



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC NO 873 OF 2014**

**MARY WANGARI WARIUKI**

*(Suing as the administrator of the Estate of the late NDUNG’U WARIUKI.....PLAINTIFF*

**=VERSUS=**

**VIRGINIA WANJIKU NDUNG’U.....1<sup>ST</sup> DEFENDANT**

**FREDRICK N NJOROGE.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiff who is the administratrix of the Estate of Ndungu wariuki (Deceased) filed a suit against the Defendants seeking the following reliefs:

***1) A Permanent Injunction restraining the Defendants by themselves, their servants and/or agents from entering, trespassing, alienating, transferring or in any manner dealing with Title Now LIMURU/KAMIRITHU/1119 and LIMURU/KAMIRITHU 1066.***

***2) A Declaration that the transfer of the Property from Ndung'u Wariuki to the Defendants herein dated 24 June, 2009 was undertaken on the basis of fraud and/or misrepresentation on the part of the Defendants. The same is therefore null and void and ought to be revoked and cancelled forthwith.***

***3) An order directing the Land Registrar to revoke and cancel the transfer aforesaid and rectify the register by reinstating the Plaintiff as the registered Proprietor of the Property.***

***4) An order do issue directing the Defendants to execute all documents necessary to effect the transfer of the Property to the Plaintiff within a time frame to be given by this Court and in default thereof, the Deputy Registrar of the Court do execute the Transfers and all other relevant documents so as to effect the transfer of the Property.***

***5) An Order directing the Plaintiff to refund the deposit to the Defendants paid herein less all costs incurred herein.***

***6) General damages as against the Defendants to be assessed***

***7) The Costs of the Suit be awarded to the Plaintiff.***

2. The Defendants only entered appearance but did not file a defence. The hearing therefore proceeded by way of formal proof.

3. The Deceased was the registered owner of LR No. Limuru/Kamirithu/1066 and LR No. Limuru/Kamirithu/1119 (suit property). The Deceased entered into a sale agreement with the Defendants in which he agreed to sell the suit properties to the Defendants at Kshs.3,500,000/=.

4. The Deceased agreed to transfer the suit properties to the Defendants in order for the Defendants to secure a loan of Kshs.1,560,000/= which Equity bank had offered them. It is the Plaintiff’s evidence that the loan was meant to clear the balance of the purchase price.

5. The Plaintiff contends that the Defendants cumulatively paid a total of Kshs.2,327,740/= in the months of May and August 2009 and thereafter refused to clear the balances. The Plaintiff tried to engage the Defendants but they refused. The Defendants did not pay the balance

even after a 21 days' Completion Notice was served upon them. The Plaintiff states that the Defendants forcefully took possession of the suit properties and have since leased the same to a third party who cultivates the same. It is on this basis that the Plaintiff seeks the reliefs set out in paragraph 1 hereinabove.

6. I have carefully considered the Plaintiff's evidence together with the supporting documents. Even though the evidence is not controverted, the court has to be satisfied that the Plaintiff has proved her case on a balance of probabilities.

7. The sale agreement is dated 23<sup>rd</sup> June 2009. Clause 1 of the agreement shows that the purchase price was Kshs.3,500,000/= clause 2 of the agreement provided that Kshs.2,600,000/= was to be paid on or before 30<sup>th</sup> April 2009. Clause 3 of the agreement provided that the balance of the purchase price of Kshs.900,000/= was to be paid on or before 15<sup>th</sup> August 2009.

8. It is not clear why clause 2 of the agreement showed a sum of Kshs.2,600,000/= was to be paid on or before 30<sup>th</sup> April 2009, yet the agreement is dated 23<sup>rd</sup> June 2009. On 28<sup>th</sup> May 2009, the Deceased acknowledged receiving kshs.127,740/= as part of the purchase price. Again it is not clear why the deceased was acknowledging receipt of this money on 28<sup>th</sup> May 2009 when the sale agreement is dated 23<sup>rd</sup> June 2009.

9. The Plaintiff's evidence is that the suit properties were transferred to the Defendants to enable them raise the balance of the purchase price. A look at the agreement in clause 4 shows that the Kshs.1,560,000/= which the Defendants were to secure from Equity bank was to go towards application for consent and stamp duty etc.

10. On 18<sup>th</sup> August 2009, the Deceased acknowledged receipt of Kshs.2,200,000/= . The acknowledgement clearly states that the amount was part of the purchase price pursuant to the sale agreement dated 23<sup>rd</sup> June 2009. If this be the case, then there are serious doubts as to the authenticity of the Plaintiff's documents which are contradictory. As pointed out hereinabove, Kshs.2,600,000/= was to be paid on or before 30<sup>th</sup> April 2009 a date which is before the agreement was signed . The acknowledgement of 28<sup>th</sup> May 2009 of Kshs.127,740 was also before the agreement . It cannot be said that clause 2 of the agreement and the acknowledgement of 28<sup>th</sup> May 2009 was a case of a typing error.

11. If the loan of Kshs. 1,560,000/= which was to be given to the Defendant's was for clearing the balance of the purchase price as per the Plaintiff's evidence, the acknowledgement of Kshs.2,200,000/= on 18<sup>th</sup> August 2009 goes to confirm that the Deceased may have been paid other monies before this payment was made. The Plaintiff's evidence is that the Defendants only paid a sum of Kshs.2,327,740/= . A look at the documents given in support of the Plaintiff's case would show that this amount is made up of Kshs.127,740/= which the deceased acknowledged on 28<sup>th</sup> May 2009 and the Kshs.2,200,000/- which the Deceased acknowledged on 18<sup>th</sup> August 2009 which totals to Kshs.2,327,740/=.

12. The Plaintiff's claim is premised on alleged fraudulent transfer of the suit properties to the Defendants. The particulars of the alleged fraud is that the Defendants misrepresented to the deceased that they were in a position to pay Kshs.3,500,000/= and that the Defendants misrepresented to the Deceased who transferred the suit properties into their names . There was no evidence of any fraud or misrepresentation adduced by the Plaintiff. The sale agreement shows that the deceased voluntarily transferred the suit properties to the Defendants.

13. It is clear that there are serious doubts whether there was any balance due to the Deceased in view of the contradictory documents being relied on by the Plaintiff. I therefore find that the Plaintiff has failed to prove her case on a balance of probabilities. The Plaintiff's case is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 30TH DAY OF NOVEMBER 2021**

**E.O.OBAGA**

**JUDGE**

In the Virtual absence of parties who had been informed of the date of delivery of judgement.

Court Assistant: Mercy

**E.O. OBAGA**

**JUDGE**