



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROBİ (MILIMANI LAW COURTS)**

**CIVIL SUIT NO 1496 OF 2002**

**AYUB NDUNGU.....PLAINTIFF**  
**VERSUS**  
**MARION WAITHERA GACHERU.....DEFENDANT**

**JUDGMENT**

By a plaint dated 18<sup>th</sup> September 2002 filed in this court on 19<sup>th</sup> September 2002, Ayub Ndungu, the registered proprietor of the land parcel known as title No. DAGORETTI/UTHIRU/945 has sued Marion Waithera Gacheru praying for judgment against her for:

- (a) An eviction order for the Defendant to vacate the piece of land (known as) Dagoretti/Uthiru/945 and demolition of the illegal structures constructed thereon (addition my own)
- (b) A permanent injunction restraining the Defendant and/or her agents, servants from collecting rent from the tenants on the suit property, interfering with the Plaintiffs quiet possession, alienation, selling, disposing, trespassing or in any other way dealing with Dagoretti/Uthiru/945
- (c) Mesne profits for illegal occupation
- (d) Costs of the suit and interest.

Briefly stated in his plaint, the plaintiffs claim is that the Defendant has invaded the plaintiff's piece of land and has put up illegal structures thereon from which she has drawn and continues to draw profit by way of rent. The plaintiff contends that his pleas to the Defendant to vacate the land have fallen on deaf ears and his efforts to urge the Defendant to leave have been fruitless.

In her defence filed on 18<sup>th</sup> October 2002 the defendant has denied that she is in illegal occupation of the suit premises or that she has invaded the same. She avers that she occupies the suit premises pursuant to her late husband's purchase of the same from the plaintiff through a sale transaction wherein the plaintiff voluntarily handed over possession to the Defendant's late husband. The defendant further avers that the structures referred to by the plaintiff are not illegal structures and were constructed by her late husband consequent upon the purchase of the suit land from the Defendant. She contends that her husband paid the agreed purchase price of Kshs 45,000/= which the Plaintiff has attempted to vary unilaterally and to increase to shs 50,000/= then shs 90,000/= and finally Kshs 200,000/=. According to the Defendant, the plaintiff is guilty of breaching the sale agreement between himself and her late husband by not completing the sale even after consent to Transfer had been obtained. She therefore counterclaims against the Plaintiff and prays for judgment against him as follows:

- (a) A declaration that the total purchase price for the suit premises is Kshs 45,000/= and the same has been paid in full.

- (b) A declaration that the Defendant is entitled to immediate transfer of the suit premises
- (c) An order of mandatory injunction (to) compel the plaintiff to execute a transfer and necessary consents in favour of the Defendant and in default the Deputy Registrar of the High court to execute the same.
- (d) Costs of the counterclaim
- (e) Interest on prayers (a) (b) and (c) of the counterclaim
- (f) Any other relief the court may deem just to grant

The Defendant has brought her counterclaim as the administratrix of the Estate of her late husband David Mbugua Gacheru and has expressed her readiness and willingness to pay any genuine amount as would be found to be due in respect of the suit premises. She alleges fraud on the part of the Plaintiff in refusing to transfer the land to her husband despite payment of purchase price. In his reply to Defence and Defence counterclaim the plaintiff insists that the Defendant is in illegal occupation, denies the alleged transaction between himself and the late David Gacheru, the alleged voluntary handing over of possession and development of the property by the late Gacheru. He does however admit the existence of the sale agreement which he had not at all alluded to in his plaint. He avers that the Defendant's late husband breached the said sale agreement by refusing to pay the full purchase price and maliciously tampering with the boundary of the suit land "thereby making him rescind the agreement for sale. He also denies the consent to transfer referred to by the Defendant.

On 11<sup>th</sup> December 2003 the parties herein filed a list of Agreed Issues as follows.

1. Whether or not the Defendant is a trespasser in land Reference No. Dagoretti/Uthiru/945 the subject matter herein
2. Whether or not Land Control Board's consent in respect of the purported sale Agreement was ever sought and whether the said consent is still valid.
3. How much was the agreed (total) purchase price for land reference No. Dagoretti/Uthiru/945 was and is there any outstanding payments?
4. Whether or not the Plaintiff fraudulently refused to transfer the land to David Mbugua Gacheru
5. Is the Defendant entitled to the land?
6. Whether or not the Plaintiff's defence to counterclaim is properly before the court
7. Whether the Plaintiff can claim the same orders in the plaint in a motion (?)
8. Whether Civil Suits H.C.C.C. No. 5117 of 1992 are still pending in court.

