



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 38 OF 2017

MINYUA GACHUHI MBURU NDUA.....APPLICANTS/PLAINTIFFS

VERSUS

MICHAEL NDIWA KIMTAI.....RESPONDENT/DEFENDANT

RULING

(On authority of Court to order transfer of land directly to a Third Party rather than decree holders)

1. The First Plaintiffs/ Applicants moved this Court by way of a Notice of Motion dated 5/7/2021 and filed on 6/07/2021. The Motion seeks the following reliefs:

(1) THAT this Honorable Court be pleased to order that Plot No. 56 Kapkoi Settlement Scheme be transferred and registered in the name of SARAH NJERI MWANIKI.

(2) THAT costs be provided for.

2. The Application was brought under **Sections 1A, 1B, 3,3A and 63** of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules**. It is supported by the grounds on the face of it and by the Affidavit of **Munyua Gachui** the first Applicant herein. The grounds are that the applicants purchased the land from the Respondent in **1991**; that on **3/12/2018** the court entered judgment in their favour for the parcel of land to be theirs and subsequently that it transferred to them; that the court ordered the respondent herein to transfer **Plot No. 56 Kapkoi Settlement Scheme** to the Applicants; that the Applicants were partners and had already shared partnership properties and this particular property was by that sharing of partnership proceeds given to the 1st Applicant; that prior to this, way back in **2005**, the First Applicant had sold the plot to one **Sarah Njeri Mwaniki**; that that took place on **5/5/2005** as exhibited by the agreement marked **annexture MG 4**; that it will save on expenses if the property is directly transferred to **Sarah Njeri Mwaniki**.

3. The averments in the Supporting Affidavit expound the grounds of the application and give the history of the purchase and sale of the parcel of land in question. In summary, it is deponed that the Applicants who were then partners purchased the suit land on **19/10/1991** from the Respondent herein, as per the attached copy of the agreement of even date and marked as **annexture MG 1**; that on **1/3/1993**, the partnership came to an end and they (the Applicants) distributed the properties they had acquired together. That **Plot No. 56 Kapkoi** fell in the hands of the First Applicant as part of his share and was therefore retained by him, as evidenced by **Annexture MG 2**; that on the **5/5/2005**, he sold the plot to **Sarah Njeri Mwaniki** although it had not been transferred to him; that in **2017** they filed this matter against the Respondent herein; that the case was heard and finalized and was determined in the Applicants' favour; that afterwards the Applicant instructed his advocate to file an application requesting the Deputy Registrar to sign all necessary documents to facilitate transfer of the Plot to them which was allowed; that the discharge of charge has been, at the time of making this Application, signed by the Deputy Registrar. The Applicant therefore prays that **Plot No. 56 Kapkoi Settlement Scheme** be transferred and registered in the name of **Sarah Njeri Mwaniki** in his place so as to save on costs; further that the said **Sarah Njeri Mwaniki** has been in occupation of the suit land for a very long period of time and he has no interest on the suit land.

4. The application is unopposed. There is neither a replying affidavit nor grounds of opposition on record by the respondent to controvert the Applicants' averments.

Submissions

5. On the **12/10/2021**, the Honourable court directed that the application be heard by way of written submissions. It directed Ms. Munialo, counsel for the Applicant, to file submissions on behalf the Applicants within **7 days** from that date. Counsel did so on the **21/10/2021**.

Analysis and Determination

6. I have carefully considered the Application, the Supporting Affidavit and the submissions filed on behalf of the Applicants. Although the application is unopposed, the court has the duty to determine the Application on merit. Thus, I have formulated one issue to determine on the Application. The issue is: **Whether justice demands that the land be transferred to one Sarah Njeri Mwaniki.**

7. As I have stated above, the application is unopposed. It is trite law that he who alleges must prove. It is therefore upon the Applicants herein to give reasons to the satisfaction of the court as to why the suit land ought to be transferred to the said **Sarah Njeri Mwaniki.**

