



**ESTHER WAMBUI**  
**KIMARI.....PLAINTIFF**

**VERSUS**

**JOHN KARIUKI KIIRU.....DEFENDANT**

**JUDGEMENT**

Esther Wambui Kimari, the plaintiff in this suit filed suit against the defendant John Kariuki Kiiru on the 9/8/05. In her plaint she prays for orders against the defendant as follows;

- i. An order restraining the defendant and or his agents, servants or assigns from interfering with the plaintiff's quiet possession of the land portions alienated as number c and d or the mutation for number 085-621 dated 24/12/99 in respect of land title no. Dagoretti/Kangemi/46 pending the hearing and determination of this application.
- ii. A declaration that the plaintiff is legally entitled to land portion delineated as portions number c and d a mutation from number 085621 dated 24/12/99 in respect of land title No. Dagoretti/Kangemi/46.
- iii. An order compelling the defendant to apply and obtain title documents for land portions marked C & D on the mutation form No. 085621 dated 24/12/99 and effect transfers to the plaintiff forthwith.
- iv. Any other order that the honorable court may deem fit in the interest of justice.
- v. Costs.

The defendant filed a defence and counter claim on the 3/4/07.

In his defence he denies the plaintiff's claim at paragraph 4, 5 and 6 and avers particulars fraud at paragraph 6 of the defence. At paragraphs 7 to 8 the defendant denies the plaintiff's claim. The defendant has a counter claim at paragraphs 13 to 15 of the defence and prays for:-

- a) A permanent injunction restraining the plaintiff or her servant or agents from harassing, intimidating the plaintiff, entering, trespassing, selling, trespassing or in any manner interfering with the defendant's quiet possession of the defendant's land parcel no. Dagoretti/Kangemi/46.
- b) The plaintiff do release to the plaintiff the title deed for land parcel No. Dagoretti/Kangemi/46 accidentally.
- c) Costs of the suit.

This suit was partly heard by Lady Justice Sitati. She heard the evidence of Jackson Ngugi Kimari PW1, the son of the plaintiff and the plaintiff Esther Wambui Kimari. When I took over the matter I heard the evidence of the plaintiff when she was recalled to produce some documents that had not been produced. I also heard the evidence of 2 defence witnesses, the defendant himself and Caroline Wanja Kariuki, the defendant's daughter. For ease of reference I find had proceedings before J. Sitati typed and in summary

this is the evidence of the witnesses who testified before J. Sitati.

PW1 Jackson Ngugi Kimari testified as follows, the plaintiff is his mother. He knows that she bought 2 plots in a shamba No. Dagoretti/Kangemi 46. The parties had an agreement dated 10/2/93 this agreement was a plot measuring 100/100 ft and was being sold at 300,000/-. The agreement was drawn by M/s Onindo advocates Mr. Onindo is now deceased. That through another agreement dated 16/12/93 the plaintiff was offered another plot and another agreement was drawn. That by 29/01/96 the plaintiff paid Kshs. 300,000/- towards the purchase of the first plot, the receipt of the Kshs. 100,000/- and another for kshs.200,000/- evidence this. That the said shamba Dagoretti/Kangemi/46 was subdivided and a mutation form produced in respect of Shamba No. 46. From the subdivision his mother bought plot No. 1335 the 1<sup>st</sup> plot and plot No.1336 the 2<sup>nd</sup> plot. The said mutation form was prepared by Mr. Gatune and Associates a licensed land surveyor. The D.O Dagoretti gave consent, he was present together with Kamano wa Ngena, John Kariuki Kiiru , Esther Wambui and seller. After all that was done they did not get the title deeds because the defendant refused to sign the transfer forms. His mother has the title from the said shamba and it bears the name of John Kariuki and Njenga Kiiru and Kamanu Wangewa.

When PW1 was cross-examined he told Court that he did not witness the agreements, he was present and that the agreements were witnessed by the late Mr. Onindo. He also stated that when they took that title deed the defendant and his sister Salome were there at Mr. Onindo's office and that neither him nor his mother obtained the title fraudulently. He stated further that the defendant is only one who signed the agreement as it's his share that was sold after the subdivision.

