



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 280 of 1979

HENRY KIMANI MWAURA (*Suing for and on behalf of the estate of Njuguna Kiumu – Deceased*).....PLAINTIFF

VERSUS

SIMON P. GICHURU.....DEFENDANT

JUDGMENT

Njuguna Kiumu, filed suit against the defendant Simon P. Gichuru on the 27th of July, 1979 seeking to have the transfer of **plot No.7 Karagoini Settlement Scheme**, Nyandarua District (*hereinafter referred to as the suit land*) to the defendant cancelled. Njuguna Kiumu who was then plaintiff, alternatively prayed for judgment to be entered in his favour against the defendant for the sum of Ksh.20,000/= which he averred was the balance of the purchase consideration which the defendant failed to pay him after the suit land was transferred to him. The defendant filed the defence whereby he admitted having entered into an agreement with the then plaintiff for the purchase of the suit land but averred that the initial purchase consideration of Ksh.38,000/= for the suit land was reduced to Ksh.30,000/= when the defendant discovered that the suit land was 42 acres instead of the 48 acres that the then plaintiff had indicated. He averred that he had paid the entire purchase consideration of Ksh.30,000/= save for Ksh.2,000/= which he used to clear off the loan in respect of the suit land which was owing to the Settlement Fund Trustees. He urged the court to dismiss the then plaintiff's suit with costs.

Thereafter the parties to the suit agreed by consent to refer the dispute to arbitration before a panel of elders. The case was referred three times to three different panel of elders who made awards which however appear not to have satisfied either the then plaintiff or the defendant. Njuguna Kiumu, the then plaintiff died on the 25th of November 1987. Wilfred Mwaura Kamure was granted limited grant of letters of administration for the purposes of taking over the proceedings from the said Njuguna Kiumu (*hereinafter referred to as the deceased*). The said limited grants were issued to the said Wilfred Mwaura Kamure on the 4th of March, 1993.

However, it appeared that although the said Wilfred Mwaura took over proceedings in this case on behalf of the estate of the deceased, no formal application was made before court to enjoin him as a party to the suit. Unfortunately the hearing of the suit proceeded before Rimita J, who after hearing the parties to this suit, dismissed the plaintiff's suit with costs. The presumed plaintiff Wilfred Mwaura Kimure appealed to the Court of Appeal against the said judgment of Rimita J. By its ruling delivered on the 24th of February, 1999 the Court of Appeal observed that Wilfred Mwaura Kimure had not been formally made to be a party to the proceedings before the High Court. This is because the said Wilfred Mwaura Kimure

had not applied to be substituted as a party to the suit. The Court of Appeal declared the proceedings before the High Court to be a nullity.

The said Wilfred Mwaura Kimure was forced to go back to the drawing board. He made an application before the High Court to substitute the deceased as a party to the suit. The application was allowed. He further made an application to have the suit which had been filed by the deceased, and which had abated, revived. The application was allowed. The said Wilfred Mwaura Kimure then made an application to amend his plaint which application was allowed. But before the case could be heard, the said Wilfred Mwaura Kimure died on the 9th of May, 2001. His son Henry Kimani Mwaura, applied and was granted limited letters of administration for the purposes of taking over the conduct of this suit on behalf of the deceased's estate. The application was allowed and on the 8th of October 2002, the said Henry Kimani Mwaura substituted the deceased as the plaintiff in this suit. The said Henry Kimani Mwaura was therefore the plaintiff in the suit when the hearing of the case finally took off.

In the amended plaint filed on the 11th of May 2001, the plaintiff alleged that the defendant was fraudulently registered as the owner of the suit land now known as *Nyandarua/Karagoine/7* in 1992 before he had paid the full purchase consideration to the estate of the deceased. He further averred that the defendant misrepresented the facts pertaining to the ownership of the suit land to the Land Registrar who thereafter mistakenly issued the defendant with the title in respect of the suit land without taking into consideration the fact that the defendant had not paid the full purchase consideration to the estate of the deceased. The plaintiff therefore prayed in his amended plaint that this court declares the agreement entered between the plaintiff and the deceased on the 8th of November 1973 to be rescinded. He further prayed that the transfer which was executed by the deceased transferring the suit land to the defendant be cancelled. In the alternative to the a foregoing prayers, this court orders the defendant to transfer the suit land to the plaintiff.

