



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT THIKA**

**ELC. CASE NO. 41 OF 2017**

***(Formerly Kerugoya ELC No 13 of 2015)***

**MARGARET RINGA P.M. GITONGA.....1<sup>ST</sup> PLAINTIFF**

**LEMMY GITONGA MAINA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JACINTA NJOKI WAHOGO.....1<sup>ST</sup> DEFENDANT**

**JAMES MUIRU WAHOGO.....2<sup>ND</sup> DEFENDANT**

**SOLOMON NJOROGI WAHOGO.....3<sup>RD</sup> DEFENDANT**

**DAVID MUNGAI WAHOGO.....4<sup>TH</sup> DEFENDANT**

**EDWARD GITAHI MATHENGE.....5<sup>TH</sup> DEFENDANT**

**DANIEL NGUGI KINUTHIA.....6<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The suit was commenced by way of a Plaint dated 19<sup>th</sup> February, 2015, and amended on 31<sup>st</sup> May, 2016. In the amended Plaint, the Plaintiffs sued the Defendants as the joint co-administrators of the estate of John Gitonga. It was averred that on or about 21<sup>st</sup> May, 2010, the 1<sup>st</sup> Defendant, on behalf of the Estate of her late husband Mr. Wahogo Kinyanjui, entered into a Sale Agreement with the late John Gitonga for sale of Land Reference number Thika Municipality/Block 33/68 (Runyua) (*“hereinafter the suit property”*) for a consideration of Kshs 2,500,000. The said amount was to be paid in installments.

2. It was averred by the Plaintiffs that at the time of the agreement, the Grant to the Estate of the late Wahogo Kinyanjui to the 1<sup>st</sup> Defendant was pending confirmation; that the administrator to the Estate was disposing off the land and that the late John Gitonga went ahead to make payments in terms of the sale agreement. However, John Gitonga died on 22<sup>nd</sup> April, 2011.

3. The Plaintiffs averred that the 1<sup>st</sup> to 4<sup>th</sup> Defendants proceeded to transfer the suit property to the 2<sup>nd</sup> and 4<sup>th</sup> Defendants and later to the 5<sup>th</sup> and 6<sup>th</sup> Defendants instead of effecting the transfer of the same in favour of the administrators of the Estate of the late John Gitonga; that the Defendants’ actions were fraudulent and that the suit property belongs to the Estate of the late John Gitonga.

4. The Plaintiffs are seeking for the following prayers against the Defendants:

***a) That this honorable court finds that there was a valid contract of sale between the 1<sup>st</sup> Defendant and the late John Gitonga as witnessed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.***

***b) That this honorable court finds that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were in total breach of the said contract by failing to transfer the parcel of land referred to as land registration NO. THIKA MINICIPALITY BLOCK 33/68 (RUNYUA) to the***

**Plaintiffs as the Legal representatives of the estate of JOHN GITONGA.**

**c) That this honorable court finds that the transfer of the said parcel of land to the 5<sup>th</sup> and 6<sup>th</sup> Defendants was illegal hence invalid.**

**d) That this honorable court find that the estate of John Gitonga was the sole and right beneficiary of the parcel of land referred to as Land Registration NO. Thika Municipality Block 33/68 (Runyua).**

**e) That this honorable court orders that the title registered in favour of the 5<sup>th</sup> and 6<sup>th</sup> Defendants be revoked and the same be registered in the favour of the estate of the late JOHN GITONGA as guided by the certificate of confirmation of grant issued to the Plaintiffs.**

**f) That this honorable court awards punitive damages in favour of the Plaintiffs for breach of contract.**

**g) That this honorable court awards costs of the suit to the Plaintiffs.**

**h) That this honorable court awards interest at its rate.**

**i) That this honorable court makes further orders as it deems fit.**

5. The 5<sup>th</sup> and 6<sup>th</sup> Defendants filed a Defence on 28<sup>th</sup> July, 2017 where they denied each and every allegation of law and fact raised in the Plaint. The 5<sup>th</sup> and 6<sup>th</sup> Defendants averred that they became purchasers for value of the suit property having purchased the same from the registered owners.

