



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 109 OF 2019

PETERSON MAINA NGUNYI.....1ST PLAINTIFF

LUCY NDUTA MAINA.....2ND PLAINTIFF

ROSEMARY NYAWIRA NJOGU.....3RD PLAINTIFF

ROSEMARY NYAWIRA NJOGU (suing as administrator of
the estate of SAMSON NJOGU).....4TH PLAINTIFF

VERSUS

GITHUNGURI CONSTITUENCY RANCHING COMPANY.....DEFENDANT

JUDGMENT

By a Plaint dated **10th January 2019**, the Plaintiffs sought for Judgment against the Defendant for the following orders;

- a. That a declaration do issue that the 1st, 2nd, 3rd and 4th Plaintiffs are shareholders of the Defendant Company under share Certificate Numbers **1651**, while the 1st and 2nd Plaintiffs under share certificate **3840**, and are by virtue of the said shareholding owners of portions of land measuring **one acre and quarter of an acre** respectively, out of land parcel number **L.R. NO. RUIRU/KIU BLOCK 2(GITHUNGURI)**.
- b. That the Defendant be compelled to obtain, execute, facilitate, and issue all documents necessary and that will enable the Plaintiffs obtain title deeds and/or official documents of title to the land herein.
- c. General Damages
- d. Costs and interest
- e. Any other or further order that the Court may grant.

The Plaintiffs averred that the Defendant is a land buying Company having purchased land for purposes of subdividing and allocating to its members and shareholders. That part of the land that was owned by the Defendant was **L.R.NO.RUIRU/KIU BLOCK 2 (GITHUNGURI)**, which was subdivided into various parcels of land. That by a Sale Agreement dated **6th April 2010**, the Plaintiffs jointly purchased a one (1) acre parcel of land out of **L.R.NO.RUIRU/KIU BLOCK 2 (GITHUNGURI)**, from one **Francis Wairi Njoroge**, who was a bonafide shareholder of the Defendant Company. The Plaintiffs further averred that the said seller pointed out to them the boundaries of the land and the beacons delineating the land sold and consequently the seller transferred to them the said land in the register held by the Defendant.

In addition, the Plaintiffs averred that when the Defendant recorded the transfer of the share which went with the land, the Defendant issued the Plaintiffs with a joint share certificate number **1651**. That the 1st and 2nd Plaintiffs also purchased another parcel of land measuring a **quarter an acre (1/4)** from the same vendor, **Francis Wairi Njoroge**. That the details of the 2nd transaction were also given to the Defendant, who recorded the transfer of the share that went with the land and issued the 1st and 2nd Plaintiffs a joint share certificate number **3840**.

The Plaintiffs further averred that the Defendant as a land buying Company is under a legal obligation to issue them with documents of title

and/or documents that will enable them process the title documents for their respective parcels of land. That the Defendant has issued and/or facilitated the issuance of title deeds to some other members and/or shareholders, but has failed and/or refused to issue and/or facilitate the issuance of title documents to the shareholders of the land within **L.R.NO. RUIRU/KIU BLOCK 2 (GITHUNGURI)**. That the Defendant has on various occasions confirmed that it recognizes the Plaintiffs as bonafide purchasers of the land herein represented by share certificate **No.1651** and **No.3840** respectively. Further that the Defendant agrees that it has the obligation to facilitate the issuance of the impugned title documents, but has refused, failed and/or neglected to facilitate the same.

The suit was not contested by the Defendant as it neither entered appearance nor filed a Defence within the requisite time. As a result, the Plaintiffs requested for default judgment against the Defendants and subsequently, the matter was placed before the Court on **8th October 2019**, and an order for the same to proceed to formal proof hearing was issued.

The matter proceeded for formal proof hearing by way of viva voce evidence on **6th July 2021**, wherein the Plaintiff called 2 witnesses.

PLAINTIFF'S CASE

PW1, Peterson Maina Ngunyi, the 1st Plaintiff herein adopted his witness statement dated **22nd March 2019**, as part of his evidence. He also produced his list of documents dated **10th January 2019**, as P. exhibits **1-8** in support of the case. He further testified that he was a shareholder of the Defendant and urged the Court to allow his claim.

PW2, Rosemary Nyawira Njogu, the 3rd Plaintiff herein also adopted her witness statement dated **10th January 2019**, as part of her evidence. She also stated that she wished to rely on the documents contained in the list of documents dated **10th January 2019**, and produced as exhibits 1-8 by PW 1 in support of her claim.

After *viva voce* evidence, the Court directed the Plaintiffs to file their written submissions. The Plaintiffs through the **Law Firm of L.G. Kimani & Co Advocates**, filed their written submissions dated **15th October 2021**, and submitted that their evidence before the Court was not contested and therefore the court should grant their claim as prayed. It was their further submissions that they purchased the suit property in the year **2010**, and since then, they have not gotten any title documents save for a lot of back and forth from the Defendant. It was the Plaintiffs' further submissions that the suit was not contested and they urged the court to grant the prayers sought in their Plaint dated **10th January 2019**.

The Court has carefully read and considered the pleadings herein the evidence adduced and the relevant provisions of law and finds that the issues for determination are;

I. Whether the Plaintiffs are entitled to the orders sought?

II. Who should bear the cost of the suit?

1. Whether the Plaintiffs are entitled to the orders sought

The right to own and acquire property in Kenya is premised on **Article 40** of the **Constitution of Kenya, 2010**. The said Article provides as follows;

“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person--

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description;

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

...”