The re-hearing of this suit commenced before this court on the 1st of December 2004. The plaintiff called one witness; himself. He testified that he was the grandson of the deceased and had taken over the proceedings in this case when his father Wilfred Mwaura Kamure who was the then administrator of the estate of the deceased died in 2001. He testified that according to the information which he was given by the deceased, the deceased and the defendant entered into a sale agreement in 1973 whereby the deceased agreed to sell to the defendant the suit parcel of land for a purchase consideration of Ksh.38,000/=. The said agreement was entered into on the 19th October 1973. The said agreement was produced in evidence as Plaintiff's exhibit No.1. The plaintiff testified that the defendant paid the sum of Ksh.8,000/= at the signing of the agreement. The defendant later paid the deceased the sums of Ksh.9,500/= and Ksh.500/= respectively. The plaintiff testified that according to the deceased, the defendant did not pay the balance of the purchase consideration of Ksh.20,000/=.

The plaintiff denied the averment made by the defendant in his defence that he had paid the deceased the sum of Ksh.8,000/= by cheque. He testified that the deceased was old and illiterate and did not therefore then hold a bank account. He testified that the defendant's allegation that he had purchased the deceased an alternative parcel of land at Murichu was not true since the plaintiff had not seen such parcel of land. He testified that the deceased had not agreed to vary the purchase consideration from the sum of Ksh.38,000/= to Ksh.30,000/=. He recalled that the deceased was forcibly removed from the suit land by the area chief under the influence of the defendant. He testified that the deceased referred the dispute to elders who rendered several decisions including the one which he produced as Plaintiff's exhibit No.2 and 3. He testified that the said elders ordered the defendant to pay the balance of the purchase consideration ranging from Ksh.7,537/= to Ksh.21,000/=.

The plaintiff testified that the defendant did not pay the deceased the amount which he was ordered to pay by the elders. He reiterated that the defendant was fraudulently registered as the owner of the suit land in 1992 during the pendency of this case and further before he had paid the full purchase consideration as provided in the agreement. The plaintiff however conceded that his testimony to the court constituted of information that was given to him by the deceased and his late father. He testified that he did not know many details related to the sale transaction between the deceased and the defendant other than what he

was told by the deceased and his late father. He testified that after the deceased was evicted from the suit land, he went to Bahati where he lived with the plaintiff until his death 1987.

The plaintiff therefore urged this court to declare the agreement which had been entered between the deceased and the defendant rescinded on account of the fact that the defendant had not paid the full purchase consideration as agreed in the said agreement. He further prayed for this court to order the title issued to the defendant to be nullified. In the alternative, he prayed for this court to order the defendant to pay the balance of the purchase consideration of Ksh.20,000/= together with damages. He urged this court to consider the value of the land within the area where the suit land is located in determining the amount that would be refunded to the estate of the deceased. He testified that the value of an acre within the area is Ksh.120,000/= per acre. He therefore urged this court to grant the prayers sought in the plaint together with costs.

The defendant called one witness; himself. He testified that in 1973 he was approached by the deceased who was his neighbour at Nyahururu with a proposal that the defendant purchases the suit land. They negotiated and agreed on the purchase consideration of Ksh.38,000/= for the parcel of land which was then referred to as Plot.7 Karagoine. The deceased informed the defendant that the said parcel of land was 48 acres. The defendant testified that he took the deceased to the offices of Evans Gaturu Advocates where they wrote an agreement which was produced as *plaintiff's exhibit No.1*. Thereafter, they went to the offices of the Settlement Fund Trustees (SFT), Nyahururu where they were informed that they had to write another agreement. The agreement was duly written and signed by the defendant and the deceased. The agreement was produced as *defence exhibit No.1*. In the subsequent agreement, the purchase consideration was indicated as Ksh.26,000/=.

The defendant agreed to take over the loan that was then due to the SFT. The defendant testified that he then attended the land control board with the deceased on the 19th of February, 1974. The consent of the Land Control Board was granted and was produced as *defence exhibit No.2*. He took the consent to the SFT offices and was issued with a letter of offer and charge documents which he signed. The letter of offer and the charge documents were produced as *defence exhibit No.3 and 4 respectively*. He testified that in 1992 the government issued a directive that all the plot owners within the Settlement schemes managed by the SFT were to be issued with titles. The loan owed would however be reflected as an encumbrance in the said title. The invoice was produced as *defence exhibit No.5*. He was later issued with a discharge of charge which he produced as *defence exhibit No.6*. He testified that he signed the transfer form which he produced as *defence exhibit No.7*. He was issued with the title of the suit land i.e. **Nyandarua/Karagoine/7** on the 29th of April, 1992. The title was produced as *defence exhibit No.8*.

