



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO.454 OF 1996

BENJAMIN WAMUGI WAWERU..... PLAINTIFF

VERSUS

JACINTA NJOKI MUREITHI (sued as the the legal representative of the Estate of)

JOHN MUREITHI WAMBUGU DEFENDANT

JUDGEMENT

This case was initiated by plaint filed on 27.02.96 making various averments which may be highlighted as follows. It is the plaintiff's case that on 30.08.84, the current defendant's husband, John Mureithi Wambugu (now deceased) leased to the plaintiff half of parcel No. Chinga/Gikigie/21 for three years with an option for a further term of three years and that the plaintiff took possession of the leased portion in 1985 and developed it. That on diverse dates between 1985 and 1990 the plaintiff advanced to the defendant various sums of money by way of financial assistance totalling Kshs.157,377/=. That eventually when the defendant was unable to repay the money, the defendant agreed to sell to the plaintiff half of land parcel No. Chinga/Gikigie/21 for Kshs.150,000/= in full and final settlement of the accumulated debt.

It is also the plaintiff's case that requisite Land Control Board consent was granted on 14.01.92 for transfer of half portion of land parcel Chinga/Gikigie/21, being Chinga/Gikigie/1134. For avoidance of doubt, original land parcel No. Chinga/Gikigie/21 was subdivided into two equal portions which became Chinga/Gikigie/1134 and Chinga/Gikigie/1135 and that the portion subject matter of the plaintiff's claim in this suit is Chinga/Gikigie/1134.

The plaintiff further avers that John Mureithi Wambugu died sometime in March, 1991 (counsel for plaintiff told this court that the year of the deceased's death was on 27.02.96 amended to read 1992) before transfer of the subject land was effected and that his widow, Jacinta Njoki Mureithi as administratrix of his estate has refused to transfer the land to the plaintiff, hence this suit against her. The plaintiff adds that in 1995 the defendant herein attempted to order the plaintiff's workmen out of the suit land and also attempted to pick tea from tea bushes planted by the plaintiff on the suit land.

Arising from the foregoing, the plaintiff prays for judgment against the defendant for:-

- a) Transfer of land parcel No. Chinga/Gikigiel/1134.
- b) In the alternative, the Deputy Registrar be authorized to sign the said transfer.
- c) Defendant be restrained from interfering in any way with the parcel in question or attempting to

pick tea from the said parcel of land.

d) Damages for trespass.

e) Costs of this suit.

f) Any other or further relief that this honourable court may deem fit to grant.

The defendant filed a defence on 29.08.96 and made averments which may be summarized as follows. While admitting that her deceased husband had leased to the plaintiff a half portion of Chinga/Gikigie/21 as pleaded in the plaint, she (defendant) denies that her late husband took the various advances of money alluded to by the plaintiff. She also avers that she terminated the lease in July, 1995 and adds that the plaintiff has never paid any rent for the land for the period 1984 – 1995 and counterclaims rent for that period. While admitting that Chinga/Gikigie/21 was subdivided, the defendant contends that the subdivision was not for purposes of sale of the land. She also says that if an agreement of sale was entered into, the same is void for lack of consideration on the plaintiff's part. The defendant denies that the plaintiff developed the subject land as pleaded in paragraph 8 of the plaint.

Regarding consent from Land Control Board, the plaintiff denies such consent was obtained but says if it was given, the same is void ab initio as she and other family members were not consulted thereon. The defendant admits that her husband died in March, 1991 (should be 1992) but denies that he had any intention of transferring the land to the plaintiff since if that was his intention he would have transferred the land in his life time and that, at the time of his death, the land was charged to the Standard Chartered Bank. The defendant denies attempting to evict the plaintiff from the suit land and denies attempting to pick tea therefrom. On the contrary, the defendant avers that she is in actual occupation and possession of the suit land, i.e. Ching/Gikigie/1134, cultivating and picking tea there and that she is under no obligation to transfer the land to the plaintiff.

