



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS)**

**ENVIRONMENTAL & LAND CASE 958 OF 2006**

**CHRISTINE GACHURU.....1<sup>ST</sup> APPLICANT**

**JAVERSON MACHARIA NJUGUNA .....2<sup>ND</sup> APPLICANT**

**ELIZABETH NJERI NJUGUNA ..... 3<sup>RD</sup> APPLICANT**

**- VERSUS -**

**VINCENT GICHURU GAITHO .....1<sup>ST</sup> RESPONDENT**

**PATRICK MAGIRI GAITHO .....2<sup>ND</sup> RESPONDENT**

**EVELYN WAMBUI KIARIE ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. This suit was commenced by an originating summons dated 8<sup>th</sup> September 2006. The principal prayer is for an order to remove a caveat or restriction lodged by the respondents against the title over LR No 76/413. The originating summons first came up for hearing before the Hon. Lady Justice Maartha Koome. She retired to deliver a judgment. However, by directions given on 17<sup>th</sup> February 2012, the Honourable judge directed that the summons be heard *de novo* and by *viva voce* evidence. On 10<sup>th</sup> May 2012, the summons came up for hearing afresh.

2. On the latter date, the parties executed the following consent;

1. *The directions granted by Hon. Justice Koome on 17/2/2012 are hereby set aside.*

2. The originating summons be determined by way of the affidavit sworn on 8/9/2006 and filed on same date, the reply thereto sworn on 22/9/2006 and filed on 26/9/2006 and the submissions by the applicant dated 9<sup>th</sup> November 2011 and the respondents submissions dated 22<sup>nd</sup> November 2011.

3. The parties shall also rely on the oral submissions or highlights made on 30<sup>th</sup> November 2011.

3. The wheel has thus turned full circle. The affidavit sworn on 8<sup>th</sup> September 2006 is made by the 1<sup>st</sup> applicant Christine Gachuru. She has annexed a sale agreement dated 25<sup>th</sup> November 2003 that is the genesis of the dispute. That agreement was made between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants, as vendors, and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents as the purchasers. The 1<sup>st</sup> and 2<sup>nd</sup> vendors were the legal representatives of Wanjiku Gachuru, deceased, who owned half share of LR No 76/413, the suit land. The third vendor owned the other half of the property. The respondents made an offer to buy the entire property from the joint vendors for a consideration of Kshs 2,000,000. The purchasers paid a deposit of Kshs 200,000 upon execution of the agreement. The balance of the purchase price was payable within 7 days of successful transfer. Possession would only pass upon payment of the full purchase price.

4. The applicants' case is that the respondents breached that agreement. In particular, the balance of the purchase price was not forthcoming. After two years of indulging the purchasers, the applicants sought to refund the deposit and annul the sale. The respondents then lodged and registered a caveat on 3<sup>rd</sup> June 2005 claiming a purchaser's interest. A notice from the registrar of lands dated 29<sup>th</sup> June 2005 is attached. The 2<sup>nd</sup> and 3<sup>rd</sup> applicants have confirmed those averments in their supporting affidavits sworn on 8<sup>th</sup> September 2006. The applicants thus pray that the caveat be removed.

5. The originating summons is contested by the respondents by a replying affidavit sworn by Vincent Gichuru Gaiitho on 22<sup>nd</sup> September 2006. He affirms the terms of the sale agreement. The respondents aver that on 15<sup>th</sup> November 2004, they forwarded to their lawyer, L. Wahome Kshs 118,750 for stamp duty fees. The respondents aver that the applicants failed to go to the offices of L. Wahome to execute the transfer documents. The respondents were thus surprised to receive a letter dated 16<sup>th</sup> March 2005 from R.K. Muthiga advocate seeking to repudiate the contract of sale. The respondent's case is that the applicants are not candid; and, that the applicants are the ones trying to frustrate the sale in order to sell to third parties at higher prices. The respondents insist on specific performance of the contract. In a synopsis, the respondents' case is that they are not in breach of the agreement; that the applicants should not be allowed to profit from their avarice; and, that the caveat is a necessary protection of the *status quo*.

6. I have studied the applicants' list of documents filed on 7<sup>th</sup> June 2007 and the Respondents' list of documents dated 22<sup>nd</sup> May 2007. I have also studied the written submissions of the applicants dated 9<sup>th</sup> November 2011 and the respondents' submissions dated 22<sup>nd</sup> November 2011. I have come to the following conclusion. The parties in the conveyance were all represented by one lawyer, L. Wahome. He drew the sale agreement. It is common ground that 10% deposit of Kshs 200,000 was paid by the purchasers and acknowledged by the vendors. A banker's cheque for Kshs 200,000 dated 17<sup>th</sup> November 2003 is exhibited. Under clause 3 of the agreement, the purchasers were required to pay the balance of Kshs 1,800,000 within 7 days of successful transfer. The vendors were to pay all rates and rents where applicable. Under clause 7, and as is customary, the purchasers were to pay stamp duty and registration fees.

7. I have seen a letter dated 8<sup>th</sup> November 2004 from L. Wahome advocate to the respondents to pay to him Kshs 118,750 being stamp duty, registration fees, consent to transfer and legal fees. I have also seen a letter dated 25<sup>th</sup> November 2004 by the lawyer to the vendors stating that he had a deposit of the balance of the purchase price. He also called upon the vendors to attend his chambers to execute the transfer before 10<sup>th</sup> December 2004. However, and this is material, the replying affidavit of Vincent Gaiitho confirms payment to the lawyer of Kshs 118,750 only. He depones as follows at paragraphs 8, 9 and 10.

