



1. Land and Environment Law Division
2. Subject of main suit: - Land LR 13537/122 Thika.

Formerly plot No.6

- (i) Sale agreement between plaintiff and defendant
 - a) Dated 13.9.86 later abandoned due to wrong plot number being quoted.
 - (b) New agreement dated 27.9.86 quoting correct plot No 6.
- (ii) Purchase was shares
- (iii) Defendant is allegedly by fraud and misrepresentation presented himself to be owner of the plot 6 when in effect he had sold the same.
- (iv) False and on misrepresentation was made to the land buying company.
- (v) Defendant charged in criminal court for theft 9 years after the sale agreement.
- (i) Trial lasts 8 years (1986-1995) Defendant convicted of two counts of theft and procuring the registration of a title deed by false pretences.
 - (ii) Sentenced to 3 to 2 years imprisonment on respective counts.
 - iii) Appeals against sentence and conviction.
 - (iv) Appeals finalized 3 years later (1998). State does not support conviction and sentence.
 - (v) Plaintiff had filed civil suit together with an injunction to restrain the defendant from disposing of the suit premises.
 - vi) Suit pending from 1990 to 2007 when defendants application to dismiss suit is not granted (Aganyanya, J). (17.10.2007)
 - vii) Full trial evidence by both parties. Hearing 8.4.20089 and 9.4.2008.

3. Issue

- (a) Whether there was a sale of property
- (b) Whether the sale agreement was subjected to Land Control Board Consent
- (c) If it was, does it become null and void and or invalid or lack Land Control Board.
- (d) Did the plaintiff take possession

(e) Did defendant fraudulently cause himself to be registered

(f) Was relief envisaged in agreement by parts.

4. Held

4.1. That the plaintiff has not proved his case on a balance of probabilities.

4.2. Prayer sought was that the defendant held property in trust of the defendant instead of prayer for specific performance and or an alternative prayer.

4.3. Alternative provision within agreement not pursued.

4.4. Any other relief as court deemed fit not pleaded.

5. Case law - Nil

6. Advocates

D.M. Mboroki instructed by Mbichi Mboroki & Co. Advocates for the plaintiff- -present

A.N. Ngunjiri instructed by A. Ngunjiri & Co. Advocates for the defendant/respondent - present

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 807 of 1997

PETER PAUL MBURU NDURURI.....PLAINTIFF

VERSUS

JAMES MACHARIA NJORE.....DEFENDANT

JUDGMENT

I: Representation and/ Procedure

1. Peter Paul Mburu Ndururi is a male adult residing in Thika. He is the plaintiff in this case and is a businessman by occupation. M/s Mbichi Mboroki and Company Advocates represents him.

2. James Macharia Njore is a male adult also residing in the Thika area. He is the defendant in this case and used to be an advocate of the High Court of Kenya. He is represented by A.N. Ngunjiri & Co Advocate.

3. The plaintiff filed this suit on 4 April 1997 seeking orders of this court to make declaration that:-

i) The plaintiff was the lawful owner of LR13537/122 Thika Municipality and the defendant holds the same in trust of the plaintiff.

ii) An order directing the Registrar of Titles to rectify the registration of this register to reflect the plaintiff is the rightful and lawful owner of LR13537/122 Thika Municipality.

iii) A permanent injunction to restrain the defendant from charging, leasing, mortgaging selling or taking possession of LR 13537/122 Thika Municipality and or interfering in any manner with the improvements therein.

iv) Mense profit from the date of Possession till vacant possession is given.

v) Costs of the suit.

4. By an Interlocutory application of 4 April, 1997 the plaintiff sought for orders for Injunction restraining the plaintiff from having any dealings with the land more so from disposing or selling the same. The application was duly granted on 3 December, 1997 and the said defendant was restrained from dealing with the suit property by way of disposing or sale.

5. Nothing happened in this file until 2007 when the application to have this suit dismissed for non-prosecution was made. It came before the new Land and Environment Law Division, the presiding Judges (as he then was) Aganyanya J dismissed the said application and ordered that the suit proceed to trial (17.10.2007)

6. The dismissal of the application was understandable with orders made for the trial to proceed, because the plaintiff on filing this suit also had made a complaint to the police against the defendant in regards to his transaction with him. The defendant was arrested in 1995 and arrayed before the subordinate criminal courts. Therefore from the date of the sale agreement to the date of arrest, it took a period of 9 years. From the date the defendant was charged, to the date he was sentenced, it took 8 years. From the date he appealed against the sentence and released on bond pending appeal, to the time the appeal was finalized, it took 3 years.

7. The parties came before this court in April, 2008 and both gave evidence. A brief facts of their case is as follows:-

II Background

a) The Plaintiff Case

8. The plaintiff alleges to have been approached by the defendant to give him some moneys as he was financially embarrassed. The plaintiff was given two to three choices. Either he exchanges the moneys for land, a lorry or a saloon vehicle. He opted for land. When he entered into a sale agreement with the defendant of 13 September, 1986 the plot number was described as plot No 2. He went back and a new agreement was entered into. This was the agreement of 27 September 86 containing the correct plot number.

