



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 649 of 2004

NJOGU MANGETHIPLAINTIFF

-VERSUS-

FRANCIS WAKARIA KANOBUDEFENDANT

J U D G E M E N T

Njogu Mangethi (hereinafter referred to as “**the Plaintiff**”) instituted this suit by way of a Plaint dated and filed on the 17th June 2004 in which the Plaintiff claims judgment against Francis Wakaria Kanogu (hereinafter referred to as “**the Defendant**”) for:-

“(I) A declaration that the Plaintiff is entitled to ownership and possession of land parcel Githunguri/Githunguri/290.”

“(ii) Specific performance of the sale agreement herein dated 30th day of July 1999 or an order directing the land registrar Kiambu to register the Plaintiff as proprietor of land parcel Githunguri/Githiga/290.”

“(iii) Cost of the suit.”

“(iv) Any other or further relief that this Honourable Court may deem fit and just to grant.”

The Defendant having failed to enter an appearance in the suit or to file his defence within the time prescribed by law despite service of summons upon him on the 24th June 2004, the court on application by the Plaintiff entered an interlocutory judgment against the Defendant on the 21st July 2004 and the suit then proceeded for hearing by way of formal proof leading to this judgment.

At the commencement of the hearing, Mr. Ngugi Waithuki instructed by the firm of Messrs. Ngugi Waithuki & Co., Advocates, sought to appear for the Defendant. The court, however, declined to allow Mr. Ngugi to participate in the proceedings because learned counsel had neither sought nor obtained leave of the court to appear on behalf of the Defendant after the aforementioned judgment was entered, notice of counsel’s appointed dated the 2nd September 2004 having been filed on the 7th September, 2004.

The evidence in support of the claim was given by the Plaintiff himself. Mr. Mangethi testified that under and by virtue of an Agreement for Sale dated the 30th July 1999 between him and the Defendant, the Defendant agreed to sell to the Plaintiff, and the Plaintiff agreed to purchase from the Defendant, the piece or parcel of land comprised in Title Number Githunguri/Githiga/290 at the price or sum of K.Sh.280,000/= which the Plaintiff duly paid to the Defendant in full as testified by the Defendant’s signature to the said Agreement.

Subsequently, and pursuant to and in fulfillment of the requirement in that behalf contained in section 6 of the Land Control Act [Cap. 302], the Githunguri Land Control Board on the joint application of the Plaintiff and the Defendant granted its consent by letter dated the 16th November 1999 to the transfer of the suit property in favour of the Plaintiff in consideration of the sum of K. Sh.60,000/=. Asked by the court to explain the anomaly between the price stated in the said Agreement for Sale and the Letter of Consent aforesaid, the Plaintiff stated that the price was deliberately understated in the Letter of Consent with intend to reduce the stamp duty payable on the Instrument of Transfer in favour of the Plaintiff which also reflected this reduced price and was duly executed by the parties on the 5th February 2003.

It was the Plaintiff's further testimony that on attempting to register the said Transfer in his favour, the Plaintiff found that the register relating to the title to the suit property was encumbered by a caution dated the 20th January 2003 by one Stephen Ngugi Ndegwa (unknown to the Plaintiff) claiming an interest as beneficiary of the suit property. The Defendant having failed at the request of the Plaintiff to cause such caution to be removed, the Plaintiff instituted this suit seeking the orders prayed in the Plaint to enable him effect the transfer in his favour by registration.

Having considered this evidence which is not contested by reason of the interlocutory judgment entered herein as aforesaid, I am satisfied that the Plaintiff has established and proved on a balance of probability that there exists between the parties a valid contract of sale and purchase of the suit property and hold that the Plaintiff is entitled to the ownership and possession thereof.

Accordingly, the following orders be and are hereby granted and made in favour of the Plaintiff against the Defendant:-

- (a) a declaration that the Plaintiff is entitled to ownership and possession of the piece or parcel of land comprised in Title Number Githunguri/Githiga/290.**
- (b) specific performance of the agreement for sale between the Plaintiff and the Defendant dated the 30th July 1999.**
- (c) costs of the suit together with interest thereon at court rates.**

It is further ordered that for stamp duty purposes, the Instrument of Transfer of the suit property in favour of the Plaintiff shall not be registered unless and until the Plaintiff shall have duly paid duty thereon assessed on the basis of the consideration paid of K.Sh.280,000/= or such higher assessment of duty as may by law be prescribed.

With regard to the second limb of prayer (ii) of the Plaint, namely that an order do issue

“directing the Land Registrar Kiambu to register the Plaintiff as proprietor of land parcel Githunguri/Githiga/290,”

I decline to grant such order for the reasons set out hereunder.

Firstly, the Plaintiff having been well aware on the 17th June 2004 when he filed this suit that the register relating to the title to the suit property was encumbered by the caution hereinbefore referred to, the Plaintiff ought to have joined the cautioner, the said Stephen Ngugi Ndegwa, as a party to this suit and sought an order against him to remove the caution.

Secondly, there is no evidence before me that the Plaintiff has invoked the provisions of section 133(2) of the Registered Land Act [Cap.300] and or that the Kiambu District Land Registrar has refused to remove the caution without just cause. In any event, the Plaintiff has also elected not to enjoin the Land Registrar in this suit.

Consequently, there is no legal basis for me to order the Kiambu District Land Registrar to register the

Plaintiff as the proprietor of the suit property which, and for the foregoing reasons, I decline to do as such order would be, in effect, to order also the removal of the said caution without giving the cautioner an opportunity of being heard.

Dated and delivered at Nairobi this Fourth day of March, 2005.

P. Kihara Kariuki

Judge