In his written submissions filed on 8<sup>th</sup> February 2006, Counsel for the Plaintiff narrows down the issues to three, namely

- (a) was there a valid Sale Agreement between the Plaintiff and the deceased?
- (b) Was the Sale Agreement concluded and if so is the Defendant entitled to the transfer in her favour?
- (c) Did the Plaintiff fraudulently refuse to transfer the land to the Deceased?

It would appear from the above that the Plaintiff has abandoned his claim that the Defendant is a

tresspasser on the suit premises and/or that she has invaded the property and put up illegal structures thereon from which she draws rent to the detriment of the Plaintiff. It appears to the court that the Plaintiff has chosen to shift from his previous position as regards what he considers to be the issues for determination upon his realization that the evidence tendered herein does not support the allegations made in his plaint.

In his written submissions counsel for the Defendant sticks to the issues as agreed and filed and has submitted that issue Nos. 6 and 7 had been abandoned by the time the matter came up for hearing. This contention is supported by the fact that no evidence whatsoever was tendered in relation to the said issues. They have therefore been disregarded in the writing of this judgment.

I find it necessary to point at this stage that parties are bound by their pleadings and the issues that the court is called to determine are those issues as can be said to flow from the pleadings themselves, or put in another way, those disputed facts in which parties can be said to have “**joined issue**” at the close of the pleadings. The plaintiff’s claim being founded on an alleged trespass and illegal occupation of his land by the Defendant and the Defendant’s defence being that she is lawfully on the land having acquired a right thereto by virtue of a sale transaction between the Plaintiff and her late husband and as administratrix (therefore as beneficiary), the main issue for determination is whether the alleged Sale Agreement, which is not denied, did give rise to a legal interest capable of conferring a legal right over the suit property to the Defendant. Although in his Plaint the Plaintiff did not disclose that there was an agreement for sale over the suit premises between himself and the Defendant’s late husband, he admits the same in paragraph 2 of his Defence to counterclaim, whilst averring in the alternative that “**the Defendant’s husband breached the Sale Agreement by failing to pay the full purchase price and in maliciously tampering with the boundary of the suit premises thereby making him rescind the agreement for sale.**”

The Plaintiffs oral testimony is full of contradictions. He claims that the sale price for the property was Kshs 90,000/= but has produced no documentary proof to confirm this. He told the court that the agreement between himself and the Defendant’s late husband was verbal. He relies on his own testimony adduced at a related hearing before the District Land Registrar Nairobi on 14<sup>th</sup> November 1990 wherein he stated that there was a verbal agreement between himself and the deceased that the purchase price was shs 90,000/=. The said proceedings, a copy of which was tendered in evidence as Ex P.2, show that the Plaintiff in Cross Examination by the Registrar had this to say:

*“I did not have a written agreement with David Gacheru Mbugua. It was a verbal agreement that the price was to be shs 90,000/= The verbal agreement was only between David Gacheru Mbugua and me and there were no witness(es).”*

The proceedings before the Registrar were in respect of an application by the Plaintiff to have a caution placed against the property by the Deceased removed to facilitate the subdivision of the original parcel of land Dagoretti/Riruta/120. The caution was removed by the Registrar who found it unnecessary to retain the same when the parties were principally in agreement to complete the sale. The Deceased having told the Registrar that the plaintiff

*“has not refused to transfer the 0.25 of an acre I purchased from him (and) is ready to transfer (the) portion...”*

the Registrar found that in those circumstances “**it would be superfluous to retain the caution,**” and proceeded to remove the same.

The Plaintiff in her evidence told the court that following those proceedings the Plaintiff applied and did obtain Land Control Board Consent under the provisions of the Land Control Act which she produced herein as Document No. 3 of her bundle of documents filed on 18 in May 2005. The consent, which is said to have been issued pursuant to an application dated 4<sup>th</sup> August, 1980 is addressed to Ayub Ndungu (Defendant) and clearly shows that the property in question is DAGORETTI/UTHIRU/120 and that the nature of transaction is

*“sub division into 2 portions of 0.25 acre and 2.41 acres then sell and transfer 0.25 acres.”*

The names of the parties to the transactions are noted as follows:

- (i) From AYUB NDUNGU
- (j) To DAVID GACHERU MBUGUA.

The consideration is given as Kshs 45,000/=.