Arising from the defendant's above averments, she prays that the plaintiff's suit be dismissed with costs and judgment be entered for the defendant for:-

a) The sum of 143,000/=.

b) Costs of this suit.

c) Interest on (a) and (b) until payment in full.

d) Any other or further relief this honourable court may deem fit to grant.

The suit came up for hearing before me on 15.02.05 whereat the plaintiff was represented by learned counsel, Mr. P.M. Gachoka while there was no appearance for the defendant. Plaintiff's counsel informed the court that his firm served defendant's counsel on record on 27.10.04 but the defendant did not appear either in person or through counsel. The court, having noted that there is on the file an affidavit of service by Isaac O. Oichoe, process server that he served hearing notice of this case for 15th and 16th February, 2005 on the firm of Rombo and Co. Advocates which the said Advocates acknowledged on 27.10.04, allowed the case to proceed in the defendant's absence. The plaintiff gave evidence as P.W.2 on his own behalf and also called Mr. Kihara Muttu to testify in this case. Mr. Muttu testified first as P.W.1.

The plaintiff's evidence may be summarized as follows. He described the present defendant's husband, John Mureithi Wambugu (deceased) as one who came from the same area as himself and as a cousin of his father-in-law. It was the plaintiff's evidence that on 30.08.84 he entered into a lease agreement (Exhibit 'D') with the deceased John Mureithi Wambugu regarding the subject land, i.e. original Chinga/Gikigie/21, and he (plaintiff) went into occupation of part of the said land. Plaintiff said that after signing the lease agreement, he realized that the same land was advertised for sale by auction and he entered into negotiations with the deceased with a view to him (plaintiff) buying the land. The negotiations led to a sale agreement of 03.08.85 [Exhibit 'B' (i)] and a supplemental agreement of

16.11.89 [Exhibit 'B' (ii)]. The size of original Chinga/Gikigie/21 has been variously given in the pleadings and supporting documents as approximately 6.5 acres or 6.2 acres. The crucial point, however, is that the agreements are to the effect that the plaintiff was to get half of original Chinga/Gikigie/21 and that the said half portion was taken as 3 acres at a cost of Kshs.50,000/= per acre and the plaintiff paid a total of Kshs.150,000/= for the 3 acres. In his oral testimony before this court, the plaintiff said he paid the full price and referred the court to the schedule of payments attached to the supplemental agreement of 16.11.89 (Exhibit 'B' (ii)). I pause here to observe that the schedule looks incomplete and the payments reflected therein total Kshs.95,914/=, not Kshs.150,000/=.

The next issue testified on by the plaintiff was Land Control Board consent. He said he went to Othaya Land Control Board for consent and that the Board gave consent dated 14.01.92 (Exhibit 'E') for transfer of land parcel No. Chinga/Gikigie/1134 which, as noted earlier, was half portion of original land parcel No. Chinga/Gikigie/21 which had been subdivided into Chinga/Gikigie 1134 and Chinga/Gikigie/1135. The Plaintiff said the portion whose transfer to him was approved by the Othaya Land Control Board was Chinga/Gikigie/1134. He produced a carbon copy of the Land Control Board consent for the transfer (Exhibit 'E') and a photocopy of application of 28.06.89 by the late John Mureithi Wambugu for Land Control Board consent to subdivide original land parcel No. Chinga/Gikigie/21 said to have measured 6.5 acres into two portions of 3.25 acres each. This copy letter was marked as Exhibit 'F'. The plaintiff complained, however, that the late John Mureithi Wambugu did not effect the transfer of the land before he died and that when he (plaintiff) approached his widow, i.e. defendant herein, to effect the transfer, the defendant refused to do so. Plaintiff added that the defendant sent him a letter through her lawyer, Harith Sheth dated 04.08.95 instructing him to vacate the suit land and that he (plaintiff) is no longer in occupation of the said land after the defendant went with her friends to the land and evicted his workers.

