



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 409 OF 2009

EUNICE WANJIRU MWANGI 1 ST PLAINTIFF

STEPHEN KIBE 2 ND PLAINTIFF

CAROLINE WAMBUI.....3RD PLAINTIFF

MERCY NYAMBURA (Suing through her Mother and next Friend)

EUNICE WANJIRU MWANGI 4 TH PLAINTIFF

=VERSUS=

JOSEPH STEPHENSON MWANGI KIBE1 ST DEFENDANT

ESTHER MUMBI CEGE and JOSEPH NJUGUNA CEGE Administrators of the Estate of FRANCIS CEGE GATHINJI also known as FRANCIS CHEGE GATHENJI 2 ND DEFENDANT

JUDGMENT

Background

1. The 1st plaintiff and the 1st defendant are wife and husband. The 2nd, 3rd and 4th plaintiffs are their biological children. Through an amended plaint dated 19/11/2014, the plaintiffs seek the following orders:

i. A declaration that the 1st defendant holds Plot No 931 situated at Mwiki Housing Coop Society Limited also known as Mwiki Company Limited, Nairobi County, in trust for the plaintiffs, and the sale of the suit plot by the 1st defendant to the 2nd defendant was fraudulent, illegal and null and void.

ii. An order of permanent injunction restraining the defendants either by themselves, their authorized agents, servants, employees or otherwise whomsoever from selling, transferring, disposing, harassing, intimidating, evicting, threatening to evict or otherwise whatsoever from interfering with the plaintiff's possession, use and/or occupation of Plot No 391 Mwiki Housing Coop Society Limited also known as Mwiki Company Limited situated within Nairobi County and/or dealing with the said plot to the detriment of the plaintiff's interest.

iii. Costs and interests of this suit.

2. The plaintiffs' case is that the 1st plaintiff and the 1st defendant jointly acquired a piece of land described as Plot Number 391, Mwiki Housing Co-operative Society Limited (hereinafter referred to as **"the suit property"**). It was mutually agreed that the suit property would be registered in the name of the 1st defendant to hold it in trust for the couple. They jointly erected thereon a matrimonial home. The 1st defendant subsequently deserted the matrimonial home and fraudulently entered into a sale agreement purporting to sell the suit property to Francis Cege Gathinji (hereinafter referred to as **"the deceased"**). It is contended by the plaintiffs that the impugned sale was illegal, unlawful, fraudulent, deceitful, null and void because the 1st plaintiff was not involved and had objected to the sale of the suit property as soon as she learnt about it. They add that pursuant to the 1st plaintiff's objection, the 1st defendant and the deceased entered into a rescission agreement pursuant to which the sale was annulled and the 1st defendant agreed to refund the purchase price to the deceased.

3. On 15/2/2010, the 1st defendant filed a statement of defence to the plaintiffs claim and a reply to the 2nd defendant's counterclaim. His case was that he bought the suit property solely and therefore, had every right to sell it to the deceased. He contended that the deceased breached the terms of the sale agreement by failing to pay the agreed purchase price. He averred that he only received Ksh.175, 000 from the deceased, a fact which was confirmed when they were called to the DO's Office at Kasarani and the deceased confirmed to have paid him only Ksh 175,000. He further averred that it was agreed that he would refund the purchase price together with the mutually agreed liquidated

damages of Kshs 50,000, together totaling Kshs 225,000, in two equal instalments of Ksh 112,500.

4. During the subsistence of this suit, Francis Cege Gathinji (sued as Francis Chege Gathenji) passed on and was substituted by Esther Cege and Joseph Njuguna Cege as his legal representatives (2nd defendant). The 2nd defendant filed a defence to the plaintiffs' claim and a counterclaim against the 1st defendant and the plaintiffs. It was the 2nd defendant's case that the suit property was lawfully purchased from the 1st defendant. It was further contended by the 2nd defendant that the contention that the suit property was matrimonial property was an afterthought by the 1st plaintiff and was meant to defraud the 2nd defendant. The 2nd defendant contended that the plaintiffs had unlawfully trespassed onto the suit property. In the counterclaim, the 2nd defendant sought the following verbatim orders;

a) Eviction orders against the plaintiffs and the 1st defendant for their eviction and any person claiming under them from the land known as Plot No 391 Mwiki Housing Co-operative Society Limited.(sic)

b) In the alternative, the 2nd defendants pray for refund of the sum of Ksh. 250,000 with interest thereon at 25% per annum from the date of payment to the date of full payment.

c) Costs of the counterclaim. (sic)

5. The plaintiffs filed replies to the defendants' defences and a defence to the 2nd defendant's counterclaim. They reiterated the averments in the plaint.

