



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC SUIT NO. 52 OF 2018

WANJIKU MWAURA.....PLAINTIFF

VERSUS

RUTH WAMBUI KEIGI.....DEFENDANT

JUDGMENT

By a Plaint dated 20th February 2018, the Plaintiff herein filed this suit against the Defendant seeking for orders that;

- a) *A Declaration that the contract for the exchange of Land Parcel No. Komothai/Kiratina/1060, previously registered in the name of the Plaintiff, with land Parcel No. Ruiru/Ruiru East 3/308, previously registered in the name of the Defendant stands rescinded.*
- b) *An order be and is hereby issued directing the Registrar of Lands in Kiambu Lands office, to rectify the register by cancelling the registration in respect of parcel No. Komothai/Kiratina/1060, currently registered in the name of the Defendant.*
- c) *An order be and is hereby issued directing the Registrar of Lands Kiambu Lands Registry, to rectify the register by cancelling the registration in respect of parcel No. Ruiru/Ruiru East 3/308, currently registered in the name of the Plaintiff.*
- d) *Mesne profits actually received or that would, with ordinary diligence have been received by the Defendant on account of wrongful possession of land parcel No Komothai/ Kiratina/ 1060.*
- e) *Damages for breach of Contract.*
- f) *Costs of the suit.*
- g) *Any other relief that may deem fit to grant.*

In her statement of Claim, the Plaintiff averred that she was the registered owner of **L.R Komothai/Kiratina/1060**, whereas the Defendant was the registered proprietor of **L.R Ruiru/Ruiru East 3/308**, situated in Kiambu County. It was her contention that in **2011**, the Defendant and herself entered into an agreement to exchange the two suit properties and the Defendant was required to subdivide her parcel of land into four portions before the respective proprietary rights in the two parcels of land could be transferred from the Plaintiff to the Defendant and vice versa. She further averred that it was an implied term of the agreement that the Defendant's Land was free from all encumbrances. That the said exchange was further conditional upon the Defendant's land which was of lesser value being subdivided into four parcels and being registered by the Defendant in favour of the Plaintiff before the transfer of the proprietary rights.

She contended that in breach of the said Contract, the Defendant failed to subdivide **L.R Ruiru/Ruiru East 3/308**, as agreed and contrary to the implied term, that the said parcel of land was encumbered as several other persons later emerged claiming ownership over the Defendant's land. That though the Plaintiff did not execute any transfer forms, she later learnt that **L.R Komothai/Kiratina/1060**, had already been transferred to the Defendant and further that the Defendant's land Parcel No. **Ruiru/ Ruiru East 3/308**, had already been registered in the Plaintiff's name without her knowledge or consent. That despite several demands, the Defendant has refused to transfer **L.R Komothai/Kiratina /1060**, back to the Plaintiff.

The suit is contested and the Defendant filed a Statement of Defence dated **9th May 2018**, and denied all the allegations made in the Plaint. She averred that the condition to subdivide the land was an afterthought long after the exchange of the parcels of land had taken place. It was her contention that the Plaintiff transferred **L.R Komothai/Kiratina/1060**, to her willingly and that the Plaintiff suffers from selective memory and has thus opted to mislead the Court. She urged the Court to dismiss the Plaintiff's claim with costs.

The matter proceeded for hearing by way of viva voce evidence wherein the Plaintiff gave evidence for herself and called **two** witnesses.

The Defendant too gave evidence for herself and called **two** more witnesses.

PLAINTIFF'S CASE

PW1, Wanjiku Mwaura adopted her witness statement dated **20th February 2018**. She further produced her list of documents as exhibit No. 1 and 2. She testified that she agreed to exchange her land which is in Komothai with the Defendant's land which is in Ruiru. She further testified that though her land in Komothai has no problem, the land in Ruiru has a problem as it has three names as the proprietors. It was her testimony that the Defendant uses the Komothai land, but she is unable to use the Ruiru land.

Further that the two had an agreement for exchange of their parcels of land and that the agreement was an oral agreement and the exchanges was to take a short while. That she had not transferred to the Defendant the title for **Komothai/Kiratina/1060**, and that the **Ruiru** land is not in her name. That the said land has never been registered in her name. She told the Court that she wanted to subdivide the **Ruiru** land, but it was impossible because the parcel of land is in the name of three other people. Further that **Wanjiku Mwaura** is her mother and that **Humphrey Njoroge** is her uncle.

