



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 238 OF 1992

ELIUD BUKU THUKU.....PLAINTIFF

VERSUS

PAUL KARIUKI MWANGI.....1ST DEFENDANT
LAND REGISTRAR, MURANG'A.....2ND DEFENDANT

JUDGMENT

By the plaint dated 26th August 1992, **Eliud Buku Thuku**, the Plaintiff herein, sought for judgment against Paul Kariuki Mwangi and the Land Registrar, Murang'a, the 1st and 2nd Defendants herein, in the following terms:

- (a) A declaration that transfer of 1.21 hectares out of land parcel No. LOC.19/GACHARAGEINI/1297 to the 1st defendant by the plaintiff's father was null and void ab initio.**
- (b) A declaration that land parcel No. LOC.19/GACHARAGEINI/1433 EXCISED FROM loc.19/GACHARAGEINI/1297 was transferred to the defendant wrongfully, fraudulently and/or unlawfully.**
- (c) An order that the Plaintiff be registered proprietor of land parcel No. LOC.19/GACHARAGEINI/1433 and 1432 having been a purchaser.**
- (d) Costs of this suit.**
- (e) Interest on (d) above at court rates.**
- (f) Any other or better relief this court may deem fit to grant.**

The 1st Defendant filed a defence to deny the Plaintiff's claim. The 1st Defendant died on 12th May 2001. Beatrice Wambui Mwangi, successfully obtained a limited Grant of Letters of Administration *ad litem* on 22nd November 2002. Beatrice Wambui Mwangi was enjoined to this suit in place of Paul Kariuki Mwangi, deceased on 16th July 2004.

When the suit came up for hearing, the Plaintiff tendered the evidence of a single witness. the Plaintiff, Eliud Buku Thuku(P.W. 1), told this Court that he was claiming the parcel of land known as **L.R.LOC.19/GACHARAGEINI/1297** on the basis that he bought the same from Thuku Macharia, his deceased father. He claimed he bought the land in 1984 at a rate of Ksh.15,000 per acre. It is alleged by

P.W. 1 that Thuku Macharia, died on 24th October 1988 before transferring the land to him. He said that the deceased did not apply for the Land Control Board Consent to approve the transaction. P.W. 1 admitted that he lodged a caution against the title on 9th January 1984 claiming purchaser's interest. P.W. 1 was sued by his late father vide **Murang'a R.M.C.C.C. No. 35 of 1985**. The deceased was successful in the suit hence the caution was removed on 17th May 1988. P.W. 1 claimed he did not know how the caution was removed yet he was not given notice by the Land registrar of his intention to remove the caution. P.W. 1 further gave evidence showing that L.R. NO. LOC.19/GACHARAGEINI/1297 was closed on 14th December 1988 upon subdivision giving rise to two subdivisions i.e. **LOC. 19/GACHARAGEINI/1432** and **LOC.19/GACHARAGEINI/1433**. P.W. 1 claimed that the subdivisions were carried out after the death of his father. There is evidence that parcel **NO. LOC.19/GACHARAGEINI/1433** was transferred to Thuku Macharia and then to Paul Thuku Mwangi. P.W. 1 claimed that he was not related to Paul Kariuki Mwangi. He claimed the aforesaid person did not buy the land from the late Thuku Macharia. He also claimed the Land Control Board could not have sanctioned the transaction when there was a caution registered against the title. P.W. 1 also claimed that his late father could not have given out **LOC.19/GACHARAGEINI/1433** as a gift yet he had bought it from him. In his evidence on cross-examination P.W. 1 stated that though his sale agreement was in writing, no Land Control Board consent was obtained approving the sale. P.W. 1 denied the allegation that the late Thuku Macharia sold his land to Paul Kariuki Mwangi when he failed to settle the purchase price. He also stated that Thuku Macharia subdivided his land and gave 3 acres to his sons and that he bought three (3) acres to be excised from **LOC.19/GACHARAGEINI/1297** having paid his deceased father Ksh.20,500.