Plaintiffs' Evidence

6. Eunice Wanjiru Mwangi (the 1st plaintiff) testified as PW1. She adopted her written statement dated 4/7/2014. In summary, her testimony was that she jointly purchased the suit property with the 1st defendant in 1988 from Mwiki Housing Co-operative Society Limited. Thereafter, they jointly built a matrimonial home on the suit property. She added that the suit property has been home for the 2nd to 4th plaintiffs since they were born and the 1st defendant deserted their matrimonial home in 2002. When she learnt about the impugned sale, she approached the deceased and informed him that she had not consented to the sale of the suit property. The 1st defendant informed her that he had only been paid a deposit of Ksh 10,000 and the balance was to be paid in two weeks. She visited the offices of Mwiki Housing Co-operative Society Limited with the intention of lodging a restriction on the suit property. The restriction was successfully lodged after she obtained a letter from the Area Chief. The Area Chief later advised the 1st defendant to refund the deceased the purchase price he had received from him. She received a letter from the deceased's advocate asking her to vacate the suit property. The deceased then lodged a complaint at the Kasarani Police Station where the 1st plaintiff and the 1st defendant were summoned. Subsequently, it was agreed in writing that the 1st defendant would refund the deceased the purchase price he had received. The deceased subsequently engaged the services of a firm of auctioneers by the name **Express Services** to evict the plaintiffs from the suit property. The deceased continued to issue threats to the plaintiffs, prompting them to bring this suit. She produced a bundle of 13 exhibits.

7. Her evidence in cross examination was that the property was not registered in their joint names because she did not have an Identification Number at the time. The total purchase price of the suit property was Ksh 15,000. She contributed Ksh 5,000 as purchase price. She was still the legal wife of the 1st defendant even though they were not living together. The sale agreement was drafted by the firm of Njiru Mbogo Advocates. She was not aware that her advocate, Mr Kamwendwa, at some point worked in the firm of Njiru Mbogo Advocates. The complete house where she lived with the other plaintiffs was not in the photographs produced in court.

8. In re-examination, she stated that she objected to the sale of the suit property in 2003 and that only Ksh 10,000 had been paid by then. She stated that she was not aware that the restriction lodged by her had been removed. She further stated that the agreement nullifying the impugned sale was handwritten by the deceased's son.

Evidence of the 1st Defendant

9. Joseph Stephenson Mwangi Kibe (1st defendant) testified as DW1. He adopted his written statement dated 15/2/2018 as his sworn in evidence-in-chief. He produced a bundle of 10 exhibits. In summary, his testimony was that he entered into a sale agreement with the deceased and was given a down payment of Ksh 10,000. He was surprised when he was summoned severally by government authorities because he had informed the 1st plaintiff of his intention to sell the suit property in 2003. The 1st plaintiff objected to the sale and issued threats against him. He was advised by the DO of Kasarani to refund the deceased the money he had received from him since he had not informed his wife that he intended to sell the suit property. He agreed to refund the sum of Ksh 225,000 in two instalments of Ksh 112,500. He honoured the agreement by presenting the 1st instalment on 27/8/2008 but the deceased failed to show up at the District Officer's Office at Kasarani to receive the money.

10. He further stated that his wife (the 1st plaintiff) gave him Ksh 5000 for the purchase of the suit property but he used the money on other commitments. He stated that the total purchase price was Ksh 15,000. He further stated that he subsequently sold to the deceased the suit property for a consideration of Kshs 250,000 but was only paid Kshs 150,000. He stated that he was willing to refund Kshs 150,000 to the deceased.