It was her further testimony that **Ruth** was to subdivide the land in Ruiru into four portions and that her mother's land was bigger than the Ruiru Land. That her mother signed some drawings for the subdivision brought by **Humphrey** who had been given the title in Komothai. Further, she also signed mutation forms by putting her thumbprint, but that she did not sign any transfer. She further testified that her land had a higher value than the Ruiru land. That she did not put a Notice that the Ruiru land had been grabbed and further that she is not **Wanjiku Mwaura** in the Ruiru land.

It was her testimony that she did not sign the transfer forms and that she has the Ruiru title and gave her title to the Defendant and that the Title for Komothai is with her brother **Humphrey Njoroge**

PW2, Mary Wambui Mwaura the Plaintiff's daughter adopted her witness statement as evidence in Court. It was her testimony that her mother is illiterate and that she agreed to exchange the **Komothai** land with the **Ruiru** land, owned by the Defendant. She denied that her mother signed the transfer of the land to the Defendant. She further testified that **Humphrey**, who is her uncle has the title to the land and that the Ruiru title deed is with her mother. She further testified that her mother wants to retain the Komothai land as the Ruiru land is being claimed by other proprietors and that the said land has issues.

She also testified that her mother had wanted the Ruiru land subdivided so that she could distributed to her family. That she did not know why the other people were claiming the Ruiru land and that she had never seen the approved subdivision scheme and that the Plaintiff took possession of the Ruiru Land. It was her testimony that **Humphrey** applied for a search and the title came in the name of their mother and her mother put a caution on the Ruiru Titles. It was her further testimony that the transfer of the Ruiru land has never been done and that the proposed survey report was not opposed and that **Humphrey** informed her mother that the Surveyor was stuck because there were other persons who were claiming the Ruiru land which was in her mother's name.

PW3, Teresiah Wambui Mwaura adopted her witness statement dated **20th February 2018**. It was her further testimony that the Plaintiff is her mother and **Humphrey** is her uncle. She denied that her mother signed the transfer form nor obtained the **Land Control Board** Consent. She also testified that she was to obtain the title from a surveyors and that she got their mother title and that her mother put caution on the property. That her mother signed drawings and mutation forms and that she did not see her sign the transfer and consent to transfer. That the Consent has a thumbprint and that the same is between **Wanjiku** and **Peter**, the title was transferred in **2009**. It was her contention that it was not their duty to subdivide and that the surveyor never informed them about the delay.

DEFENCE CASE

DW1, Ruth Wambui Kanyi adopted her witness statement. She further produced her list of documents filed on **25th July 2018** as Exhibit No. 1. It was her testimony that she had an oral agreement with the Plaintiff having been introduced by **Humphrey Njoroge**. That the two agreed on the exchange because the Komothai land was near her home and that the Plaintiff thumb printed the documents and that they obtained the **consent** to transfer from the Land Control Board. She denied that she transferred the land to **Maria Wairimu** and contended that maybe the Plaintiff sold it. It was her further testimony that the Plaintiff caused the problems as she delayed the work by keeping the Original Title. It was her evidence that everything was legally done. She further testified that the land in **Komothai** was bigger and that they were to subdivide the land in **Ruiru** to cover the difference and that the same could not happen as the Plaintiff kept the original title deed for Ruiru.

Further that the Mother title is taken to the lands office for subdivision and after the subdivision, the mother title is surrendered to the Lands office. That the Plaintiff thumb printed the transfer and that they used three surveyors because the Plaintiff remained with the Original Title deed and the surveyor needed it for the subdivision.

It was her further testimony that she did not know the people claiming the land and that the titles are not yet out. Further that there is a caution and subdivision cannot therefore be done. She contended that the Plaintiff does not use the Komothai nor the Ruiru land.

DW2, Peter Kengi Ndungu testified that he lived in Komothai Gathirimu. He adopted his witness statement dated **9th May 2018**, and further stated that the Plaintiff exchanged the land with his wife and the land was transferred to him and the Defendant. It was his testimony that the Plaintiff thumb printed the transfer form and also signed the consents. That there was no purchase and the parties went to **Land Control Board** in **Githurai** and transferred their land to the Plaintiff. Further, that they went to Githunguri and the Plaintiff's land was transferred to them. That the Plaintiff wanted four titles, but she withheld the Original title, and they have engaged 3 surveyors so far.

That the process of subdivision was not done because the Plaintiff took away the title deed. That Plaintiff had first surrendered the title deed to the surveyor for the search and that the Defendant transferred the title in the Plaintiff's favour but only the subdivision was remaining.