The Plaintiff disowns the consent letter in his Defence to counter claim and also during cross-examination by the Defence. However in re-examination by his advocate he states as follows:

***“I was asked whether I applied for Land Board Consent. I said I did so but Gacheru did not come. I was given consent on 6<sup>th</sup> August 1980 ... At the time of applying for Land Board consent I was ready to transfer to him.”***

Although the consent of 6.08.80 was issued ten years before the hearing by the Registrar, the increase in the purchase price from shs 45,000/= is not explained and appears to be nothing more than a unilateral attempt by the Plaintiff to increase the purchase price as claimed by the Defendant. It is not shown to have been accepted by the Deceased as to vary the initial agreement that the purchase price was shs 45,000/= as stated in the consent dated 6<sup>th</sup> August 1980 which the Defendant has given an account which I have no reason to doubt that the payment of shs 45,000/= was done to the Plaintiff in her presence and two other persons who have since died. She also testified that she has been in occupation of the suit premises since it was bought and that she was involved in the construction of the rental houses built thereon in which the Plaintiff was the mason. This contradicts the Plaintiff's evidence in Chief that the developments were put up without his consent while he was in Kisumu. The Plaintiff however admitted in cross examination that he was engaged in the construction of the rental houses between 1980 and 1982 and cannot in the circumstances claim that the same were built without his consent and therefore illegal.

The Plaintiff claims to have rescinded the sale agreement for reasons that the Deceased had failed to pay the balance of purchase price. Initially he says he did so in 1989. He then changes his story to say that he does not remember when he did so. To quote him the Plaintiff told the court that:

*“I rescinded the agreement in 1989 after the caution was removed by the Registrar.”*

Clearly that cannot be so since the Registrar's ruling was delivered on 21<sup>st</sup> November 1990.

Rescission of a contract to sell land can only arise where the party in default has been notified of the default and given an opportunity to rectify the same. This is the position taken in the Court of Appeal decision of **NJAMUMU VS NYAGA [1983] KLR 282** cited herein by the plaintiff's advocate in support of the suit. Holding No. 8 of the said decision reads as follows:

*“Before an agreement such as this can be rescinded by the party in default should be notified of the default and given reasonable time within which to rectify it. Once notice of default has been given failure to rectify will result in the rescission of the contract.”*

The law requires is that in the case of a rescission of a contract for the sale of land the vendor returns the deposit to the purchaser in order to escape liability to pay damages for breach of contract. The plaintiff has not given any evidence of such notice having been issued. He says he cannot even remember when he rescinded the contract which clearly shows that no rescission can be inferred. It is important to point out here that rescission will only be allowed where restitution is possible, which cannot be the case where possession has been given to the purchaser who has thereafter developed the land.

The Plaintiff was anything but a truthful witness. His testimony does not support his claim against the

Defendant at all thus leading the court to find that:

1. There did exist a valid contract between the Plaintiff and the Deceased's late husband for the sale of a portion of title No. Dagoretti/uthiru/120 measuring 0.25 of an acre now in possession of the Defendant. This contract was never rescinded as claimed by the Defendant.
2. The agreed purchase price for the sale of the said 0.25 of an acre was shs 45,000/= which the deceased duly paid.
3. The Deceased's developments on the said property were constructed with the full knowledge and consent of the Plaintiff and are therefore not illegal.
4. The Defendant is not a trespasser on the Plaintiff's land but occupies the disputed 0.25 acres thereof lawfully pursuant to a valid sale of the same by the Plaintiff to her deceased husband and as administratrix of the estate of the deceased.

Taking due consideration of the facts of the case, the pleadings filed herein, the evidence adduced both orally and by way of documents, as well as the submissions by counsel for both parties, the Plaintiff has failed to prove his case against the Defendant on the balance of probabilities.

Based on my findings and considering the evidence tendered in support of the counterclaim I find that the Defendant has proved the same on the balance of probabilities. I find therefore, find that whereas the Plaintiff's case fails, the defendant's counterclaim against him succeeds. I therefore dismiss the Plaintiff's suit with costs to the Defendants and allow the defendant's counterclaim dated 18<sup>th</sup> October 2002 do enter judgment for the Defendant as prayed thereon.

Dated and delivered at this 24<sup>th</sup> day of May, 2006

**M. G. MUGO**

JUDGE

Delivered in the presence of:

No appearance for the Plaintiff

Mr. Mwaura for the Defendant