8. For the reasons above, a brief history of what transpired before the instant Application is vital and worth repeating. The Applicants, one **Munyua Gachui** (hereinafter known as the **1st Applicant**) and one **Mburu Ndua** (hereinafter known as the **2nd applicant**) were business partners prior to **1/03/1993**. During the lifetime of the partnership they acquired assets jointly. One of the assets was Land Parcel **No. Plot 56 Kapkoi** Settlement Scheme. They jointly purchased the suit land from the defendant. What was and has been pending all along was the transfer of that plot known as **Plot No. 56 Kapkoi Settlement Scheme** from the seller. They instituted this suit against the Respondent/Defendant for a declaration that the suit land belongs to them, and that the Defendant had no proprietary interest in it. In the alternative they prayed for an order that the trust created by virtue of the land being registered in the name of the Defendant does terminate and the title deed issued to him be cancelled and a new one be issued in their names and the register be rectified accordingly. They also prayed for an order of injunction restraining the Defendant, his agents and/or servants from transferring and registering the land into his name. On **3/12/2018** judgment was entered in their favour as against the Defendant as prayed.

9. Later on, the plaintiffs filed an Application dated **17/1/2020** for the orders that the Honourable Court does direct the Deputy Registrar to sign the relevant documents on behalf of the Respondent/Defendant to facilitate the transfer of **Plot No. 56 (the suit land herein)** to the Applicants/Plaintiffs. The Application was allowed on **19/02/2020**. Annexure **MG 7** shows that on **27/5/2021**, the Deputy Registrar of this Court signed the Discharge of Charge in respect of the Plot - namely **Kwanza District/Kapkoi/56**.

10. The above processes yielded the instant application. Rather than the First Applicant having the land transferred and registered in his name, he has now opted to have it transferred to one **Sarah Njeri Mwaniki**, the subsequent purchaser from him. It is the **1st** Applicants' contention that although they purchased properties jointly with the **2nd** applicant, they shared out the properties upon termination of the partnership. This was evidence in the supporting Affidavit as stated above. He annexed to the Affidavit a copy of the sale agreement dated **19/10/1991** showing their joint purchase enterprise. In addition, he also annexed thereto evidence of the sharing of the properties by way of a partnership assets' distribution agreement dated **1/3/1993**. The agreement reveals that indeed the suit land herein **Plot No. 56 Kapkoi Settlement Scheme** (among other properties not the subject matter of this suit) was to remain in the sole ownership of **Dr. Munyua Gachui** - the **1st** Applicant herein. Furthermore, the Applicant has annexed a copy of agreement of sale of the land between himself and one **Sarah Njeri Mwaniki**. The agreement is dated **5/5/2005**. As the Second Plaintiff Applicant does not dispute any of the facts deposed to by the Plaintiff, and the Court having found judgment in their favour in respect of the Plot in issue, I find that the Applicant has established a case for the need of the Court to order a direct transfer of the property to another party other than him.

11. In my considered view, the applicants' application has been brought in good faith. It is not tainted by any fraud, malice, ill will or illegality. The Applicants have proved that the sole intention and purpose of the application is to accord the subsequent purchaser of that land what is lawfully and rightfully hers - the proprietary interest in it. As neither the **2nd** Applicant nor the Defendant has raised any issue with regard to having the land being transferred to one **Sarah Njeri Mwaniki**, I find that the applicants have proved that they deserve the orders prayed for.

12. In the conclusion, and in the interest of justice, basing my discretion on the provisions in which the application was brought, I find that the application dated **5/7/2021** is meritorious and is hereby allowed in terms of **Prayer No. 1**. For avoidance of doubt, the Deputy Registrar of this Court is hereby authorized to execute all transfer documents in relation to **Kwanza District/Kapkoi/56** situate in **Kapkoi Settlement Scheme** in favour of **Sarah Njeri Mwaniki** for registration in her name, upon payment of the requisite stamp duty and other payments that may be due to Government and other bodies for that purpose. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 10TH DAY OF NOVEMBER, 2021.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.