



Mugwe & another ((Administrator of the Estate of the Deceased-Jeremiah Mugwe Njoroge)) v Kamau & 2 others (Environment & Land Case 628 & 532 of 2013 (Consolidated)) [2022] KEELC 15147 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15147 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 628 & 532 OF 2013 (CONSOLIDATED)
OA ANGOTE, J
NOVEMBER 24, 2022

BETWEEN

JAMES WARATHO MUGWE PLAINTIFF
(ADMINISTRATOR OF THE ESTATE OF THE DECEASED-JEREMIAH
MUGWE NJOROGE)

AND

ROSE MUGURE KAMAU DEFENDANT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 532 OF 2013

BETWEEN

LOISE MUGURE GICHUHI APPLICANT

AND

JOHN KAMAU MUGWE 1ST RESPONDENT
JAMES WARATHO MUGWE (ADMINISTRATOR OF THE ESTATE OF
JEREMIAH MUGWE NJOROGE - DECEASED) 2ND RESPONDENT

JUDGMENT

B ackground

1. This judgment is with respect to two suits, being ELC 628/2013 and 523/2013, which were consolidated by an order of the court on October 20, 2018.



2. In ELC 628 of 2013, the plaintiff vide an amended plaint dated March 27, 2017, sought for the following reliefs against the defendant:
 - i. An order of eviction of the defendant from LR No Limuru/Bibirioni/4232
 - ii. Costs of this suit.
3. It is the plaintiffs' case that the late Jeremiah Mugwe Njoroge is the registered proprietor of parcel of land known as Limuru/Bibirioni/4232 which measures 0.061Ha (hereinafter the suit property) and has been the registered proprietor thereof since June 20, 2012 and that the defendant has without the authority and consent of the plaintiff trespassed onto the suit property and has declined to vacate the same despite a demand and written notice to sue having been issued.
4. In response to the original plaint, the defendant filed a defence on June 28, 2013. At the instigation of the Plaintiff vide an application dated November 28, 2013, the court on February 9, 2015 struck out the defence on the grounds that it did not disclose any reasonable defence.
5. After the amendment of the plaint, the defendant filed a "defence to the amended plaint" dated July 13, 2017 in which it stated that the suit is an abuse; that on May 3, 2013, the deceased filed miscellaneous application No 4 of 2013, which he later abandoned because the same was bad in law
6. The defendant averred that on December 23, 2004, together with her then husband David, they entered into a legally binding sale agreement and purchased a plot measuring 100*100 feet being John Kamau Mugwes' share of inheritance in LR No Limuru/Bibirioni/1572 and that she continues to be in occupation of the suit property. The defendant averred that she has since filed and obtained judgment in ELC (O.S) No 523 of 2013 under order 34 rule 8 of the *Civil Procedure Rules*.
7. The plaintiff in ELC No 523 of 2013 instituted a suit by way of originating summons seeking the following reliefs;
 - i. A declaration that a portion of land measuring 100*100 feet of the 1st respondents share of inheritance in land reference number Limuru/Bibirioni/1572 belongs to Loise Mugure Gichihi by virtue of a sale agreement dated December 23, 2004 and by virtue of the sufficient consideration paid to the 1st respondent.
 - ii. That this honourable court be pleased to order for sub-division and registration of the applicant as sole proprietor of the subject land measuring 100*100 feet from the Land Reference Number Limuru/Bibirioni/1572 by the Commissioner of Lands and in default the Deputy Registrar, High Court of Kenya, Nairobi to effect the said transfer and registration of title in the applicants names.
8. The summons was supported by an affidavit in which the plaintiff deponed that on December 23, 2004, she together with her husband entered into a legally binding agreement for the purchase of the plot of land measuring 100*100 feet, being the 1st respondents' share of inheritance in Land Reference Number Limuru/Bibirioni/1572.
9. It was deponed by the plaintiff in the originating summons that they have been in possession and ownership of the aforesaid property until 2011 when their marriage was dissolved; that it was a term of the dissolution of the marriage that her husband maintains the children while she, together with the children, continued residing on the property which they occupy to date.



10. The defendants filed a memorandum of appearance and a response to the originating summons on June 14, 2013 outside the stipulated timelines. On July 4, 2013, the court directed that default judgment be entered as against the defendants and the matter was scheduled for formal proof hearing.