The plaintiff testified that she has sued the defendant because he has refused to transfer the parcel of land she bought from the defendant. That during the sale she signed some documents before Onindo advocates who prepared the documents for sale. She identified the thumb print on the sale agreements exhibit No. 1. She bought 2 plots and she paid the defendant shs,300,000/- she paid Kshs.200,000/- first and then 100000/-. In total that she paid Kshs.700,000/- for the 2 plots. That during the transaction the defendant asked her to lend him Kshs. 100,000/-. The total purchase price was Kshs.680,000/- for the 2 plots, she paid excess of kshs,100,000/-. Her 2 plots are numbers 1335 and 1336. That she called a surveyor and a survey was done, the defendants relative, Nyokabi, Kamanu Nyenga and the defendant were present. They also obtained the land Board consent, later the defendant refused to sign the transfer form.

When she was cross-examined the plaintiff stated that her claim is not time barred, she denied that she manufactured the documents, and that she paid the money as stated by her and that she did not sign any agreement for the Kshs.100000/- she lent to Kariuki. She denied that she owes the defendant Kshs.200000/- and that she processed the transaction behind Kariuki's back and that it is not true that the defendant was selling only one plot and that she is not holding that title illegally. The plaintiff produced the agreement for sale dated 10/12/93 between the defendant and herself for Dagoretti/Kangemi/46 Exhibit No. 1. The 2<sup>nd</sup> agreement for sale dated 16/12/93 for Dagoretti/Kangemi/46 exhibit No.2, Exhibit No. 3 an acknowledgment of receipts of Kshs.100,000/- by the defendant from the plaintiff on the 28/2/94, an agreement for sale dated 29/5/96.

The defendant testified as follows: He knows the plaintiff, he sold one plot to her. The title he had was jointly owned by himself, Kamanu Wangewa and Njenga Kiiru. The plot he sold to the plaintiff was 100ft by 100ft. the purchase price was 300,000/- she paid him 100000/- the balance was 200000/-. His child Carol Wangewa was present when he received the 100,000/- the plaintiff did not pay him the balance. She paid him before a lawyer Mr. Onindo. He does not know of the other payments .He did not sell to her another plot. The thumb print in the agreement dated 16/12/93 exhibit no. 2 is not his neither is the finger print in agreement dated the 29/5/96, Exhibit No. 4. He never sold the plot to the plaintiff on the 28/2/94. He had 3 plots of 100ft by 100ft he could not sell what he did not have. They had agreed with his family that he sells one plot and they subdivided the others. That they went to the sub chief and he told them to go and solve the problem. The title deed remained with the lawyer. The plaintiff and her children are disturbing him. He does not know about the surveyor he did not summon the surveyor nor did he go to the land control board , he knows nothing about the consent. If he had subdivided the land he could have taken her to the land control board but she has to pay the balance. He wants his title returned so that he can subdivide the land. He holds that the he jointly with his brother. The plaintiff bought people to the

said land and she is trying to subdivide it and he wants her stopped. That he wants his title back and if she pays the balance he has no problem. He has never received 600,000/- from the plaintiff but only 100,000/-.

When he was cross-examined the defendant told court that the plaintiff lives at the place she was purchasing. He denied that he knows the survey or called Gatune and that he recalls that the plaintiff went to his place with the surveyor without his notice. That he knows that Salome and Wangare went to the land control board but they were told to go back home. That he went to the Chief's office twice and he was given the money he was given money at once time on those 2 occasions. That Esther went to ask for the title and they went together to Onindo's office. That he was paid 100,000/- at Onindo's office. That they had no 2<sup>nd</sup> agreement. He does not recall writing the 2<sup>nd</sup> agreement with the plaintiff. He was not paid money for the 2<sup>nd</sup> plot. That he could not be given money without his children being there.

In re-examination the defendant stated that the plaintiff took Onindo's advocates that Salome was not involved in the subdivision, that the only thumbprint he knows is the one in the agreement dated 10/12/93 and that he went to Onindo's office twice.

The 2<sup>nd</sup> defendant witness was Caroline Wanja Kariuki. The defendant daughter. She testified that the plaintiff went to her place to buy a shamba from them in 1993. She was present. They talked and agreed that her father would sell to Esther a shamba of 100ft by 100ft for ksh.300,000/-. To them the plaintiff was known as Mama. Later they went to Onindo's advocates. The plaintiff paid them Kshs. 100000/- and the balance was Kshs. 200000/-. She witnessed her father's thumb print in the agreement. She asked the plaintiff to call when she was ready to pay the balance Ksh. 200,000. Later she heard that they were going to the Board. Her mother and she went to the board and nothing happened. That as the elder child nothing happens without her knowledge. That the title is in 3 names of James Njenga Kiiru, her father and Kamano Wangare and no subdivision has been done. That she does not know the agreement dated the 16/12/93. She only knows exhibit No. 1 she does not know if the surveyor went and subdivided the land. She has not been at the D.O's nothing has happened there or at the lands office. No consent was given. That the father could not have sold the land as she has other siblings. That her father told her that the plaintiff wanted the title to show that he was selling the land to her. When the 2<sup>nd</sup> defence witness was cross-examined she told court that she has been to Onindo advocates once but she recalls her father went with the plaintiff's son. That the father stays in all the plots and the plaintiff at another plot and not Dagoretti/Kangemi/46. That the shamba is not hers as it has not been subdivided. That she was not there when the surveyor went there. That her father told her that he was not called when the surveyor went there. She went to the land control board. She followed her father there. In re-examination she testified that when they were at the land control board the D.O told them to go back when they agreed and that nothing happened and that she could have received money if the defendant received any money and the plaintiff would have called her if she wanted to pay.