6. The 5<sup>th</sup> and 6<sup>th</sup> Defendants denied having perpetrated any fraud on their part and averred that they purchased the suit land with a clean title devoid of any encumbrances and that they paid the full purchase price for the same.

#### **The evidence of the Plaintiffs:**

7. The 2<sup>nd</sup> Plaintiff testified as Pw1 and adopted his witness statement. PW1 testified that he is the son of the late John Gitonga; that the Late John Gitonga (*the deceased*) entered into an agreement of sale of land known as Thika Municipality Block 33/68 (Runyua) (*the suit property*) with the 1<sup>st</sup>- 4<sup>th</sup> Defendants and that the purchase price was Kshs. 2,500,000.

8. It was the evidence of PW1 that the deceased paid Kshs 2,162,500 for the suit land and that by the time the deceased died on 22<sup>nd</sup> April, 2011, he had a balance of Kshs. 337,500 as unpaid. According to PW1, the 1-4<sup>th</sup> Defendants extorted over Kshs. 3,000,000 from them and that after obtaining the letters of administration, he discovered that the suit land that the deceased purchased had been transferred to the 5<sup>th</sup> and 6<sup>th</sup> Defendants.

9. PW1 told the court that he wanted the title revoked. On cross examination, he testified that the land was registered in the name of the spouse of the 1<sup>st</sup> Defendant and that the 1<sup>st</sup> Defendant was selling the same although the process of administering the Estate of the deceased had not been completed. PW1 testified that the 1<sup>st</sup> Defendant was never the registered owner of the suit land and that the 1<sup>st</sup> Defendant never featured in the Sale Agreement.

10. PW1 stated that the 2<sup>nd</sup> to 4<sup>th</sup> Defendants had title to the land registered in their favour before selling the same to the 5<sup>th</sup> and 6<sup>th</sup> Defendants; that the 2<sup>nd</sup> to 4<sup>th</sup> Defendants defrauded him and extorted money from him and that the 5<sup>th</sup> and 6<sup>th</sup> Defendants were not part of the extortion. It was his testimony that the 5<sup>th</sup> and 6<sup>th</sup> Defendants bought the same land that his father had bought.

#### **Evidence of the 5<sup>th</sup> Defendant:**

11. DW1 testified that the 2<sup>nd</sup> to 4<sup>th</sup> Defendants offered to sell him the suit land; that the 2<sup>nd</sup> to 4<sup>th</sup> Defendants inherited the suit property from their late father and that he bought the land for Kshs 7,500,000. DW1 told court that a search conducted on 27.3.2013 revealed that the 2<sup>nd</sup> to 4<sup>th</sup> Defendants were the registered owners of the suit land and that as such, a transfer was executed. It was the evidence of DW1 that a consent to transfer the suit property was obtained from the Land Control Board; that he is the registered owner of the suit property and that he has the original Title Deed to the land. It was the evidence of PW1 that no rival claim was revealed on the register and that he did not know the Plaintiffs or the 1<sup>st</sup> Defendant.

12. It is only the 5<sup>th</sup> and 6<sup>th</sup> Defendants submissions that are on record. The Defendant's advocate submitted that the sale agreement between the Plaintiffs' late father and the 1<sup>st</sup> Defendant is a nullity; that the 1<sup>st</sup> Defendant did not own the suit land and that the purported sale of the land to the Plaintiffs' late father constitutes an offence under the Law of Succession Act.

13. Counsel submitted that the transaction between the Plaintiffs' late father and the 1<sup>st</sup> Defendant was contrary to the provisions of the Land Control Act; that the Plaintiffs never obtained the consent of the Land Control Board to buy the land as required under the said Act and that the Agreement entered into between the Plaintiff and the 1<sup>st</sup> Defendant is a nullity. Counsel relied on numerous authorities which I have considered.

