



Matara & 3 others (suing for and on behalf of Good Neighbors Welfare Association) v LW Gitahi T/A Kemalita Investment Agencies (Environment & Land Case 209 of 2015) [2022] KEELC 3329 (KLR) (9 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3329 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 209 OF 2015
LC KOMINGOI, J
JUNE 9, 2022**

BETWEEN

**DAVID MATARA 1ST PLAINTIFF
OSEKO MOGWANCHI ONDERI 2ND PLAINTIFF
NANCY WANJIRU KIAMA 3RD PLAINTIFF
JOEL MBUTHIA KIBOGO 4TH PLAINTIFF
SUING FOR AND ON BEHALF OF GOOD NEIGHBORS WELFARE
ASSOCIATION**

AND

LW GITAHI T/A KEMALITA INVESTMENT AGENCIES DEFENDANT

JUDGMENT

1. By a plaint dated 12th March 2015; the Plaintiff's seek judgment against the Defendant for:-
 - a) A permanent injunction order restraining the Defendant whether by themselves or through their agents, servants and /or workers from trespassing, harassing, evicting, disposing off, selling and /or in any other manner interfering with the Plaintiffs' quiet use, possession and occupation of their respective plots in Land Reference No.6845/66.
 - b) A declaration that the Defendant is under a duty to give effect and to transfer the suit premises to the various Plaintiffs and all others in proportion to the plots each acquired.



- c) In the alternative to prayer (b) above, an order authorizing the Deputy Registrar of this Honourable Court to execute all the necessary consents and conveyance documents to give force to the effectual transfer of the suit premises and registration of each plot in the name of its respective purchaser.
 - d) Costs of this suit and interest thereof.
 - e) Any other relief that the Honourable court may deem fit to grant.
2. The Plaintiffs' case is brought on their own behalf and on behalf of purchasers of various plots all hived from the Defendant's Land Reference No.6845/66. It is their case that the Defendant was the beneficial owner and lately the registered and equitable owner of the suit land. They stated that the 1st -4th Plaintiffs plots are plot No.s 14, 94, 5 and 75 respectively. The Plaintiffs contended that the Defendant issued them with certificates of ownership with a promise of pursuing respective titles for the Plaintiffs in each respective plot bought.
3. The Plaintiffs contended that they have had quiet possession and occupation of their respective plots for close to twenty (20) years and that they have also been paying land rates in respect of their respective plots to the City Council of Nairobi and lately Nairobi City County and have developed their respective plots but the Defendant has to date refused, neglected and /or declined to issue them with certificates of title.
4. They also contended that the certificate of title to the suit property has since been processed and the Defendant has it but it has been demanding further payments over and above the respective purchase price in order to process and issue the Plaintiffs with their respective certificate of title. They contended that the Defendant has also persistently harassed them with threats of eviction if they do not make further payments thus interfering with their quiet enjoyment of the suit land. They added that the Defendant may proceed to dispose off the suit premises to unsuspecting third parties thereby making it difficult for the Plaintiffs to redeem their properties and occasion them irreparable loss and damage.

The Defendant's case

5. The Defendant filed a statement of defence dated 24th July 2017. It is her case that she acquired the suit land in 1993 from Githunguri Njiru Farm (1966) Limited and she is still awaiting title. She further stated that the suit land has deed plan No.141893 already given and consent from the land control Board has already been given. She admitted that she sold the suit land to the Plaintiffs and issued them with share certificates and that they are in possession of their respective plots.

The Plaintiff's evidence

6. PW1, David Matara, the chairman of Good Neighbours Welfare Association. His witness statement dated 12th March 2015 and the Plaintiffs' list of documents dated 12th March 2015 were adopted as part of the Plaintiffs' evidence. He told the court that the members numbering about 100 bought plots on L.R No.6845/66 from the Defendant. He further stated that he purchased two (2) plots and he was issued with a share certificate. He produced his share certificate and stated that each purchaser was issued with a similar share certificate indicating the purchaser's plot number. He added that most plots are occupied and the occupants pay rates to Nairobi City County.
7. He stated that they have tried to pursue their title and produced a letter addressed to the Chairman, Githunguri Njiru Farm [1966] Ltd who was the holder of the mother title and who sold to many land buying companies urging it to issue title. He told the court that they filed this suit under certificate of urgency because the Defendant tried to evict them. He was not cross-examined.



