



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 253 OF 2017

JOSEPH MUIRURI NJIRAINI.....PLAINTIFF /RESPONDENT

VERSUS

JOYCE WANJIKU NGUGI.....1ST DEFENDANT/APPLICANT

LUCY WANJIRU MURIGI.....2ND DEFENDANT /RESPONDENT

THE LAND REGISTRAR MURANGA.....3RD DEFENDANT/RESPONDENT

JUDGEMENT

1. The Plaintiff instituted his claim vide a plaint dated 7/5/2016 for orders:

- a) That the 1st and 2nd Defendants and their agents be barred by way of a permanent injunction, trespassing, cultivating and or interfering in any way with the Plaintiff's quiet possession of all that piece known as MAKUYU/MAKUYU BLOCK.1/9081.
- b) That the Plaintiff be declared as the lawful and bona fide owner of all that piece of land known as MAKUYU/MAKUYU BLOCK.1/9081.
- c) That the 3rd Defendant do lift the caution registered by the 1st Defendant against all that piece of land known as MAKUYU/MAKUYU BLOCK.1/9081.
- d) That the 1st and 2nd Defendants be ordered to uproot all and any vegetation planted by them or with their authority on the suit land of land.
- e) Costs of the suit.
- f) Any other relief that this Court deems fit to grant.

2. The Plaintiff's case is that he's the registered owner of MAKUYU/MAKUYU BLOCK.1/9081 (hereinafter referred to as the suit land) vide a Title deed issued on 12/8/2015. That sometime in 2016, the 1st and 2nd Defendants started cultivating the suit land without his authority. That the 1st Defendant went ahead and lodged a caution over the suit land which was registered by the 3rd Defendant on 1/2/2016. His claim therefore is for vacant and quiet possession and lifting of the said caution since the 1st and 2nd Defendants have no interest over the suit land.

3. Initially, this Court had entered default judgment against the Defendants on 17/12/2017. The 1st Defendant applied for review and setting aside of the Judgment which application was allowed on 11/12/2019.

4. The claim is thus opposed.

5. The 1st Defendant filed her amended defence and counter claim dated 10/3/2020. She denied the Plaintiff's claim and counter claimed as the administrator of the estate of her late husband, Ngugi Muiruri Kimuhu. She sought the following orders;

- a. The suit land be transferred to the 1st Defendant.

b. In the alternative the Plaintiff to pay the 1st Defendant the market value of the suit land.

c. Costs of the suit.

6. She contended that the Plaintiff and her late husband entered into sale agreement for land parcel no. LOC.6/GIKARANGU/2220 dated 28/3/1989. That land parcel no. LOC.6/GIKARANGU/2220 (hereinafter referred to as parcel 2220) had a family dispute and the Plaintiff promised to give her an alternative land being the suit land. That she tried to follow up on the alternative land with the Plaintiff from 2006 but only managed to get it in 2011 when she took possession and has cultivated it as her own to date. She urged the Court to dismiss the Plaintiff's case and allow her counter claim to the effect that the suit land be transferred to her. In the alternative the Plaintiff pays her the market value of the suit land; costs of the suit and any other relief the Court may deem fit to grant.

7. The 2nd Defendant neither entered appearance nor filed her defence and judgment in default stands.

8. The 3rd Defendant entered appearance and filed a statement of defence dated 13/10/2020. She denied the Plaintiff's assertions and maintained that if at all any caution was registered, then the same was lawful, regular procedural and in furtherance of her statutory duties.

9. The Plaintiff filed his reply to 1st Defendant's defence and opposed the counter claim dated 20/1/2020. The Plaintiff denied the sale agreement dated 28/3/1989 between him and the late Ngugi and put the 1st Defendant to strict proof thereof.

10. The Plaintiff testified as PW1 and adopted his statement dated 75/2016. In his statement, PW1 stated that he is the registered owner of the suit land and upon conducting a search on the land, he found a caution registered on it in March 2016. He denied showing the 1st Defendant the suit land and maintained that the only sale agreement he entered into was the one with the 1st Defendant's late husband for parcel 2220. PW1 was emphatic that there has never been an agreement in respect of the suit land with either of the Defendants or the late Ngugi. While admitting knowing Robert Ndungu, he was clear that Robert never accompanied him to show the 1st Defendant the alternative land. That he did not compensate the 1st Defendant with the suit land in lieu of the parcel 2220 (subject of the sale agreement between him and the 1st Defendant's husband). He produced copies of the title deed for the suit land, his Identity card and official search as P.Exh nos. 1-3.