DW3, Humphrey Njoroge adopted his witness statement dated **9th May 2018**, as his evidence. He testified that the Plaintiff who is his cousin gave him the title deed for **Ruiru Land** so that he could give it to the surveyor and the surveyor can subdivide the land into four portions. He denied that he was given the title deed for Komothai land. That the Plaintiff and the Defendant agreed to exchange the land and that he witnessed the transfer for the Ruiru land, but not the Githunguri land. He further testified that for the Ruiru land, there was Land Control Board Consent, but that he did not attend the said Board. That the Application forms were signed in a Hotel at Ruiru Township. He further testified that he witnessed the signing of the transfer forms at Githurai and that he did not participate in the transfer of the Komothai land. That the Ruiru land is in the name of the Plaintiff and the Komothai land is in the name of the Defendant's husband.

Further that he told **Wanjiku** that the surveyor could not carry out any work as there was a problem and that **Wanjiku** (Plaintiff) refused with the Ruiru title deed and the subdivision could not be done as the mother title taken by the Plaintiff was needed by the surveyor. That the Defendant had not put any caution on the land to prevent subdivision.

After close of viva voce evidence, the parties filed written submissions which the Cot has now carefully read and considered and renders itself as follows.

It is not in doubt that that the parties entered into an oral agreement in which they agreed to exchange their properties, with the Plaintiff getting the Defendant's property in Ruiru and the Defendant getting the Plaintiff's property in Komothai. It is the Plaintiffs contention that it was an implied term of the agreement that the Defendant's land would be free from any encumbrance and that further the Defendant would subdivide the Ruiru land as the value of the Plaintiff's land in Komothai was bigger and therefore of a higher value. The plaintiff however contended that without her consent, the Defendant illegally transferred the suit properties with the Ruiru one going to the Plaintiff and the Komothai one going to the Defendant. She has further alleged that she has however failed to put the land to use as there are third parties laying acclaim to the said land.

However, it is the Defendant's contention that the suit properties were legally transferred and that the Plaintiff signed the transfer form by thumbprinting on the said transfer forms. Further that they attended the Land Control Board and the consent was granted and therefore the Plaintiff has no claim to the said suit property.

The Court finds the issues for determination are;

- 1. Whether the Plaintiff's suit can be sustained*
- 2. Whether the Plaintiff is entitled to the orders sought*
- 3. Who should bear the costs of the suit*

1. Whether the Plaintiff's suit can be sustained

The provisions of **Section 3(3)** of the **Law of Contract Act**, that have been repeated in **Section 38** of the **Land Registration Act** are to the effect that every contract for the sale and disposition of interest in land must be written. See The Law of Contract Act, **Chapter 23** of the Laws of Kenya which provides in **Section 3** that:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract on which the suit is founded –

(i) is in writing.

(ii) is signed by all 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 Section 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.”

It is not in doubt that the agreement in issue for the exchange of the suit properties which is in effect a disposition of land is an oral agreement. Therefore, it automatically means that the same offends the provisions of section 3 (3) of the Law of Contract Act and in so far as the Plaintiff is seeking for the contract to be rescinded and that the Defendant be cited for breach of Contract, then the suit is unsustainable in this regard. See the case of **Daudi Ledama Morintat ...Vs...Mary Christine Karie & 2 others [2017] eKLR** where the Court held that;

“The plaintiff thus makes admission that there was no agreement that was in writing yet the foundation of the suit is the said alleged oral agreement. The said agreement having not been in writing contravened Section 3(3) of the Law of Contract Act and cannot be relied upon to sustain the present suit by the plaintiff. The contract is unenforceable as it related to a disposition of an interest in land and such a contract has to have been in writing and signed by the parties to it and witnessed as required under Section 3(3) of the Law of Contract Act. See the cases of Rainald Schumacher –vs- Aubrey Garth Monsey [2008] eKLR, Laikipia Mifugo Ranching Co. Ltd –vs- Nanyuki Ranching Ltd [2007] eKLR and John Michael Wanjao –vs- Alubala

Abonayo Andambi [2011] eKLR where the courts declined to enforce contracts which fell foul of Section 3(3) of the Law of Contract Act and proceeded to strike out the suits for non compliance thereof.”

Therefore, this Court finds and holds that the suit is a nullity to the extent that it seeks for rescission and breach of the Contract.

However, the Plaintiff has further sought for various other orders including the cancellation and rectification of the register by the Land Registrar in respect of the suit properties. Does the prayers also become a nullity? The question then begs whether the said prayers are hinged upon the oral agreement. Will the cause of action against the Defendant in this instance survive without the written agreement? It is the Court’s considered view that the said prayers of cancellation and rectification are based on the allegations by the Plaintiff that the transfer forms used to transfer the suit properties were illegal as she did not sign the said transfer forms. Without placing reliance on the oral agreement, the suit with regards to the prayers sought can still be sustained. See the case of **Daudi Ledama Morintat ...Vs... Mary Christine Karie & 2 others (supra) where the Court stated:**

“In the present suit there can be no dispute that the plaintiff’s suit is predicated on the alleged oral agreement of sale entered into in 2008 as can be deciphered from the pleadings and material placed before the court by the plaintiff. Without placing reliance on that oral agreement, the plaintiff would be without any cause of action against the defendants.”