Further section 26 (1) (b) of the Land Registration Act states that: “The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The Court notes from the above that the Plaintiffs have an incontrovertible right to property. While a certificate of title shows that the holder of the same is the indefeasible owner of land, this Court notes that the Plaintiffs do not have such a title to the suit property as contemplated in Section 24 as read together with Section 26 of the Land Registration Act, 2012.

The Plaintiffs have explained the lack of title by assigning blame to the Defendant herein. The Plaintiffs gave uncontroverted evidence that they jointly purchased an acre of land which was to be excised from L.R.NO. RUIRU/KIU BLOCK 2 (GITHUNGURI) from Francis Wairi Njoroje. Subsequently the 1st and 2nd Plaintiffs also purchased quarter of an acre of land to be excised from L.R.NO.RUIRU/KIU BLOCK 2 (GITHUNGURI), from the same vendor who was a member of Githunguri Constituency Ranching Company. It was the Plaintiffs’ evidence that in exchange for consideration, they received share certificate numbers 1651 and 3840 respectively. It was the Plaintiffs’ further evidence that the Defendant has refused/neglected to delineate and issue them with title deeds for their parcels of land, despite the fact that they are their members vide the aforementioned share certificates.

The law requires the Court to look at the weight of the evidence adduced by the Plaintiffs even where the same is uncontroverted. See the case of **Gichinga Kibutha v Caroline Nduku [2018] eKLR** where the Court held as follows;

“The hearing referred to above is the one commonly known as “Formal proof”. The Civil Procedure Rules do not define “Formal Proof”. Black’s Law Dictionary defines “Formal” as including “rules established by an institution according to certain processes”. This particular hearing is for the claimant to prove his claim. It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

In analyzing the evidence presented by the Plaintiffs, the Court notes that there is a sale agreement dated 6th April 2010, between the Plaintiffs and Francis Wairi Njoroje. The said sale agreement as stated above is uncontroverted and is proof that the Plaintiffs are indeed bonafide purchasers for value.

The definition of a bonafide purchaser, has been defined by the Court in the case of **Lawrence Mukiri ...Vs... Attorney General & 4 Others [2013] eKLR** as

“... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;”

The Court finds that the aforementioned sale agreement only refers to a parcel of land being ballot number 961, which was to be excised from L.R.NO.RUIRU/KIU BLOCK 2 (GITHUNGURI). There is no clear description on which plot/s on the map the Plaintiffs were entitled to. Further there was no list made available before the Court showing the allocation of the parcels of land subdivided from L.R.NO.RUIRU/KIU BLOCK 2 (GITHUNGURI) to the members of the Defendant Company.

This Court takes judicial notice of the nature of business undertaken by the Defendant Company. That being the case, the Defendant has a duty to its members including the Plaintiffs, which duty the Defendant is yet to efficiently and conclusively carry out. There is a contract entered into by the parties as noted earlier, but the said agreement does not indicate the exact parcels of land that the Plaintiffs were entitled to.

This Court is not in the business of rewriting contracts on behalf of parties. Its role is to give effect to the intentions of the contracting parties. As rightly put by Justice Onguto in **Mamta Peesh Mahajan [Suing on behalf of the estate of the late Peesh Premlal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] [2017] eKLR**

“Where therefore parties reach an agreement on all the terms of contract they regard (or the law requires) as essential, a contract is deemed to have been formed. What is essential is the legal minimum to create a contract. These are the intention to create legal obligations and consideration. Other terms are secondary as far as formation of a contract is concerned. The reason is that the law does not require commercially sound terms or sensible terms. Parties may agree to any terms and the court will, once it is shown that the parties agreed and valid consideration exists, always hold the parties to their bargain”

The intentions of the Plaintiffs and the Vendor to buy and sell land flow from the sale agreement dated **6th April 2010**. Therefore, the Defendant only has an option to live as per the terms of the said contract by making available all the necessary documents to enable the Plaintiffs take possession of their respective parcels of land and successfully register the said parcels in their names. In the interest of justice, this Court cannot wish away the Plaintiffs’ rights due to the glaring omission of description in the aforementioned sale agreement.

The upshot of the foregoing therefore is that this Court directs the Defendant to delineate and show the Plaintiffs their respective parcels of land as per the share certificate Nos. **1651** and **3840** respectively. Further, the Defendant is directed to make available for the Plaintiffs’ use, the completion documents and sign all the relevant documents for purposes of transfer and registration of titles to the Plaintiffs.

2. Who should bear the costs of this suit

Section 27 of the Civil Procedure grants the Court the discretion to grant costs. However, it is trite that costs usually follow the events unless special circumstances present themselves. In the instant case, the Court finds no special circumstances and therefore the Plaintiffs being the successful party are entitled to the costs of the suit.

Having carefully read and considered the Pleadings by the parties, the evidence adduced, the written submissions and the relevant provisions of law, the Court finds and holds that the Plaintiffs have proved their claim against the Defendant herein on the required standard of balance of probabilities. Consequently, the Court enters judgment for the Plaintiffs against the Defendant as prayed in the Plaint dated **10th January 2019**, in terms of prayers no. (1) (2) and (3).

The Defendant having been given several Demand Notices and having failed to make good the Plaintiffs’ demand is also condemned to pay General damages of **Kshs.300,000/=** to the Plaintiffs herein.

Consequently, the Plaintiffs succeed in their claim in terms of prayers no. **1,2,3, and 4**.

As per prayer **no. 3**, the Plaintiffs are entitled to General damages of **Kshs.300,000/=**.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 9TH DAY OF DECEMBER, 2021

L. GACHERU

JUDGE

9/12/2021

Delivered online in the presence of

Kuiyaki & Alex Mugo - Court Assistants

Mr. Karanja for Plaintiffs

N/Appearance for Defendant

L. GACHERU

JUDGE

9/12/2021