11. In cross-examination, PW1 conceded that he knew Joseph Ngugi Kimunyu Muiruri, the 1st Defendant's late husband having entered into a contract for sale of parcel 2220. PW1 said that the sale collapsed because parcel 2220 was family and his family objected to the sale. That it was registered under his father's name and the Court seized with succession proceedings revoked the sale in 1989. PW1 confirmed that he received some money in respect of the transaction but asserted that he did not offer any alternative land to the 1st Defendant.

12. On the issue of the 1st Defendant's entry into the suit land and concluding the cross-examination, PW1 said;

“The 1st Defendant entered the land in in 2015. That is when I learned she had entered and rented it to another person 3rd party. I live in Nyandarua. I instructed Karuga Wandai Advocates to ask the 1st Defendant to collect the cash and hand over the land. This was the money that I received with respect to parcel 2220 which I had received from her husband.

The original contract as frustrated by the succession, I did not refund the money I received. I want the 1st Defendant to remove the caution.”

13. In re-examination, PW1 was categorical that he never entered into any sale agreement with the 1st Defendant. That he sold parcel 2220 that was registered under his father 's name to the late Ngugi.

14. The 1st Defendant testified as DW1 and called two witnesses in support of her case. She relied on her statement dated 10/3/2020 as her evidence in chief and List of Documents of even date. In her witness statement, DW1 stated that her late husband purchased parcel 2220 from the Plaintiff vide a sale agreement dated 28/3/1989. That upon completion of payment, they took possession of the land fenced it and cultivated bananas and coffee thereon. That after two years of cultivating the land, the Plaintiff's brothers started harassing them and they complained to the Plaintiff who allegedly promised the late Ngugi another land, being the suit land.

15. That unfortunately, the late Ngugi passed on before the Plaintiff could show them the new parcel of land. Thereafter DW1 said she followed up on the alternative land and the Plaintiff showed her the suit land in the presence of Robert Ndungu and the Plaintiff's sister called Mwihaki. That DW1 started cultivating the suit land in 2009 as she pursued the Plaintiff to transfer the suit and to her in vain. DW1 then opted to report the matter to the chief at Makuyu who organized for a meeting on 17/2/2016 which never took place as the Plaintiff failed to turn up. Afterwards, DW1 heard that the Plaintiff intended to sell the suit land without informing her. She then conducted a search at the Murang'a Land's office and learnt that the suit land was registered in the Plaintiff's name prompting her to register the impugned caution. DW1 closed her evidence by pointing out that she received a letter from the Plaintiff's advocate dated 4/3/2016 requesting her to remove the caution in exchange of Kshs. 170,000/=. DW1 produced her exhibits Nos. 1-8 as listed in the List of Documents dated 10/3/2020.

16. In cross-examination, DW1 explained that her late husband purchased 1.7 acres out of parcel 2220 for Kshs. 85,000/= in 1989. DW1 admitted that she had no agreement in respect to the suit land and conceded that she had no prayer for parcel 2220. She also acknowledged that she registered cautions on both parcels 2220 and the suit land 9081. That she had an oral agreement with the Plaintiff for her to cultivate the suit land.

17. Robert Ndungu testified as DW2 and relied on his statement dated 10/3/2020. His evidence was similar to that of DW1 to the extent of knowing the 1st Defendant and her deceased husband and the genesis of this suit. He admitted to knowing the Plaintiff as they schooled together. He informed the Court that he was present when the Plaintiff gave the 1st Defendant the suit land to cultivate pending the resolution of succession proceedings in respect to parcel 2220.

18. During cross-examination, DW2 confirmed that the sale agreement between the Plaintiff and the late Ngugi was for parcel 2220 and that DW1 started cultivating the suit land in 2015. He said he was aware that land dealings should be in writing.