Further the validity of a suit arising from the requirements of **Section 3** of the **Law of Contract Act** will depend on whether the reliefs sought will stand without the oral contract or whether even in the absence of the contract, the party would still have a claim so that Court will be looking at the actual relief. See the case of **Leo Investment Ltd ...Vs... Estuarine Estate Ltd [2017] eKLR** the Court held that

“I would, however, add that the validity or otherwise of a suit arising from a scenario of non-compliance with the mandatory formal requirements of Section 3(3) of the Law of Contract Act does depend on the precise plea made to the court and the actual relief sought from the court by the plaintiff. In this regard, whereas a suit for specific performance or damages for breach of a non-compliant contract is a nullity, a suit for restitution (recovery of money paid in furtherance of a non-compliant contract) or a suit for declaration of a constructive trust arising from the non-compliant contractual relationship would be a valid suit.”

The Court finds and holds that in so far as the suit relates to the rectification and cancellation of the register in respect to the suit properties, the suit can be sustained.

2. Whether the Plaintiff is entitled to the orders sought

The Plaintiff has sought for the rectification of the register and averred that the Defendant fraudulently transferred the Komothai property to herself and further transferred the Ruiru property to the Plaintiff without the Plaintiff’s consent as she signed the transfer forms by thumbprinting. The Court has already found and held that the oral agreement entered into between the parties was void ab initio. Therefore, it follows that any acts done in furtherance of the said agreement is illegal and thus void. See the case of **Daudi Ledama Morintat ...Vs... Mary Christine Karie & 2 others (supra)** the Court held that

“Possession by the plaintiff of the suit property was pursuant to the impugned agreement for sale and cannot give the plaintiff right of ownership and neither can it be relied upon to found a cause of action.”

Further in the case of **Leo Investment Ltd ...Vs... Estuarine Estate Ltd (supra)** the Court held that;-

“The net effect is that a contract which does not meet the formal requirements set out in Section 3(3) of the Law of Contract Act is a nullity ab initio.”

In **Kukul Properties Development Limited ...Vs.... Tafazzal H Maloo & 3 Others (1993) eKLR** the Court held that;

“I hold that the intended agreement between the appellant and the Porbundarwallas was inoperative and therefore unenforceable for lack of execution by the appellant; the sum total was that there was no valid agreement enforceable in law.”

The Court finds that in so far as the transfer forms were either validly signed or not, but were done on the basis of the impugned contract, then the same were illegal.

Section 80 of the Land Registration Act gives the Court powers to order the rectification of the register and it provides;-

“80(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

It is the Court’s considered view that the transfer and subsequent registrations having been made in furtherance of an unenforceable contract, the same must then collapse. Therefore, the court finds and holds that the Plaintiff is entitled to the orders sought of cancellation and rectification.

The Plaintiff has also sought for mesne profits. However it is trite that mesne profits must be specifically pleaded and proved. See the case of **Peter Mwangi Mbutia & another ...Vs...Samow Edin Osman [2014] eKLR** where the Court held that :-

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

The Plaintiff is therefore not entitled to mesne profits

3. Who should bear the costs of the suit

Ordinarily costs usually follow the events. In **R....Vs...Rosemary Wairimu Munene, Exparte Applicant...Vs...Ihururu Diary Farmers Cooperative Society Ltd Judicial Review No. 6 of 2014**, the Court held that:-

“The issue of costs is the discretion of the court as provided by the law. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party, rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case”.

Section 27 of the Civil Procedure Act gives the Court discretion to grant cost. Looking at the circumstances of this case, it is the Court’s considered view that each party should bear its own cost.

Having now carefully analyzed the available evidence and the written submissions, the Court finds that the Plaintiff has partially proved her case on the required standard of balance of probabilities. Consequently, the Court finds that the Plaintiff claim vide a Plaint dated **20th February 2018** is **partially merited** and the same is allowed in terms of prayers **b** and **c**. Each party to bear her own costs of the suit.

It is so ordered.

Dated, signed and Delivered at Thika this 30th day of July 2020.

L. GACHERU

30/7/2020

JUDGE

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With consent of:

Matemu Katasi for the Plaintiff

Muturi Njoroge for the Defendant

L. GACHERU

30/7/2020

JUDGE