



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ENVIRONMENTAL & LAND CASE 556 OF 2007**

**JOSEPH KINUTHIA MWANGI.....**  
**PLAINTIFF**

**- VERSUS -**

**GEOFFREY IRUNGU**  
**MWANGI.....DEFENDANT**

**JUDGMENT**

1. The plaintiff is the younger brother of the defendant. By a plaint dated 11<sup>th</sup> March 2002, the plaintiff claims half share of the land known as Loc 18/Kirere/201 from his brother. Their father, Gibson Kariuki Mwangi, now deceased, agreed to purchase the land and trees thereon for Kshs 52,000 from the vendor, Mwangi Kariuki. It is the plaintiff's case that the land was purchased for his benefit and that of the defendant in equal shares. The plaintiff and defendant were to contribute to the purchase price. At the inception, the plaintiff contributed Kshs 15,000. The defendant gave a cheque for Kshs 10,000 which was dishonoured. He replaced it with a cash payment of Kshs 10,000. Their father then paid a further sum of Kshs 20,000 to the vendor leaving a balance of Kshs 7,000. The plaintiff was to pay Kshs 2,000 while the defendant was required to pay Kshs 5,000.
2. The plaintiff's evidence was that upon the death of the vendor, the entire suit land was secretly transferred and registered in the name of the defendant. The plaintiff contends that the process was tainted with irregularity and fraud. Both parties were in possession. However, when their father died, the defendant purported to evict the plaintiff. The plaintiff testified that he and his family have lived on the land, he has developed it with a permanent house and that the intended eviction is illegal. The plaintiff thus prays for a permanent injunction; a declaration that he is an equitable tenant in common with the defendant; and an order to compel the defendant to transfer half share of the suit land to him.
3. The defendant contests the claims. He has filed a defence and counterclaim dated 12<sup>th</sup> June 2002. He concedes that the plaintiff paid Kshs 15,000 towards the purchase of the land. He says that on his part, he initially paid Kshs 20,000. But he alleges that upon the death of the vendor, the estate demanded a further Kshs 35,000 towards the purchase price due to inflation. There was also conflicting evidence that the price was hiked by Kshs 48,000. The plaintiff failed to pay half of the additional amount. The defendant paid it. The defendant claims to be in occupation of  $\frac{2}{3}$  of the land and  $\frac{1}{3}$  that belonged to his deceased father. He denies that the plaintiff has erected permanent structures on the land. He contends that the transfer to him was regular. He thus counterclaims for a declaration that he is the sole proprietor and for an order to evict the plaintiff.
4. I have considered the evidence, the pleadings and the written submissions of the parties. I take the following view. It is common ground that by a sale agreement made on or about 1<sup>st</sup> August 1985 (exhibit

1) the plaintiff's and defendant's father Gibson Kariuki Mwangi, deceased, bought the suit land from Mwangi Kariuki, also deceased. The plaintiff contributed Kshs 15,000 in cash. The defendant made out a cheque number A509250 for Kshs 10,000. The cheque was dishonoured. He later countermanded it in cash. I am satisfied from the evidence that the plaintiff, the defendant and one Francis Irungu were witnesses to that agreement. The agreed purchase price was Kshs 52,000. The price included the value of some trees planted on the land. The father of the protagonists paid Kshs 20,000 bringing the total payment to Kshs 45,000. The balance was payable upon transfer.

5. In the meantime, the vendor passed on. Pursuant to succession cause 76 of 1997 at the Chief Magistrate's court, Muranga, the defendant became registered as the proprietor of the suit land. That evidence was corroborated by the plaintiff's other witness Francis Irungu Kinuthia.

6. I would turn the focus to the defendant's evidence. Although the defendant alleged that the purchase price was enhanced by Kshs 35,000 and which he paid, I doubt him very much. First, the defendant's witness Wilson Kariuki Mwangi, a son of the deceased vendor, admitted in cross-examination that the purchase price was Kshs 52,000 which included the value of trees planted on the land. His claims of a new purchase price were untrue. But I am also fortified in that finding because the parties had a written agreement. Time was not made of the essence. That agreement could not be varied by an oral agreement. In any event, there is no evidence of variation of that contract by the original parties to the contract. From a legal standpoint, the alleged oral agreement would fly in the face of section 3 of the Law of Contract Act. See Schon Noorani Vs Damji Ramji Patel Nairobi, HCCC 77 of 2006 [2006] e KLR. Although the defendant claimed to have paid Kshs 72,535 for the land, he did not produce in court evidence of such payment. As I have stated, his other witness did not prove it either. The defendant and his witness also contradicted each other. The defendant had stated that the additional purchase price was Kshs 35,000. His witness stated it was Kshs 48,000. I have come to the conclusion that the defendant was less than candid on that aspect.