19. The 2nd Defendant, Lucy Wanjiku Murigi was the last witness. Similarly, she adopted her statement dated 10/3/2021 as her evidence in chief. Notably her evidence was akin to that of DW1 except that she was DW1's employee and has been tilling the suit land since January 2016. That she learnt from the suit land neighbors about the Plaintiff's intention to sell the land and informed DW1 about it.

20. In his written submissions, Plaintiff rehashed the background of the suit, hearing proceedings and evidence adduced by the rival parties. He submitted that he is the registered owner of the suit land and no doubt that there is no agreement in relation to the suit land. That the 1st Defendant's allegations of an oral agreement for the suit land in place of parcel 2220 is not backed by any evidence. That the 1st Defendant has placed cautions on both the suit land and parcel 2220 yet the only written agreement was for parcel 2220, the Gikarangu property.

21. The Plaintiff cited section 3(3) of the Law of Contract Act and section 38(1) of the Land Act which provide that land contracts must be in writing and signed by all parties. To that end he argued that the 1st Defendant's counter claim fails as there is no agreement for the suit land and relied on the case of **Patrick Tarzan Matu & Anor. –v- Nassim Sharif Abdulla & 2 others [2009] eKLR**. He maintained that the 1st Defendant has no interest in the suit land and thus the counter claim fails. Lastly, the Plaintiff submitted that he has proven on a balance of probabilities that he's the rightful and indefeasible owner of the suit land and that the 1st and 2nd Defendants are trespassing on his land. He beseeched the Court to enter judgment against the Defendants as prayed with costs.

22. On the other hand, the 1st Defendant narrated the background of the suit as already highlighted above and faulted the Plaintiff for seeking Court remedies with unclean hands. The 1st Defendant's submissions were largely marginal and revolved around the issue of injunction only. That the Plaintiff's conduct and averments are contradictory tainting his plea before Court in line with **section 120** of the Evidence Act. The 1st Defendant faulted the Plaintiff for evading his responsibilities after benefiting from the transaction in the guise of section 3(3) of the Law of Contract Act. She urged the Court not to grant the Plaintiff's an injunction as sought and relied on the case of **Francis J.K Ichatha vs Housing Finance Company of Kenya, Civil Application No. 108 of 2005**.

23. The following factors are not in dispute; the Plaintiff entered into a sale agreement with the late Ngugi for sale of 1.7 acres being a portion of parcel 2220 vide a sale agreement dated 28/3/1989 D. Exh. 3 with the Plaintiffs husband; the Plaintiff is the registered owner of the suit land as evidenced by Title deed issued on 12/8/2015, see P.exh.1; the 1st Defendant is the wife and legal representative of the deceased purchaser of 1.7 acres out of parcel 2220; The Plaintiff lives in Nyandarua;

24. As at 21/2/13 Parcel No 2220 was registered in the names of; Albert Njiraini Muhia, Anne Njoki Njiraini, Joseph Muiruri Njiraini, Jeniffer Muthoni Njiraini, Virginia Nyambura Njiraini, John Njoroge Njiraini and Beatrice Kanyi Njiraini.

25. Having read and considered the pleadings, the evidence, the rival written submissions and all the materials placed before me, the issues for determination are as follows;

- a. Whether there was a valid agreement for sale between the Plaintiff and the 1st Defendants husband.
- b. Was the oral agreement between the Plaintiff and the 1st Defendant invalid?
- c. Is the Plaintiff entitled to prayers of eviction and permanent injunction against the 1st and 2nd Defendant?
- d. What orders should the Court grant
- e. Who meets the cost of the suit?

26. The Plaintiff admits the agreement with the 1st Defendants husband entered into on the 28/3/1989 over parcel 2220 which he claims that it was family Land. He blames a family dispute that frustrated the sale.

27. According to the sale agreement the subject of the sale was a portion of 1.7 acres of land at the price of Kshs 85,000/- which was paid in full and acknowledged by the Plaintiff. The buyer had already been given exclusive possession of the suit land at the time of execution. This agrees with the 1st Defendants account that they took possession of the land, fenced it and cultivated coffee and bananas until after 2 years, that is 1991 when the Plaintiffs step brothers harassed them and the Plaintiff promised to give them the current suit land that had no dispute.

