



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 98 OF 2016

PETER MACHARIA NDERITU.....PLAINTIFF

VERSUS

EMILY WAIRIMU MUIRURI.....1ST DEFENDANT

PURITY WANJIRA MUIRURI.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

The plaintiff filed this suit seeking an order against the 1st defendant to transfer 1½ acres of land parcel Number GICHUGU/SETTLEMENT/SCHEME/4404 and removal of the restriction/caution placed on the suit land by the 2nd defendant. The plaintiff is also seeking costs of the suit.

At paragraph 5 of the plaint dated 28th June 2016, the defendant averred that on or about the 20th February 2015, the plaintiff and the 1st defendant entered into negotiations for the sale of 1½ acres out of land parcel No. GICHUGU/SETTLEMENT/SCHEME/4404 at an agreed purchase price of Ksh. 2,555,000/=. The said purchase price was paid as follows:

(i) 20/2/2016 - Ksh. 1,900,000/= through Equity Account No. 0100190186601 belonging to Muiruri Karungo.

(ii) 2/6/2015 - Ksh. 800,000/= to Equity Bank Account No. 0100190186601 belonging to Muiruri Karungo.

(iii) 2/6/2015 - Ksh. 620,000/= to Equity Bank Account No. 0100190186601 belonging to Muiruri Karungo.

It is further averred that on 26th January 2016 an agreement was entered into between the plaintiff and the 1st defendant in which the 1st defendant acknowledged receipt of Ksh. 2,550,000/= being the total purchase price of the suit property.

The plaintiff also averred that consent to sub-divide was duly given by the Land Control Board but before the consent to transfer could be issued, the 2nd defendant placed a caution on the suit property without any reasonable cause. On 15th September 2016, the 2nd defendant through the firm of Wangechi Munene & Co. Advocates filed statement of defence and counter-claim against the plaintiff in which she admitted having placed a caution on the suit property and averred that the 1st defendant who is her mother holds the suit property in trust for herself and her siblings which she named as Nancy Wambui Muiruri, Jane Njoki Muiruri, Teresiah Wambui Khangai, Peter Njogu Muiruri and Mary Wanjiru Muiruri and could not therefore dispose the same without their consent. The 2nd defendant therefore seeks a declaration that the 1st defendant holds land parcel No. GICHUGU/SETTLEMENT/SCHEME/4404 in trust for her and her siblings. The 1st defendant did not file any defence to the plaintiff's claim but opted to file defence to the 2nd defendant's counter-claim jointly with her husband Muiruri Karungo. In what they are calling 1st and 2nd Defendant's Defence to the counter-claim, the 1st defendant and her husband averred that the 2nd defendant's interest in the main suit is only limited to their late mother's land parcel No. GICHUGU/SETTLEMENT/SCHEME/1724 and not in the suit property. The 1st defendant and her husband therefore averred that the caution placed by the 2nd defendant in the main suit is unlawful and lacks merit and that the same ought to be removed forthwith.

PLAINTIFF'S CASE

The plaintiff gave sworn testimony and stated that he bought a portion of the suit property measuring 1½ acres at an agreed consideration of Ksh. 2,550,000/=. He bought the land from the 1st defendant. He paid the purchase price through the account of Muiruri Karungo who is the 1st defendant's husband. He made the payments through funds transfer on 20th February 2015 as follows:

(i) Ksh. 1,100,000/= Plaintiff's Exhibit 2.

(ii) Ksh. 800,000/= Plaintiff's Exhibit 3.

(iii) Ksh. 620,000/= Plaintiff's Exhibit 4.

By the time he was making the payments, they had not written the sale agreement. The 1st defendant showed him a letter of consent from the Land Control Board dated 10th September 2015. The same was produced as Plaintiff's Exhibit No. 5. They later entered into a written sale agreement dated 26th January 2016 also produced as Plaintiff's Exhibit No. 6. He later learnt from the Lands office that the 2nd defendant had placed a caution on the property. He conducted a search and confirmed the same. He wrote a demand letter to the 1st defendant on 20th April 2016. The demand letter was produced as Plaintiff's Exhibit 7. He also wrote a letter to the Land Registrar Kirinyaga County complaining on the restriction dated 20th April 2016. The letter was produced as Plaintiff's Exhibit 9. He wrote a demand letter to the 2nd defendant in April 2016 which was also produced in evidence as Plaintiff's Exhibit No. 8. He stated that he visited the suit property and found that there were no people living on the land. He said that the 1st defendant told him that the land belonged to her. He said that it was one Mary Wanjiru who connected him to the 1st defendant and her husband. He stated that the suit property is not a clan land.

1ST DEFENDANT'S CASE

The 1st defendant offered no defence and closed her case.

