

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Suit 19 of 2004

TABITHA WAMUYU ZACHARIA PLAINTIFF

Versus

ZAKARIA MURIUKI WARUI 1ST DEFENDANT

EDWARD MURIUKI KAMATHI 2ND DEFENDANT

JUDGMENT

The plaintiff brought an action against both defendants praying for a declaration that the transfer made by the first defendant to the second defendant of parcel Numbers. **KONYU/BARICHO/ 2066, 2082 and 2083** was null and void. That the court would order that the said parcels of land would be transferred to the plaintiff. The claim was defended. The first defendant stated that the plaintiff was his wife. He pleaded that she had no cause of action against him since she can settle with him on parcel no. NANYUKI/MARURA/BLOCK 6/3028 (Endana). The second defendant in his defence denied the plaintiff's claim and counter claim that the plaintiff occupied those portions of land unlawfully and prayed for her eviction. When the case came up for hearing the plaintiff's advocate did not attend but the case proceeded for hearing. The plaintiff in evidence stated that she and the first defendant her husband sat down with their sons and the clan in 1991. The first defendant proceeded to share his property amongst his six sons and his wife. The sons were to get 5 plots and she was to get parcel numbers. 2066, 2082 and 2083. The first defendant retained for him self 8 plots. As time went by he sold those plots. In the year 2003 he came on the land with a purchaser and told her that he had sold the parcels in this action to him. The plaintiff showed that purchaser who is the second defendant the agreement drawn whereby the first defendant gave his land to his sons and his wife. That agreement was relied upon by the plaintiff as evidence that the first defendant had given her the land in question. The agreement was witnessed by 3 persons but was not signed by the first defendant. The first defendant in his evidence stated that those parcels of land belong to him and that he was entitled to sell them. He said that he retained in his name parcel No. 2066. He however sold to the second defendant parcel No. 2082 and 2083. He has to date transferred those parcels to the second defendant and the second defendant has paid in full the purchase price. On selling those parcels of land he vacated the land but the plaintiff refused to follow him at Endana property. He purchased that property at Endana on 7th August 1997. The property comprises of 5 acres. He desires that the plaintiff his wife would join him on that land. The second defendant in evidence corroborated what was stated by the first defendant. He confirmed that he purchased parcel numbers. 2082 and 2083. He produced before court certificate of official search which showed that he was the registered owner. He therefore prayed that the court would order the plaintiff to vacate the said parcel of land. That in totality was the evidence.

What is clear is that the agreement relied upon by the plaintiff was not supported by consideration. Indeed looking at the translated version of that agreement it clearly shows that it was not invested with the insignia of contract. Indeed it does look like the parties to that agreement did not intend to invoke the assistance of the court to honour their agreement. It is essentially a family agreement and that being so it was not intended to be the subject of litigation. In the case of **Balfour vs Balfour (1919) 2KB 571** the court considered a case where a civil servant had agreed to give his wife a monthly maintenance of 30 pounds since she was unable to accompany him when he was transferred out of England. He was sued by

her for breach of that agreement. The Court of Appeal of England held that no legal relations had been contemplated and that the wife's action had to fail. Atkin LJ had this to say:-

“It is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in law. The ordinary example is where two parties agree to take a walk together or where there is an offer and an acceptance of hospitality. Nobody would suggest extraordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife. to my mind those agreements, or many of them, do not result in contracts at all Even though there may be what as between other parties would constitute consideration They are not contracts because the parties did not intend that they should be attended by legal consequences.”

Similarly in this case it is clearly that no legal relation was intended with the agreement relied upon by the plaintiff. For that reason the plaintiff's claim does fail. The second defendant claim in the counter claim does succeed on a balance of probability. The second defendant proved ownership of parcels no. 2082 and 2083. The judgment of this court is as follows:-

- 1. The plaintiff claim is hereby dismissed with costs to both defendants.***
- 2. An order is hereby issued for the plaintiff to vacate from KONYU/BARICHO/2082 and 2083 within 60 days from this date hereof.***
- 3. The plaintiff failing to vacate as stated in no. 2 above an eviction order is hereby issued against her from property no. KONYU/BARICHO/2082 and 2083.***
- 4. The 2nd defendant is awarded costs of his counter claim.***

DATED AND DELIVERED THIS 22ND DAY OF OCTOBER 2008

MARY KASANGO

JUDGE