



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 464 of 1998

LAWRENCE M. MAIKWEKI.....PLAINTIFF

VERSUS

MICHAEL NDICHU NDUNGI.....1ST DEFENDANT

PETER KAIRU KIAI.....2ND DEFENDANT

TIMOTHY KAMAU GITHOGORI.....3RD DEFENDANT

DAVID NJOROGE MBUGUA.....4TH DEFENDANT

JUDGMENT

The plaintiff filed this suit seeking judgment to be entered against the defendants on the following terms;

(a)The defendants be restrained by themselves, their agents or servants from interfering, alienating, and or wasting, damaging or otherwise dealing with plots No.1144/461 Naivasha town.

(b)The 1st defendant do execute a transfer over the suit property in favour of the plaintiff free from any encumbrances.

(c) Costs of the suit.

The plaintiff averred in his plaint that in the month of July 1998 he negotiated with one Joseph Muiruri t/a Rift Valley Supplies Company, an agent of the 1st defendant Michael Ndichu Ndungi who was selling parcel No.L.R 1144/461 Naivasha town (*hereinafter referred to as the suit land*). He averred that the said Joseph Muiruri contacted the 1st defendant and made an offer on the plaintiff's behalf for the suit land. The plaintiff had made an offer to purchase the suit land for the sum of Ksh.750,000/=. The plaintiff averred that the 1st defendant, through his advocates M/S Gikandi & Company Advocates accepted the offer made by the plaintiff.

The plaintiff was required to pay a 10% deposit of the purchase consideration and pay the balance within sixty (60) days. The plaintiff averred that pursuant to the agreement, he paid the 1st defendant's advocates the sum of Ksh.75,000/= on the 18th of September, 1998. The balance of the purchase consideration of Ksh.675,000/= was paid on the 8th of October, 1998 to the 1st defendant's advocates. On

the 26th of October, 1998 the plaintiff was shocked and surprised to see the 2nd, 3rd and 4th defendants trespass into the suit property which by the time he considered to be his. He therefore urged the court to restrain the defendants from interfering with his possession of the suit property. He further prayed that the 1st defendant be compelled by the court to transfer the suit property to him.

The defendants filed defences to the plaintiff's plaint. The 1st defendant admitted that he had authorized the said Joseph Muiruri to sell the suit property on his behalf but he denied that the plaintiff had purchased the suit land as claimed in his plaint. He averred that by the time the plaintiff paid the 10% deposit of the purchase consideration, he had already sold the suit property to the 2nd, 3rd and 4th defendants. He averred that he was not made aware by the firm of Gikandi & Company Advocates that an agreement had been entered to sell the suit property to the plaintiff. He averred that he had legally sold the suit property to the 2nd, 3rd and 4th defendants and had executed the transfer documents in favour of the said defendants and therefore he did not have any property to transfer to the plaintiff.

On their part, the 2nd, 3rd and 4th defendants averred that they had met the 1st defendant, negotiated and agreed on the purchase consideration. They entered into an agreement with the 1st defendant for the sale of the suit property. They paid the purchase consideration to the 1st defendant. The 1st defendant executed the transfer documents of the suit property in their favour. They denied that the plaintiff had purchased the suit property before them. They further denied that they were trespassers onto the suit property. They averred that they were the legitimate owners of the suit property. They therefore urged this court to dismiss the plaintiff's suit with costs.

This suit was first heard by Visram J, who was however transferred before he could conclude the hearing of this case. The parties to this suit agreed by consent to have the case heard afresh by this court. The plaintiff called two witnesses; He testified himself as PW1. He stated that in 1998, he approached PW2 Joseph Muita Muiruri who runs a commercial agency business known as Rift Valley Supplies. He informed him that he was interested in purchasing a commercial plot within Naivasha Township. After a while, PW2 informed him that there was parcel No.L.R 1144/461 which was available for sale. He was informed that the parcel of land was owned by Michael Ndungi who was a resident of Mombasa. The plaintiff authorized PW2 to contact the owner of the suit parcel of land so that he could purchase the same.