Hearing & evidence

11. The two matters proceeded for hearing on February 23, 2022. PW1 was James Waratho Mugwe, the plaintiff in ELC628 of 2013 and 1st defendant in ELC 523 of 2013. It was his testimony that he is a business man and the legal representative of the Estate of the late Jeremiah Mugwe Njoroge and that his late father is the registered proprietor of the parcel of land known as Limuru/Bibirioni/4232 which is a sub plot curved out of the larger parcel of land known as parcel 1572.
12. According to PW1, on December 23, 2004, his brother John Kamau Mugwe entered into an agreement with one David Gichuhi Kamau for sale of the portion of land measuring 100 x 100 feet to be curved out of parcel number 1572, which agreement was reduced into writing and witnessed by one Mr Wariuki Advocate and that the portion of the suit land was his brother's anticipated share of inheritance from their father.
13. It was the evidence of PW1 that the purchaser paid the deposit of the purchase price but was unable to complete the balance; that his brother was equally unable to complete the transaction after their father declined to effect the transfer of the plot in his favour; that as a result of the aforesaid circumstances, his brother together with the purchaser mutually agreed to rescind the agreement; that on August 31, 2012, they revoked the agreement in writing and that the entire consideration paid by the purchaser was refunded.
14. According to PW1, after the refund of the purchase price, the purchaser vacated the suit property; that the vendor had by this time become estranged from his wife, the defendant herein; that the vendor wrote a letter notifying her that he had divested his interest in the suit property and the same no longer belonged to him and that despite a request and a demand letter asking her to vacate the property, the defendant has declined to do so.
15. PW1 reiterated that there was no agreement between his father, the owner of the suit property and the defendant; that the agreement was between the vendor and his brother who did not own the land; that the defendant is the wife of the late David Gichuki Kamau and that the defendant found a house on the suit property which was put up by his brother kamau. it was the evidence of pw1 that the defendant lives on the property to date.
16. DW1 was Rose Loise Mugure, the plaintiff in ELC 523 of 2013 and defendant in ELC 628 of 2013. DW1 informed the court that she was at all material times lawfully married to David Gichuhi Kamau and that they both purchased the suit property measuring 100*100 feet being John Kamau Mugwe's share of inheritance in LR No Limuru/Biririoni/1572 for value pursuant to a sale agreement dated the December 23, 2004.
17. According to DW1, she has since the time of the purchase been in use, occupation and ownership of the suit property; that in 2011, her husband filed a divorce case and that it was a term of the dissolution of the marriage that he maintains the children while she stays with the children on the said property.
18. DW1 stated that on May 3, 2013, the deceased, Jeremiah Mugwe Njoroge, filed a miscellaneous application but abandoned the same; that the court in ELC 523 of 2012 granted her judgment in respect of LR Limuru/Bibirioni/1572 and that she was relying on the agreement dated December 23, 2004 between David and John.



19. It was the evidence of DW1 that she is not aware of the revocation of the sale agreement; that she is unaware that David was refunded the purchase price; that when they bought the land, she was still married to him and that she has lived on the suit property since 2004.
20. DW1 informed the court that when they took possession of the property, it had a three roomed house; that she has created an extension thereon; that her children have been brought up on the land; that they bought the land for Kshs 350,000 with Kshs 280,000 being paid upfront and that the balance was to be paid upon the transfer of the land.

Submissions

21. The plaintiff's counsel submitted that the plaintiff has a valid title to the parcel of land known as Limuru/Bibirioni/4232 which was curved out of a larger parcel of land number known as parcel number 1572; that parcel number 4232 stands separately with its own title and that the defendant's contention that she is entitled to 100*100 feet of parcel 1572 aforesaid is misguided as the said parcel of land is no longer in existence.
22. It was submitted that the sale agreement which the defendant is relying on shows that she was only a witness and not a purchaser or co-purchaser and therefore no privity of contract exists between the defendant and the vendor and that the defendant's status on the suit property is that of a trespasser and a squatter.
23. Counsel cited the case of *Ochako Obinchi vs Zachary Oyoti Nyamongo* [2018] eKLR as well as section 3 of the *Trespass Act* which defines trespass as any unjustifiable intrusion by one person upon the land in the possession of another.
24. The Plaintiff's counsel submitted that it is undisputed that the deceased is the registered proprietor of the suit property and as such, has absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto pursuant to the provisions of section 24 of the *Land Registration Act*.
25. It was submitted that in any event, the seller of the property was never the registered proprietor and was not entitled to sell it and that the above notwithstanding, the sum of Kshs. 280,000 being the deposit of the purchase price paid by the defendant's former husband was fully refunded vide a banker's cheque dated August 31, 2012 pursuant to the revocation of the agreement that was entered into.
26. Counsel for the plaintiff lastly submitted that there is no evidence that any monies were ever paid by the defendant to the vendor; that subsequently, no consideration is being held by either the estate of the deceased proprietor or the disclosed vendor and that the court should uphold the plaintiff's suit and dismiss the defendant's originating summons.
27. The defendant's advocate submitted that there is a valid binding contract for the sale of the suit property between the defendant's husband and one John Kamau witnessed by the deceased Jeremiah Mugwe; that the contract met the prerequisites set out in section 3(3) of the *Contract Act* and that pursuant to section 25 of the *Land Registration Act*, the rights of a proprietor whether acquired on first registration or subsequently for valuable consideration are not liable to be defeated.
28. It was submitted that the defendant was at all material times lawfully married to David; that they bought the suit property which she continues to reside on with her children; that this court in ELC 523 of 2013 granted the defendant judgment in default of appearance; that the defendant in that suit proved purchase of the suit property and that the defendant took possession of the suit property in 2004 and has been occupying it since then



