



REPUBLIC OF KENYA



**Karanja v Michael Ndichu Wangaruro t/a Ndichu & Associates & 2 others (Environment & Land Case 447 of 2015) [2022] KEELC 3094 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3094 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 447 OF 2015  
LC KOMINGOI, J  
JUNE 30, 2022**

**BETWEEN**

**MARY WANJIKU KARANJA ..... PLAINTIFF**

**AND**

**MICHAEL NDICHU WANGARURO T/A NDICHU & ASSOCIATES .... 1<sup>ST</sup>  
DEFENDANT**

**CHARLES KIHAGI THUAH ..... 2<sup>ND</sup> DEFENDANT**

**TITUS MBUGUA KABERI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By the plaint dated May 25, 2015, the plaintiff prays for judgment against the defendants jointly and severally for orders:-
  - a. A permanent injunction be issued restraining the defendants by themselves, their servants and/or agents from trespassing, encroaching, interfering, developing or in any way dealing with property Land Reference No 9363/65 IR No 14628/73.
  - b. Costs of the suit.
  - c. Any other or further relief that this court may deem fit to grant.
2. It is the plaintiff's case that she is the widow and administrator of the estate of Karanja Kago (deceased) vide letters of administration issued in Nairobi Succession Cause No 2361 of 2014. She further averred that LR No 9363/65 (IR No 14628/73) is registered in the name of her deceased husband and therefore forms part of his estate.
3. She stated that sometime in 2008, her late husband had contracted the 1<sup>st</sup> defendant to plan and survey the suit land for purposes of subdivision but despite being paid, the 1<sup>st</sup> defendant failed to complete



the assignment as the approved deed plans have never been issued. She contended that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are trespassing and encroaching on the suit property and purporting to own it without her authority as the administrator. She added that the 2<sup>nd</sup> defendant has commenced construction works on a portion of the suit land.

4. She also contended that the 1<sup>st</sup> and 3<sup>rd</sup> defendants conspired to forge her late husband's signature purporting to authorize the 1<sup>st</sup> defendant to allocate a portion of the suit property to the 3<sup>rd</sup> defendant while her husband was incapacitated and could not sign any documents at the time the said authority was executed. She averred that the defendants' actions are illegal and thus they should be restrained from intermeddling with the estate of the deceased.

#### **The 1st and 3rd Defendant's case**

5. The 1<sup>st</sup> and 3<sup>rd</sup> defendants filed a joint statement of defence and counterclaim dated August 10, 2015. The 1<sup>st</sup> defendant averred that Karanja Kago (Deceased) appointed him in 2007 and paid him Kshs.240,000/= to subdivide the suit land and draw preliminary plot sketches over the suit property which he intended to market for sale. He averred that he drew eighty (80) plots forming part of seven (7) acres that were excised from the twenty five (25) acre suit property and that he completed the sketches and the plots were subsequently sold. He added that the Plaintiff is aware of the completion as she included the subdivided plots and deed plans in Nairobi Succession Cause No.2361 of 2014. She is misleading this court that the suit property had no liabilities with a view of defeating interests of the defendants and other persons in beneficial possession of part of the suit property.
6. The 1<sup>st</sup> defendant also averred that the plaintiff was aware that Karanja Kago (deceased) had executed agreements and transfers in his favour for valuable consideration and that he put him in possession of LR. No.9363/304,305 and 306 but new titles could not be processed as the head title to the suit property was being held by one Karanja Wamugi as a lien.
7. The 3<sup>rd</sup> defendant contended that the deceased put him in possession before his death in consideration for the 3<sup>rd</sup> defendant using his resources to pay an advocate to file an eviction suit to evict intruders and acting as caretaker of the suit property.
8. They also contended that in March 2015, all interested parties in the suit property met with a surveyor on the suit property and the plaintiff agreed to transfer their respective plots upon confirmation of grant in Nairobi Succession Cause No.2361 of 2014.
9. In their counterclaim they seek the following orders:-
  - a. A declaration that the plaintiff is holding the titles to L.R No.9363/304,305 and 306 on behalf of the 1<sup>st</sup> Defendant and ¼ of an acre in LR No 9363/312 on behalf of the 3<sup>rd</sup> defendant as constructive trustee of the defendants.
  - b. An order of specific performance directing the plaintiff to effect the transfer of LR No 9363/304,305 and 306 to the 1<sup>st</sup> defendant and ¼ of an acre in lr no 9363/312 to the 3<sup>rd</sup> defendant failure of which the registrar of titles be ordered to execute fresh transfers in favour of the defendants.
  - c. Spent.
  - d. Exemplary/punitive damages to be issued against the Plaintiff for misrepresentation and to compensate the Defendants.
  - e. Costs of the suit and



- f. Any other remedies or further reliefs that this court may deem fit to grant.

