



REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 157 of 2007

THITU MUHINDI (DECEASED)

SUBSTITUTED BY

GLADYS WAMBUI THITU.....1ST APPELLANT

DAVID MUHINDI THITU.....2ND APPELLANT

VERSUS

JACKSON MUNIU MBATIA.....RESPONDENT

JUDGMENT

Plot Number 80, Sabugo Scheme, Nyandarua was balloted for and allocated to Maina Ngonyo Mbatia who is now deceased. She was also granted a loan of Ksh 16,000/= by the Settlement Fund Trustees (SFT). This was all done in the year 1991. The SFT demanded payment. Maina Ngonyo Mbatia approached her elder son, Jackson Muniu Mbatia for assistance. He did not assist her. She turned to her son Dickson Ndungu Kibatia to assist her. They got a buyer for the plot, one Mr. Thitu Muhindi who agreed to buy the land for shs 130,000/=. He paid Shs 60,000/=. There is no indication that the total purchase price was ever paid.

The matter therefore first went to court in Nyahururu SRM No. 16 of 1990. The court referred the dispute to a Panel of Elders under the Chairmanship of the District Officer Ol Kalou Division, which confirmed the sale between Ngonyo Mbatia and Thitu Muhindi.

After hearing both the mother (*Ngonyo Mbatia Muniu*) and her son Jackson Muniu Mbatia, and one Mwangi Muniu, the brother of Mbatia (*husband of Ngotho Mbatia herein*), the Panel of Elders found that though the Maina Ngotho was the registered owner of Plot No. 80, the Plot had been acquired jointly with her late husband, and that her sons were rightful heirs to the plot in equal shares and ordered that the proceeds of sale be equally divided between Mama Ngonyo, and her two sons Dickson Muniu and Jackson Muniu.

The finding of the Panel of Elders was adopted as a judgment of the court in Nyahururu SRMC Misc. Application No. 16 of 1990, on 24th February 1992.

That was the first part of this dispute.

The second part of the dispute is Nyahururu P.M.C. Civil Suit No. 309 of 1991 in which Thitu Muhindi Thitu (now deceased) sued Jackson Muniu Mbatia (the Respondent) for vacant possession of the

plot. In response to the claim for vacant possession and his eviction, the Respondent denied that the plaintiff was the lawful owner of the plot and counter-claimed against the said Jackson Muniu Mbatia that he did not buy the plot, he, his mother and brother were the true owners of the plot and that his mother his brother and the Plaintiff had fraudulently purported to sell the plot without his consent, and thus defeating his interest in the plot, and pleaded particulars of fraud.

In a judgment delivered on 16.05.2005, the Plaintiff's suit was dismissed and the Defendant's counter-claim was granted for 1/3 of the market value of the said plot. It is that decision which is the subject of the appeal herein, and therefore the subject of this judgment. There were five grounds of appeal, namely -

- (1) *That the learned magistrate erred in law in holding that the sale of Plot LR Nyandarua/Milangine/80 from the 2nd Appellant to the 1st Appellant was fraudulent considering elders award in SRMCC No. 16 of 90, Nyahururu and the decree thereof 24.02.1992 and issued on the same date.*
- (2) *That the learned magistrate erred in law and misdirected himself in failing to hold that the negotiated sale price was Kshs 130,000/= of which the respondent was given a share of Kshs 30,000 by the 2nd Appellant.*
- (3) *The learned magistrate erred in law and misdirected himself in making the order that the 1st Appellant should pay Kshs 500,000/= to the respondent if he wants the plot being 1/3 of the value of the plot since he had already bought the same as per court order in SRMCC No. 16 of 1990 between NGONYO MBATIA 2nd Appellant and the respondent.*
- (4) *The learned magistrate erred in law and fact and misdirected himself in admitting the evidence of valuation report marked MF 1.15 without calling the maker.*
- (5) *The learned magistrate misdirected himself and erred in law in failing to hold that the 1st appellant had bought the whole plot as per Decree in SRMCC No. 16 of 1990.*

reasons wherefore the 1st and 2nd Appellants pray for orders:

1. *that the judgment herein be set aside,*
2. *that the respondent be evicted from the suit property and the 1st appellant be given vacant possession thereof.*
3. *that cost of the lower court and this appeal be awarded to the appellants.*

The appeal was filed by Thitu Muhindi Thuta who died on 9th April 2009, and was substituted by Gladys Wambui Thitu and David Muhindi Thitu, the current appellants. The Respondent acted in person. The Appellant's counsel and the Respondent filed written submissions. I have considered both the submissions as well as the record of proceedings before the Panel of Elders and their award, the judgment of the court adopting the award of the Elders as a judgment of the court, as well the judgment of the court in Nyahururu Principal Magistrate's Court Civil Suit No. 309 of 1991, the subject of the appeal herein.

I have already given the background and all antecedents to this appeal. I now set out my opinion thereon following herein the same paragraphs herein as the grounds of appeal.

OF GROUND 1 – whether the learned trial magistrate erred in law in holding that the sale of Plot LR Nyandarua/Milangine/80 from the 2nd Appellant to the 1st Appellant was fraudulent considering elders award in SRMCC No. 16 of 90, Nyahururu and the decree thereof 24.02.1992 and issued on the same date.

Two issues arise out of this ground. **Firstly** where the elders award was made, and when it was

adopted, and **secondly** when was title issued to the Appellant, and what was the consideration therefore?

The title herein was issued on 2.08.1991. The order of the court adopting the award was not made until 24.07.1992. In other words there was no judgment upon which the title could be issued to the late Thitu Muhindi Thuita if the award was adopted on 24.07.1992. That is perhaps a minor issue compared to the larger question of the jurisdiction of a panel of elders whose jurisdiction is limited by Section 3 of the Land Disputes Tribunal Act, 1990 (No. 18 of 1990) to determining questions of -

- (1) *the division of, or the determination of boundaries to land, including land held in common,*
- (2) *a claim to occupy or work land; or*
- (3) *trespass to land.*

The Panel of Elders had no jurisdiction to determine contracts relating to sale of land and their award was made without jurisdiction and was therefore illegal. Neither the subordinate court nor this court can give effect to an illegal award. That award and the purported judgment of the subordinate court made on 24.05.1990 and 24.07.1992 respectively are hereby set aside as null and void.

Ground 1 of the Appeal therefore fails.

Of Ground 2 – Of the consideration of purchase price

The title issued to the Appellant on 2.08.1991 shows a consideration of shs 60,000/=. The submissions refer to a sum of Ksh 130,000/= of which shs 30,000/= was allegedly paid to the Respondent. What was the consideration, Shs 60,000/= or Shs 130,000/= ? That is an indication of fraud upon the Respondent who all along insisted that he had developed Plot 80, to a value of Ksh 200,000/=. His evidence before court was backed by a valuation which showed the plot to be well near Ksh 3 million today.

There is certainly an indication of fraudulent dealing by the Appellant to the detriment of the Respondent.

In summary, having come to the conclusion that the Panel of Elders had no jurisdiction to deal with matters of contract, the purported transfer to the Appellant was a nullity as already stated. The appeal fails and is dismissed with costs to the Respondent.

I direct that the said title be cancelled, and a new title issued in the name of the Respondent in trust for himself, his mother and brother.

Dated, signed and delivered at Nakuru this 12th day of April, 2013

M. J. ANYARA EMUKULE

JUDGE