The defendant testified that he paid all the sums due in respect of the purchase consideration to the deceased. The plaintiff produced copies of cheques counterfoils and bank statements to confirm that he had indeed paid the balance of the purchase consideration to the deceased. He testified that five years after he had occupied the suit parcel of land, the deceased filed suit against him. He narrated how, after the filing of the said suit, the dispute was referred to be arbitrated upon by the elders at Nyahururu. He testified that the elders decided that he owed the deceased the sum of Ksh.7,537/=. After the decision was rendered he paid the money to the deceased through the area chief. The area chief acknowledged receipt of the said sum of money produced as *defence exhibit No.16*. The defendant testified that even if it were established that he owed the deceased part of the purchase consideration, after the arbitration processes, he had paid the deceased more than Ksh.50,000/= which was beyond the initial amount which was agreed at Ksh.38,000/=. The defendant therefore urged this court to dismiss the plaintiff's suit with costs.

I have carefully read the pleadings which were filed by the parties to this suit. I have also read the submissions which were filed by the parties to this suit in support of their respective cases. I have also considered the evidence that was adduced by the parties to this case during the hearing. The issue for determination by this court is whether the plaintiff had established to the required standard of proof that the defendant failed to pay the purchase consideration for the suit land to the extent that the plaintiff, on behalf of the deceased's estate, would be entitled to rescind the agreement and refund the purchase consideration. The other issue for determination is what orders would be issued by this court if indeed it is established that the defendant had not paid the full purchase consideration for the suit land to the

deceased.

Certain facts are not in dispute in this case. It is not disputed that the deceased and the defendant entered into an agreement whereby the defendant agreed to purchase the suit land from the deceased. There were two agreements which were prepared. The first agreement (*Plaintiff's exhibit No.1*) was prepared before Evans Gaturu Advocate whilst the second agreement was prepared at the SFT offices at Nyahururu (*defence exhibit No.1*). The purchase consideration in the first agreement was Ksh.38,000/=. The purchase consideration in the second agreement was stated to be Ksh.26,000/=. Whereas the plaintiff insists that the deceased had sold the suit land to the defendant for the sum of Ksh.38,000/=: the defendant testified that he entered into an oral agreement with the deceased to reduce the purchase consideration after he discovered that the suit parcel of land was less than the 48 acres stated in the agreement. He testified that they agreed to reduce the purchase consideration to be Ksh.30,000/=.

Having evaluated the evidence adduced on this point as regard the purchase consideration, I hold that the purchase consideration of the suit land was Ksh.38,000/=. It is trite law that parole evidence cannot be adduced to challenge documentary evidence especially where it is clear that both parties had agreed on the matters in issue. In this case, there is no correspondence between the deceased and the defendant which confirmed that the deceased and the defendant had agreed to vary the said purchase consideration. What is however clear from the evidence adduced is that there appears to have been a disagreement between the deceased and the defendant over the terms and conditions of the said sale agreement. The agreement did not specify who was to pay the loan that was then outstanding in respect of the suit land to the Settlement Fund Trustees. The defendant took over the said loan but deducted the amount from the balance of the purchase consideration due to the deceased. The deceased was not amused and made a decision to take over all the animals that were on the farm and which had been sold to the deceased by the Settlement Fund Trustees.

However, there appears to have been no big difference between the deceased and the defendant because the defendant and the deceased completed the transaction in respect of the transfer of the said parcel of land. They both attended the Land Control Board where the consent to transfer was granted. The deceased executed all the documents necessary to transfer the said parcel of land to the defendant. The deceased further gave vacant possession of the suit land to the defendant. I did not believe the testimony of the plaintiff when he testified that the deceased was forcefully evicted from the suit land by the area chief on instructions from the defendant. My evaluation of the evidence adduced clearly shows that the deceased peacefully vacated the suit land after he had sold the same to the defendant.

On the issue of whether or not the defendant paid the purchase consideration in full to the deceased, I hold that the defendant substantially paid the purchase consideration to the deceased. I further hold that the defendant did not complete paying the purchase consideration to the deceased until after the deceased had brought this suit before this court. However, when the dispute was referred by consent of the parties to be arbitrated upon by a panel of elders, the said elders made an award to the effect that the defendant should pay the deceased the balance of purchase consideration of Ksh.7,537/=. The defendant deposited this amount with the chief of Leshau location of Nyandarua District to be collected by the deceased or the members of his family (*See Defence exhibit No.16*). I therefore hold that whatever amount that was owed by the defendant to the deceased was paid in full after the panel of elders had arbitrated over the matter and made the above said award in favour of the deceased. The defendant does not therefore owe any money to the estate of the deceased.

The upshot of the above reasons is that the suit filed by the plaintiff on behalf of the estate of the deceased lacks merit and is hereby dismissed with costs. The plaintiff has failed to establish on a balance of probabilities that he is entitled to the prayers sought in his plaint in respect of the suit land. The defendant is the lawful owner of all that parcel of land known as *Nyandarua/Karagoini/7* measuring 15.5 hectares or there about.

It is so ordered.

DATED at NAKURU this 17th day of November, 2006

L. KIMARU

JUDGE.