Counsels filed written submissions which they highlighted in Court. The plaintiff's counsel cited one case of ***Duncan Waitheka Ndegwa and another Vs. Sigal Investments Ltd.*** A judgment of Justice Sitati and the defendant cited the case of ***Leonard Njonjo Kariuki Vs. Njoroge Kariuki Alias Benson Njonjo.***

I have considered the evidence before me. The plaintiff claims that she bought 2 plots from the defendant and that she only paid for them. The defendant denies that the plaintiff bought 2 plots but that she only bought one which she did not fully pay for. The agreements the plaintiff states they had were exhibited in Court. The defendant accepted only PEXT No. 1 but not the others PEXT 2, 3 and 4. I do agree with the plaintiff counsel that who alleges must prove what is the law as concerns the plaintiff's case. The defendant raised the issue that the plaintiff's suit is time barred. The agreements were made in 1993. The plaintiff suit falls under the law of Contract. Under Cap. 22 at section 4 (a) the act states that any action or a contract may not be brought under the end of six years. Even if I went to take the 1<sup>st</sup> agreement PEXT No. 1 to be the genuine agreement, then the plaintiff had a duty to file suit within 6 years. The suit in this matter was filed in the year 2005. The plaintiff ought to have filed suit in the year 1999. I therefore agree with the defendant's counsel that this suit is time barred. Further on the plaintiff's claim she seeks that orders over a mutation form marked 085621 dated 24/12/99 in respect of land title No.

Dagoretti/Kangemi/46. The plaintiff produced only 4 agreements in Court. The mutation form that she refers to was marked for identification. There is a dispute that the parties went to the land control board. It was upon the plaintiff to call the officers from the land control board to give evidence on the consent and an officer from the lands office to give evidence on the mutation form. This evidence was it adduced. The mutation form she basis she claim on was not produced in court. It was merely marked for identification. The plaintiff failed to adduce this evidence and therefore her case cannot succeed it must fail in the absence of the mutation form. There could have been an agreement for sale, but the plaintiff has a duty to establish the claim. Further she failed to call expert evidence on the defendant's thumb print. I find that the evidence is inadequate to sustain the claim as stayed in the plaint and I therefore dismiss the plaint entire claim.

On the defendants counter claim the defendant claims that the plaintiff is disturbing him. His evidence on his was rather vague. I find that he failed to show how the plaintiff is harassing on initiating him as claimed. The defendant talked of the plaintiff's affidavit to sell the land but no evidence was produced to support that. The plaintiff claims she is on the portion of land she bought. The defendant denies this. The Court did not have the benefit of visiting the parcel of the plot to establish this. The defendant has failed to adduce sufficient evidence on the order for an injunction.

Lastly it is not in dispute that the plaintiff has the title. She claims that late Mr. Onindo advocate had it and gave it to her. It is apparent that counsel could have done so, as the defendant failed to prove how she obtained it fraudulent. The title is not in her name. It is in the defendant's name plus 2 others. The plaintiff should not be holding the title. Although the defendant's prayer in the defence reads "the plaintiff do release to the plaintiff the title deed from land parcel No. Dagoretti/Kangemi/46 unconditionally", I take that it was only typing error and it should read "the plaintiff do release to the defendant the title deed for land parcel no. Dagoretti/Kangemi/46". I find that the defendant is entitled to have the title back. I therefore order that the plaintiff do release to the defendant title deed land No. Dagoretti/Kangemi/46. I find the defendant is entitled to have the title back. I therefore order that the plaintiff do release it to the defendant. Bearing in mind the background of this case I order that each party bears its costs.

**Dated, signed and delivered this 7th day of August 2012.**

**R. OUGO  
JUDGE**

In the Presence of:-

..... For the plaintiffs

..... For the defendants

..... Court Clerk