



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KISHII**

**ENVIRONMENT AND LAND CASE NO. 122 OF 2016**

**CALLEB AMBOGA.....PLAINTIFF**

**VERSUS**

**MARCO MAKORI ONKWARE.....1<sup>ST</sup> DEFENDANT**

**JOSEPH OBURI.....2<sup>ND</sup> DEFENDANT**

**THE REGISTERED TRUSTEES (Pentecostal Assemblies of God)**

**NYAKOMISARO – PAG CHURCH..... 3<sup>RD</sup>DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff is the registered owner of the parcel of land known as **LR No. NYARIBARI CHACHE / B/B/ BOBURIA/10573** (“the suit land”). He was registered as the proprietor of the land on 3<sup>rd</sup> September 2013. He instituted the present suit against the Defendants by a plaint dated 4<sup>th</sup> May 2016 seeking an order of eviction against them. He claims that the Defendants have occupied his parcel of land on the basis that they own it pursuant to an expired lease agreement. He urges the court to issue a permanent injunction restraining the Defendants from dealing with the land in any manner. He also prays for general damages against the Defendants as well as a declaration that he is the lawful, bona fide and registered owner of the land.
2. The Defendants do not deny that the Plaintiff is the registered owner of the suit land. Their response, as set out in their statement of defence and counterclaim dated 24<sup>th</sup> May 2016, is that the 3<sup>rd</sup> Defendant purchased the land from the Plaintiff when the land was still registered in the name of the original owner, one Masega Miregwa. They refute the Plaintiff’s claim that they had leased the land and assert that they purchased the land from him. The Defendants also claim that the land should have been registered in the name of the 3<sup>rd</sup> Defendant but was secretly registered in the name of the Plaintiff and therefore the Plaintiff is registered as the owner of the land as trustee for the 3<sup>rd</sup> Defendant. They refute the allegation that they have trespassed onto the suit land and state that they were put in possession of the land in the year 2004.
3. In their counterclaim, the Defendants expound that the 3<sup>rd</sup> Defendant entered into an agreement for purchase of the land from the Plaintiff on 7<sup>th</sup> December 2004 at a purchase price of One Hundred and Ten Thousand Shillings (Kshs. 110,000/=). They claim that they paid the full purchase price in 6 instalments and also paid an excess of Kshs. 10,000/= for processing the title deed as demanded by the Plaintiff. That upon paying the first instalment, the 3<sup>rd</sup> Defendant was put into immediate vacant possession of the land where it set up semi permanent structures and its members have been worshipping on the land peacefully since then. They claim that the Plaintiff received the money as per the agreement but refused to transfer the land to the 3<sup>rd</sup> Defendant in breach of the agreement.
4. The Defendants contend that by filing this suit, the Plaintiff is attempting to obtain title through fraud having failed to perform his part of the bargain. They urge the court to declare that the suit land is owned by the 3<sup>rd</sup> Defendant and compel the Plaintiff to specifically perform his part of the contract by signing all the relevant papers to put the land into the ownership of the 3<sup>rd</sup> Defendant. The Defendants also urge the court to declare that the title deed of the land is being held by the Plaintiff in trust for the 3<sup>rd</sup> Defendant and that the trust should now be terminated so that the 3<sup>rd</sup> Defendant can be registered as the owner of the land.
5. The Plaintiff filed a reply to the defence and a defence to the Defendants’ counterclaim. He reiterated the contents of his plaint and denied the particulars of fraud, breach of the agreement and breach of trust as claimed by the Defendants.