Defendant's evidence

8. DW1, Lizah Wangui Gitahi adopted her witness statement dated 24th July 2017 and the list of documents of even date as part of her evidence. In her statement, she stated that she co-owns Land parcel Number L.R 6845/66 with Mary Njeri Mungai and Margaret Waceke Muriuki having acquired it from Githunguri Njiru Farm (1966) Limited in 1993. She further stated that together with her co-owners, they formed a partnership called Kamelita Investment Agencies and subdivided the suit land and sold plots to various persons including the Plaintiffs and transferred possession to them. She stated that they are currently awaiting the Mother Title for the property from Githungurri Njiru Farm [1966] Limited and the same has a deed plan no.141893 already given.
9. She told the court that she sold the suit plots to the Plaintiffs and she has not refused to give them titles. She is awaiting the issuance of the mother title. It was her testimony that she gave the Plaintiffs share certificates in the name of the Defendant and informed them that they would have to process the titles at their own cost.
10. When cross-examined, she stated that the Plaintiffs bought the suit land from the Defendant and that they reside on the land and she has no intention of evicting them. She further stated that she will process the mother title then the Plaintiffs can process their titles at their own cost since they did not agree that she will cater for the cost of the title deeds. She stated that she has not tried to sell the plots to other people since she sold them in 1993 and she has no intention of evicting the Plaintiffs. She prayed that the Plaintiffs' case be dismissed.
11. She told the court that when the Plaintiffs sell their plots, the new buyers are issued with share certificates and that everyone pays rates for their plot. She also stated that she has the deed plan and that there is no order stopping her from processing the mother title from Githunguri Njiru Farm.
12. At the close of oral testimonies, parties tendered final written submissions.

The Plaintiff's submissions

13. They are dated 1st April 2020. Counsel for the Plaintiffs submitted that the Defendant being in possession and ownership of the suit land offered to sell to the Plaintiff their respective plots at a consideration to which they accepted and performed their end of the bargain by paying the requisite purchase price with the promise that the Defendant would complete her side of obligations under the contract.
14. It was his submission that midway, the Defendant breached the contractual terms and obligations of the parties under the parties' respective contracts and now demands payment of additional fees in the name of "processing fee for titles' failure to which no certificate of title will be processed or issue to the Plaintiffs.
15. He added that parties to a contractual relationship are bound by their terms of agreement and any alteration thereafter must be in congruence with all the parties input contrary to which the same amounts to a counter offer and is unenforceable under the law. He cited the case of *Catherine Mgendi v Utumishi Investments Limited & Another* [2017] for that position.
16. He submitted that if the Defendant felt that she had entered into a bad bargain & thus required more money in order to process the Plaintiffs' titles, the same could not be forced upon the Plaintiffs. He put forward the case of *Fina Bank Limited v Spares & Industries Limited* (Civil Appeal No.51 of 2000) (Unreported) Where Shah JA held, "It is clear beyond peradventure that save for those special cases



where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.”.

17. He also submitted that parties to a contract are bound by their terms of the contract and courts cannot be called upon to rewrite contracts neither can they imply terms that were not part of the contract. He put forward the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR.