9. The relationship between the parties according to the defendant was mutual. The plaintiff was his very good friend then. The defendant was an advocate of the High Court and the plaintiff was a client of his partner.

10. According to the plaintiffs evidence which is contained in his testimony and in the proceedings of the lower court (section 34 Evidence Act Cap 80 applies the plaintiff) stated that the defendant did not move out of the premises but remained in the said premises and paid rent of Ksh.2000/-. This was acceptable to the plaintiff. He appointed valuers and agree to collect rent.

11. The agents after two or so years noted that the defendant fell in arrears of payment. They collected money only between 1986 to 1991. The plaintiff become suspicious according to his comprehension, the plot 6 sold to him was to await a title deed. The sale agreement would generally be given to the land buying company to record so that when a title would come out it would come out in the

name of the buyer.

12. When the plaintiff went to confirm about the title he discovered that it was already issued to the defendant without his knowledge. Both the defendant and the officer of the company concerned were arrested and charged. Later the officer was released and became the prosecution witness.

13. The plaintiff wants possession of the suit land. He seeks specific performance of the said contract but did not actually state so in his pleadings.

b) The Defendants case

14. The defendant in his evidence stated that the plaintiff was a client of his partner. As he was aware that there was quite a substantial amount of funds in the plaintiff clients account he asked the moneys he held there.

15. According to the defendant he was a prominent advocate in Thika. The sole advocate to the Municipality Council of Thika, the advocate to the Barclays Bank and other prominent clients. He came across a mayor of Thika and or Councilor who wished to sell his land.

16. He paid a deposit of Kshs 1.2 million toward the purchase price of Kshs. 5 million. The balance of the loan was going to come through Gideon Moi and the Agricultural Finance Company of Kenya. He would have been a very rich man if he was able to have succeeded in the sale. His problem arose when the title was held by Kaplan and Stratton Advocate.

They refused to release the title till, I understood, the bill of Costs were paid. By the time the title was released the "consent to the land control board had expired." The mayor's estranged wife objected to the said land being sold. A suit was filed and he, the defendant lost the suit on grounds that there was no Land Control Board consent.

17. He had planned to get rich. To achieve this the defendant stated he approached the plaintiff, a very good friend of his to buy his property. This was just a gimmick to put pressure on the seller of the 5 million farm that he was planning to buy. The said seller even paid Kshs. 2,000/- per month, to show the seriousness that he had no where to go till sale agreement was in place. He still lived in the premises, plot 6, but he took possession of the Kshs.5 million firm and began to keep cows and harvest the coffee. He never occupied the farm house.

18. When he finally lost his case he went back to rescind the agreement he had with the plaintiff but did not actually tell the plaintiff. Instead he proceeded to obtain the title deed for plot No.6.

19. I must explain at this juncture that the plaintiff was representing the land buying company as an advocate. That is the reasons he was allocated plot 6 which is adjacent to the University of Jomo Kenyatta Institute of Agriculture and Technology. The deceased was aware that the said property was sold to the plaintiff and title was been issued to the plaintiff. The Defendant informed them that the agreement had been recorded. This was not correct according to the plaintiff.

20. The defendant stated he was humiliated when hand cuffed marched down Thika streets with journalist taking pictures of him. He lost his clientele and he had to close his practice. He is now a businessman.

21. According to the defendant, the sale agreement had a clause, namely,

"Provided always that it is hereby agreed by and between the parties that if any party makes a breach of this agreement he shall pay the other party 10% by way of liquidated damage of the purchase price plus all monies expended towards the development of the plot."

22. The plaintiff ought to have pursued this clause as provided in the agreement, stated the

defendant, but did not do so.

II OPINION

23. The parties asked that I determine this case on eight issues agreed to be so determined. These are:-

23.1. "Did the defendant sell the plaintiff plot No.6 being a share of Ithuri Farm or a surveyed plot No.6 which later became LR No 13537/122?"

23.2. Was the transaction between the plaintiff and the defendant subject to the Land Control Board Consent?

23.3. If the answer to 23.2 above is in the affirmative did the transaction between the plaintiff and defendant become null and void and or invalid for lack of Land Control Board consent and in the circumstances, is the plaintiff entitled to the orders sought herein?

23.4. Did the plaintiff take possession of Plot No 13537/122 upon execution of the sale agreement?

23.5. If the answer to (No.4) is yes on what terms did the defendant continue to occupy the plot?.

23.6. Did the defendant on or about October 1988 falsely and fraudulently caused himself to be registered as the proprietor of Land parcel No. 13537/122?

23.7. Whether the relief sought herein was envisaged and or supported by the agreement by the parties herein?

23.8. Who is to bear the costs of the suit?

24. From the evidence before the court, I find that the defendant did indeed sell to the plaintiff Plot No.6 being the share of Ithuri Farm or a surveyed plot No.6 that later became LR NO. 13537/122 for Kshs 355,000/-. His intention though was that the sale was subject to his purchasing another larger farm for Ksh. 5 Million. This was not in the agreement nor was it in the agreement that the intention of the sale was to provoke the owner of the Kshs.5 million farm to hurry up with the sale. The plaintiff, it is unclear as to whether he was aware of these intentions, namely, if the Ksh.5 million sale falls through, whether his sale agreement falls through also.