6. Mutungi J. took the Plaintiff's evidence while I heard the three witnesses who testified in support of the Defendants' case.
7. At the hearing of his case, the Plaintiff recalled that he had purchased two adjacent parcels of land from Richard Masega Miregwa which were subsequently registered in his name on 3<sup>rd</sup> September 2013 as LR No. Nyaribari Chace / B/B/ Boburia/10573. He testified that in the year 2000, he was approached by the Defendants who requested him to allow them to use his land for their Sunday services as they had a temporary church on the adjacent land. He allowed them to use the land on condition that they would not put up any structures on his land. It was the Plaintiff's evidence that when the Defendants started using the land he had not yet acquired title from the seller. It was agreed that the Defendants would yield vacant possession whenever the Plaintiff required it. There was also an understanding that the Defendants would pay the Plaintiff for occupying the land but the amount had not been agreed upon. The plaintiff testified that over time, the Defendants paid a sum of Kshs. 62,000/=.
8. The Plaintiff testified that in 2008, when he wanted to use the land, he asked the Defendants to move out but they refused. When he got registered as the owner of the land, the Defendants lodged a caution over the land. The Plaintiff told the court that the Defendants had taken advantage of his being away in Nairobi to construct a pastor's house on his land. He denied ever agreeing to sell his land to the Defendants. He insisted that whatever payments the Defendants made to him was for their use of his land and it was not payment of the purchase price. He thus urged the court to grant the orders sought in the plaint.
9. During cross examination, the Plaintiff admitted that his brother in law, Charles Ogenche had received the first instalment for the purchase of the land. He stated that he had not been aware of the acknowledgement by his brother- in- law and insisted that he had not authorized him to sell the land. He denied receiving a total of Kshs. 121,000/= and testified that he had sent back a sum of Kshs. 40,000/= which had been sent to him via Mpesa. He stated that he had refunded the money since the sender had indicated that it was for purchase of the land. He maintained that any payments he received were for the use of his land and not for the purchase of the land.
10. Joseph Oburi Oburi (DW 1) identified himself as the church deacon of P.A.G. Church located within Kisii Town. He adopted his witness statement and further testified that the Plaintiff had sold to them a portion of L.R. No. BOMOBEA/BOBURIA/5142 measuring 82 feet by 76 feet at a purchase price of Kshs. 110,000/= in 2004. He testified that they had paid the purchase price in full by instalments. He produced documents in support of the claim that they had paid Kshs. 120,000/= which included a sum of Kshs. 10,000/= for processing of the title deed. He stated that they made some payments through Charles Ogenche on the authority of the Plaintiff. DW 1 testified that after paying the purchase price, they were not given the title deed even though they had taken possession of the land in 2004. He testified that they had constructed a temporary structure which served as a church on the land and had built a temporary house for the pastor, pit latrines and they had also planted 20 blue gum trees on the land.
11. When probed during cross examination, DW 1 admitted that he did not have a detailed sale agreement. He stated that he only had an acknowledgement which had not been signed by the Plaintiff or his representative and further testified that they had not agreed on a time frame for payment of the purchase price. He testified that the Plaintiff had promised to obtain a consent from the Land Control Board but failed to do so. He also acknowledged that when they purchased the land, the Plaintiff was not the registered owner of the suit land. He further admitted that the Plaintiff had sent back the sum of Kshs. 40,000/= 6 months after he sent the amount to him on 3<sup>rd</sup> September 2014. He however refuted the claim that they had leased the land and insisted that it had been sold to them by the Plaintiff.
12. George Getwambu Okari (DW 2) the pastor at Nyakomisaro P.A.G. Church testified that the Plaintiff, who was one of the congregants at his church had informed him that he wanted to sell a portion of his land which bordered the Church. The Plaintiff had approached them together with his sister and his brother in-law Charles Ogenche. He stated that the Church entered into an agreement for purchase of the land on 7<sup>th</sup> December 2004. They agreed on a purchase price of Kshs. 110,000/= which they paid in instalments. DW 2 testified that he had witnessed the payment of the deposit of Kshs. 30,000/= to the Plaintiff's brother in-law, Ogenche who had prepared the sale agreement as an agent of the Plaintiff. DW 2 admitted that the agent and the Plaintiff had not signed the agreement but he, DW 1, Jenes Getwambu and others had signed the sale agreement in their capacity as committee members for the Church.
13. DW 2 further stated that some instalments had been sent to the Plaintiff's account but when they sent the last instalment, the Plaintiff returned the money and issued them with a notice to vacate. He told the court that they had taken possession of the land in 2004 and had constructed a temporary structure which they used as their place of worship. He also maintained that they had bought the land as opposed to leasing it as claimed by the Plaintiff.
14. Marco Makori Onkwere (DW 3) who was also a pastor of Nyakomisaro P.A.G. Church testified that he had been served with a letter demanding that they vacate the suit property as they were merely leasing it. He testified that he had called a Church Committee meeting to discuss the demand letter and it was resolved that the balance of the purchase price be paid. A fund raiser had been held to raise the money which was sent to the plaintiff via his mobile phone. However, after about 5 to 6 months, the Plaintiff sent back the money to DW 1. DW 3 testified that when the money was returned, he lodged a caution against the title. He explained that they had delayed in paying the final instalment because they did not have money. He told the court that they were not willing to surrender the land to the Plaintiff, having developed it over time. He also testified that the agreement had been that the Plaintiff would transfer the land to the Church after obtaining a title from the initial owner.