2ND DEFENDANT'S CASE

The 2nd defendant testified and stated that the 1st defendant is her mother and Muiruri Karongo is her father. She also stated that the plaintiff is her neighbour. She confirmed having placed a caution on the suit property on grounds that the plaintiff bought the same without involving them. She stated that their father has two wives namely Esther Wambui Muiruri (deceased) who is her step mother. She passed on in 2014. She said that her grandfather gave his father land parcel No. Gichugu/Settlement parcel No. 573 measuring 4.13 Hectares on 19th July 1968. His father sub-divided the land into parcel No. GICHUGU/SETTLEMENT/SCHEME/1723 and 1724 for his two wives. Parcel No. GICHUGU/SETTLEMENT/SCHEME/1723 was given to his mother while parcel No. GICHUGU/SETTLEMENT/SCHEME/1724 went to her step mother. Land parcel No. GICHUGU/SETTLEMENT/SCHEME/1723 was later combined with 943 and was closed. She produced a green card for the combined parcel No. 943 – 2nd Defendant's Exhibit No. 2. She also produced a search certificate for land parcel No. 943 as 2nd Defendant's Exhibit No. 3 while certificate for L.R. No. 1723 produced as Defence Exhibit 4 and L.R. No. 1724 was produced as Defence Exhibit No. 5. The land the plaintiff bought is a sub-division from L.R. 4385 which was sub-divided into L.R. No. 4404-4406. A certificate of search for L.R. No. 4305 was produced as 2nd Defendant's Exhibit No. 6. Parcel No. 4405 and 4406 were sold to Stephen Ndegwa Mwangi (4405) while Pius Mwangi Kabuchi bought parcel No. 4406. A search for parcel No. 4405 was produced as Defence Exhibit No. 7 and certificate for L.R. No. 4406 was produced as Defence Exhibit No. 8. She cautioned the remaining land which was being purchased by the plaintiff. She stated that they cultivate the land but they live in Kiandegwa Village. She stated that she placed the caution in September 2016. She produced a search as Defence Exhibit No. 9.

ISSUES FOR DETERMINATION

The counsels for the plaintiff and the defendants filed separate issues. However, the following are in my view the appropriate issues for determination:

- (1) Whether the 1st defendant holds land parcel No. GICHUGU/SETTLEMENT/SCHEME/4404 in trust for herself and the 2nd defendant and the other siblings.**
- (2) Whether the sale agreement entered between the plaintiff and the 1st defendant on 20th February 2015 is legal**
- (3) Who shall bear the costs of this suit?**

ANALYSIS AND DETERMINATION

I have considered the evidence by the plaintiff and the 2nd defendant. I have equally considered the submissions by counsel for the plaintiff and the defendants. The plaintiff in this case bought a portion of land from parcel No. GICHUGU/SETTLEMENT/SCHEME/4404 measuring approximately 1½ acres at a price of Ksh. 2,550,000/=. The 1st defendant obtained consent to transfer the portion of the suit property but before the same would be effected, the 2nd defendant lodged a caution against the transfer. According to her defence and counter-claim dated 7th September 2016, the 2nd defendant averred that their father Muiruri Karungo sub-divided land parcel No. GICHUGU/SETTLEMENT/SCHEME/573 which was later sub-divided and shared between his two wives into parcel No. GICHUGU/SETTLEMENT/SCHEME/1723 and 1724. The 2nd plaintiff further stated that their mother and their father later combined parcel No. 1723 and 943 to become land No. 4385 in the name of the 1st defendant. The later was subsequently sub-divided into parcel Nos 4405 and 4406. The 2nd defendant stated that her mother and father then colluded and sold the two portions without informing her and the other siblings. She then lodged a caution on grounds that the 1st defendant held the land in question in trust for herself and the rest of the family members.

The issue that now seeks to be answered is whether the land parcel No. GICHUGU/SETTLEMENT/SCHEME/4404 is held by the 1st

defendant in trust for herself and the rest of the family members.

The issue whether a registered proprietor is holding the same under customary trust is a question of evidence. The *Halsbury's Laws of England, 4th Edition, Volume 17, at paragraphs 13 and 14* describes it thus:

“13. The legal burden is the burden of proof which remains constant throughout a trial. It is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issue”.

The 2nd defendant in this case filed defence and counter-claim alleging that the 1st defendant holds the suit property for herself and the rest of the family members including herself. The burden of proving that the suit property is a trust land lies upon the 2nd defendant. In the case of *Karanja Wanjihia Vs Duncan Wanjihia & 4 others (2004) e K.L.R.*, the Court stated as follows regarding trust:

“Trust is an issue both of fact and law. It is a serious issue, and needs to be demonstrated through evidence and verification of evidence”.

The 2nd defendant has not tendered any evidence showing that the suit property is a trust land. In the contrary, the plaintiff has demonstrated by evidence that he bought the suit property from the 1st defendant who is the registered proprietor at a purchase price of Ksh. 2,550,000/= which he paid in full. I find and hold that the plaintiff has proved his claim against the defendant on the required standard.

I therefore enter judgment for the plaintiff against the 2nd defendant as prayed in the plaint. The 2nd defendant’s counter-claim lacks merit and the same is hereby dismissed with costs. The costs of the plaintiff’s suit shall also be borne by the 2nd defendant. It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 4th day of October, 2019.

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E.C. CHERONO

ELC JUDGE

4TH OCTOBER, 2019

In the presence of:

1. M/S Asimwe holding brief for Wangechi Munene
2. Ms Wambui holding brief for Makworo
3. Wachira – Court clerk – present