



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE 472 OF 1986

SOSPETER MURIMI KARITU.....PLAINTIFF

VERSUS

MURIMI KARIO.....1<sup>ST</sup> DEFENDANT

DAVID MUGO MURIMI.....2<sup>ND</sup> DEFENDANT

J U D G M E N T

By a plaint dated 9<sup>th</sup> December, 1980 and filed in court on 11<sup>th</sup> December, 1986, Sospeter Murimi Karitu, hereinafter referred to as “*the plaintiff*” claimed as against Murimi Kario and David Mugo Murimi, hereinafter referred to as “*the 1<sup>st</sup> and 2<sup>nd</sup> defendants*” respectively:

- “(a) That the 2<sup>nd</sup> defendant herein do transfer land parcel No.Mwerua/Kanyokora/131 to the plaintiff herein.
- (b) A declaration that the 1<sup>st</sup> defendant has breached the contract and or his undertaking and or his obligation.
- (c) In the alternative and without prejudice to (a) above the defendants do refund the purchase price and do compensate the plaintiff for all the developments he has effected on the suit premises.
- (d) Costs of this suit.
- (e) Interest on above at court rates.”

The plaintiff’s claim was based on the following facts:

- “1.....
- 2.....
- 3.....

4.The 1<sup>st</sup> defendant is the real father of the 2<sup>nd</sup> defendant herein.

5. The plaintiff avers that by an agreement dated 14<sup>th</sup> January, 1986 entered between the plaintiff and the 1<sup>st</sup> defendant herein the 1<sup>st</sup> defendant agreed to sell to the plaintiff herein land parcel No.MWERUA

/KANYOKORA/131 measuring 7 acres at an agreed purchase price of Ksh.3500/=.

6. The plaintiff avers that the said land was registered under the name of the 2<sup>nd</sup> defendant in trust for the 1<sup>st</sup> defendant.

7. The plaintiff avers that it was under the terms and conditions of their agreement that the 1<sup>st</sup> defendant was to cause the 2<sup>nd</sup> defendant who was not a grown up to transfer the said land to the plaintiff after attaining the age of majority.

8.The plaintiff avers that he started occupying the suit land during the year 1968 with the knowledge and authority of the 1<sup>st</sup> defendant and that the plaintiff has already planted over 19,000 tea plants which covers over 6 acres within the said piece of land.

9. The plaintiff further avers that he has been developing the said land with the knowledge of the defendants and without any interruption from the defendants and value of the development on the suit land is over 900,000/=

10. The plaintiff avers that in breach of the said agreement the 1<sup>st</sup> defendant has refused and or neglected to cause the 2<sup>nd</sup> defendant to transfer land parcel No.MWERUA/KANYOKORA/131 to the plaintiff.

11. In the premises the plaintiff's claim against the defendant's is for an order requiring the 2<sup>nd</sup> defendant to transfer land parcel No.MWEUA/KANYOKORA

/131 to the plaintiff and for a declaration that the 1<sup>st</sup> defendant is in breach of his obligation or undertaking.”

Sometimes in January, 1989 the 1<sup>st</sup> defendant passed on. By an application dated 21<sup>st</sup> October, 1989, the 2<sup>nd</sup> defendant sought and was allowed to substitute the 1<sup>st</sup> defendant as a legal representative. Pursuant to that order of substitution made on 7<sup>th</sup> June, 1990, the 2<sup>nd</sup> defendant proceeded to file a defence to the plaintiff's claim in these terms:

“1.....

2.....

3. The defendant denies paragraph 5 of the plaint and puts the plaintiff to strict proof. The defendant further states that MURIMI KARIO now deceased had no capacity to sell land parcel MWERUA/KANYOKORA/131 as the same was not his land parcel.

4. The defendant denies that land parcel MWERUA/KANYOKORA/131 was registered in his names as a trustee for MURIMI KARIO now deceased. He further avers that his registration is first registration and his is an absolute proprietor as well as the sole beneficiary of the whole land parcel MWERUA/

KANYOKORA/131 to the exclusion of all other persons.