#### **ISSUES FOR DETERMINATION**

15. Having analyzed the parties' pleadings, the evidence and written submissions by the Plaintiff, I am of the view that the issues arising for determination are as follows;
  - a) Whether there was a valid land sale agreement between the Plaintiff and the Defendants and if so, whether the Plaintiff is in breach of the agreement;
  - b) Whether the Plaintiff is registered as the owner of the suit land in trust for the 3<sup>rd</sup> Defendant;

- c) Whether the orders sought in the plaint should be granted; and
- d) Whether the orders sought in the counterclaim should be granted.

## ANALYSIS AND DETERMINATION

16. It is not in dispute that the Plaintiff is the registered owner of the suit land. From the evidence adduced by both parties, it is clear that the parties had entered into an agreement since the Plaintiff allowed the Defendants access and occupation of his land. The nature of the transaction between the parties is what is in contention.

17. On the one hand the Plaintiff claims that the transaction between him and the Defendants was a lease agreement. He claims that he entered into an oral agreement with the Defendants to let them use his land at a fee and they were to yield vacant possession whenever he required it. On the other hand, the Defendants maintain that they entered into an agreement for purchase of the suit land from the Plaintiff. They claim that in the sale agreement dated 7<sup>th</sup> December 2004, the Plaintiff agreed to sell to them the suit land at a purchase price of Kshs. 110,000/=.

18. DW 1 testified that they had paid a first instalment of Kshs. 30,000/= for purchase of the plot on 7<sup>th</sup> December 2004. He produced the acknowledgment for receipt of the money which indicated that one Charles Ogenche, who was acting on behalf of the Plaintiff, had received the money from the Defendants. DW 2 confirmed that he, DW 1 among other committee members had been present when Charles Ogenche received that first instalment but both he and DW 2 admitted that neither the Plaintiff nor his agent had signed the acknowledgement.

19. A petty cash voucher dated 7<sup>th</sup> April 2005 for Kshs. 12,000/= was produced by DW 1 as evidence of payment of the second instalment. A sum of Kshs. 15,000/= was later on paid into the Plaintiff's account as exhibited in a deposit slip dated 6<sup>th</sup> June 2006. The fourth instalment of Kshs. 17,000/= was paid into the Plaintiff's account on 10<sup>th</sup> January 2008 and the fifth instalment of Kshs. 5,000/= was similarly paid into the Plaintiff's account on 16<sup>th</sup> July 2008. DW 1 testified that he sent the final instalment of Kshs. 40,000/= to the Plaintiff via mobile money transfer on 3<sup>rd</sup> September 2014 but the Plaintiff returned the money after 6 months.

20. Other than the acknowledgment dated 7<sup>th</sup> December 2004, no other document was produced as proof of the sale of the land by the Plaintiff. The Plaintiff rightly argued that there was no document which met the conditions of Section 3(3) of the Contract Act which stipulates that;

*3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—*

*(a) the contract upon which the suit is founded—*

*(i) is in writing;*

*(ii) is signed by all the parties thereto; and*

*(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:*

*Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.*

21. The Plaintiff relied on the case of **Sammy Some Kosgei vs Grace Jele Boit [2013]eKLR** where Munyao J. held;

*"Thus it will be discerned that for an agreement for the disposition of land to be enforceable, the agreement must not only be in writing, but must be signed by the parties thereto and attested by a witness who must be present when the contract is signed"*

22. The Defendants admitted that neither the Plaintiff nor his agent had signed the acknowledgment dated 7<sup>th</sup> December 2004. There was no formal agreement setting out the terms and conditions of the alleged agreement. The Plaintiff contended that the length of time taken to pay for the land from the first instalment on 7<sup>th</sup> April 2004 to the last payment on 3<sup>rd</sup> September 2014, only demonstrated that the transaction between the parties was not for sale of the suit land.

23. The Plaintiff's counsel also argued that the Defendants had not obtained Land Control Board Consent within a period of 6 months as required under section 6 (1) of the Land Control Act. The Defendants acknowledged that the consent from the Land Control Board had not been obtained but were of the view that it was the Plaintiff's responsibility to obtain the consent. This is however not the position, as any of the parties could obtain the consent from the Land Control Board. No proof was adduced to show that the Defendants had attempted to acquire the consent and were hindered or delayed from obtaining it by the Plaintiff.

