



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**ELC NO 112 OF 2012**

**GEORGE NDUNGU NJOROGE.....PLAINTIFF**

**VERSUS**

**TABITHA NYAMBURA NGANGA.....1<sup>ST</sup> DEFENDANT**

**NJUGUNA NGANGA.....2<sup>ND</sup> DEFENDANT**

**WANJIRU NGANGA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaintiff, **George Ndungu Njoroge**, filed a plaint dated **20<sup>th</sup> June, 2012** praying for judgement against the defendants in the following terms:

(i) **A declaration that the Plaintiff is the lawful owner of the parcel of land known as Plot No 238 Old Game Mutukanio Farm ("the suit property")**

(ii) **A permanent order of injunction restraining the defendants by themselves, their servants and / or agents from trespassing, entering, remaining in or in any other way interfering with the plaintiff's quiet possession and use of the suit property**

(iii) **Costs of the suit and interest thereon**

(iv) **Any other further relief that the court may deem fit and just to grant**

2. The plaintiff contends that he bought the suit property from **Mary Njoki Waigwa** for valuable consideration in December, **2010**. However, the defendants entered into the property without any justification on **7<sup>th</sup> February, 2011** and uprooted Rongai grass, 50 timber poles and 450 feet of barbed wire and proceeded to cultivate the suit property.

3. Aggrieved by this illegal and unlawful conduct, the plaintiff filed a claim before the Gilgil Land Disputes Tribunal but the same was not concluded as its constituent Act, the Land Disputes Tribunal Act, No 18 of 1990 was repealed before conclusion of the suit.

4. The 1st and 2nd defendants filed a defence and a counterclaim on **28<sup>th</sup> February, 2013**. In their defense, they strongly denied the allegations as contained in the plaint.

5. In their counterclaim, they contend that the 1<sup>st</sup> defendant was and still is, the legal owner of the suit property, having purchased two shares in **Mutukanio Farmers Company Ltd** ("the company") but registered one share in the name of her mother-in-law, **Njeri Nganga** as per the Company's regulations; that she and her family have been in possession and occupation of the suit property ever since; That in October, 2010 the share certificate was stolen. She reported the loss to the police and was issued with a police abstract. She was later surprised to find that the suit property had been transferred fraudulently to the plaintiff which particulars of the fraud she sets out as follows; stealing of share certificate No 2759, the purported sale was done by someone who had no authority to do so; consent of the relevant Land Control Board was not obtained and the area Chief witnessed the fraud in the absence of the real owner.

6. The defendants seek the following prayers in their counterclaim:

**i) A declaration that the defendants are the bona fide owners of the suit property.**

**ii) A permanent order of injunction restraining the plaintiff by himself, his servants and/ or agents from trespassing, entering, remaining in or in any other way interfering with the defendants' quiet possession and use of the suit property**

**iii) Costs of the suit and interest thereon**

**iv) Any other further relief that the court may deem fit and just to grant**

7. The 3<sup>rd</sup> defendant did not enter appearance nor file a defence.

8. Counsel for the plaintiff filed a list of proposed issues on 19<sup>th</sup> June, 2013. Counsel for the defendants did not file any and raised no objection to the issues filed by the plaintiff being adopted. The court will determine the case based on the issues filed which are;

**1. Did Mary Njoki Waigwa have capacity to sell the plot No. 238 Old Game Muttukanio farm to George Ndungu Njoroge?**

**2. Who was the rightful owner of the suit property before it was purportedly sold to George Ndungu Njoroge?**

**3. Who was the lawful owner of the suit property?**

## **THE EVIDENCE**

### **(a) The Plaintiffs Evidence.**

9. When this matter came up for hearing on **11<sup>th</sup> December, 2013** the plaintiff, PW1 testified and called two witnesses. He testified that he had purchased the suit property from **Mary Njoki Waigwa** on **9<sup>th</sup> December, 2010** which sale agreement (Pexh. 1) was witnessed by **Francis Kagwe Ndungu**, his son, under whose name the suit property was registered; that he entered into another agreement (Pexh.2) with **James Maigwa Karuri** (husband to Mary Njoki Waigwa) on 31<sup>st</sup> December, 2010 to buy the posts and barbed wire belonging to the 1<sup>st</sup> defendant which had been used to fence the suit property.

10. After signing the agreement for purchase of the suit property, PW 1, accompanied by the vendor and her husband visited the adhoc Committee set up after the Company was wound up. The committee after confirming in their records that Mary Njoki was the registered owner of the suit property canceled her name and replaced it with PW 1 son's name, **Francis Kabui** (Pexh.3). From there, they visited the Chief Miti Mingi Location who summoned the 1<sup>st</sup> defendant to his office.

