



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 52 OF 2017

(FORMERLY NAIROBI ELC 743 OF 2012 AND FORMERLY KIAMBU SPMCC NO. 52 OF 2010)

MARTIN WAINAINA MATHENGE.....PLAINTIFF

VERSUS

NG'ANG'A THAARA GITHINJIDEFENDANT

JUDGMENT

1. By way of a plaint filed in court on 22.2.2010, plaintiff has sued defendant seeking the following orders:

- (i) That the plaintiff is legally entitled to ownership and possession of land no. Kiambaa/Waguthu/5180.**
- (ii) An order directed to the defendant to effect transfer of land No; Kiambaa/Waguthu/5180 into the name of the plaintiff.**
- (iii) An order of permanent injunction to be issued restraining the defendant whether by himself, his agents, servants and or anybody claiming ownership through the defendant or otherwise from trespassing into, selling, transferring or in any other way interfering with the use, possession, occupation and enjoyment of land no. Kiambaa/Waguthu/5180 by the plaintiff**
- (iv) Costs of the suit.**

2. Defendant filed a statement of defence and a counter claim on 24.6.2010. , where he denies plaintiff's claim. He also prays for the following orders;

- (a) A declaration that the promise and/or representation by the defendant to the plaintiff was perpetuated by undue influence and coercion and is therefore unlawful, null and void.**
- (b) A declaration that the plaintiff is the absolute owner and therefore entitled to all that piece of land known as Kiambaa/Waguthu/5180**

3. The trial proceeded exparte after the court ascertained that defence side had been duly served.

4. Plaintiff testified that long ago, he used to reside at Gathanga. His mother was doing business and in the course of that business, she met defendant who offered to stay with the plaintiff.

5. Plaintiff met defendant in 1998 but he eventually moved on defendants land parcel No. Kiambaa/Waguthu/1497 in year 2000. The two agreed that plaintiff was to be assisting defendant with food, security and general assistance. Plaintiff demolished his house at Gathanga and he put up his house on defendants land whereby he developed the place by installing electricity, drilling boreholes and other general developments.

6. This arrangement was extended to giving plaintiff a portion of the land measuring 0.0350 hectares. To this end an agreement was written and is P Exhibit 1. However, the same is not in English.

7. Pursuant to this arrangement the portion that plaintiff was to get was identified to measure 40 x 95 feet and was even given a new number Kiambaa/Waguthu/5180. Again in furtherance of this agreement the two parties did sign transfer forms and they also obtained consent for the transfer from the land Control board. This was in 2009. The transfer forms and the consent were produced as plaintiff Exhibits 2 & 3 respectively.

8. According to plaintiff, the only hitch that occurred preventing the registration of the land into his name was that the land Registrar had raised an issue that the numbers given for new subdivisions, No. 5180 and 5181 (arising from parcel No. Kiambaa/Waguthu/1497) were too much ahead and the surveyor needed to carry out fresh mutations to give fresh numbers of which defendant was to sign.

9. Plaintiff avers that a broker then started to tell defendant that he could get him another buyer who would give him shs.1.5 million for the parcel no 5180 which plaintiff was supposed to get. That is when defendant threatened to evict plaintiff hence the court case. Plaintiff has produced photographs (Plaintiff Exhibit 4) showing the home dwelling where he resides with his family.

10. Plaintiff called 3 witnesses namely Peter Muigai Kiarie (PW 2), David Njuguna Kagia (PW 3) and Charles Gatimu Kariuki (PW 4). These witnesses testified and they also relied on their statements recorded on 24.10.2011. Their evidence is that on 9.1.2009 they were witnesses to the agreement between the litigants herein, whereby defendant had stated that he was giving a portion of his land 1497 measuring 40x94 feet from his parcel Kiambaa/Waguthu/1497 to the plaintiff.

Determination

11. I have carefully analyzed the pleadings, the evidence adduced and the submissions proffered. I find that plaintiff has given a consistent and plausible account of how he came to acquire an interest in the suit land. The agreement produced as P exhibit 1 is not in English and I have not seen any translation thereof. I disregard it all together. Despite that short coming, I find that the three witnesses called by plaintiff have confirmed that the meeting of 9.1.2009 did take place. The status of these witnesses is interesting. Both PW 2 (Peter Muigai Kiarie) and PW 3 (David Njuguna Kagia) are step brothers of defendant while PW 4 (Charles Gatimu Kariuki) is actually a son of defendant. These are very close relatives of defendant and hence their evidence strongly buttresses plaintiff's claim.

12. In the case of **Charles Mwirigi Miriti vs Thananga Tea Growers Sacco Ltd & another Court of Appeal at Nyeri Case No. 158 of 2001 (2014) eKLR** cited by plaintiff the court defined what amounts to consideration quoting the definition from **Chitty on contracts Vol. I General Principles 29th Edition** as follows;

“The traditional definition of consideration concentrates on the requirement that something of value must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (and he may receive value). Usually, this detriment and benefit are merely the same thing looked at from different points of view”.

13. A perusal of the statement of defence reveals that although there is the usual denial of plaintiff's claim, in paragraph 9 thereof, defendant does admit that plaintiff did put up structures on the land and even dug a borehole.

14. I am also in agreement with the authority of **Henry Mwangi Gatai vs Another vs Margaret Wanjiku Godwin & Others (2018) eKLR -L. Gacheru J** cited by plaintiff where it was held that;

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect such as failure to comply with the formal requirements or mistake or illegality which makes the contract invalid or unenforceable....”

15. In the instant case, the parties had even obtained the consent from land control board and transfer documents had been signed. It appears that a window of opportunistic maneuvers was opened when the Land Registrar raised the issue of numbers of the new sub divisions.

16. All in all, I find that plaintiff has proved his case on a balance of probability.

Final orders:

(1) It is hereby declared that MARTIN WAINAINA MATHENGE is entitled to ownership and possession of land parcel No. Kiambaa/Waguthu/5180 measuring 40 x 95 feet.

(2) An order is hereby given for plaintiff to be registered as the owner of parcel no. 5180 measuring 40 x 95 feet, which parcel is to be hived off from Land parcel no. Kiambaa/ Waguthu/1497.

(3) An order is hereby directed to defendant to sign all requisite documents to facilitate the transfer of the land in the name of the plaintiff and in the alternative, the Deputy registrar of this court is hereby authorized to sign any such requisite documents to facilitate the transfer of the land to the plaintiff

(4) The consent of land control board is hereby dispensed with in the implementation of this judgment.

(5) Each party to bear their own costs of the suit.

Dated, signed and delivered at Thika this 2nd day of May, 2019

MBUGUA LUCY

JUDGE

2/5/2019

In the presence of

Court Assistant: Diana

Mr. Kamau Counsel for Plaintiff

Plaintiff: Present