



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Civil Case 40 of 1998**

**WILFRED KIURA MWANGI.....PLAINTIFF**

**VERSUS**

**HARRISON MWANGI GACHECHE.....1<sup>ST</sup> DEFENDANT**

**LYDIA WAIRIMU MWANGI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The defendants were a husband and wife respectively and the first defendant was the owner of a parcel of land known as **NYANDARUA/KIRIITA SHAURI BLOCK 1(LESHAU PONDO)804** (hereinafter referred to as "***the suit premises***") which measures 1.029 hectares or thereabouts and was residing thereon with his wife (the second defendant) and their children.

The plaintiff testified that on 21/8/96 he entered into a sale agreement with the first defendant whereby he purchased the suit premises for Kshs.180,000/- which he paid in full to the vendor and thereafter they obtained consent of Ndaragwa Land Control Board for sale and transfer of the suit premises to him. On 20/6/97 he was issued with a title deed for the said property (P. Exh.7).

However, the plaintiff could not take possession of the suit premises because the second defendant and her children were living there, the first defendant having moved out to go and stay with one of his other wives elsewhere. The plaintiff prayed for an eviction order against the second defendant and her children. He also prayed for mesne profits as he had been prevented from using his parcel of land for many years.

In cross examination by the second defendant, the plaintiff stated that he was a neighbour to her and when he was buying the land from the first defendant, he knew that it was the second defendant and her children who were in occupation of the suit land but he did not tell her that he was purchasing the land. When the application for consent to sell and transfer the suit premises came up before the area Land Control Board, the first defendant attended with one of his other wives apart from the second defendant.

At the close of the plaintiff's case, the first defendant had no evidence to offer. On her part, the second defendant stated that her husband had four wives and she was the second. She further stated that the first defendant retired in 1985 and went to live with her in a place known as Karamton. He then decided to sub-divide his parcels of land amongst his four wives as there was a disagreement amongst them. The first defendant moved the second plaintiff and her children to the suit premises in December 1988. The land was not developed by then and the first defendant built a temporary house for his second wife and children and told them to start developing the same. He then went back to Karamton to stay with his youngest wife whom he had married after retirement.

The second defendant's children dropped out of school due to lack of school fees and the family concentrated on developing the land as they had nothing else to do. They planted trees and food crops thereon besides other developments. After about four years the first defendant visited the second defendant and said that he wanted to sell the suit land and told the second defendant and her children to move out but he did not offer them an alternative. The second defendant naturally resisted the proposed move and went and saw the local District Commissioner and attempted to register a caution against the Title to suit premises but the same was rejected. The second defendant said that the plaintiff was her

neighbour and he knew everything about the land, that she was living there with her children and that they were not present in the Land Control Board meeting when consent to sell the property was being given and in the circumstances, he should not have agreed to purchase the same.

The second defendant was a lawful wife to the first defendant, having married her in 1965. The first defendant had four wives and several properties and according to the unchallenged evidence of the second defendant, he decided to divide the property amongst the four wives and he gave to the second defendant the suit premises after moving her from where she had originally settled. That was in 1988, after he married his youngest wife. Although he gave the suit premises to the second defendant and her children, he did not transfer the title to the said property into her name.

Having done so, did he have capacity to disinherit the second defendant and her children by deciding to sell the suit premises to the plaintiff? In my view, he did not have such capacity. It was not disputed that when the first defendant applied for consent to sell the suit premises in 1994, he went to the Nderagwa Land Control Board with one of his other wives, but not the second defendant who was in occupation of the property sought to be sold and indeed the *de facto* owner of the same. He did not disclose to the Land Control Board that the property was occupied by the second defendant and her eight children. The plaintiff was also aware of that fact but he did not disclose the same to the members of the said Land Control Board.

I believe the Land Control Board would not have given its consent for the proposed transaction if the truth had been made known to it. The sale agreement between the plaintiff and the first defendant was thus fraudulent, as both parties knew that the second defendant and her children were the ones in occupation of the land and had not consented to its sale. I believe that explains why the plaintiff and the first defendant entered into two separate sale agreements, the first one dated 9<sup>th</sup> June, 1994 and a subsequent one dated 21<sup>st</sup> August, 1996.

In the latter agreement, it was stated that if the first defendant breached the terms of the sale agreement, he would refund the purchase price together with 20% interest thereof and any costs arising out of the improvements made on the property. The first defendant did not deny that he received from the plaintiff Kshs.180,000/- on account of sale of the said property. The first defendant did not also deny that by the time he was purporting to sell the property, he had already given it out to the second defendant and her children after moving them from Karamton where they had lived for many years. He did not also state that he gave any alternative parcel of land to the second defendant and her children and it was therefore unreasonable and in my view fraudulent to force the second defendant to move out of the suit premises.

I find that the first defendant was in breach of the sale agreement and he should refund to the plaintiff the sum of Kshs.180,000/- plus interest at the agreed rate of 20% per annum from the date of payment of the sum until payment in full plus all the disbursements incurred by the plaintiff in registering the property in his name. The plaintiff should in return surrender the Title Deed for the suit premises to the District Land Registrar, Nyandarua, for cancellation and subsequent re-issuance of the same in the name of the second defendant.

I therefore dismiss the plaintiff's suit and order that the first defendant pays the plaintiff's costs of the suit as well as those of the second defendant.

DATED, SIGNED & DELIVERED at Nakuru this 23<sup>rd</sup> day of May, 2005.

**D. MUSINGA**

JUDGE

**23/5/2005**