She stated that she had no objection to the sale of the suit property by her daughter but informed the chief that she had lost the receipts. The suit property was thereafter transferred and registered in his name by the District Land Adjudication officer (Pexh.6).

11. He took possession of the suit property in 2010 and planted grass but did not put up any developments. In February, 2011 the defendants trespassed onto the suit property and started cultivating. He reported the matter at Elementaita Police Station and filed claim No 49 of 2011 before the Land Dispute Tribunal (Pexh.5) but the same was not concluded as the tribunal was disbanded upon the Land Dispute Tribunal Act being repealed.

12. PW1 testified that he had been a neighbour to the defendants for a long time and that Mary Njoki had been living on the suit property, but her current whereabouts were unknown. He had tried to trace her and her husband by all means, including advertisements in Inooro radio with no success. He further testified that when the suit property was purchased, Mary Njoki was a grown woman who was about to get married and had the capacity to raise the money to buy land. He denied being aware that the share certificate in Mary Njoki's name had been stolen or that the theft had been reported to the police, but pointed out that the police abstract related to another plot (1862) while the suit property was plot No. 238.

13. **Simeon Gideon Mutume** PW2 testified on **21<sup>st</sup> January, 2014**. He was currently the Chief Settlement Officer in charge of Naivasha Sub County. He admitted having authored the letter dated **2<sup>nd</sup> July, 2012** (Pexh.6) confirming that the plaintiff was the owner of the suit property and produced a certified copy of the register as presented to their office by the Company (Pexh.7)

14. PW3 was **Francis Njoroge Kairigi** who had at one time served as secretary to the adhoc committee of the Company. He testified that according to their records, Mary Njoki was the owner of Plot No. 238. He stated that in **January 2011**, the plaintiff, Mary Njoki and her husband had visited the Company's offices wishing to effect a transfer of the suit property in the name of Francis Kabui Ndungu (the Plaintiff's son). As secretary to the Company, he deleted Mary Njoki's name from the Company's register and replaced it with Francis Kabui Ndungu's name (Pexh.3). Their records now read that Francis Kabui Ndungu holder of ID No 23298029 was the owner of plot No 238 measuring 2.5 acres which previously belonged to Mary Njoki Waigwa of ID No 6633084/69.

### **(b) The Defence Evidence**

15. The defendant did not share the plaintiff's view of the evidence. **Tabitha Nyambura Nganga** DW1 the 1<sup>st</sup> defendant, testified on **7<sup>th</sup> May, 2014** and called one witness. She testified that she had purchased 2 shares from the company and she had registered one share in her husband's name and the other in her daughter's (Njoki Nganga's) name because the Company policy did not allow any member to register two shares in one person's name. After making the requisite payments for the two plots, (Dexh.2 (1-12)), she was issued with ballot papers No.169-170 (Dexh1) and allocated two plots and thereafter issued with share certificates.

16. DW1 testified that about 4 years ago, the share certificate registered in her daughter's name was stolen from her house which loss she reported to the local chief and later to the police and was issued with a police abstract on **12<sup>th</sup> February, 2011** (D exh.3). She denied knowing a person by the name of Mary Njoki Waigwa and reiterated that her daughter's name was Njoki Nganga. She was no longer cultivating the suit property as the tribunal had restrained them from using or entering the land.

17. On cross examination, she stated that she had 10 children and that Njoki Nganga was her first child. Njoki was unmarried but had a son who was deceased and who was buried on the suit property. She stated that when Njoki lived on the suit property she lived there with different men and had put up some structures but moved out after her father asked her to demolish the structures. She denied knowing a man by the name of Waigwa. She further testified that there had been a barbed wire fence and trees separating the two plots which were removed by the people who bought the suit

property. She admitted being summoned to the chiefs office and reporting to the police about the stolen share certificate but stated that the police declined to record the plot number in the police abstract for the reason that there was a dispute over that parcel of land before the Chief. She further testified that she did not wish to speculate on who had stolen her share certificate, did not know the whereabouts of her daughter Njoki, but their relationship had been good. She admitted that the plaintiff had been their neighbour since they occupied the suit property.

18. **Geoffrey Njuguna Nganga**, DW2 the 2<sup>nd</sup> defendant, corroborated the evidence of DW1. He testified that the suit property belonged to his father who had purchased two parcels as a member of the Company, each measuring 2.5 acres each and which were separated by a barbed wire fence and trees. One portion had been registered in his father's name and the other in his eldest sister (Njoki's) name, who had lived on the suit property since 1975 before her disappearance.