The plaintiff reiterated the prayers in his plaint. As intimated earlier, Mr. Kihara Muttu testified in this case as P.W.1. He said he is an advocate and currently a Commissioner in the Electoral Commission of Kenya. It was his evidence that he knew the late John Mureithi Wambugu as a client in connection with the agreements alluded to by the plaintiff. Mr. Muttu did not think he knew the defendant. It was he, Mr. Muttu who drafted the agreements as counsel for both the plaintiff herein and the late John Mureithi Wambugu. Both parties signed the agreements before him (Muttu). He said of the schedule to the supplemental agreement that it related to money paid by the plaintiff to the late John Mureithi Wambugu on various dates. Mr. Muttu said that the plaintiff paid some money on behalf of the deceased to salvage some loan the deceased had with the Kenya Commercial Bank, Nakuru and that the money was paid to Jones & Jones Advocates for the Bank. Mr. Muttu added that the plaintiff also paid some other money to Mathenge & Muchemi Advocates for Official Receiver and Interim Liquidator on behalf of the deceased, to clear a debt owed to the Official Receiver and Interim Liquidator by the deceased. Mr. Muttu produced a bundle of correspondence between him on the one hand and Mathenge & Muchemi Advocates for the Official Receiver on the other, plus correspondence between him (Muttu) and Jones & Jones Advocates for Kenya Commercial Bank, Nakuru. The correspondence includes copy receipts for money paid on account of the deceased.

I have reproduced in a fair amount of detail the main points in the pleadings and evidence availed to this court. The evidence weighs heavily against the defendant's case. I accept the evidence adduced by and on behalf of the plaintiff.

One of the things I find remarkable in the defendant's case is her contention that just because her deceased husband did not effect transfer of land parcel No. Chinga/Gikigie/1134 to the plaintiff, therefore he had no intention of transferring the land to the plaintiff. . It is my finding that the deceased received various payments from the plaintiff as consideration for giving the plaintiff land parcel No. Chinga/Gikigie/1134 and that even if the payments in the schedule annexed to the supplemental agreement [Exhibit 'B' (ii)] do not on their own amount to Kshs.150,000/=, the bundle of correspondence including copy receipts produced by Mr. Kihara Muttu (P.W.1) points irresistibly to the deceased having received substantial sums of money from the plaintiff and that the money was paid by the plaintiff as consideration for the suitland. If the defendant herein is serious in her contention that the deceased in fact had no intention of transferring the suit land to the plaintiff, that would make the deceased someone who

obtained the money by false pretences! The defendant cannot be serious in her aforesaid contention that would paint her late husband in such negative light.

The only other issue I wish to comment on regarding the defence is the defendant's suggestion that the agreements entered into between the deceased and plaintiff regarding transfer of the suit land are null and void, inter alia, on account of her and other family members not having been consulted. In that connection, I observe that no evidence was tendered to this court that the defendant and/or other members of the family were joint owners of the subject land. In absence of such evidence, the law as I understand it is that the deceased was the sole proprietor of the land in question and, ex facie, had legal capacity to transfer the land to whomsoever he wished and the plaintiff would not be involved in the deceased's family's internal affairs.

I note by way of foot note from the lease agreement (Exhibit 'D') that the rent to be paid by the plaintiff to the deceased was at the rate of Kshs.13,000/= per annum. In her defence the defendant says the plaintiff never paid rent for the years 1984 to 1995. I do not believe the defendant's averment that the plaintiff would have leased the subject land for that long without paying for it and without the deceased doing anything about it.

On the evidence before me, I am satisfied on balance of probability that the plaintiff has proved his case against the defendant. Accordingly, I make the following orders:-

- a) The defendant shall transfer land parcel No.Chinga/Gikigie/1134 to the plaintiff forthwith.
- b) In the event of the defendant declining to comply with order (a) above, the Deputy Registrar of the High Court is hereby authorized to sign the necessary transfer documents.
- c) The defendant is restrained from interfering in any way with land parcel No. Chinga/Gikigie/1134 or attempting to pick tea from the said land.
- d) The defendant shall pay to the plaintiff damages for trespass for the years 1995 to date at the rate of Kshs.13,000/= per year, totalling Kshs.130,000/=.
- e) The defendant shall bear the plaintiff's costs of this suit.

Orders accordingly.

Delivered at Nairobi this 11th day of May, 2005.

B.P. KUBO

JUDGE