



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

CIVIL SUIT NO. 208 OF 1989

PETER JOHN GAKONDE NYAGU
PLAINTIFF

VERSUS

JOSEPH NG'ANG'A KANYUKI KINYIRIRIA1ST
DEFENDANT

KARANJA MACHARIA2ND
DEFENDANT

KIRIGO NGATIA3RD
DEFENDANT

JUDGMENT

By an amended plaint filed in court on 23.2.1996, the plaintiff, Peter John Gakonde Nyagu, sued the 3 defendants namely:

(a) Joseph Ng'ang'a Kanyuki Kinyiriri,

(b) Karanja Macharia and

(c) Florence Kirigo Ngatia (substituted for the late Charles Maina Ngatia), seeking a declaration that

(a) "that the second defendant's bid of Kshs.150,000/= as the highest bid for Limuru/Bibirioni T.57 be held to be null and void,"

(b) "an order of declaration that the plaintiff was the highest bidder of Limuru/Bibirioni/T.757 for Kshs. 160,000/= and hence Limuru/Bibirioni/T.757 be transferred to the plaintiff, the court to authorize the Registrar of the High Court to sign the transfer documents".

(c) "that the present Registration be held to be null and void. An order for injunction restraining the second defendant from registering himself as the lawful owner of

Limuru/Bibirioni/T.57”,

(d) Damages

(e) Costs

(f) Interest on (d) and (e).

When the suit came before me for hearing, I discovered that none of the defendants had ever filed any defence within the time allowed by law, though litigation has been going on for a very long time with several applications being filed and determined. Again, I found that most of the original parties to the suit died in the course of time, and the court record show that there were several substitutions.

I noticed from the file that the defences of the 1st and 3rd defendants “**suddenly**” appeared on record with the filing of submissions by their lawyers on 9th December, 2004. The same were not on record when I heard the suit on 16th November, 2004. There was no application filed seeking leave to file defences out of time, considering that the original plaint was filed on 18th January 1989, and subsequently amended by leave of the court vide amended plaint filed on 23.2.1996.

The plaintiff, Catherine Wanjiku Gakonde who was substituted for her husband Peter John Gakonde the original plaintiff, who is mentally sick, testified that the suit premises known as L.R **LIMURU/BIBIRIONI/T.757**, is the home where she lives with her family. She recalled that in 1984, a lady called Margaret who had borrowed money from Barclays Bank, Limuru, approached her husband to buy the land other than letting the bank sale it, as she was unable to repay the loan.

The plaintiff’s husband agreed to buy the land for Kshs.160,000/=. The bank balance by then was about Kshs.75,000/=.

Catherine confirmed that her husband paid Margaret Kshs.160,000/= in the presence of witnesses, but later they learnt that Margaret did not repay the bank loan, and the bank proceeded to advertise the property for sale by public auction.

Catherine and her husband attended the auction sale and bid for the property for Kshs.160,000/= but the auctioneer who was later sued as one of the defendant’s refused their bid, saying that one Karanja Macharia, also sued as a defendant, had bid for the property for Kshs.150,000/=.

Karanja died and was substituted by his wife Virginia on 22nd May, 2003.

The auctioneer declared the late Karanja the highest bidder at the fall of the hammer.

Catherine and her husband came to court and filed this suit. They also sought an injunction from the court. Catherine referred to the 3rd defendant Florence Kerigo Ngatia, as the one currently registered on the title to the suit premises. A copy of the green card shows that Florence was registered on the land in 1993. Florence’s husband, Charles Ngatia was not alive by then, he had died. He used to work with Bata in Limuru. Catherine produced a copy of the Standard Newspaper advertising his death on 30th October, 1990. She also produced the original search certificate as an exhibit in court.

Catherine stated that as Charles Ngatia had died in 1990, he could not have bought the land and become registered on 22nd February, 1993, as the green card shows! Catherine also confirmed that Charles Ngatia was not present at the auction sale.

Catherine said that the auctioneer declared Karanja the highest bidder, that is why they sued him. She also confirmed that Karanja was not the same person as Charles Ngatia.

She asked the court to declare her the highest bidder at the auction sale. She also asked for costs of the

suit.

Several questions were put to Catherine to which she answered that her husband was the highest bidder at Kshs.160,000/=. That the court granted an injunction in favour of her husband and directed him to pay Kshs.160,000/=. Catherine could not remember when her husband made the payment because he became mentally sick, that is why Catherine took over the case. There is a doctor's letter to that effect, dated 14th May, 2002.

Catherine replied to further questioning that she and her husband took possession of the suit premises in 1985. They found an unfinished house. They finished it. They also brought electricity to the house, and also put a water tank. She also confirmed that by 1988 they were living in the suit premises and in 1989, they came to court and obtained an injunction to restrain anybody from evicting them.

Catherine recalled that there was an injunction application filed by her husband who was now not well and conducted the case coming from Mathare hospital. The application was against the 3rd defendant Florence stopping her from selling the property. The application was however dismissed by Aganyanya, J on 23.7.1996.

Catherine also stated that the injunction order granted in their favour was never served on the Land Registrar in good time. She did not know at that time that her husband was not well.

When she discovered his mental illness she took over the case. The court allowed her to be substituted.

She prayed the court to cancel the registration of land into Florence's name because she got land from her husband who died in 1990, yet was registered as the proprietor in 1993, as per the evidence she adduced.

Having heard the evidence of Catherine, evidence on which she was cross examined, I decided to close the case because there were no defences filed and as I have said, no applications made for leave to file defences out of time.

