



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 193 OF 2014

NDIRANGU KARIUKI.....APPLICANT

-VERSUS-

WELLINGTON WANJAU.....RESPONDENT

JUDGMENT

1. By the Originating Summons dated and filed herein on 17th September, 2014, Ndirangu Kariuki (*the Applicant*) prays for orders:

1. That vide an agreement dated 30th May, 2006, a trust was created over the parcel of land LR No. Aguthi/Muruguru/1628 in favour of the Applicant;
2. That the subsequent transfer of the suit land to Wellington Wanjau (*the Respondent*) was subject to the pleaded trust;
3. That the Respondent thus holds the suit land in trust in favour of the Applicant;
4. (That there be a) determination of the pleaded trust by registration of the suit land in the names of the Applicant in place of the Respondent.
5. That in the alternative and without prejudice to the aforesaid the Respondent do refund to the Applicant the consideration paid, the agreed default penalty and the consequential costs pursuant to the agreement dated 30th May, 2006; and
6. That the Respondents also bear the costs of this suit.

2. The summons is supported by the annexed Affidavit of the Applicant wherein the Applicant avers at paragraphs 2 to 9 as follows:

- “2. That the parcel of land L.R No. Aguthi/Muruguru/1628 (hereinafter referred to as the “suitland”) is registered in the name of the Respondent as per the copy of search annexed hereto (“N 1”);
3. That the Respondent was so registered on 17th July, 2007, the suit land having been previously registered in the name of the Respondent’s brother, Christopher Muchina Mwai (hereinafter referred to as the “Respondent’s brother”).
4. That the said Respondent’s brother while registered as the proprietor of the suit land admittedly held the same in trust for the Respondent;
5. That vide an agreement dated 30th May, 2006 (“N 2”) I agreed with the Respondent and his said brother that the suit land would be transferred to me at a consideration of Kshs.600,000/-, out of which I variously paid Kshs.581,000/- and Kshs.6,000/- legal fees as per the acknowledgments and receipts annexed hereto (“N 3”) while the agreement also provided for a default penalty of 30% of the purchase price;
6. That I immediately took exclusive possession and use of the suit land to-date where I farm and plant trees;
7. That contrary to the intention of the parties, the Respondent had the suit land transferred to himself, whereas the same was to be transferred to myself from his brother;

8. That the Respondent has to date failed to have the land transferred to me; and

9. That it had been thereafter invariably agreed that the beneficial interest in the suit land in favour of the Respondent, subject to which the Respondent's brother held the suit land was to be transferred to me to hold in the said land as an absolute proprietor thereof.

3. Despite service of the Originating Summons upon the Respondent, the Respondent neither entered appearance nor did he file any response thereto. The suit thus proceeded by way of formal proof with the Applicant testifying as the sole witness.

4. Testifying at the trial as PW1, the Applicant told the court that on 30th May 2006, they had agreed with one Christopher Muchina Mwai who was the registered owner of the suit property and his brother Willington Wanjau (the Respondent herein) that the said land would be transferred to the Applicant at a consideration of Kshs.600,000/-.

5. The Applicant told the court he paid the sum of Kshs.300,000/- upon execution of the agreement which he produced as Exhibit 1. He further told the court he thereafter made several payments including for legal fees and that he took possession of the land and started using it for farming.

6. The Applicant told the court that sometime in the year 2007, he realized that the Respondent had instead transferred the land to himself. The Applicant has since made several attempts to have the Respondent to transfer the land to himself but he has failed to do so thereby prompting the institution of this suit.

7. I have perused and considered the Originating Summons, the testimony of the Applicant as well as the evidence adduced at the trial. I have equally considered the submissions and authorities placed before me by the Learned Counsel for the Applicant. The Respondent neither entered appearance nor responded to the Applicant's claim.

8. The Applicant herein urges this court to determine that as a result of an agreement dated 30th May, 2006 executed between himself and the Respondent, a trust was created over all that parcel of land known as Aguthi/Muruguru/1628 in favour of the Applicant. Accordingly the Applicant urges the court to find that the subsequent transfer of the suit property to the Respondent was subject to the trust and hence the Respondent holds the suit land in trust for the Applicant.

9. From the material placed before me, both the Applicant and the Respondent entered into an agreement for the sale of the suit land measuring approximately one (1) acre on 30th May, 2006. A perusal of the Agreement produced herein as Exhibit 1 reveals that the suit property was at the time registered in the name of one Christopher Muchina Mwai who is described as a brother to the Respondent.

10. The agreement which refers to the Respondent as the vendor of the suit property does not state why the registered proprietor who equally executed the agreement giving his consent to the transaction did not sell the property on his own to the Applicant. Instead it provides as follows in the relevant portion of the preamble.

“WHEREAS the vendor herein is the real brother of one Mr. Christopher Muchina Mwai who is the registered proprietor of land title number Aguthi/Muruguru/1628 which comprises of 1 acre or thereabouts.

AND WHEREAS the vendor is willing to sell and the purchaser is willing to purchase the said title number Aguthi/Muruguru/1628 measuring 1 acre or thereabout.

Now THEREFORE this agreement witnesseth as follows between the vendor and the purchaser ...”

11. The agreement then proceeds to provide the purchase price as Kshs.600,000/-. A perusal of clause 2 thereof reveals that the respondent was paid the sum of Kshs.300,000/- upon execution of the agreement and that the balance thereof was to be paid on or before December, 2006.

12. Clause 3 of the agreement committed the vendor to avail himself in the relevant offices to have the said land transferred in the name of the purchaser. According to the Applicant, he did discover sometime in the year 2007 that the Respondent had instead transferred the property to his name and efforts to have the same transferred to his name have been futile.

13. Indeed a perusal of the certificate of search dated 5th June, 2014 produced by the Applicant herein reveals that the property was on 17th July, 2007 registered in the name of the Respondent. It is apparent from the bundle of acknowledgment receipts produced by the Applicant that as at the time the dispute arose, he had paid a substantial amount of the purchase price being Kshs.581,000/- and that only a balance of Kshs.19,000/- remained outstanding. It is also apparent that while clause 4 of the agreement required the Respondent to pay all fees relating to the transaction, the Applicant had paid the sum of Kshs.6000/- as legal fees to the transaction advocates and had been placed in possession of the suit property.

14. Arising from the foregoing, I was persuaded that this was a transaction for value which created a binding contract. Upon execution of the contract for the sale of interest in land with the consent of the registered proprietor, the vendor became a trustee holding the title for the purchaser who became the beneficial owner thereof. By his conduct of receiving almost the entire purchase price and placing the Applicant into possession of the suit land, the Respondent created a constructive trust in favour of the Applicant.

15. In the premises, I am persuaded that there is merit in the Originating Summons dated 17th September, 2014. I allow the same in terms of prayers 1, 2, 3 and 4 with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 18TH DAY OF NOVEMBER, 2021.

In the presence of:

Mr. C. M. King'ori for the Plaintiff

No appearance for the Defendant

Court assistant - Wario

J. O. Olola

JUDGE