



REPUBLIC OF KENYA

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

Civil Case 4112 of 1993

SAMUEL KINYANJUI MUNGAIPLAINTIFF

VERSUS

JOSEPHAT MUGO KIMANIDEFENDANT

RULING

1. Land and Environmental Law Division

2. Subject of main suit – Land

LR Dagoretti/Riruta/1335

LR Dagoretti/Riruta/1534

a) Originating summons section 122. The Registered Lands Act Cap.300.

b) Sale agreement between plaintiff and father to defendant Josephat Mugo Kimani – called Kimani Chege.

c) Sold 2 pieces of land to plaintiff

d) Only one land given to plaintiff who had paid for 2 parcels of land

e) The reason Hccc1052/78 where land to be given to plaintiff was fraudulently transferred to 2nd defendant in above case

f) Hccc1052/78 withdrew by Kimani Chege

Died soon thereafter

g) Plaintiffs sued as defendants son

h) Defendants son admits purchase money received by father but no more plots left to give.

3. Held: a) That defendant, as administrator to estate of deceased has

double enrichment holds land and money

b) That the plaintiff be given land where no land available the equivalent sum of money at to-days rate/value to enable plaintiff purchase equivalent land.

4. Case law

a) Hirani Ngathe Githere v Wanjiku Munge (1979) KLR50

b) Simiyu v Watambala (1985) KLR 852

c) Wasike v Swala (1985) KLR 425

5. Advocates

W.O. Ochanda for Ochanda Onguro & Co. Advocates for the plaintiff/applicant – present

K Mwangi for B.W. Kamunge & Co. Advocates for the defendant/respondent- present

I: Background

1. A sale agreement for purchase of land from the Original Land title LR Dagoretti/Riruta/1175 was entered into between Samuel Kinyanjui (buyer) and plaintiff herein and Kimani Chege (now deceased) (seller). The agreement of 3 March 1977 stipulated that two plots of 140' x 100" would be sold from the sub-division at Ksh.26,500/-.

2. The plaintiff paid the sum of Ksh.26,500/- in installments of Ksh.18,000/- and 8,500/-. He fully completed the payments satisfactory. The sub-division took time. There were other buyers. The deceased was illiterate. He claimed that he sold to George Ngugi Nganga and David Mureithi Mbugua portion of his land on the scheme of sub-division being Dagoretti/Riruta/ 1531 and Dagoretti Riruta 1932 respectively. The two fraudulently inserted and changed the numbers of these plots to Dagoretti/Riruta/1537 and Dagoretti /Riruta/1541 fraudulently.

The effect was that the plaintiff herein was allocated land parcel Dagoretti/Riruta/1535 and Dagoretti/Riruta/1534 or 1537. The deceased sued the two persons in Hccc1052/78. He claimed the return of the two plots on grounds that he had been deceived in signing the documents through fraud. His old age was taken advantage off. The High Court heard his evidence De Bense esse Harris J.

3. According to the plaintiff the said deceased had asked that he be patient and want to be allocated one out of the two plots. The deceased was in effect able to give the plaintiff one plot. The second plot was to be given to the plaintiff from one of the two plots fraudulently allocated by two defendants in Hccc1052/78 plot number Dagoretti Riruta/1541 was ear marked for the plaintiff.

4. Unfortunately the deceased passed away. He did withdrew the whole claim against the two persons sued in the Hccc1052/78 case.

5. The plaintiff in the meantime had paid for this plots but had been only given one. The said defendant in this suit therefore holds funds for one plot and retains one plot. He came to court and give evidence whereby he did acknowledge this fact but had never addressed his mind to the fact that it amounts to double enrichment and or possibility of paying for the said refund. He did tell the court all the land had been allocated and given out.

III Findings

6. I find as a fact that the plaintiffs had entered into a lawful sale agreement and had purchased two plot from the deceased I also find that the plaintiff was put in possession of only one plot and not two as

agreed. Should the plaintiff be entitled to his plot and or equivalent value of the plot purchased?

iv) Limitation of actions/consent

7. The defendants stated that the Land Control Board was required for such a transaction to be valid. He relied on the case law of :-

Hirani Ngathe Githere v Wanjiku Muge (1979) KLR 50

Where there are controlled transaction in land parties require to obtain land control bond consent.

In the case law of Simiyu v Wantambala (1985) KLR 852

Where a sale transaction fails only purchase price is entitled to be received.

The case of :-

Wasike v Swala

(1985) KLR 425

Only a refund can be claimed.

8. In this case the plaintiff had entered in an argument. The deceased requested he awaits the outcome of a ending case that the deceased filed in 1978. This case was terminated in 1988 about 10 years later.

9. It was the deceased who caused the plaintiff not to take action pending the suit where he was not party to one of the defendants their was in effect the one who took the plot he would have been allocated. I find that the action accrued and is such the mater before court is properly before me. The claim though can only be that the plaintiff be refunded the purchase price of one plot.

10. I accordingly orders so, and enter judgment for the plaintiff be awarded a refund of his purchase price. Further that the defendant and the plaintiff do compute the sum being the actual refund sum together with interest at 12% per annum.

11. I award the costs of this suit to the plaintiff.

Dated this 27th day of July 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

W.O. Ochanda for Ochanda Onguro & Co. Advocates for the plaintiff/applicant – present

K Mwangi for B.W. Kamunge & Co. Advocates for the defendant/respondent- present