (as in her testimony) yet the Grant of Letters of Administration to the estate were confirmed on 19<sup>th</sup> May 2006. This would be counter the provisions of Section 82 The Law of Succession Act (Chapter 160 Laws of Kenya) which provides that-

**“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-**

**(a) ...**

**(b) To sell or otherwise turn to account, so far as seems necessary or desirable on execution of their duties, all or any part of the assets vested in them as they think best;**

**Provided that**

- (i) ...
- (ii) **No immovable property shall be sold before confirmation of the Grant.**
- (c) ...
- (d) ...

Getrude would not have authority to sell any immovable asset of the Deceased's estate before 19<sup>th</sup> May 2006 when the letters were confirmed. This would make the purported sale to Mary null and void.

34)What about the Plaintiff's claim? The Court was shown two written documents, the agreement of 20<sup>th</sup> July 2007 (PExhibit 7) and the transfer of 28<sup>th</sup> December 2007 (PExhibit 2). Neither meets the requirements of Section 3(3) of The Law of Contract Act. I note that the agreement of 20<sup>th</sup> July 2007 produced in Court did not have the common seal of the Plaintiff affixed on it but was signed by the Directors of the Plaintiff. It was not made under the Plaintiffs Common Seal and an obligation fell on the Plaintiff to prove that Section 34(1) (a) of The Companies Act had been complied with. This Section provides-

**34(1) Contracts on behalf of a Company may be made as follows-**

**"A contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied."**

There was no proof that the Directors had authority to execute the contract on behalf of the company in the manner they did.

35)The transfer of 28<sup>th</sup> December 2007 has its own problems. It was executed by the Vendor only. The Plaintiffs claim is a suit brought upon a contract for the disposition of an interest in the suitland. One of the requirements of Section 3(3) of the Law of Contract is that the contract upon which the suit is founded must be executed by all the parties thereto. This transfer falls short of that.

36)That said, the Plaintiffs claim is sustainable only because it is expressly admitted by the Getrude. She does so in her pleadings and testimony to Court. She admits, recognizes and is desirous that the transfer to the Plaintiff be effected. The Court will grant this wish to her and the Plaintiff.

37)The Plaintiff also sought a prayer for general damages for the delay in registration of the transfer instrument but laid no basis for me to grant these. No evidence of the loss suffered was adduced. I decline to grant any damages.

38)Ultimately, I make the following orders-

- (a) **I declare that the suit land [L.R. No. 3209 Section 1 Mainland North] has been validly sold by the first Defendant to the Plaintiff and that the Plaintiff is entitled to specific performance of the said sale by making of an entry in the register and on the title document in the prescribed manner upon registration of the transfer instrument dated 28<sup>th</sup> December 2007 executed in favour of the Plaintiff.**
- (b) **The caveat lodged by the 2<sup>nd</sup> Defendant in the Register of LR No. 3209 Sec. 1 MN be and is hereby removed.**
- (c) **The 2<sup>nd</sup> Defendant shall meet costs of the Plaintiff's claim and removal of the caveat.**

**(d) The 2<sup>nd</sup> Defendants counterclaim is hereby dismissed but with no order on costs. I bear in mind all the circumstances of this case.**

**Dated and delivered at Mombasa this 27<sup>th</sup> day of February, 2013.**

**F. TUIYOTT  
JUDGE**

**Dated and delivered in open court in the presence of:-  
Mohamed for Kimani for Plaintiff  
No appearance for Defendants  
Court clerk - Moriasi**

**F. TUIYOTT  
JUDGE**