The plaintiff was later informed by PW2 that the owner of the suit parcel of land (*the 1st defendant*) had offered to sell the said parcel of land for a purchase consideration of Ksh.750,000/=. The plaintiff accepted the offer. He was instructed to pay 10% deposit of the purchase consideration on the signing of the agreement and the balance was to be paid within forty five (45) days. The plaintiff however requested to be given sixty (60) days to pay the balance of the purchase consideration. His counter offer on extension of time was accepted by Gikandi & Company Advocates who was then the advocate of the 1st defendant. The plaintiff paid the sum of Ksh.75,000/= on the 18th of September, 1998 to Gikandi & Company Advocates (*photocopy of the cheque produced as Plaintiff's exhibit No.1*). He paid the balance of Ksh.675,000/= on the 8th of October 1998 (*copy of the cheque produced as Plaintiff's exhibit No.2*).

He testified that before he entered into the said agreement, he was satisfied that PW2 had the authority to deal with the said parcel of land on behalf of the 1st defendant. He saw the letter of authority to sell which was produced as *Plaintiff's exhibit No.3*. He further testified that he saw the letter sent by PW2 to the 1st defendant confirming acceptance of his offer (*letter produced as plaintiff's exhibit No.4*). He testified that the offer was accepted on behalf of the 1st defendant by Gikandi & Company Advocates (*letter dated the 20th of July, 1998 produced as plaintiff's exhibit No.5*). PW2 replied to the letter on the 14th of August 1998 (*letter produced as Plaintiff's exhibit No.6*). The letter accepting the mode of payment of the purchase consideration by the 1st defendant was produced as *plaintiff's exhibit No.7*. The plaintiff testified that he could not however take possession of the suit land because he later discovered that the 1st defendant had sold the suit land to the 2nd, 3rd and 4th defendants through the same firm of advocates, Gikandi & Company Advocates.

The plaintiff testified that the 1st defendant could not have sold the parcel of land to the 2nd, 3rd and 4th defendants because at the time he purported to have sold the said parcel of land, the same had been sold to him and he had paid the purchase consideration. He testified that when he confronted the 1st defendant through his advocates, Gikandi & Company Advocates, the said firm of advocates offered to refund the purchase consideration to the 2nd, 3rd and 4th defendants (*letter produced as plaintiff's exhibit No.10*). He testified that the 1st defendant had confirmed that he was the 1st purchaser of the suit land (*letter produced as plaintiff's exhibit No.11*). He testified that when he realized the 1st defendant was not willing to back out of the agreement with the 2nd, 3rd and 4th defendants, he put a caveat on the title in respect of the said parcel of land (*produced as plaintiff's exhibit No.12*). The plaintiff prayed that the 1st defendant be compelled to transfer the suit land to him pursuant to the agreement which was entered between him and the 1st defendant.

PW2 Joseph Muita Muiruri basically corroborated the testimony of the plaintiff. He testified that he was authorized by the 1st defendant to sell the suit property on his behalf. He testified that the said authority was in writing. He further confirmed that the plaintiff visited his offices and made an offer for the suit property. The offer of Ksh.750,000/= was accepted by the 1st defendant through his advocate M/s Gikandi & Company advocates. PW2 testified that all the documents in his possession established that the plaintiff had legally purchased the suit property from the 1st defendant through his advocates at Mombasa. PW2 denied the suggestion by the 2nd, 3rd and 4th defendants that the authority to sell had been withdrawn when the 1st defendant sold the suit parcel of land to the 2nd, 3rd and 4th defendants. In his view, the plaintiff was the legitimate owner of the suit land.

The 1st defendant testified as DW1. He testified that he had been approached by PW2 with a view of assisting him sell his parcel of land at Naivasha. He testified that he instructed PW2 to look for a buyer after which he was to communicate to his lawyer at Mombasa M/S Gikandi & Company Advocates. He admitted that he was advised that he could revoke the agreement with PW2 if he found a buyer on his own and if he paid a penalty of 5% commission as provided by Clause 8 of the Agency Agreement. He testified that he had given these instructions before the 18th of September, 1998.