## Analysis and Determination:

14. Upon considering the pleadings filed herein, the testimonies of the witnesses as well as submissions, and in view of the failure of the 1<sup>st</sup> to 4<sup>th</sup> Defendants to file a Defence, the following are the issues for determination:

- a) *Whether the 5<sup>th</sup> and 6<sup>th</sup> Defendants acquired the title to the suit land fraudulently;*
- b) *Whether the Plaintiff is entitled to the prayers sought in the Plaint as against the 5<sup>th</sup> and 6<sup>th</sup> Defendants;*
- c) *Who should bear the costs of the suit.*

15. The Plaintiffs produced in evidence the sale agreement dated 21<sup>st</sup> May, 2010 between the 1<sup>st</sup> Defendant and the late John Gitonga. The Agreement shows the 1<sup>st</sup> Defendant as the ‘*vendor*’ while the late John Gitonga is indicated as the purchaser of land known as Thika Municipality Block 33/68 (Runyua) (*the suit property*). The agreement described the 1<sup>st</sup> Defendant as follows:

***“WHEREAS the vendor is the Administrator of the Estate of WAHOGO KINYAMJUI- (Deceased), the registered proprietor of land parcel known as THIKA MUNICIPALITY BLOCK 33/68...”***

16. The 5<sup>th</sup> Defendant produced in evidence the Sale Agreement dated 8<sup>th</sup> February, 2013 between the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants on one hand and himself on the other hand in respect to the suit land. The 5<sup>th</sup> Defendant also produced in evidence the Consent of the Land Control Board in respect to the suit land and the transfer and the Title Deed issued to himself and the 6<sup>th</sup> Defendant on 7<sup>th</sup> June, 2013. The 5<sup>th</sup> Defendant also produced in evidence the Certificate of Confirmation in respect to the Estate of the late Daniel Wahogo Kinyanjui.

17. The evidence before me shows that by the time the 1<sup>st</sup> Defendant purported to sell to the Plaintiffs’ father the suit property, the registered proprietor of the land had already died. Indeed, the succession proceedings in respect to the Estate of the late Wahogo commenced in 1996 in Thika Chief Magistrates Court Succession Cause No. 361 of 1996 and only ended in the year when the Certificate of Confirmation alluded to above was issued by the court.

18. The agreement by the Plaintiffs’ father having been entered into after the demise of the registered proprietor of the suit property, and before a Certificate of Confirmation had been issued by the court, the said sale agreement is contrary to the provisions of section 45 of the Law of Succession Act, and is therefore null and void.

19. Indeed, to the extent that the Plaintiffs’ father and the 1<sup>st</sup> Defendant never obtained the consent of the Land Control Board as stipulated under section 6 of the Land Control Act, the Agreement between the Plaintiffs’ late father and the 1<sup>st</sup> Defendant is unenforceable.

20. The Certificate of Confirmation dated 21<sup>st</sup> June, 2012 shows the suit property was to be registered in the name of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. Therefore, no right accrued to the 1<sup>st</sup> Defendant in respect to the suit property. It is these three Defendants that transferred the suit land to the 5<sup>th</sup> and 6<sup>th</sup> Defendants.

21. Section 26(1) of the Land Registration Act, provides that:

***“The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.”***

22. The Plaintiffs did not produce any evidence to show that the 5<sup>th</sup> and 6<sup>th</sup> Defendants procured the title document in respect of the suit property by fraud or misrepresentation or that the Title Deed was acquired illegally, unprocedurally or through a corrupt scheme.;

23. The 1<sup>st</sup> Defendant did not have the letters of administration when she engaged in a transaction over the suit land, and yet she went ahead to transact on the suit land. This was deliberate dishonesty on her part. The 1<sup>st</sup> Defendant engaged in an unlawful and criminal act, and had no title to pass to the Plaintiffs or their late father. The Plaintiffs’ recourse is to pursue the 1<sup>st</sup> Defendant for the refund of the monies paid.

24. For those reasons, I dismiss the Plaintiffs’ Amended Plaint with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5<sup>TH</sup> DAY OF JUNE, 2020.**

**O.A. ANGOTE**

JUDGE