The defence case is supported by the evidence of **Beatrice Wambui Mwangi** (D.W. 1). D. W. 1 told this Court that her son, Paul Kariuki Mwangi, the deceased, bought land from Thuku Macharia. The relevant Land Control board consent was obtained. D.W. 1 said the deceased paid Thuku Macharia Ksh.54,000/=. **Antony Mwangi Kariuki** (D.W. 2) produced documents which he got access upon the demise of his father Paul Mwangi Kariuki, deceased. Those documents included a sale agreement which indicated that the deceased bought three (3) acres at Ksh.54,000 from Thuku Macharia, deceased. D.W. 2 further produced a receipt acknowledging receipt of Ksh.19,000 plus proceedings before the Murang'a resident Magistrate's Court. D.W. 1 confirmed that his late father got registered as the proprietor of LOC.19/GACHARAGEINI/1433 on 14th December 1988.

At the end of the evidence, learned counsels from both sides were invited to file written submissions which they gladly did. I have considered the evidence plus the submissions. It is important to state at this stage that the case against the Land Registrar Murang'a, the 2nd Defendant was withdrawn. Though the parties did not file the agreed issues, I think the following issues arose for my determination;

- (1) Whether or not the transfer of **L.R. NO. LOC. 19/GACHARAGEINI/1297** to the 1st Defendant by the Plaintiff's father was null and void?
- (2) Whether or not LOC.19/GACHARAGEINI/1433 was fraudulently transferred to the 1st Defendant.
- (3) Whether or not this Court should issue an order directing that parcels Nos. LOC.19/GACHARAGEINI/1432 and 1433 be registered in the name of the Plaintiff as a purchaser.
- (4) Who should pay costs?

I will determine the aforesaid issues together. On the 1st, 2nd and 3rd issues, it is important to note that the Plaintiff's father, the late Thuku Macharia owned land measuring about 30 acres. He subdivided that land after which he gave his sons each a portion measuring three (3) acres. He reserved for himself parcel No. **LOC.19/GACHARAGEINI/1279**. The aforesaid land measured approximately six (6) acres. It is also not in dispute that the Plaintiff was amongst the beneficiaries of the land. It is also not in dispute that the Plaintiff went into an oral agreement with Thuku Macharia, deceased, in which he was to purchase three (3) acres to be excised from LOC.19/GACHARAGEINI/1297. The Plaintiff paid Ksh.21,500/= leaving a balance of Ksh.23,500 out of the agreed sum of Ksh.45,000/=. The aforesaid agreement was not reduced

into writing neither did it receive approval from the relevant Land Control Board. To start with, it is therefore obvious that the alleged transaction between the Plaintiff and the late Thuku Macharia was null and void for lack of the Land Control Board consent, hence the order for specific performance is not available. Let me now examine the transaction between the 1st Defendant and the late Thuku Macharia. The evidence tendered indicates that Thuku Macharia, deceased, entered into a written agreement with the 1st Defendant, the late Paul Kariuki Mwangi to sell three (3) acres of his land. The purchase price was Ksh.18,000/= per acres. The entire sum of Ksh.54,000/= was paid to the vendor. The Land Control Board consent was obtained thus sanctioning the transaction. The Plaintiff registered a caution against LOC.19/GACHARARAGEINI/1297 when he realized that his late father wanted to sell the land to someone else. The late Thuku Macharia successfully convinced the Court to remove the caution thus paving the way for him to subdivide the land and to transfer **LOC.19/GACHARAGEINI/1433** to the late Paul Kariuki Mwangi. It is therefore apparent that there was no fraud nor mistake in respect of the transaction involving the late Thuku Macharia and the late Paul Kariuki Mwangi. For the above reason, I see no merit in the Plaintiff's suit. The same is ordered dismissed with costs to the 1st Defendant.

Dated and delivered at Nyeri this 23rd day of September 2011.

J. K. SERGON
JUDGE

In open Court in the presence of Mr. Kiminda for the Plaintiff and Macharia holding brief Njuguna for 1st Defenant.