



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.376 OF 1999

EUNICE KIRUNDA KINYUA [suing as the Administratrix of the Estate of JOSEPH KINYUA KARANI (Deceased)].....**PLAINTIFF**

VERSUS

J.M.K [as guardian *ad litem* to D. K.M]

.....**DEFENDANT**

JUDGMENT

The plaintiff, Eunice Kirunda Kinyua has instituted this suit as the administratrix of the estate of the late Joseph Kinyua Karani (the deceased). In the suit, the plaintiff seeks a declaration that she is the legal owner of five (5) acres of land comprised in NYANDARUA/OL KALOU/CENTRAL/39 (the suit property) and an order of perpetual injunction to restrain the defendant from trespassing into the said 5 acres of the suit property.

The plaintiff testified that the deceased and D.K.M (defendant) now substituted by his son, J.M.K on account of loss of memory, entered into a written agreement in 1982 in which the defendant sold to the deceased the suit property at a consideration of the Kshs.40,000/= for the land and additional Kshs.5,000/= for the trees on the land. It was the plaintiff's case that upon payment of the purchase price and on obtaining the Land Control Board consent, the plaintiff took possession of the suit property, fenced it and began to cultivate and plant substance crops. The plaintiff would also harvest the trees to sell. After the deceased passed away in 1995, the defendant and his sons began to interfere with the plaintiff's occupation and use of the suit property. The defendant brought a suit, Nyahururu PMCC No.456 of 1997, against the plaintiff for a declaration that the defendant is the rightful owner of the suit property and an order compelling the deceased to unconditionally surrender the title deed of the suit property.

The suit was, however struck out for lack of jurisdiction. The plaintiff has testified that even after the striking out of the suit, the defendant and his sons continued to interfere with the suit property, destroying the fence, cutting down trees and burning charcoal, hence this suit.

I have already noted that the defendant was substituted with his son, J.M.K as guardian *ad litem* after the court found that the defendant was suffering from severe loss of memory. J, who is a primary school teacher recalled that following the death of the defendant's wife, Miriam, in 1982, the deceased developed a strange relationship with the defendant which culminated in the latter granting the former grazing rights on the suit property. Being concerned about this relationship and suspecting that the deceased's intention was to take their land, J wrote to the District Commissioner on 5th October, 1982

raising his suspicion. The District Commissioner advised him to direct his complaint to the Land Control Board, which he duly did on 27th October, 1982.

In 1988 the deceased came to the suit property claiming that he had purchased it from the defendant. The defendant denied ever selling the land. Regarding the sale agreement and the subsequent document acknowledging receipt of the purchase price, J asserted that the defendant was illiterate and could not sign; that he would only thumb-print as was clear from his identification card and in his application to the Settlement Fund Trustee.

I have weighed the evidence presented by both sides, written submissions by their counsel as well as authorities cited. This is a strange dispute in that the two main parties have not directly given their respective sides, as one is deceased and the other suffers from diminished memory. However, their representatives through their testimonies have been of great help in providing vital material from which the court is able to reach a just conclusion of this dispute.

It is a common ground that the entire NYANDARUA/OL KALOU CENTRAL 39, measuring approximately 10 acres was transferred to the defendant by the Settlement Fund Trustee on 15th December, 1988. It is also not in dispute that in 1982-83 the deceased began to use a portion of the suit land. The broad question is the capacity in which he used the portion

According to the plaintiff, the portion measuring five acres was acquired by the deceased by way of a purchase. That upon survey and obtaining the necessary consent, the deceased took possession and began to develop the suit property. Twelve (12) years after the purchase and upon the death of the deceased, the defendant began to lay claim on the portion in question. Together with his sons, they damaged the fence, fell the trees and generally prevented the plaintiff from accessing the property. Indeed, even after this suit was instituted and injunctive orders issued to restrain the defendant and his sons, they have continued with the activities complained of by the plaintiff.

On the part of the defendant, it is strongly contended that the deceased tricked the defendant into transferring the suit property by taking advantage of his illiteracy and alcoholism; that the defendant's reasoning was greatly affected by the death of his wife. It was further contended that the sale agreement purportedly signed by the defendant was a forgery as the defendant has no signature but instead thumb-prints. That the consent purportedly obtained from the Land Control Board was either a forgery or irregularly obtained; that the Settlement Fund Trustee's written consent was not obtained before the alleged transfer.