8. **THAT** on the 8<sup>th</sup> November 2004, our mutual advocates, M/s L. Wahome & Company Advocates wrote to us asking us to pay to his office a total of Kshs 118,750.00 being payment for stamp duty and other charges related to the transfer. (Annexed and marked **VGG 3** is a copy of that letter.)

9. **THAT** on the 15<sup>th</sup> November 2004 we paid to M/s Wahome the amount he demanded. (Annexed hereto and marked **VGG 4** is a copy of the receipt for the payment). **THAT** the same letter also called upon the vendors to go to the advocates and sign the transfer to facilitate registration into our names.

10. **THAT** the vendors never went to sign the transfer documents.

8. There is no averment that the balance of the purchase price had been deposited with the lawyer. Since that is the crux of the matter, nothing would have been easier than to provide a further receipt of payment for that sum. Instead, the respondents blame the applicants for not executing the transfer. The perils of using the conveyancing services of one lawyer emerge clearly. In ordinary practice involving different sets of lawyers, the purchasers advocate would have given an undertaking for the balance. All that took place was the letter of 25<sup>th</sup> November 2004 of the lawyer confirming that he had the balance of the purchase price.

9. Even assuming that the lawyer for both parties was in possession of the balance, I note that the sale agreement was executed on 25<sup>th</sup> November 2003. The stamp duty and registration fees were paid nearly a year later on 15<sup>th</sup> November 2004. True, clause 9 of the agreement had provided the sale would be subject to approval by the court. This was expected because the 1<sup>st</sup> and 2<sup>nd</sup> applicants were administrators of the vendor's estate. That may explain the opening paragraph of L. Wahomes' letter of 8<sup>th</sup> November 2004 that "the beneficiaries of the estate of Wanjiku Pauline Gichuru have now been adjudged owners" of the suit land. But I have also seen the certificate of confirmation of grant to the estate. It had been issued way back on 10<sup>th</sup> May 2004. The blame for delay in completing the sale cannot be left at the door step of the applicants.

10. My doubts are removed further by the fact that at the time of the registration of the caveat on 29<sup>th</sup> June 2005, the respondents were claiming a purchaser's interest pursuant to the sale agreement. That is what was attached. There is no mention that the caveators had paid the balance of the purchase price or that it had been deposited with their joint lawyer. And since this lawyer was acting for both parties there should really be no second guessing. He should have satisfied both parties that he was in funds. Even the respondents' list of documents in opposition dated 22<sup>nd</sup> May 2007 and filed on 31<sup>st</sup> May 2007 have no document or receipt evidencing deposit of the balance with the lawyer. On a preponderance of the evidence, I thus find that the purchasers, two years after the sale agreement, had not paid the balance of the purchase price of Kshs 1,800,000. On balance of probability I find the claim that the monies had been deposited with their lawyer to be false. Certainly, there is a paucity of evidence to support that assertion. I thus find the rendition of events by the applicants more feasible: that the respondents were hard up; and, that being neighbours of the vendors, they had sought for more time to raise the balance.

11. I note the agreement did not provide a clear time table. Certainly, it did not specify that time would be of essence. But the delay in completion here is too inordinate and inexcusable. In *Sagoo Vs Dourado* [1983] KLR 365 the court cited with approval *Halsbury's Laws of England*, 4<sup>th</sup> Edition, paragraph 481 as follows;

*"The modern law in the case of contracts of all types, may be summarized as follows. Time will not be considered to be of essence unless:*

*(1) The parties expressly stipulate that conditions as to time must be strictly complied with;*

*(2) The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence, or;*

(3) A party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence”.

See also *Kazungu Karisa Vs Cosmos Angore Chanzeva* [2006] e KLR. I thus find that failure to consummate fully or complete the sale agreement dated 25<sup>th</sup> November 2003 for over two years could not have been within the agreement or contemplation of the parties. The failure to pay the balance of the purchase price for so long by the respondents was a clear breach. It cannot be answered by a simple averment that the vendors had not executed the transfer instrument.

12. The applicants had submitted that the transaction was void for want of consent of the land control board under the Registered Land Act. That submission falls flat on its face because there is no evidence the sale was over agricultural land. Secondly, I have perused the indenture of title that leaves no doubt in my mind that the suit land fell under the regime of the Government Lands Act.

13. I would thus place the blame for breach of the sale agreement squarely on the laps of the respondents. The applicants then became entitled to annul the sale. The latest letter from their lawyer R.K. Muthiga dated 16<sup>th</sup> March 2005 seeking to impeach the sale for want of consideration and to refund the deposit is well founded on the contract of sale. I would venture to add that the remedy for the respondents did not lie in the registration of the caveat. Their remedy, would point in the direction of a refund for the deposit paid.

14. Having so found, it follows that the caveat placed by the respondents upon the suit land was irregular and unlawful. I thus enter judgment in favour of the applicants. I order that the caveat received in the lands registry at Nairobi on 12.02 hours on 3<sup>rd</sup> June 2005 and registered in Vol. N 64 Folio 413/4 by the respondents or any other restriction or inhibition lodged by the respondents against the land title LR No 76/413 be removed by the Registrar of Lands forthwith. The costs of removal of that caveat shall be paid by the respondents. I also award the applicants costs of the originating summons to be paid by the respondents.

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 26<sup>th</sup> day of June 2012.

**G.K. KIMONDO**  
**JUDGE**

**Judgment read in open court in the presence of**

Mr. B.W. Musundi for the Applicants.

Mr. A.N. Karanja for the Respondents.