11. In cross examination, he stated that he solemnized his marriage with the 1st plaintiff in 1996. The suit property was purchased in 1988 when they were already married. He confirmed that the 1st plaintiff contributed towards building their matrimonial home. He further stated that when the 2nd defendant failed to show up to collect the refund, he deposited the money with the advocate and later withdrew it. He referred to a letter dated 27/5/2003 and stated that he did not pick the last instalment of the purchase price amounting to Kshs 50,000 from the firm of Njiru Mbogo Advocates because the 1st plaintiff was still in occupation of the suit property. He stated that he did not demand the balance of the purchase price from the 2nd defendant because the 1st plaintiff had objected to the sale. He added that Kamwendwa was working in the firm of Njiru Mbogo Advocates when the sale agreement was drawn.

2nd Defendant's Evidence

12. Fredrick Njuguna Cege testified as DW2. He stated that he was the son of the Late Francis Cege Gathinji. He adopted his written statement dated 19/1/2018 as his sworn evidence- in-chief. He produced a bundle of 5 exhibits. His evidence was that his late father entered into a sale agreement for the purchase of the suit property from the 1st defendant in 2003 at a consideration of Ksh 250,000. The 1st plaintiff moved to the suit property in 2003 when she learnt that the 1st defendant intended to sell the Plot. Mr Kamwendwa, the plaintiffs' advocate acted for both parties during the transaction. It was the same Mr Kamwendwa who wrote a letter to the 1st plaintiff demanding that she vacates the suit property and pays rent arrears. The auctioneers were sent to the suit property to evict the 1st plaintiff and the 1st plaintiff reported the matter to the DO's Office at Kasarani. All the parties were summoned and the 1st defendant was ordered to refund Kshs 225,000 to the deceased but the money has never been refunded. The 1st defendant has land elsewhere and his actions were intended to defraud the deceased. He urged the court to allow the 2nd defendant's counterclaim.

Submissions

13. The plaintiffs filed their submissions on 14/3/2019. It was submitted that the 1st plaintiff had proved that she was still married to the 1st defendant and that the Married Women Property Act which was applicable at the time of purchasing the suit property gave women equal rights over property jointly acquired. Reliance was placed on: (i) **Mugo Muiru Investments Limited vs Elizabeth Wanjiru Bageine & 2 Others Nairobi Civil Appeal No 262 of 2004** and (ii) **Williams & Glyn's Bank vs Boland [1979] 2 All ER 697** where the courts held that where property is a matrimonial home, the buyer should always inquire or ask personally if the spouse has consented to the sale of the property. It was further submitted that the 2nd defendant ignored the 1st plaintiff's objection and went ahead to pay additional money to the 1st defendant. The plaintiffs submitted that the 2nd defendant had not proved how the 1st plaintiff and the 1st defendant had colluded to deny the Estate of the deceased the suit property.

14. The 1st defendant filed his submissions on 27/9/2019. He submitted that since the 2nd defendant had failed to pay the full purchase price, he was willing to refund his Estate a sum of Ksh 225,000 which had been agreed upon.

15. The 2nd defendant filed submissions on 27/9/2019. It was submitted that the 1st defendant should be compelled to surrender the suit property to the 2nd defendant because the deceased had paid the full purchase price for the property. It was further submitted that in the alternative, the full purchase price plus interest at 25% p.a from the date the property was sold to date should be paid to the 2nd defendant.

Analysis and Determination

16. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal frameworks, principles and jurisprudence. Parties did not agree on or frame issues to be determined in the suit. Having taken into account the parties' pleadings, evidence and submissions, the following five key issues fall for determination in this suit: (i) Whether the suit property is a matrimonial property jointly owned by the 1st plaintiff and the 1st defendant. (ii) Whether the impugned sale agreement dated 11/3/2003 was annulled through a subsequent agreement dated 27/5/2008 between the 1st defendant and the deceased, Francis Cege Gathinji also known as Francis Chege Gathinji; (iii) Whether the plaintiffs are entitled to the prayers sought in the Amended Plaint; (iv) Whether the Estate of the Late Francis Cege Gathinji also known as Francis Chege Gathinji is entitled to the prayers sought in the 2nd defendant's counterclaim; and (v) Who should bear costs of this suit.