28. In answer to issue No 1 the Court answers in the affirmative.

29. Fast forward to 2006 the husband of the 1st Defendant passed away before the transfer of the land was completed.

30. The Plaintiff denied ever showing the 1st Defendant the suit land in lieu of the family land. It is the evidence of the 1st Defendant that she was shown the alternative land being the suit land by the Plaintiff in the company of the DW2 and she started cultivation in 2009. This evidence was corroborated by DW2 who informed the Court that he was a former school mate of the Plaintiff and so knew him well. That he accompanied the Plaintiff to the land whereupon they met with the 1st Defendant and her sister Mwhaki. That then the Plaintiff called her sister in law to stop cultivating the land so that the 1st Defendant could take over. That the 1st Defendant was handed over possession.

31. I find the evidence of the 1st Defendant that she was showed the land by the Plaintiff credible. The said evidence is supported by the DW2 and DW3.

32. I have also seen a letter dated the 28/8/2012 written by the chief Kigumo Division to the chief of Magumu Division where the Plaintiff resides informing him of a land dispute between the Plaintiff and the 1st Defendant. There is therefore a possibility that the Plaintiff was aware that the 1st Defendant was on the land as much earlier as 2009. It is not true that he learned about it in 2015.

33. It is on record that the Plaintiff became registered as owner of the suit land in 2015 as shown on the official search dated the 3/3/2016.

34. It is true that the Plaintiff did not enter into an agreement with the 1st Defendant but her husband. The 1st Defendant is claiming on behalf of the estate of her husband and hence the legal nexus. I have found that the Plaintiff granted possession to the 1st Defendant of the suit land in settlement of the 1987 agreement. The oral agreement was followed by execution by the 1st Defendant by taking possession and carrying out farming activities on the land. The only thing that remained was the transfer of the title to the 1st Defendant/estate of her husband.

35. The Plaintiff is therefore estopped in law and equity from denying the transaction firstly through the agreement of sale of 1987 and the granting of possession of the suit land to the 1st Defendant in 2009.

36. The conduct of the Plaintiff is supported by the letter dated the 4/3/2016 addressed to the 1st Defendant where the Plaintiff acknowledged the sale agreement and sought to refund double the amount of the purchase price to the 1st Defendant. This can only be in recognition and acknowledgement of the transaction. The Plaintiff admitted in evidence that he did not refund the purchase price either to the 1st Defendant or her husband. The agreement of sale dated the 28/3/1987 did not make any provisions for refunds.

37. In the case of **Ramsden Vs Dyson (1866) LR 1 HL 129** the Court held;

“that is a man under a verbal agreement with a landlord for certain interest in land or what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest takes possession of such land with the consent of the landlord and upon the faith of such promise or expectation with the knowledge of the landlord, and without objection by him lays out money upon a land , a Court of equity will compel the landlord to give effect to such promise or expectation.”

38. Upto this far the evidence before the Court is that the agreement of 1987 was settled by the alternative land which is the suit land herein. The 1st Defendant having been put in possession by the Plaintiff has earned possessory rights on the suit land.

39. The interest held by the Plaintiff in the land is being held in trust for the 1st Defendant.

40. The answer to issue No 2 is in the negative.

41. In conclusion the appropriate orders that commends themselves to this case is that the Plaintiffs case fails. The 1st Defendants counterclaim succeeds.

42. Final orders;

- a. The Plaintiffs suit fails. It is dismissed.
- b. The counterclaim of the 1st Defendant succeeds.
- c. The suit land be and is hereby transferred to the estate of Ngugi Muiruri Kimuhu, deceased.
- d. The costs of the suit shall be payable by the Plaintiff in favour of the 1st Defendant.

43. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 15th DAY OF JULY, 2021

J. G. KEMEI

JUDGE

Delivered in the presence of:

Kamau HB for Chiuri for the Plaintiff

Kiragu HB for Kiroko Ndegwa for the 1st Defendant

2nd Defendant: Present in person

3rd Defendant: Absent