However, on the 18th of September, 1998 he was approached by the 2nd, 3rd and 4th defendants who told him that they would be interested to purchase his parcel of land at Naivasha. He negotiated with them and agreed to sell the suit land known as L.R NO.1144/461 for a sum of Ksh.500,000/=. The 2nd, 3rd and 4th defendants paid him the said sum of money in the presence of Gikandi Advocate. An agreement was written on the 18th of September, 1998. (*Agreement produced as defence exhibit No.1*). The advocate issued a receipt for the purchase consideration which was paid (*produced as Defence exhibit No.2*). The 1st defendant executed the transfer documents in respect of the suit land (*produced as defence exhibit No.3*). He was later informed that the transfer documents which he had executed were not the correct ones. He executed a new set of transfer forms (*Produced as defence exhibit No.4*). The 1st defendant testified that he was the registered owner of the suit property but had lost the title document. He swore an affidavit indicating that he lost the said title (*Affidavit produced as defence exhibit No.4*).

The 1st defendant testified that at the time he entered into the agreement with the 2nd, 3rd and 4th defendants he was not aware that the firm of Gikandi & Company Advocates had committed him to sell the suit property to the plaintiff. He further admitted that when he was told of the offer made by the plaintiff that he was to purchase the suit property for a sum of Ksh.750,000/= by Gikandi Advocate, he accepted the offer. He however, insisted that at no time did Gikandi advocate make him aware of the stage of negotiation that the transaction involving the plaintiff had reached. He reiterated that at the time he sold the suit property to the 2nd, 3rd and 4th defendants he was not aware that the plaintiff had made any commitment to purchase the suit property. He testified that as far as he was concerned, he had sold the property to the 2nd, 3rd and 4th defendants. He was of the view that he had no property to transfer to any other person.

The 4th defendant testified as DW2. He stated that he and his two colleagues purchased the suit land from the 1st defendant. He testified that upon receiving information that the 1st defendant was selling the suit property, he, the 2nd and the 3rd defendant traveled to Mombasa and met with the 1st defendant on the 17th of September, 1998. They negotiated the price of the plot and settled at a purchase consideration of Ksh.500,000/= . He testified that they then went to the office of Gikandi advocate at Mombasa where an agreement was executed in respect of the said parcel of land. They paid the full purchase consideration to the firm of Gikandi advocate who received it on behalf of the 1st defendant. They were issued a receipt which was produced as *defence exhibit No.2*.

The 4th defendant testified that the 1st defendant executed all the conveyancing documents, including the transfer documents in their favour. On the 28th of September, 1998, the 4th defendant went to Ardhi House, Nairobi where he was informed that the transfer documents which had been executed by the 1st defendant related to a land registered under the Registered Land Act and not the Registration of Titles Act. They again communicated with Gikandi advocate who procured the 1st defendant to execute a new set of transfer documents. However, when the sought to effect the transfer a second time, they discovered that the plaintiff had placed a caveat.

The 4th defendant testified that upon paying the purchase consideration they took possession of the suit land and in fact deposited some materials on the land (*receipts of the material purchased produced as defence exhibit No.7(a), (b) and (c)*). He testified that Gikandi advocate had not told them that the 1st defendant had sold the suit land to the plaintiff. He testified that as far as he was concerned, the agreement that was entered between the plaintiff and the firm of Gikandi & Company Advocates was overtaken by events because by the time the purchase consideration was paid in full by the plaintiff, the 1st defendant had already sold them the suit property. He urged this court to dismiss the plaintiff's suit with costs.

I have read the pleadings filed by the parties in this suit. I have also carefully considered the evidence that was adduced before this court by the plaintiff and the defendants. I have further read the written submissions filed by the plaintiff and the defendants respectively. The parties to this suit did file on the 1st of December 1999, the statement of the issues to be decided by this court. The said issues are framed in the following terms;

- (i) *Is the 1st defendant the proprietor of parcel No.1144/461 Naivasha Town?*
- (ii) *Did the 1st defendant enter into a sale agreement with the plaintiff for the purchase of the above plot?*
- (iii) *Did the 1st defendant enter into a sale agreement with the 2nd, 3rd and 4th defendants for the purchase of the said plot?*
- (iv) *Did M/S Gikandi & Company Advocates, acting for and on behalf of the 1st defendant, receive the sum of Shs.750,000/= from the plaintiff being the agreed purchase price?*
- (v) *Did M/S Gikandi & Company Advocates, also acting for the 1st defendant, receive the sum of Shs.500,000/= from the 2nd, 3rd and 4th defendants being the agreed purchase price?*
- (vi) *Between the plaintiff on the one hand and the 1st, 2nd 3rd and 4th defendants on the other hand, to whom should the title of the above parcel vest?*

I will answer the above questions and in answering them this court will determine the issues in dispute between the plaintiff and the defendants.

