



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HCC NO.145 OF 2012

GEORGE MUIRU KINYANJUI.....PLAINTIFF

VERSUS

ASAPH MBUGUA KIBUE & 20 OTHERS.....DEFENDANTS

JUDGMENT

(Suit by plaintiff seeking specific performance; the vendors being a Group; sale agreement signed only by the Chairman; Group contesting this sale agreement and stating that the Chairman by himself had no capacity to bind the Group; plaintiff having had an earlier agreement with the Group signed by the officials; plaintiff thus knew that the Group acts through its officials and not by the sole acts of the Chairman; sale agreement nullified and plaintiff cannot be entitled to specific performance; plaintiff to be refunded money deposited in the Group's account)

1. The plaintiff through a plaint filed on 26 April 2012, sought orders to have the defendants permanently restrained from the land parcel Nakuru Municipality/Block 2/355 and to have an order of restriction lifted in respect of the title to the said land. He has also sought orders to have the title to the land parcel Nakuru Municipality/Block 2/355 (hereinafter referred to as the suit land) transferred to him. The 1st – 20th defendants are members of Matariko Self Help Group which has been sued as the 21st defendant. The reason the plaintiff seeks these orders is that he contends that the defendants sold to him the suit land at a consideration of Kshs. 3,000,000/= through a sale agreement dated 20 April 2009, signed between himself and the 1st defendant, who is alleged to have been acting on behalf of all defendants as the Chairman of Matariko Self Help Group. The plaintiff avers that he paid Kshs. 2,000,000/= as a down payment and has pleaded that it was agreed that the balance would be paid once the title is processed. He has pleaded that the defendant derived his mandate to sell through minutes of 12 December 2008 and 9 January 2010. He avers to have been given possession of the suit land but that the 2nd and 4th defendants and one Samuel Kamau Njoroge are interfering with his possession.

2. Two different counsel were appointed in the matter for the defence. M/s Githui & Company Advocates entered appearance and filed defence on behalf of the 1st, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 16th, 18th, 19th, and 21st defendants, while M/s Nancy Njoroge & Company Advocates entered appearance and filed defence on behalf of the 2nd, 3rd, 4th, 15th and 17th defendants. For the latter group, it was pleaded in the defence that the suit land was not capable of being sold as some of the registered owners were dead at the time of sale. It was also denied that they gave consent to the 1st defendant to sell the suit land on their behalf. It was claimed that this case is a cover up to irregularly dispose of property whose members have not reached a unanimous decision to sell. I have not seen a defence filed by M/s Githui & Company Advocates on behalf of his clients though the approach that his clients took at the initial stages of the proceedings, discernible through some replying affidavits to the plaintiff's application for injunction, is that they had no problem with the orders sought by the plaintiff. It is probably because of this that they filed no defence.

3. In the course of time, the 1st defendant died, and the suit against him therefore abated.

4. The plaintiff testified inter alia that he owns premises next to the suit land, and that he was approached by the 2nd and 4th defendants and one Samuel Kamau Njoroge, and advised that if he was interested in purchasing the land, he could meet the members who were scheduled to hold a meeting the following week. He met the Group and they informed him that they would get back to him. After some time, the 1st defendant who was Chairman of the Group, and other members, came to negotiate with him and it was agreed that he could purchase the land at Kshs. 3,000,000/=. He did a search and they later wrote a sale agreement on 20 April 2009. He paid a banker's cheque of Kshs. 1,800,000/= and cash of Kshs. 200,000/= as deposit, and he deposited the balance of Kshs. 1,000,000/= with his advocate. Rates were paid and clearance certificates issued. Later, his advocate called him and informed him of a restriction placed in the title of the suit land by the 4th defendant. He saw the 1st defendant who promised to talk to the 4th defendant but he later came back to the plaintiff and informed him that he could not get through to him and therefore he (the plaintiff) should consider going to court. He stated that the 1st defendant signed the agreement as Chairman of the Group and he also had minutes which he stated allowed him to enter into a sale agreement. On the argument that some members had died at the time of the sale agreement, he responded that it was the Group which was selling the land to him. Cross-

examined, he stated that he was not aware that nine of the members of the Group were deceased at the time of the sale agreement and he did not investigate whether all members were alive. He mentioned that he relied on the minutes given to him. He acknowledged that the search showed 24 names in the title but he only entered into a sale agreement with the 1st defendant because he was trustee of the Group. He also acknowledged having had an earlier sale agreement dated 17 March 2008, which fell through, but which was signed by five persons including the Chairman, Treasurer and Secretary, as trustees of the Group, contrary to the agreement dated 20 April 2009, which was only signed by the 1st defendant. He stated that he did not see the need of the rest signing this later agreement.