### **The 2nd Defendant's case**

10. The 2<sup>nd</sup> defendant filed the defence dated 22<sup>nd</sup> June 2015. He admitted that Karanja Kago (deceased) was registered proprietor of the suit land. He contended that about the year 2011, the deceased caused his land to be subdivided into twenty-four (24) plots designated as LR No 9363/304 to 327 and relevant deed plans were drawn and registered. He averred that on or about 2012, the deceased sold LR No 9363/314 measuring one acre to Sarah Wambui Kimani who in turn sold the entire portion to the 2<sup>nd</sup> defendant with full knowledge, consent and concurrence of the deceased who executed a transfer deed in his favour on 24<sup>th</sup> September 2013 where after the 2<sup>nd</sup> defendant took possession and commenced construction of a perimeter fence wall.
11. On October 28, 2021, the plaintiff's suit was dismissed for want of prosecution. The matter proceeded to hearing of the 1<sup>st</sup> and 3<sup>rd</sup> defendant's counterclaim.

### **The 1st Defendant's evidence in the counterclaim**

12. DW1, Michael Ndichu Wangaruro, the 1<sup>st</sup> defendant testified on February 14, 2022. He is a registered physical planner. His witness statement dated 10<sup>th</sup> August 2015 was adopted as part of his evidence in chief. He stated that in May 2007, he entered into an agreement with Karanja Kago (Deceased) for the purpose of physical planning, land surveying and land subdivision of his parcel L.R 9363/65 into parcels of 1 acre each. He further stated that he drew a professional quotation dated May 26, 2007 and a consultancy agreement but the deceased informed him that he did not have money to pay up for the professional service therefore he offered him two (2) acres in consideration .
13. He stated that at the time, he completed his task and finally 24 survey deed plans covering the 24 parcels of land were produced. He stated that the scheme plan was approved by Nairobi City Council and the necessary subdivision scheme was approved by the Ministry of Lands & Housing at Ardhi House.
14. He stated that in an agreement made on March 18, 2010 between him and the deceased for a consideration of an acre of the suit land, he was tasked to process title deeds for all the twenty four (24) parcels of land and in the process he learnt that the deceased had surrendered his mother title to Mr Karanja Wamugi trading as Omega Commercial agencies as alien for a loan to pay land rates which had accumulated over the years at the City Council of Nairobi. He added that Mr. Karanja Wamugi has kept the said title to date making it impossible to register the subdivisions since the Mother Title must first be surrendered.
15. He stated that the deceased was selling plots with the conveyance transaction being handled by M/S TT Nganga Advocates. He further stated that in 2013, the deceased called him for a meeting at offices of M/ S T.T Nganga Advocates where he told him that he had sold around 100 or more sub plots measuring 50ft by 70ft each and there was insufficient land available to fit all those who had bought the sub-plots because he had oversold. He stated that the deceased instructed him to subdivide seven (7) acres within LR 9363/65 into sub plots measuring 30ft by 60ft to accommodate the land purchasers whose register was with M/S TT Nganga Advocates. He produced a schedule showing each plot, subplot and the allottees.
16. He told the court that he completed his task 15 years ago and was given the L.R 9363/304, 305 and 306 as consideration. He added that the deceased signed the transfers and they were effected without challenge but he could not take possession since Mr. Karanja kago died in 2014 and the plaintiff and her children became hostile towards him. He stated that the plaintiff is aware there was an agreement



between him and the deceased as he has used his documents to sell sub plots to about 100 people and 60% of them have taken possession. He stated that and he is the only one who was not paid or took possession. He stated that he completed his work but the Plaintiff became hostile together with her children and could not allow him to take possession. He claims LR No 9363/304, LR No 9363/05 and LR 9363/306.

17. At the close of oral testimony, the 1<sup>st</sup> defendant tendered final written submissions.

### **The 1st Defendant's submissions**

18. They are dated April 19, 2022. Counsel for the 1<sup>st</sup> defendant submitted on the following issues:-

- a. Whether an order of specific performance should issue in favour of the 1<sup>st</sup> defendant.
- b. Whether the orders sought in the counterclaim should be granted.

19. Counsel urged the court to be guided by the principles to award specific performance as stated in *Reliable Electrical Engineers (k) Ltd v Mantrac Kenya Limited* [2006] e KLR. He added that the 1<sup>st</sup> defendant performed his obligation and the deceased signed sale agreements in favour of the 1<sup>st</sup> defendant for the properties he claims and that they do not suffer from defects as they are capable of enforcement.

20. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited. The issues for determination are:-

- i. Is the 1<sup>st</sup> defendant entitled to LR 9363/304,305 and 306?
- ii. Have the 1<sup>st</sup> and 3<sup>rd</sup> defendants made a case for grant of orders of specific performance?
- iii. Is the 3<sup>rd</sup> defendant entitled to ¼ of an care in LR No 9363/312?
- iv. Who should bear costs of the suit?