In answer to issue (i), there is no dispute that the 1st defendant is still the registered owner of all that

parcel of land known as *L.R 1144/461 Naivasha Township*. At the material time, he had the legal authority to sell to anyone he wished the said parcel of land. The 1st defendant however misplaced the title in respect of the suit property. The register maintained by the Registrar of Titles confirms that the 1st defendant is the registered owner of the said parcel of land.

In answer to issue (ii), the plaintiff established that he contacted the 1st defendant through his agent PW2 Joseph Muita Muiruri. I have perused the letter of authority which was produced as *plaintiff's exhibit No.8*. I have no doubt in my mind that the 1st defendant authorized the said Joseph Muita Muiruri through his company Rift Valley Supplies Co. to sell the suit land on his behalf. The said letter of authority is dated the 29th of August 1998. However the 1st defendant signed it on the 31st of August 1998. Clause No.1 of the said letter of authority provided that;

"I the undersigned give you authority and instruct you to sell the following property. I undertake to pay commission for the service rendered."

The parcel number of the suit land is then stated in the letter of authority. Clause 8 of the said agreement provides that;

"In the event of the vendor revoking this agreement without giving three months notice he/she will pay 5% of the reserved price as per the agreement together with other incurred costs."

Clause 10 states that;

"This sale agreement is valid for a period of TWELVE (3) months unless a notice of three months to vary the same is given by either party."

It is therefore clear from the above letter of authority that PW2 had the authority of the 1st defendant to sell the suit property. Further when the plaintiff approached PW2 with a view of making an offer to purchase the suit property, PW2 contacted the 1st defendant who confirmed through his advocate by letter dated the 20th of July 1998 and the 29th of August 1998 that he had accepted the offer made by the plaintiff subject to the plaintiff paying 10% deposit and paying the balance of the purchase consideration within sixty (60) days of the 29th of August 1998. The plaintiff paid to Gikandi & Company Advocates the 10% deposit being the sum of Ksh.75,000/= on the 18th of September 1998. M/S Gikandi & Company Advocates acknowledged receipt of the said amount on behalf of the 1st defendant. The plaintiff paid the balance of Ksh.675,000/= to Gikandi & Company Advocates vide his cheque dated the 8th of October 1998. The said firm of Gikandi & Company Advocates acknowledged receipt of the entire sum of Ksh.750,000/= by his letter dated the 8th of October 1998.

The said letter however confirmed the fact that Gikandi & Company Advocates had overlooked the letter of authority issued by the 1st defendant to PW2 and thereby entered into another agreement with another group of purchasers. On the same day, M/S Gikandi & company Advocates wrote to the 2nd, 3rd and 4th defendants and informed them that a mistake had occurred when the 1st defendant sold them the suit property by overlooking the fact that he had authorized PW2 to sell the suit property on his behalf. He offered to refund the purchase consideration to the 2nd, 3rd and 4th defendants. The said letter the 8th of October 1998 was produced as produced as *plaintiff's exhibit No.11*. In answer to issue (ii) I hold that the plaintiff entered into a valid agreement with the 1st defendant through his agents for the purchase of the suit property. I further hold that the default clause in the letter of authority only related to the principal and agent i.e. the 1st defendant and PW2. It did not affect the validity of the agreement entered between the plaintiff and the 1st defendant.

In answer to issue (iii), I hold that the 1st defendant entered into an agreement with the 2nd, 3rd and 4th defendants on the 18th of September 1998 before he had revoked the letter of authority which he had issued to PW2 to sell the said property on his behalf. The problem was further compounded by the fact

that M/S Gikandi & Company Advocates gave the go-ahead to the 1st defendant to sell the suit property to the 2nd, 3rd and 4th defendants by overlooking the agreement that had been entered between the plaintiff and the 1st defendant through PW2. M/S Gikandi & Company Advocates realized his mistake and sought to have the agreement between the 1st defendant and the 2nd, 3rd and 4th defendants rescinded. The 2nd, 3rd and 4th defendants were however not in any position to accept to be refunded the purchase consideration hence this suit. In answer to issue (iii) therefore, I hold that when the 1st defendant entered into the agreement with the 2nd, 3rd and 4th defendants, the suit land had already provisionally been sold to the plaintiff subject to the plaintiff completing the payment of the purchase consideration. The 1st defendant therefore had no parcel of land to sell to the 2nd, 3rd and 4th defendants at the time he entered into the second agreement.

In answer to issue (iv) and issue (v), I hold that the plaintiff paid the firm of M/S Gikandi & Company advocates the sum of Ksh.750,000/= on behalf of the 1st defendant. The 2nd, 3rd and 4th defendants also paid the firm of Gikandi & Company Advocates the sum of Ksh.500,000/= on behalf of the 1st defendant. This court holds that the 1st defendant received the sum of Ksh.1,250,000/= for the said parcel of land from the plaintiff and the 2nd, 3rd and 4th defendants.

Now to the last issue (vi), who as between the plaintiff and the 2nd, 3rd and 4th defendants is the owner of the suit land? From the a foregoing, it is clear that this court holds that the plaintiff is the lawful owner of the suit land. He negotiated and agreed the purchase consideration with PW2 who was the agent of the 1st defendant. The plaintiff made an offer to purchase the suit parcel of land which offer was accepted by the 1st defendant through his advocate M/S Gikandi & Company Advocates. The plaintiff paid the agreed purchase consideration of Ksh.750,000/= within the sixty (60) day period stipulated in the agreement. The 1st defendant had not withdrawn his authority to sell from his agent (PW2) when he purported to enter into another agreement for the sale of the suit land to the 2nd, 3rd and 4th defendants.

At the time the 1st defendant purported to have sold the suit land to the 2nd, 3rd and 4th defendants, he did not have a parcel of land to sell. Once the plaintiff paid the full purchase consideration of Ksh.750,000/=, he was entitled to have the suit property transferred to him. He was entitled to take possession of the same. The defendants in their submissions have raised the issue of whether or not there existed a valid agreement for sale of land in view of the provisions of Section 3(3) of the Law of Contract Act that requires that an agreement in respect of land be in writing and in one document. I have read the said section of the Law of Contract Act. In my view, the agreement between the plaintiff and the 1st defendant was in writing though it was not contained in one document but in a series of documents which confirmed that there was an offer made, which offer was accepted and consideration paid for the purchase of the suit land.

In any event, I agree with the submissions made by the plaintiff that the provisions of Section 3(3) of the Law of Contract Act which requires that an agreement in respect of disposition of an interest in land be contained in one document had not come into effect by the time the agreement was entered between the plaintiff and the 1st defendant. The said section of the **Law of Contract Act** came into effect on the 1st of June 2003 vide Legal Notice No.189 of 2002. At the time the agreement was entered between the plaintiff and the 1st defendant, there was no legal requirement that an agreement in respect of a sale of an interest in land be contained in one document.

The upshot of the above is that judgment is entered for the plaintiffs against the defendants jointly and severally as hereunder;

(a) The defendants are hereby permanently restrained from interfering with the plaintiff's possession and ownership of parcel No.1144/461, Naivasha Township. If the defendants are in possession of the suit land, they are hereby ordered to give vacant possession to the plaintiff within thirty (30) days of today's date or in default thereof the plaintiff shall be at liberty to evict them.

- (b) The 1st defendant is hereby ordered to execute transfer documents in respect of parcel No.1144/461 in favour of the plaintiff within thirty (30) days of the delivery of this judgment or in default thereof the Deputy Registrar of this court do execute the transfer forms on behalf of the 1st defendant.
- (c) The 1st defendant is hereby ordered to refund the purchase consideration of Ksh.500,000/= to the 2nd, 3rd and 4th defendants which was paid pursuant to the vitiated agreement.
- (d) The defendants shall pay the costs of the suit to the plaintiff.

DATED at NAKURU this 14th day of November, 2006

L. KIMARU

JUDGE