Starting with the sale agreement, whereas it was argued during the trial that the sale agreement was a forgery, previous averments in this suit and past suits by the defendant do not support that position. For instance in the suit brought by the defendant against the plaintiff in Nyahururu PMCC No.456/1997, the defendant averred at paragraph 5 and 9 of the plaint thus:

“4. That through various and varied agreements in writing in 1983 the plaintiff received various amounts of money from the defendant purportedly for the purchase of a plot of land measuring 5 acres which was not specified.

5. On the 23rd day of March, 1983, the defendant prepared on agreement on a Ministry of Lands and Settlement letter head and intimidated the plaintiff into signing away 5 acres of land from his parcel of land No. Nyandarua/Ol Kalou Central/39

.....
9. That the plaintiff has offered to refund any monies that might have been advanced to him by the defendant which offer the defendant has turned down and the plaintiff shall seek to deposit such money in court.”

(Emphasis added)

Those are averments which were made by the defendant in his own suit in which he also deposed in paragraph 1 that he was of sound mind. He has himself confirmed that indeed he signed several agreements. It is also clear that he has identified the suit property as the subject of the agreements. There is express admission that funds were received from the deceased as consideration

In one of the replying affidavits dated 27th January, 1998, in Nyahururu PMCC No. 456 of 1997, the defendant deposed that:

“4. That in late 1987, I decided to sell part of the said land and the deceased husband of the defendant indicated his willingness to buy the same.

5. That the said purchaser however paid the price of the purported land in such small installments including as little as Kshs.500/= that the purpose of the sale was defeated.

6. That at no time did I and the deceased agree on the particular parcel of the land that was being sold.”

In his reply to defence in the said cause (No.456 of 1997), the defendant further stated that:

“ 3. The plaintiff refers to paragraph 3 of the defence and reiterates the contents of paragraph 5 of the plaint save that indeed the agreement signed under duress is dated 22nd day of March, 1983.”

In the present suit, the defendant has also made the following deposition in his replying affidavit sworn on 6th September, 1999.

“5. That on or about 1983, myself and the plaintiff’s deceased husband (herein referred to as deceased) entered into various agreements which were purported to be lease agreement for the defendant (sic) to work my land whereof he assisted me pay school fees for my children.”

I believe what I have set out in the foregoing paragraphs amply demonstrate an admission that the deceased purchased from the defendant 5 acres from NYANDARUA/OL KALOU CENTRAL/39.

The defendant has not raised a consistent defence. At one point it is argued that after the death of his wife, he took to heavy consumption of alcohol; that the deceased took advantage of this and caused him to sell the suit property. At another point it is alleged that he was coerced into selling the property. Yet in the same breath, it is submitted that the agreements are a forgery; that the defendant only granted to the deceased grazing rights.

I turn to consider whether the consent by the Land Control Board was regular. The defendant has maintained that he did not participate in the process leading to the consent being granted; that the consent is a forgery as essential steps of obtaining a consent were not followed. The plaintiff is relying on a consent said to have been granted at a meeting of the Board held on 11th February, 1983, clearly within the six months from the date of the first agreement as prescribed by **section 8(1) of the Land Control Act**. The argument that the second agreement was invalid for the reason that it was purported to be entered into after the consent had been granted, has no merit in view of the clear provisions of **section 9(4)** aforesaid. The plaintiff having produced a consent from the relevant board, any person questioning the process and legality of the consent must lead evidence to demonstrate the illegality or that the process was flawed.

Indeed **section 8** of the **Land control Act** provides that once the board has given a consent, that decision is final and conclusive and cannot be questioned in any court. Similarly **section 112** of the **Evidence Act** shifts the burden to the defendant to disprove the fact that the consent was regularly obtained. He has not discharged that burden.

For all the reasons stated, I find that there was a valid disposition of the suit property as claimed by the

plaintiff. Consequently judgment is entered in terms of the plaint and for avoidance of doubt it is:

- i) declared that the plaintiff is the lawful owner of the five acres of NYANDARUA/ OL KALOU CENTRAL/39;
- ii) ordered that the said portion of the property be transferred to the plaintiff on behalf of the estate of the deceased;
- iii) ordered that there shall be a perpetual injunction to restrain the defendant, his family, agents as prayed in paragraph (b) of the plaint;
- iv) ordered that costs of the suit will be borne by the defendant.

Dated, Delivered and Signed at Nakuru this 14th day of February, 2011.

**W. OUKO
JUDGE**