5.....

6. The defendant in answer to paragraphs 10 and 11 of the plaint states that he has no legal or

equitable obligation to transfer his own land to the plaintiff. There is no privity of contract.”

Following several interlocutory applications and adjournments, this suit eventually came up for hearing before me. As expected in cases of this nature, one of the parties was not ready to proceed. This time around it was the plaintiff. Though he was in court, he had not been accompanied by his two crucial witnesses. He sought an adjournment on that basis. The application was vehemently opposed by the defendant. As the matter was too old (21 years) I put down my feet and denied the plaintiff the adjournment sought. The plaintiff then took the stand and started testifying in support of his claim. Midway through his testimony however, Mr. Kariithi, his learned advocate applied to change tact in the matter. He then proposed that the matter be settled on the basis that the plaintiff be refunded the purchase price paid as pleaded in the plaint plus interest. Further that the developments on the suit premises made by the plaintiff be valued and suitably compensated for by the defendant.

The defendant was not averse to the proposal. However he was only prepared to pay the plaintiff the sum of Ksh.700,000/= in full and settlement of the entire claim. In a bid to resolve the matter amicably and with the concurrence and consent of the parties and their advocates I directed that:

“The District Agriculture Officer, Kirinyaga District do visit the land parcel number Mwerua/Kanyokora/131 and value the tea plants standing herein and to file further report on the land generally on or before 29<sup>th</sup> January, 2008.....”

Two reports were subsequently filed by Divisional Agriculture Office, Kerugoya as well as Divisional Forest Office. Mr. M.M. Mwangi, Divisional Agriculture Extension Officer, Ndia Division valued the tea plants and arrow roots on the suit premises. The valuation was as follows:-

1) Tea plants – 22750 stems X Kshs.160 = 3,640,000/=

2) Arrow roots – 0.4 Ha. X Kshs.100,000 = 40,000/=

Total value of tea and arrow roots 3,680,000/=

As for B.W. Kamenyi, a Forester, Ndia Division he valued the trees on the suit premises. His verdict was as follows:-

“Eucalyptus saliga (Blue Gum)

(1) Class one trees – volume 37.994M3 = Ksh.49,934.30

(2) Class two trees – volume 113.832M2 = Kshs.251,597.80

(3) Class three trees – volume 187.272 = Kshs.710,332.70

Gravella Robusta

(1) Two hundred young stems 200 X 500 = Kshs.100,000/=

The total value of the trees stands at Kshs.1,111,864.80”

The two reports were read to the parties. The defendant was not happy with the reports and requested the court to give him a chance to file another report through Ndima Tea Factory Co. Ltd. In the main he disputed the number of tea bushes. He claimed that the tea bushes were less than 22,750 as captured in the valuation report. I granted him the request. By a report dated 26<sup>th</sup> November, 2008, Mr. J.K. Mwega for Ndima Tea Factory Limited was of the view that:

“.....Tea planted in mid-late 1960’s, with expansion on the lower sides of the plantation. Total

bushes 1,500 – not brought into bearing is over 4 metres high. 10900 mature bushes. Total 12,400 bushes....”

This report too was read and availed to the parties.

I must hasten to add that the consent order of 22<sup>nd</sup> October, 2007 was directed at the District Agricultural Officer and not Divisional Agriculture Extension Officer and Divisional Forest Officer. However, since none of the parties raised any objection to the reports, I will not make much capital out of it. Perhaps these were the only officers with the necessary expertise in those fields in the District.

This time around however, the plaintiff was not satisfied with the report by Ndima Tea Factory Limited. He asked the court to appoint another valuer for the same purpose. My view was that this matter had dragged on unnecessarily and the court should no longer indulge the parties any further. Accordingly I stood over the matter to 6<sup>th</sup> February, 2009 for submissions if any, on the valuation reports on record. I further directed that whichever party that was not satisfied with the valuation reports was at liberty to engage his own valuer to prepare another valuation report and file it in court on or before the aforesaid date. As the advocate for the defendant was absent, I directed the advocate for the plaintiff to serve him with a hearing notice.