19. On cross examination, DW2 stated that he was one of DW1's 10 children and that he was born in 1957. His elder sister Njoki was born around 1949-1950, was not married but had a son who was now deceased and was buried on the suit property. That Njoki had lived and cultivated on the suit property for about 10 years but the rest of the siblings lived and cultivated on their parents parcel of land.

### **Submissions**

20. The plaintiff filed brief submissions on 23<sup>rd</sup> May, 2014 but the defendant did not file any despite being given adequate time to do so. Counsel for the plaintiff submitted that the plaintiff was the lawful owner of the suit property having entered into a sale agreement with one Mary Njoki Waigwa being the previous owner of the suit property and whose name appeared on all the ownership documents.

21. In his view, the question before the court for determination was whether Mary was holding the land in trust for her mother. It was his contention that she was not and gave the following reasons;

- i) The suit property documents are all in the name of Mary
- ii) she was an adult at the time of buying the shares
- iii) she had lived on the suit property for a long time
- iv) None of her other siblings lived on the suit property
- v) The suit property was separated by a fence from the other share belonging to the family.
- vi) Mary's child was buried on the suit property whereas Mary's two siblings were buried on the share occupied by the rest of the family.

### **Analysis of the Evidence and Determination of Issues**

22. Having set out **in extenso**, the evidence of both the plaintiff and the defendant, I now turn attention to the determination of the issues raised by this suit.

23. **Issue 1. Who was the rightful owner of the suit property before it was purportedly sold to George Ndungu Njoroge?**

The answer to this question is Njoki Nganga alias Mary Njoki Waigwa. DW1's evidence contradicts her counterclaim and statement. In paragraph 13 of her counterclaim, she states that when she bought shares from Mutukanio Farmers, she registered one share in the name of Njeri Nganga who is her mother in law. In her statement, she states that she used the name Njoki Nganga who was her mother in Law. While testifying in Court she made no reference to her mother in law but instead stated that when she

bought the shares, she registered one share in the name of her daughter Njoki Nganga. To me, all this circus is an attempt by the 1st defendant trying to show that the documents used by the plaintiff did not emanate from the hands of the registered owner who is either her daughter called Njoki Nganga or her deceased mother in law who also shared the same name. However, from the evidence of PW1, PW3, DW1 and DW2 which was clear, unambiguous and unequivocal, there is no doubt that the person who sold the suit property to the plaintiff was the 1<sup>st</sup> defendant's daughter, whether she went by the name of Njoki Nganga, or Mary Njoki Waigwa. All the documents that were produced in evidence relating to the suit property were registered in either of the two names including payment receipts issued by the Company (Dexh.2(1-12), the share certificate, the Company register (Pexh.3) and the Land Adjudication office records (Pexh.7). The 1<sup>st</sup> defendant has admitted in her testimony that she was summoned by the chief in relation to this sale transaction who threatened to sell the land whether she liked it or not. She has also admitted that this matter went before the tribunal but her daughter did not testify. The 1<sup>st</sup> Defendant knew only too well that her daughter Njoki Nganga alias Mary Njoki Waigwa was behind the sale and there is no doubt she is one and the same person.

24. Issue 2. **Did Mary Njoki Waigwa have capacity to sell plot No. 238 Old Game Mutukanio farm to George Ndungu Njoroge?**

As stated above, it is not contested that all documents in relation to the suit property were in the name of Njoki Nganga or Mary Njoki Waigwa. The issue in contention is whether she was the legal owner of the suit property, whether she had the capacity to dispose of it or whether she was holding it in trust for her Mother. In their evidence, the defendants claim that the 1<sup>st</sup> defendant bought the suit property and had it registered in Njoki's name. On the face of it, this implies a resulting trust. In the 1<sup>st</sup> defendant's mind, although the land was registered in Njoki's name, the land actually belonged to her as the purchaser. This is essentially a question of law and there are many decisions in our law reports on this question.

25. The authors of Halsbury's Laws of England, 3<sup>rd</sup> Edition Vol. 38, para. 1457 describe a resulting trust as:

**" A resulting trust is a trust arising by operation of law where inter alia the property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, and the retention of the beneficial interest of the purchaser or disposer is presumed and is held to be equitable"**

**" in all these cases ....the beneficently expressed or indicated beneficiary or object result or reverts to the disposer or purchaser of the property"**

26. In this case, the 1<sup>st</sup> defendant alleges that she purchased the suit property in her daughter's name, not for her but to hold in trust which evidence is corroborated by her son DW2. At the time the 1<sup>st</sup> defendant says she purchased this land, her daughter was about 21 years old. She was an adult and no evidence has been adduced to affect that she did not have the capacity to acquire the necessary funds to purchase shares in the company and subsequently have the suit property allocated to her.