7. There is also another matter that casts the defendant in poor light. Their father passed away in July 2001: yet the defendant transferred the land to himself on 12<sup>th</sup> October 2000 when his father was still alive. That is clear from plaintiff's exhibits 3 and 4. It has not escaped my mind that his father was the purchaser in the agreement. The clear intention was to assist his only two sons to acquire the suit land. The payment was a *harambee*: He contributed Kshs 20,000; the plaintiff Kshs 15,000; and the defendant Kshs 10,000. There was a balance to be shared of Kshs 7,000. To my mind, the only other sum that the defendant could have paid on the purchase price of the land was the balance of Kshs 7,000. The conduct of the defendant was at best cunning and at worst fraudulent. The secret transfer to himself during the lifetime of his father points to a clear intention to defraud his younger brother, the plaintiff.

8. I am well alive to the cardinal precept of the law of evidence that he who alleges must prove it. See Koinange and 13 others Vs Koinange [1986] KLR 23. The standard of proof for fraud is very high approaching but below proof beyond reasonable doubt. See Ratilal Gordhanbhai Patel Vs Lalji Makanji [1957] E A 314, Urmila Mahindra Shah Vs Barclays Bank International and another [1979] KLR 67. It requires proof beyond the usual standard of balance of probabilities in civil cases.

9. The defendant made some prosaic submission that the cost of the land was Kshs 43,000 but was increased to Kshs 75,000. The defendant's evidence was that the increment arose because the land was found to be larger by 0.3 acres. That is not backed by the written agreement. The defendant had also testified that due to the delay in finalizing payment, the price kept on rising. In the end, it shot up to nearly Kshs 100,000 out of which he paid Kshs 72,535. I have already stated that the *parol* evidence rule forbids that type of oral evidence. See Housing Finance Company of Kenya Ltd Vs Palm Homes Limited and 2 others [2002] KLR 93. Secondly, I have stated that time was not made of the essence to the agreement.

10. 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 Cosmus Angore Chanzeva [2006] e KLR. Lastly, there is a paucity of evidence to back up those assertions.

11. I do not entertain doubt that the defendant intended to evict the plaintiff. If there was such doubt, it is completely removed by the defendant's counterclaim: a declaration that the plaintiff has no proprietary right to the suit land; and an order for his eviction. The defendant concedes he is occupying  $\frac{2}{3}$  of the suit land and also a  $\frac{1}{3}$  that belongs to his late father. I had stated earlier that the defendant had alleged that he paid 72,523 out of the revised purchase price of Kshs 100,000. I found the alleged revision to be a red herring that finds no support in law and fact. Even assuming that the defendant was right, which is highly improbable, his argument is a tacit admission that he does not at least own a third of the suit land. Where then did half of his father's contribution on behalf of the plaintiff and the plaintiff's own contribution go? I have come to the inescapable conclusion that the defendant sought to not only disinherit the plaintiff but also take away the plaintiff's investment in the land.

12. On a preponderance of the evidence, I have found that the defendant paid a total of Kshs 27,000 made up of Kshs 10,000 paid at the inception of the agreement, Kshs 7,000 paid subsequently and a credit of Kshs 10,000 being half of his father's contribution. The plaintiff in turn paid Kshs 25,000 being Kshs 15,000 paid at the inception of the agreement and Kshs 10,000 being half of his father's contribution. I also find on the uncontroverted evidence that the plaintiff has been in occupation of a portion of the suit land. The fact that he has put up permanent structures was not borne out by the evidence. But it is not material. What is material is that he is in possession of a portion of the land. And I have also found, on the evidence, that he is entitled to a portion *pro rata* to his contribution of Kshs 25,000.

13. In the result, I dismiss the defendant's counterclaim. I find and declare that the defendant holds part of the suit land in trust for the plaintiff in respect of the plaintiff's contribution to the purchase price.

14. I therefore order that the parcel of land known as Loc/18/Kirere/201 shall be divided into two unequal portions to accord to the following percentages of ownership;

a) Plaintiff             $Kshs\ 25,000 \times 100\ \% = 48\ \% \text{ of land.}$   
52,000

b) Defendant         $Kshs\ 27,000 \times 100\ \% = 52\ \% \text{ of land.}$   
52,000

15. The plaintiff shall bear the cost of surveying, subdividing and transferring the portion to himself and the attendant cost. Pending that subdivision, the defendant is prohibited by a permanent injunction from interfering with the plaintiff's use and quiet possession of the portion comprising 48 % of the suit land.

16. Lastly, I order that the defendant shall execute all necessary instruments and papers to allow the survey, subdivision and transfer of the plaintiff's portion of land. In default, the District Land Registrar shall execute such instruments or papers.

17.Costs ordinarily follow the event and are at the discretion of the court. The disputants are brothers. Their late father intended that they live in harmony. That is clear from their joint purchase of the suit land. In the interests of justice, and to promote their reconciliation, the order that commends itself to me is that each party shall bear his own costs.

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 19<sup>th</sup> day of July 2012.

**G.K. KIMONDO**

**JUDGE**

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

Mr. Gacheru for the Plaintiff.

Mr. Muriuki for Kimani for the Defendant.