On 6<sup>th</sup> February, 2009, the advocate for the defendant and the defendant himself were absent from court though the plaintiff was present. The plaintiff’s advocate had infact filed his written submission on the valuation reports. The defendant had not. I was not satisfied as to whether the defendant’s advocate had been properly served with the Notice. Accordingly I stood over the matter to 13<sup>th</sup> February, 2009. On this date, again neither the defendant nor his advocate attended court though they had been served. Again the defendant’s submissions had not been filed. I noted though that the defendant’s advocate had accepted service under protest. That being the case, I once again stood over the matter to 6<sup>th</sup> March, 2009 to accommodate the defendant. I further directed that a mention Notice do issue and be served on the defendant’s advocate. Again on 6<sup>th</sup> march, 2009 the defendant and his lawyer failed to turn. However as this court was not sitting, the matter was mentioned by Kasango, J. and put off to 27<sup>th</sup> march, 2009 for mention before me. The same scenario replicated itself on 27<sup>th</sup> March, 2009. The defendant and his advocate were nowhere to be seen. I again stood over the matter to 8<sup>th</sup> May, 2009 to accommodate the defendant and or his advocate. Come 8<sup>th</sup> May, 2009 and this court was not sitting again. However the case was mentioned before E.J. Osoro, the Deputy Registrar of this court. On this occasion for once there was full representation. There was an advocate holding brief for Mr. Kamiru, for the defendant. The plaintiff’s advocate too was present. The deputy registrar with the consent of the advocates put off the matter to 15<sup>th</sup> May, 2009. Again neither the defendant and or his advocate attended court on that day though the date had been taken earlier in court by consent. It was then that I decided to resolve this matter once and for all, the absence of submissions by the defendant notwithstanding.

From the court record it appears that the counting of the tea bushes in the suit premises has been undertaken three times during the pendency of this suit. First it was by Messrs Tysons Ltd in 1993 who established that the number of the tea bushes were 21,000. Second is by the Divisional Agriculture Extension Officer, Kirinyaga who found the tea bushes to be 22,750. Finally, was J.K. Mwega of Ndima Tea Factory Limited who came up with 12,400 as the number of the tea bushes. Between the three reports I choose to believe that of Government Officials that is to say the reports by Divisional Agricultural Extension Officer and Divisional Forest Office. They had no reason to exaggerate and or under count the number of the tea bushes. I cannot however say the same of the report by Ndima Tea Factory Co. Ltd. The difference in the number of the tea bushes as reported by Ndima Factory is such as to lead to the conclusion that something in that report simply does not add up. It is not credible. In any event, it is doubtful whether whoever authored the report by Ndima Tea Factory is qualified in that field. Mr. J.K. Mwega, the author of the report is not shown

to have any expertise in the field or indeed any other field of expertise. He does not state in the report his field of specialty and or expertise. He may have been a mere employee in the factory with no particular skills in the field of tea bushes. As correctly submitted by Mr. Kariithi, the genuine valuation report is the one by the Divisional Agriculture Extension Officer who has the knowledge of value of crops and not persons working in a factory and without knowledge of how tea or any other crop is planted or grown.

For purposes of determining this dispute therefore, I would adopt the valuation reports by the Divisional Agricultural Extension Office and Divisional Forest Office. The judgment of this court is therefore that the defendant shall pay the plaintiff:-

- (a) Kshs.3,500/= being a refund of the purchase price.
- (b) Kshs.3,680,000/= being the total value of tea and arrow roots on the suit premises.
- (c) Kshs.1,111,864/80 being the total value of the trees on the suit premises.
- (d) Costs and interest.

However the aforesaid amount shall attract interest at court rates from the date of this judgment.

*Dated and delivered at Nyeri this 18<sup>th</sup> day of June, 2009.*

M.S.A. MAKHANDIA

JUDGE