27. Secondly, Njoki's occupation of the suit property with several men to the exclusion of her parents and all her other siblings negates the intention of a trust. She was the only person among her family members who lived there and cultivated. Only her son is buried on the suit property while her deceased siblings are buried in their Parents portion of land.

28. From the foregoing, a presumption that she was indeed the beneficial owner and not a mere trustee of her mother can be inferred. In the case of **Yogendra Purshottam Patel v Pascale Mireille Baksh (Nee Patel) & 2 others [2006]** eKLR, Githinji JA, observed the following:

**"Now turning to the presumption of resulting trust this category of trusts arise in order to give effect to the intention of the parties where the parties have not made their intention**

clear on the face of the instrument effecting the transfer of property as to where the ownership of beneficial interest lies - that is where there is a "beneficial vacuum". A resulting trust arises by operation of equity. Where however, the transferor has no intention to create a trust and such an intention cannot be inferred from the circumstances of the case the resulting trust will not arise.

In the case of Ayoub v Standard Ban of S.A. [1963] EA 619, the Privy Council said at page 623 paragraph A:

"The courts will not imply a trust save in order to give effect to the intention of parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied".

The Privy Council adopted the general rule stated in Cook v Fountain (1676) 36 ER 984 at page 987, that:

"The law never implies, the court never presumes a trust, but in a case of absolute necessity".

(See also Mbothu & Others v Waitimu & 11 Others [1986] KLR 171 page 189, 2nd paragraph where the two passages were applied).

29. From the evidence adduced in this case, I find and hold that the burden of proving any facts alleged, lies on the person who asserts them. In this case, the 1<sup>st</sup> defendant alleges that her daughter was holding the suit property in trust for her and that she fraudulently transferred the same to the defendant. She has failed to prove the existence of these facts and this court invokes the provisions of **Section 3 (4)** of the Evidence Act, Cap 80 Laws of Kenya which provides:-

"A fact is not proved when it is neither proved nor disproved" and also the provisions of **Section 107** of the Evidence Act which places the burden of proof on the person, "**desiring any court to give judgment as to any legal right or liability dependent on existence of facts which she asserts to prove that those facts exist**".

30. In the circumstances, the 1<sup>st</sup> defendant has failed to discharge the burden imposed on her by law of proving what she has alleged. For the above reasons, I find that Njoki Nganga alias Mary Njoki Waigwa had the capacity to enter into a sale agreement with George Ndungu Njoroge and subsequently transfer the suit property to him.

### Issue 3. Who is the lawful owner of the suit property?

31. In his evidence, the Plaintiff states that he was a neighbour to Mary Njoki Waigwa and her husband and also Njoki's family. Before purchasing the suit property, he conducted due diligence which is corroborated by PW2 and PW3. For good measure, the plaintiff accompanied Mary Njoki Waigwa and her husband to the Company's office and to the Chiefs office. Having satisfied himself that this transaction was above board, the plaintiff proceeded to effect transfer of the suit property. He cannot be faulted for doing so and his story is on a balance of probabilities more maintainable.

32. The 1<sup>st</sup> Defendant on the other hand, only has receipts of payments in Njoki Nganga's name and the police abstract to support her story of which the Plaintiff has cast doubt as to whether it is the right police abstract for the right plot. She alleges that fraud was committed but has failed to furnish the court with unimpeachable evidence to back up her claim as was held by the court of appeal in the case of **Ratilal Gordhanbhai Patel -vs- Lalji Makanji (1957) EA 314** which established the threshold on the burden of proof required in Civil cases founded on fraud.

"There is one preliminary observation which we must make on the learned Judge's treatment of this evidence: he does not anywhere in the judgment expressly direct himself on the burden of proof or on the standard required. Allegations of fraud must

**be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required...."...**

**Conclusion**

33. In conclusion and in light of the findings in issues 1-3 above, I find and hold that that the Plaintiff is entitled to the prayers that he has sought in his plaint. I also find that the counter-claim by the defendants has no basis either in fact or in law and dismiss the same with costs to the plaintiff.

34. On the question of costs under Section 27 of the Civil Procedure Act, costs follow the event unless the court for good reason to be recorded, orders otherwise. I find no good reason to ordering otherwise. As the plaintiff has been successful on all the issues raised, he shall also have the costs of the suit herein.

**Dated signed and delivered in open court at Nakuru this 10<sup>th</sup> day of October 2014**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

M Ngure for the plaintiff

N /A for the defendants

Tabitha Nganga 1<sup>st</sup> defendant: present

Njuguna Nganga 2nd defendant: present

Emmanuel Juma: Court Assistant

**L N WAITHAKA**

**JUDGE**