17. The first issue is whether the suit property is a matrimonial property jointly owned by the 1st plaintiff and the 1st defendant. The 1st plaintiff contends that they jointly acquired the suit property in 1988 and they subsequently jointly developed it as a jointly owned matrimonial home. Both defendants denied this contention in their respective pleadings. In his subsequent testimony, the 1st defendant stated that the suit property was acquired in 1988 at Kshs 15,000. They were married at that time but they solemnized their marriage in 1996. He admitted that the 1st plaintiff gave him Kshs 5,000 towards acquisition of the suit property. It was his evidence that he utilized the money on an unnamed project and used insurance proceeds from an accidental claim to pay the purchase price. From this evidence, it is clear that the 1st plaintiff contributed towards purchase of the suit property. The fact that the 1st defendant used the Kshs 5,000 on an unnamed project and sourced some other money to replace it did not in my view vitiate the fact that the 1st plaintiff had made a contribution of Kshs 5,000 towards the purchase price. The 1st defendant's utilization of the 1st plaintiff's contribution on the unnamed project was a personal arrangement of convenience by the 1st defendant and did not in any way alter the fact that the 1st plaintiff made a contribution of Kshs 5,000 towards acquisition of the suit property.

18. Secondly, there is evidence that at the time the 1st defendant purported to sell the suit property to the 2nd defendant, the parties had jointly developed a matrimonial home on the suit property. In the circumstances, the 1st defendant was not at liberty to dispose the suit property without the concurrence of the 1st plaintiff. Consequently, it is my finding that the suit property is a matrimonial property jointly owned by the 1st defendant and the 1st plaintiff.

19. The second issue is whether the impugned sale agreement dated 11/3/2003 was mutually rescinded through a subsequent agreement dated 27/5/2008 between the 1st defendant and the deceased, Francis Cege Gathinji. It is not contested that the 1st plaintiff contested the impugned sale and on 27/5/2008 the 1st defendant and the deceased entered into a formal agreement annulling the impugned sale agreement. The agreement dated 27/5/2008 reads as follows:

"AGREEMENT OF MONEY REFUND

THIS AGREEMENT made this 27th May 2008 between Francis Cege Gathinji ID Number 2018334 and of P O Box 3005-00100 Nairobi on the one part and Joseph Stephen Mwangi Kibe ID Number 7869543 and of P O Box 7504-00200 on the other part do hereby agree as follows;

That Joseph S M Kibe do hereby agree owing Francis Cege Gathinji the sum of Kenya shillings two hundred twenty five

thousand only (Kshs 225,000)

That Joseph S M Kibe do hereby agree to Refund the said sum of Kshs 225,000 by two (2) equal installments of Kshs 112,500 W.E.F 27th August 2008 with a grace period of seven (7) days from the said date.

That aforesaid debt arose from the sale of Plot Number 391 Mwiki which due to unforeseen reasons was nullified

That the 2nd and final instalment of Kshs 112,,50 is to be paid on or before 27th November 2008 with a grace period of 14th days from the said date.

Failure to honour this agreement a penalty of Kshs 1000 per week to accrue until payment in full

Dated this 27th may 2008

Signed by Francis Cege Gathinji this 27th may 2008

BEFORE ME

DISTRICT OFFICER

KASARANI DIVISION

NAIROBI NORTH DISTRICT

NAIROBI

DISTRICT OFFICER

SIGNED BY J S M KIBE

BEFORE ME

DISTRICT OFFICER

KASARANI DIVISION

NAIROBI NORTH DISTRICT

NAIROBI

DISTRICT OFFICER

Further the Original Certificate to be in the custody of the District Officer Kasarani.