Analysis and Determination

29. The present dispute revolves around the ownership of the parcel of land measuring 100x100 feet of LR Limuru/Bibirioni/1572 which has since been surveyed as LR Limuru/Bibirioni/4323 (the suit property).
30. DW1's case is that she, together with her husband, purchased property being a portion measuring 100*100 feet of Limuru/Bibirioni/1572 sometime on December 23, 2014 for valuable consideration; that after her divorce, she remained on the property to date with her children and that PW1 is attempting to take away her rightful property.
31. In support of her claim, she adduced into evidence the sale agreement dated December 23, 2004, copies of divorce proceedings in respect of Divorce Case No 1 of 2011; the letter dated October 18, 2010 from the Deputy County Commissioner to the District Land Registrar, Kiambu seeking a restriction on the property LR Limuru/Bibirioni/4232 and request for judgment in the originating summons dated June 21, 2013.
32. On his part, PW1 informed the court that his deceased father is the registered proprietor of all that parcel of land known as LR No Limuru/Bibirioni/4323, which property is a sub-plot curved out of parcel number 1572; that his brother purported to sell a portion of parcel of land number 1572 being 100*100 feet in anticipation of receiving a share thereof as his property and that his brother granted the purchaser possession of the property.
33. According to PW1, both parties were unable to complete the transaction as his brother had not been issued with a title to the property while the vendor was unable to pay the balance of the purchase price leading to a mutual revocation of the agreement and that after the revocation of the sale agreement, the purchaser was refunded the balance of the purchase price.
34. The plaintiff adduced into evidence a copy of limited grant of letters ad-litem issued to him on March 3, 2015; title deed for LR Limuru/Bibirioni/4232 registered in the names of Jeremiah Mugwe Njoroge on June 14, 2013; the official search for title number Limuru/Bibirioni/4232, the green card extract for Limuru/Bibirioni/3140 and the sale agreement dated December 23, 2004.
35. PW1 also produced in evidence the acknowledgements of receipt of Kshs 145,200 cash by the vendor on March 4, 2005 and Kshs 90,000 on the March 11, 2005; revocation of agreement dated August 31, 2012; copy of bankers cheque for the sum of Kshs 280,000; receipt dated August 31, 2012 being payment of Kshs 4,000 for revocation of agreement; certified copy of the judgment in Divorce Cause 1 of 2011; and the letter dated September 19, 2012 from David Gichui Kamau to DW1 informing her that the plot was no longer his as he had failed to pay the balance and that the purchase price and had been refunded.
36. The sale agreement that was adduced in evidence was duly signed by PW1's father and the vendors' wife both of whom consented to the sale. According to the agreement, its completion was predicated upon payment of the balance of the purchase price and transfer of the title. There being no evidence of either, it is clear that the agreement failed for want of consideration.
37. Further, it has been shown that not only was the sale agreement formally revoked, but the partial purchase price that was paid towards the sale was refunded. The above notwithstanding, it is apparent that DW1 was not party to the agreement, neither was there a clause in the agreement to support any trust, agency, collateral contract or express or implied term on behalf or to include her in the agreement in any capacity other than being a witness.



38. Under the common law doctrine of privity of contract, rights and obligations under a contract are only conferred or imposed on the parties to the contract. This position was affirmed by the Court of Appeal in *Aineah Liluyani Njirah vs Aga Khan Health Services* [2013] eKLR which provided as follows;

“The essence of the privity rule is that only the people who actually negotiated a contract (who are privity to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him.”

39. DW1 cannot therefore rely on a contract that she was not a party to and which was in any event revoked, admittedly, inter alia, for lack of title by the vendor.

40. That being the case, and the plaintiff in the OS having not been on the land for more than 12 years since she took possession, she does not have any recognizable claim over the suit property. In the circumstances, ELC 523 of 2013 (Originating Summons) is dismissed with costs, while the plaint in ELC No ELC 628 of 2013 is allowed as follows:

- i. An order of eviction of the defendant, Loise Mugure Gichuhi, and any one claiming the land under her, from LR No Limuru/Bibirioni/4232 be and is hereby issued.
- ii. Costs of this suit to be paid by the defendant.

DATE, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for Plaintiff

Mr. Ranah for Wachakana for Defendant

Court Assistant - June