The Defendant's submissions

18. They are dated 25th November 2021. Counsel for the Defendant submitted on the following issues:-
- a) Was there a valid sale agreement between the Plaintiffs and the Defendant?
 - b) Whether the Defendant has refused to issue the Plaintiffs with their title deeds.
 - c) Whether the Defendant has evicted or threatened to evict the Plaintiffs herein.
 - d) Who should bear costs on the registration of the individual title deeds?
19. On whether there was valid sale agreements between the Plaintiffs and the Defendant, he submitted that prior to their agreement, both parties were aware that the mother title L.R 6845/66 was yet to be issued by Githunguri Njiru Farm (1966) Ltd thus the Plaintiffs cannot allege that the Defendant has refused to issue them with title while all along they knew that she was working on it and she has made efforts to process the mother title. He submitted that the process was halted by the conservatory orders herein.
20. He submitted that the court should be guided by the maxim; “equity, like nature, will do nothing in vain’ and decline to grant the orders sought. He also submitted that the Plaintiffs have not filed any formal complaint asserting harassment from the Defendant thus their claims on harassment remain baseless and unsubstantiated.
21. On the issue of who bears the costs of registration of the individual title deeds, he submitted that the Kenyan Constitution guarantees everyone the right to individually or in association acquire and own property of any description and in any part of Kenya under Article 40 (1) of *the Constitution*. He added that the court should ask itself whether the said acquisition should be at the expense of others. He urged the court to consider common practice which dictates that the purchaser and or their Advocates undertakes the transfer and registration of their respective title deeds. He pointed out clause 8.5 of the Law Society of Kenya Conditions of sale, 2015 takes the common practice approach. He submitted that the Defendant shall bear the cost of processing the mother title while the Plaintiffs would bear their own costs.
22. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are:-
- a) Was there an agreement between the Plaintiffs and the Defendant on the party to bear title processing fees?
 - b) Has the Defendant neglected to issue the Plaintiffs with their titles?
 - c) Is the Plaintiff entitled to the reliefs sought?
 - d) Who should bear costs of the suit?



23. The Defendant admitted that she owns L.R No.6845/66. She admits that the Plaintiffs are in possession. She also admits that she is processing title to the mother title of the suit land in readiness for issuance of titles in respect of the suit plots.
24. The only issue in contention is who between the Plaintiff and the Defendant should cater for title processing fees. The court is alive to the finding in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR where the court stated that a court cannot rewrite a contract between the parties or imply terms between them. While the Plaintiffs argued that their respective sale agreements were silent on the issue of the title processing cost, they did not place the said sale agreements on record for this court's consideration. The Plaintiff's claim that that the mother title to the suit land has since been registered to the Defendant was also unsubstantiated.
25. In the present case, the Plaintiffs and the Defendant entered into agreements for the sale of land. The terms were clearly spelt out and the Plaintiffs duly performed their end of the bargain. The Defendant on her part tried to vary the contractual obligations imposed on her by demanding additional amounts for processing titles, failure to which the Plaintiffs would be evicted. This demand was made through word of mouth and implied actions by the Defendant herself and/or her servants or agents by failing to process the respective certificates of title. Based on the contract entered into between the parties, then the Defendant is duty bound to complete the contractual obligations as stipulated and any other demand outside that is unenforceable.
26. In conclusion, I find that the Plaintiffs have proved their case as against the Defendant on a balance of probabilities.
27. Accordingly, judgment is entered for the Plaintiffs as against the Defendant as follows:-
 - a) That a permanent injunction is hereby issued restraining the Defendant whether by themselves or through their agents, servants and /or workers from trespassing, harassing, evicting, disposing off, selling and /or in any other manner interfering with the Plaintiffs' quiet use, possession and occupation of their respective plots in Land Reference No.6845/66.
 - b) That a declaration is hereby issued that the Defendant is under a duty to give effect and to transfer the suit premises to the various Plaintiffs and all others in proportion to the plots each acquired within ninety (90) days from the date of this judgement.
 - c) That in default of prayer (b) the Deputy Registrar of this Honourable Court is hereby directed to execute all the necessary consents and conveyance documents to give effect to transfer of the suit premises and registration of each plot in the name of its respective purchaser.
 - d) That the costs of this suit be borne by the Defendant.

DATED, SIGNED AND DELIVERED NAIROBI THIS 9TH DAY OF JUNE 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Wanjiku for Mr. Gachie for the Plaintiffs

Mr. Mwenda for the Defendant

Steve - Court Assistant