24. The wording of Section 6 (1) of the Land Control Act is peremptory. The provision stipulates as follows;

*6 (1) Each of the following transactions that is to say –*

*(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;*

*is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.*

25. The Courts have been categorical that the foregoing provision of the law must be adhered to, failure to which the transaction becomes void. (See **David Sironga Ole Tukai vs Francis Arap Muge & 2 Others Civil Appeal No. 76 of 2014 [2014]eKLR**). It was common ground in this case that the consent had not been obtained.

26. The Defendants sought to take refuge in trust. They argued that when they purchased the land from the Plaintiff, it was not yet registered in his name and there was an understanding that the land would be registered in the name of the 3<sup>rd</sup> Defendant once the title was issued. The creation of trust relationships was examined by the Court of Appeal in **Twalib Hatayan & Another v Said Saggat Ahmed Al-Heidy & 5 others CA Civil Appeal No. 51 of 2014 [2015]eKLR**, thus;

*Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see Halsbury's Laws of England vol 16 Butterworths 1976 at para 1452). In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts.*

...

*A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settler or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see. Snell's Equity at p.177) (supra).*

27. The above authority categorizes trusts as a remedies provided in equity. Where the law is expressly stated on a particular point, the doctrine of equity is inapplicable as equity works as a supplement for law and does not supercede the prevailing law. That was the position of the Court of Appeal in the cases of **Karuriv Gitura [1981] KLR 247** as well as the case of **David Sironga Ole Tukai(Supra)** where the Court held that the provisions of the Land Control Act are of an imperative nature and there is no room for the application of any doctrine of equity to soften them. In the case of **Kariuki v Kariuki [1983]KLR 225**, it was held that when a transaction is stated by express terms in an Act of Parliament to be void, a party to that transaction cannot be guilty of fraud if he relies on the statute to argue that the transaction is void.

28. In **Hannah Mugure Karago v Peter Karuri Waweru & Another Civil Appeal No 155 of 2014 [2016] eKLR** the Court of Appeal opted for a more lenient application of the provisions of the Land Control Act, the Court opined;

*"It appears that human greed or inconsistency and perfidy have found a powerful tool and ally in the provision that declares void all transactions without timely or any consent. The question becomes whether a court of justice would so interpret the provision as to aid a fraudster, mischief maker or a contract breaker.*

*We are not prepared to hold that courts should provide judicial approval to such dishonesty and lack of integrity and approve of results that are plainly unjust. Nor should they wring their hands and emit impotent sighs in the face of such injustice".*

29. The alleged sale of the land by the Plaintiff to the Defendants was in this case not written as required by the law and the acknowledgement which the Defendants purported to be the sale agreement was neither signed by the Plaintiff nor his agent. If such a contract existed, it is my considered view that the doctrine of equity would not be applicable to the Defendants who did not come across to me as parties who were vigilant in protecting their interests. They only paid the purported last instalment nearly a decade after paying the first instalment and appeared to have been jolted into action by the Plaintiff's notice to vacate.

30. In the final analysis, I find that the Defendants failed to prove that the transaction between the 3<sup>rd</sup> Defendant and the Plaintiff was one for sale of the suit land. There is however abundant evidence that the Defendants are in occupation of the land. Being the registered owner, the Plaintiff is entitled to the absolute ownership of the land together with all rights, privileges and appurtenances thereto in accordance with sections 24, 25 and 26 of the Land Registration Act.

31. In view of the foregoing, I find and hold that the Defendants have failed to prove their counterclaim and I dismiss it with costs. On the other hand, the Plaintiff has proved his case on a balance of probabilities. Accordingly, I enter judgment for the Plaintiff in the following terms;

a) A declaration is hereby issued that the Plaintiff is the legal owner of all that parcel of land known as LR NO. NYARIBARI CHACHE / B/B/ BOBURIA/10573 ;

b) The Defendants are hereby ordered to vacate that parcel of land known as LR NO. NYARIBARI CHACHE / B/B/ BOBURIA/10573 within 45 days failing which they shall be forcefully evicted.

c) A permanent injunction is hereby issued restraining the Defendants either by themselves, their agents, servants and/or anyone claiming under the Defendants from entering into, re-entering into, trespassing into, building structures, cultivating, converting the suit land or interfering with the suit land that is LR NO. NYARIBARI CHACHE / B/B/ BOBURIA/10573;

d) The costs of this suit shall be borne by the Defendants.

**Dated, signed and delivered** via zoom this 20<sup>th</sup> day of May, 2020.

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**J.M. ONYANGO**

**JUDGE**