21. On October 28, 2021, this court dismissed the plaintiff's claim for want of prosecution. The 1<sup>st</sup> and 3<sup>rd</sup> defendants had filed a joint statement of defence and counterclaim. The 3<sup>rd</sup> defendant claims ownership of ¼ of an care in LR No 9363/312 while the 1<sup>st</sup> defendant claims ownership over LR 9363/304, 305 and 306 all hived from LR No 9363/65, registered in the name of Karanja Kago (deceased). He also seeks an order of specific performance directed to the plaintiff to effect transfer over the parcels to him. The 3<sup>rd</sup> defendant did not lead any evidence to prove his claim. However, having filed a joint statement of defence and counter claim with the 1<sup>st</sup> defendant, his claim is treated as uncontroverted.

22. The 1<sup>st</sup> defendant's evidence was uncontroverted. However, he had the burden to prove his case. In *Gichinga Kibutha v Carooline Nduku* (2018) eKLR, the court held that:-“It is not automatic that instances where the evidence is not controverted the claimants shall have his way in court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

23. The 1<sup>st</sup> defendant led evidence that vide the agreement dated May 30, 2007 and a further agreement dated March 18, 2010, the proprietor of the suit land, Mr Karanja Kago (deceased) paid him 1 acre and a further two acres respectively in consideration of his work done on the suit land. The said agreements outline the scope of his work which included surveying the land, drawing sketches and processing titles.



24. He produced the sale agreement dated July 1, 2011 between him and Karanja Kago (deceased) over land parcel LR 9363/304 and the agreement of even date over LR 9363/305. He produced transfers dated June 27, 2011 signed between him and Karanja Kago (deceased) over the said two (2) parcels.
25. The 1<sup>st</sup> defendant also produced an agreement dated March 18, 2010 between him and Karanja Kago (deceased). The 1<sup>st</sup> defendant was to be paid with one acre (0.4 hectares) for the processing of titles for the various plots being LR No 9363/304 to LR No 9363/327 respectively.
26. By a meeting held on March 15, 2012 held at the 1<sup>st</sup> defendant's office. it was resolved under;
- “Matter Arising”
- Mr Karanja Kago said that according to their agreement with Mr. Ndichu he was to get the third acre when he produced 240 titles, Mr Ndichu reported that they did not agree on 240 titles but 24 titles and it was witnessed by Francis Mburu and Mary Nyambura but Mr Kibathi requested them to produce the agreement but both of them did not have it and Mr Kibathi said they cannot continue with the meeting before they produce the agreement so as to know who was on the right.
- NB; It was agreed that Mr Ndichu will get the third acre when he produces the 24 titles deeds from Ministry of Lands within 3 months failure to do so Mr Karanja Kago will revoke the agreement of giving Mr Ndichu the third acre and he can terminate the services. This was proposed by Mr Kibathi and seconded by George Wangaruro”
27. It is clear from the above minutes that the 1<sup>st</sup> defendant would only get the third acre upon successful processing of the 24 title deeds. The 1<sup>st</sup> defendant has failed to demonstrate that he was able to procure the said title deeds to be entitled to the third acre.
28. Therefore, the lack of a sale agreement over Reference Number 9363/306 and reference to it as a “gift” in the aforesaid undated transfer deed is entirely inconsistent with the terms of the previous agreements. Further, I note that the transfers are dated 27<sup>th</sup> June 2011. They were executed before the sale agreements which is a defect as a sale agreement would precede a transfer in execution.
29. The Agreements to allow the 1<sup>st</sup> defendant with two acres for the work done has not been controverted. I find that he is entitled to the two acres. In the case of *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* (2006) eKLR(Supra), the court stated that:-
- “Specific performance like any other equitable remedy is discretionary and the court will only grant it on well laid principles”. “The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”
30. In conclusion, I find that the 1<sup>st</sup> defendant has proved that he is entitled to two plots equivalent to two acres. As the 1<sup>st</sup> and 3<sup>rd</sup> defendants filed a joint statement of defence and counterclaim, I find that the 3<sup>rd</sup> defendant is entitled to a ¼ acre plot. This too was not controverted.



31. The 1<sup>st</sup> defendant told the court that he is in possession of the parcels. I find that he is not entitled to any exemplary and or punitive damages.
32. Accordingly, judgment is entered for the 1<sup>st</sup> and 3<sup>rd</sup> defendants as against the plaintiff as follows:-
- a. That a declaration is hereby issued that the plaintiff is holding the titles to LR No 9363/304 and LR No 9363/305 in trust of the 1<sup>st</sup> defendant and ¼ of an acre in LR No 9363/312 in trust of the 3<sup>rd</sup> defendant.
  - b. That an order of specific performance is hereby issued directing the Plaintiff to effect the transfer of LR No 9363/304 and LR No 9363/305 to the 1<sup>st</sup> defendant and ¼ of an acre in LR No 9363/312 to the 3<sup>rd</sup> defendant within ninety (90) days from the date of this Judgement. Failure To Which the Honourable Deputy Registrar of this court do execute the necessary transfer documents.
  - c. That the 1<sup>st</sup> and 3<sup>rd</sup> defendants shall have costs of the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 30TH DAY OF JUNE 2022.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Ms Chemutai for Mr. Kiarie advocate for the Plaintiff

Mr. Juma advocate for the 1<sup>st</sup> Defendant

No appearance for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants

Steve - Court Assistant