I need to point out from the record that the 1st defendant Joseph Ng'ang'a Kanyuki Kinyireria, was present in court on the day of the hearing, and insisted that he had filed a defence, but I did not find any, apart from the one filed with the submissions on 9th December, 2004

Neither the 2nd defendant nor his lawyer was in court, though the lawyer had been served with a hearing notice. The 1st defendant was represented by Mr. Kimani, advocate who conceded that he had not seen a defence filed on behalf of his client by the previous counsel.

I consider it most unfortunate that from the last time I heard this case, this court file went before several Judges as the record shows before it was finally brought back to me on 4th July, 2005, when I set the date for the final judgment. This would explain "**the rather long delay**", in delivering this judgment.

I have considered the submissions filed by the advocates representing the plaintiff, and the 1st and 2nd defendants.

Counsel for the plaintiff prepared his submissions as per his pleadings, as well as the oral evidence adduced by his client, Catherine. He submitted that her evidence was not challenged as none of the defendants filed any defence, and again none of them gave evidence in court.

The submissions on behalf of the first and 3rd defendants introduced their defences which were clearly filed out by time without the leave of the court.

The two defences filed out of time drew a reaction from the plaintiff's counsel who responded by way of "**Reply to the 1st and 3rd defendants submissions.**"

He quoted the provisions of Order IX Rule I which allows for the filing of a defence “**at any time before interlocutory judgment is entered, or at any time before the final judgment**”.

Mr. Muhoro submitted that this rule must be read with Order VIII Rule 1(2) which provides for the filing of defence within 15 days of the service of summons to enter appearance.

I have considered the oral evidence adduced in this case as well as the pleadings which were on record as at the time I heard the suit.

I have also considered the written submissions filed by the advocates representing the parties herein.

As far as the 1st and 3rd defendants are concerned, I find myself unable to consider their defences filed out of time without leave of the court, as service of summons to enter appearance was conducted within the period prescribed by law. Besides, the defences were annexed to submissions. They were not even filed, and of course, no leave was sought and none was granted for their filing. I find that in these circumstances, the plaintiff would be highly prejudiced if I considered the 2 defences I found in the file after the plaintiff had given her evidence in full, and was cross examined on it at length. The defences must have been tailed to rebut her evidence which defendants one and three or their lawyers had the benefit of listening to in court. I therefore reject the defence of defendants 1 and 3, forwarded to court with the submissions.

Going back to the plaintiff’s evidence and her pleadings, I find that this evidence was not challenged. This was the evidence of how the plaintiff and her husband acquired the suit premises where they built a home and have lived in since 1988, to date.

According to the evidence adduced by the plaintiff, Charles Maina Ngatia, who was said to have bought the land, a fact which Catherine and her husband disputed, died on 27.10.90, as per the death advert produced in court.

The green card, however, however shows that the suit premises was transferred to him – i.e. (transfer by charge) on 22nd February 1993, and on 30th March 1993, Florence Kirigo Ngatia (wife of Charles Maina Ngatia) had the property registered in her name by transmission, i.e. succession.

Given the fact that Charles died in 1990, yet in February 1993 the suit premises was transferred to him by charge, which same suit premises was then transferred to Florence a month afterwards, shows in my view that the transfer of the suit premises to Charles Maina Ngatia was “**suspect**” and at most “**fraudulent**”, because he was already dead!

Part III of the green card on “INCUMBERANCES” at entry 4, shows a “**Discharge by Chargee under Sec. 72**”. This was the discharge of the charge in favour of Barclays Bank of Kenya Ltd. The charge to Barclays Bank was registered on the title on 20th February, 1984.

I find that this evidence of the charge having been registered on the title in 1984, by Barclays Bank Ltd, corroborates the evidence of Catherine, the plaintiff, to the effect that it was in 1984, when the owner of the suit premises, Margaret Njeri Njenga, approached them, asking them to buy her land to redeem it from Barclays Bank where she had borrowed money and charged the suit premises and was unable to repay the same.

The evidence which I also find ‘**suspect**’ and therefore doubtful is the entry showing that it was Charles Maina Ngatia who discharged the charge in favour of Barclays Bank, and therefore became registered on the title the same day, 22.2.93, and just about one month after that on 30.3.93, his wife Florence Kirigo Ngatia (3rd defendant) became registered upon transmission.

I do not believe or accept this evidence which as I have said looks very suspicious and smells of “**fraud**”. I reject it totally! I find it unfortunate that whoever caused the entries to be made, in the register seem to

have worked in conjunction with the officials at the Lands Office in Kiambu, in an effort to take the land away from the plaintiff and her family. For all reasons I have considered in this case, I proceed to declare that, **“the second defendant’s bid of Kshs.150,000/= said to have been the highest bid for LIMURU/BIBIRIONI/T.57, is hereby declared null and void”**.

Secondly, **I declare the plaintiff Peter John Gakonge Nyagu, now substituted by his wife, to have been the highest bidder of L.R LIMURU/BIBIRIONI/T.757, and I direct that this property be transferred and be registered in the name of his wife Catherine Wanjiku Gakonde.** If the current title holder, Florence Kirigo Ngatia, refuses to sign documents of transfer, I authorize the Registrar of the High Court to sign the transfer documents.

Finally, I declare the present registration of the suit premises in the name of Florence Kirigo Ngatia, to be **“null and void”, and order that it be cancelled.**

I will not award any damages as prayed, because there was no evidence tendered on that head.

I award the costs of this suit to the plaintiff as against Joseph Ng’ang’a Kanyuki Kinyuriri, the 1st defendant, Virginia Muthoni, substituted for Karanja Macharia the second defendant, and Florence Kirigo Ngatia, the 3rd defendant.

Dated at Nairobi this 1st day of December, 2005.

JOYCE ALUOCH

JUDGE