Agreement honoured 3/09/2008

DISTRICT OFFICER

KASARANI DIVISION

NAIROBI AREA

20. It is apparent from the above sale agreement that the preceding sale agreement dated 11/3/2008 was annulled and it was mutually agreed that the 1st defendant would refund the deceased a total sum of Kshs 225,000 which comprised of refund of purchase price and the agreed liquidated damages of Kshs 50,000. The answer to the second issue therefore is that the sale agreement dated 11/3/2008 was mutually rescinded by the parties to the agreement.

21. The third issue is whether the plaintiffs are entitled to the prayers sought in the amended plaint. The first prayer is a declaration that the 1st defendant holds the suit property in trust for the plaintiffs and the 1st defendant, and that the sale of the suit property by the 1st defendant to the deceased was fraudulent, illegal and null and void. The second prayer seeks a permanent injunction against the defendants in favour of the plaintiffs. The third prayer relates to costs of this suit.

22. There was no evidence tendered to demonstrate that the 2nd, 3rd and 4th plaintiffs have any recognized interest in the suit property. Only the 1st plaintiff has demonstrated a recognized interest in the suit property. The claim by the 2nd, 3rd and 4th plaintiffs therefore fails.

23. The 1st plaintiff has proved on a balance of probabilities that she contributed towards the purchase and development of the suit property; that the suit property is a co-owned matrimonial home held by the 1st defendant in trust for the couple. I would therefore grant prayers (i) and (ii) to the 1st plaintiff. My finding therefore is that only the 1st plaintiff is entitled to prayers (i) and (ii) of the amended plaint.

24. The fourth issue is whether the 2nd defendant is entitled to the prayers sought in the counterclaim. The counterclaim is against the 1st defendant and the four plaintiffs. The first prayer in the counterclaim is a plea for an eviction order. The second prayer is an alternative plea for a refund of Kshs 250,000 with interest at 25% per annum. The third prayer relates to costs of the counterclaim.

25. I have found that the suit property is trust property held by the 1st defendant in trust for the couple and was not available for sale by the 1st defendant to the deceased. Having made that finding, the plea for an eviction order in favour of the 2nd defendant is unavailable.

26. From the evidence on record, the deceased and the 1st defendant annulled the sale agreement dated 11/3/2003 and the 1st defendant agreed to refund the deceased Kshs 225,000. I would therefore allow the alternative plea to the extent that the 1st defendant is ordered to refund the sum of Kshs 225,000 together with interest at court rate from the date of filing the counter-claim. The 2nd defendant sought interest at Kshs 25% per annum from the date the 1st defendant was paid the money. There was however no evidence tendered to support the claim of interest at Kshs 25% per annum. I have no evidential basis upon which to grant that plea. The agreement of 28/5/2008 provided for a penalty of Kshs 1,000 per week. The 2nd defendant did not, however, pray for penalty at Kshs 1,000 per week. In the absence of a prayer for penalty, I will not grant it.

27. The last issue relates to costs of this suit. The dispute giving rise to this suit was authored by the 1st defendant and the deceased. The 1st defendant is husband to the 1st plaintiff and father to the 2nd, 3rd and 4th plaintiffs. Francis Cege Gathinji is now deceased. In the circumstances, I will order that each party bears their respective costs of the suit.

Disposal Orders

28. In light of the foregoing, I make the following disposal orders in tandem with the prayers made in the plaintiff's suit and in the 2nd defendant's counterclaim:

a) The suit by the 2nd, 3rd and 4th plaintiffs is dismissed with no order as to costs

b) It is hereby declared that the 1st defendant holds Plot Number 391 situated at Mwiki Housing Co-operative Society Limited, also known as Mwiki Company Limited, Nairobi County, in trust and the purported sale of the suit property by the 1st defendant to the late Francis Cege Gathinji was illegal, null and void.

c) The Estate of the Late Francis Cege Gathinji is hereby restrained against interfering with the 1st plaintiff's possession, use and occupation of the said property.

d) The 1st defendant shall pay the Estate of the Late Francis Cege Gathinji Kshs 225,000 together with interest at court rate from the date of filing the counter-claim.

e) Each part shall bear their respective costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JANUARY 2020.

B M EBOSO

JUDGE

In the presence of:-

Parties to this suit

Court Clerk - June Nafula