25. It was during an interlocutory application with Mbitio, J. that the issue of the Land Control Board Consent was raised. The Hon. Judge in dealing with the application for injunction thereafter went into the merits and demerits of there being Land Control Board consent but that this was subject to proof in the trial.

26. Under the Land Control Act, Land Board one must give consent to transactions that involve agricultural land. The land that is not within the agricultural land is:- **"i) A municipality or a township or**

ii) An area which was on or at any time after the 1st July, 1952, a township under (now repealed) or

iii) An area which was on or at any time after the 1 July, 1952 a trading centre under the trading centre ordinance (now repealed) or

iv) A market"

27 The property in question was an agriculture land. Land buying company of 223 members brought the said land under the Public Companies Act. In 1980's the policy of the government thereafter changed and it ordered all Public Land Buying Companies to dissolve and to sub-divide the properties to its members and each have its title. This explains why the defendant at first held shares with the company. Later when the property was sub-divided he was issued with a title but not under the Registered Lands Act Cap 300 but under the Registered Titles Act cap 28 Laws of Kenya.

28. The time of the sale agreement the defendant held shares under the Registered Company known as Ithuri Farmers Company. No Land Control Board was required at that point. When a person wished to sell his shares, a sale agreement was tabled before the Ithuri Farmers Board and land is transferred. The company, in error according to them, there were under the impression that the agreement was rescinded. They registered the plaintiff but were not able to reverse this due to there required to be a court order.

29 The parties did not address me fully on why the property title deed was made under the Registration of Titles Act Cap 281. This is an act of Parliament that "provides for the transfer of land by registration of titles.

"This act also provide that the certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the property thereof shall be later by all courts as conclusive evidence that the person named therein as proprietor of land is the absolute and indefeasible owner thereof subject to the encumbrances easements restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation or which he is proved to a party".

30 At the time of the sale transaction Land Control Board hearing was undertaken. The plaintiff state this was done when the company attended the various consent boards – the defendant stated that this according to the agreement were to attend to the "Offices of the Directors of the company to effect transfer of the plot to the name of purchase and shall obtain all consents documents necessary to effect transfer.

31. According to the evidence before me all consents were never effected by the parties jointly.

32. The transaction may or may not have been subject to the Land Control Consent Act but in either case the agreement required that all consents be obtained included that of the company.

33 Upon execution of the sale agreement the plaintiff did not take physical possession of the property. He stated over and over again in the subordinate court that the defendant remained in possession and lived there. The plaintiff was under the impression that the defendant was his tenant subject to the sale transaction and therefore a licensee. The defendant stated that this was only a "*gimmick*" to compel the seller of the Kshs. 5 million farm to sell. At one time he did pay. Physical possession was with the plaintiff. The defendant was being paid rent. Subject to the sale agreement, the defendant was meant to be a tenant, unfortunately there is no where in the agreement that this was part of this arguments. In the subordinate court the agents collected the rents. They for the subject court the agents collected the rents. They stated they ever raised it from Kshs. 2,000/= to Kshs. 3,000/= to distress of rent was effected, no case was filed with the Rent Restriction Tribunal to recover the said rent or in effect to increase the rents.

34. The other issue was whether the plaintiff falsely and fraudulently caused himself to be registered as the proprietor of the land? This is where the crucial court case was important. It was imperative that the plaintiff provides there was fraud and misrepresentation on the defendants part. Unfortunately in a civil claim the person who alleges requires to prove. The plaintiff got a conviction against the defendant in the lower courts. This conviction could not stand on appeal. According to the defendant the agreement had fallen apart. He collected his title. The plaintiff claims this was fraud or misrepresentation. It is the plaintiff to prove this ground. He did so by the lower court proceedings which have held otherwise. Should the land buying company also been sued.?

35. The plaintiff claims the defendant holds the property in trust of the plaintiff. I expected the

plaintiff to claim specific performance or alternatively the refund of the purchase sum for non-compliance of the sale agreement by the seller defendant. I do not think he can rely on the doctrine of trust under the Law of Equity which he claims herein. There is no relationship between the parties for this. This was purely a commercial transaction which fell apart. The plaintiff should have sought prayers for specific performance.

III: Conclusion

36 I hereby find that the plaintiff has not proved his case on a balance of probability. There was no prayer for “any further relief by the court that it deems fit”.

37. I accordingly dismiss this suit.

38. On the issue of costs I am of the view that each party bears its own costs and accordingly orders so.

DATED THIS 10TH DAY OF APRIL, 2008 AT NAIROBI

M.A. ANG’AWA

JUDGE

D.M. Mboroki instructed by Mbichi Mboroki & Co. Advocates for the plaintiff- -present

A.N. Ngunjiri instructed by A.N. Ngunjiri & Co. Advocates for the defendant/respondent - present