5. DW-1 was Stephen Njuguna Gatiba, the 4th defendant and the current Chairman of Matariko Self Help Group (the Group). He testified that the Group was formed around the years 1969/1970 by twenty people, as a partnership, but he mentioned that several members are now deceased. He acknowledged that in the year 2008, the 1st defendant was Chairman of the Group, and he (DW-1) was Treasurer, while Samuel Kamau served as Secretary. He recalled that they had on 17 March 2008 entered into a sale agreement with the plaintiff for the sale of the suit land and he pointed out that the Committee members signed it on behalf of the Group. This agreement was however not completed and was abandoned. He stated that the Group did not authorize another sale of the suit land and was unaware of the sale agreement of 20 April 2009 which was only signed by the 1st defendant. He pointed out that the title read the names of 20 persons, and that if one person does not wish to sell, the sale cannot proceed. He stated that the Group found the sum of Kshs.1,800,00/= deposited in its account and placed a caution over the title of the suit land. This money, he said, is intact. He was cross-examined on the minutes of a meeting held on 9 January 2010, but he stated that he was not present in the said meeting, yet he was the Treasurer. The Secretary was also not present. He pointed out that some of those noted to be present in the said meeting were not members of the Group and he stated that a meeting could not be held without the other officials being present. He stated that every member needed to be present for a resolution to be passed giving the 1st defendant authority to sell. He also testified that the 1st defendant never told them that he has been paid.

6. With the above evidence, the parties closed their respective cases. I invited counsel to file written submissions and Mr. Opar, learned counsel for the plaintiff, and Ms. Njoroge, for the defendants contesting the suit, filed their submissions. I have taken note of these before arriving at my decision and I find as follows hereunder.

7. The core question in this suit is whether the 1st defendant had authority to sell the suit land. I do note that in his submissions, Mr. Opar, learned counsel for the plaintiff argued that the 1st defendant had authority to sell, based on the minutes of 22 December 2008, 9 January 2010, and 24 June 2006. I have looked at these minutes. It does appear that the Group had been mulling selling the suit land and I have seen that in the minutes of the meeting held on 24 June 2006, the Group passed a resolution and they authorized the Chairman and his Committee to sell the suit land to whoever offered a good price. I think that it is because of this that the sale agreement of 17 March 2008 was entered into between the Group and the plaintiff. That sale agreement was signed by four persons on behalf of the Group, that is Asaph Mbugua Kibue (Chairman), Waweru Mwaura Ngorongo (Vice Chairman), Stephen Njuguna Gatiba (Treasurer), and Samuel Kamau Njoroge (Secretary), who executed the agreement as the trustees of the Group and they did mention in the sale agreement that they are representing the Group. It is common ground that this agreement was abandoned and no obligations arise out of it.

8. The sale agreement that is sought to be enforced in this suit was only signed by the 1st defendant on behalf of the Group. Interestingly, within that sale agreement is noted that *“the vendor is the Chairman of Matariko Self Help Group who are represented by the registered trustees, owners of all that parcel of land known as Nakuru/Municipality Block 2/355...”*. I have not been shown any minutes where the Group agreed that the 1st defendant, by himself, could execute a sale agreement on behalf of the Group and it is apparent from a reading of the sale agreement itself, that the Group was represented by the registered trustees. This was not new information to the plaintiff, because he had earlier entered into the sale agreement of 17 March 2008 with the same group and the sale agreement was signed by the four officials said to represent the Group. The plaintiff thus knew that the Group acts through officials or trustees, and not by the sole action of one person, and it was careless of him to have entered into the sale agreement with only the 1st defendant as signatory.

9. I do not see how the minutes of 9 January 2010 can assist the plaintiff, for these minutes come after the sale agreement of 20 April 2009. I am not persuaded that they can change the legal position that the trustees and/or officials of the Group, and not one person, had capacity to bind the Group at the time that the sale agreement of 20 April 2009 was entered into. This position is indeed borne out by the registration of the title itself, which shows that it is registered in the names of five persons as trustees. It follows that it is these five persons, or their successor trustees, who were the ones with capacity to enter into the sale agreement.

10. From my above analysis, my finding is that the sale agreement dated 20 April 2009 is null and void for it was not signed on behalf of the vendor, by the persons who had authority to bind the Group. Having held as much, it follows that the plaintiff cannot benefit from an order of specific performance and this suit fails.

11. There is the issue of the sum of Kshs.2,000,000/= claimed to have been paid to the Group by the plaintiff. The sum of Kshs.1,800,000/=, which was in the form of a banker's cheque, is not disputed to have been deposited in the accounts of the Group. However, the plaintiff claims to have paid the sum of Kshs.200,000/= in cash to the 1st defendant but the Group has not seen this money and it is not reflected anywhere in their accounts. I wonder why the plaintiff paid the 1st defendant Kshs.200,000/= in cash, for the already impugned sale agreement provided that he was to make a deposit of Kshs.2,000,000/= in form of a banker's cheque, and there is no indication that any payment was to be made in cash. I also note that in the minutes of 22 December 2008, the Group resolved that all cash transactions have to be signed for by the Chairman, Secretary and Treasurer, but the plaintiff avers that only the 1st defendant received the cash, which if this is indeed what happened, is irregular. What I can ask the Group to do is to refund only the sum of Kshs. 1,800,000/= to the plaintiff. The plaintiff, if he is so minded, will separately have to pursue the alleged cash payment of Kshs.200,000/=.

12. The plaintiff has lost and he will shoulder the costs of this suit in respect of the defendants who opposed this suit. I make no orders as to costs in respect of the defendants who opted not to oppose this suit.

13. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 1st day of October 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Opar present for the plaintiff.

Ms. Wanuma holding brief for Ms. Nancy Njoroge for 2nd, 3rd, 4th, 15th and 17th defendants.

No appearance on the part of M/s Githui & Co. for the other defendants.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU