



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 623 OF 2012

JOHN WAKABA NJAU.....1ST PLAINTIFF
EDWARD MWAURA MBUGUA.....2ND PLAINTIFF
ANDREW KAMAU KINUTHIA.....3RD PLAINTIFF
SAMUEL NGUKU KARIUKI.....4TH PLAINTIFF
PAUL KAMAU KAHINJU.....5TH PLAINTIFF
JOSEPH KINYANJUI MUIRURI.....6TH PLAINTIFF
DAVID MBUGUA MBECA.....7TH PLAINTIFF
PETER KIBUI THINJI.....8TH PLAINTIFF
ZIPPORAH WANJIKU KARIUKI.....9TH PLAINTIFF
ELIUD NDICHU THUBIRA.....10TH PLAINTIFF
FRANCIS MUNYINYI GAKAMI.....11TH PLAINTIFF
MARY NDUTA MURABA.....12TH PLAINTIFF

VERSUS

MARKROSCAR KENYA LIMITED.....DEFENDANT

JUDGMENT

The plaintiffs are members of unincorporated organization known as Mutu-ini 1962 Age Group Association. On or about 7th February, 1996, the plaintiffs purchased from the defendant two parcels of land known as Plot No. 75 and Plot No. 76. After survey, the two parcels of land were given land reference numbers 8469/75 and 8469/76 respectively (hereinafter together referred to as “the suit properties” and separately as “Plot No. 8469/75” and “Plot No. 8469/76” respectively). The plaintiffs purchased the suit properties from the defendant at a consideration of Kshs. 150,000/- which they paid in full. After the completion of survey and subdivision, the titles for the suit properties were issued and registered in the name of the defendant on 25th June, 2010. The defendant was supposed to transfer the suit properties to the plaintiffs upon obtaining the said titles. The defendant did not do so.

The plaintiffs brought this suit against the defendant on 20th September, 2012 seeking the following reliefs;

1. An order compelling the defendant to transfer to the plaintiffs the suit properties and to deliver to them the original title for Plot No. 8469/76.
2. An order compelling the defendant to furnish the plaintiffs with all the completion documents such as Land Rent Clearance

Certificate, Land Rates Clearance Certificate and the consent to transfer from the Commissioner of Lands.

3. In the alternative, an order directing the Registrar of Titles to vest the suit properties upon the plaintiffs.
4. An order for vacant possession of the suit properties.
5. An injunction restraining and/or forbidding the defendant from possessing, interfering with, entering on, alienating, selling, assigning and/or transferring the leasehold interest in the suit properties to any third party pending the hearing of the suit.
6. Costs of the suit.

In their plaint, the plaintiffs averred that pursuant to the said agreement of sale between them and the defendant made on or about 7th February, 1996, they paid to the defendant a sum of Kshs. 150,000/- being the purchase price for the suit properties and a further sum of Kshs. 154,000/- which the defendant demanded for survey and processing of title deeds for the suit properties in their favour. The plaintiffs averred that after the said payments, the defendant handed over to them the original title for Plot No. 8469/75 together with an instrument of transfer for their execution and promised to hand over the original title for Plot No. 8469/76 at a later date.

The plaintiffs averred that they found the instrument of transfer that was given to them by the defendant for execution in respect of Plot No. 8469/75 erroneous in that it was drawn in the name of Mutu-ini 1962 Age Group Association which was not a legal entity as the transferee. The plaintiffs averred that their advocates on record drew a fresh instrument of transfer in respect of the said plot and forwarded the same to the defendant for execution. The plaintiffs averred that the defendant refused and/or neglected to execute the new instrument of transfer in respect of Plot No. 8469/75 so that the said property could be registered in the name of the plaintiffs. The plaintiffs averred that the defendant also refused to hand over the original title for Plot No. 8469/76 to them to enable them transfer the property to their names. The plaintiffs averred that despite demand made and notice of intention to sue given, the defendant had failed and/or refused to deliver the original title for Plot No. 8469/76 to the plaintiffs and to execute the instrument transfer in favour of the plaintiff in respect of Plot No. 8469/75.

The defendant filed a statement of defence on 6th December, 2017. The defendant admitted that it sold to the plaintiffs the suit property on or about 7th February, 1996 and that the titles for the suit properties were processed in 2009. The defendant admitted further that after the plaintiffs had paid the purchase price for the suit property and additional sum of Kshs. 154,000/- on account of survey fees and processing of titles, it released to the plaintiffs the original title for Plot No. 8469/75 together with an instrument of transfer and promised to hand over to the plaintiffs the original title for Plot No. 8469/76 later. The defendant averred that the names of the transferees in the instrument of transfer that it handed over to the plaintiffs were given by the plaintiffs and that it had pointed out to the plaintiffs that the said instrument of transfer could not be registered because Mutu-ini 1962 Age Group Welfare Association was not a legal person.

The defendant admitted that the plaintiffs prepared another instrument of transfer and forwarded the same to the defendant for execution. The defendant averred that it did not execute the said instrument of transfer due to an objection that was raised by some of the plaintiffs especially, Zipporah Ndirangu who claimed that the persons in whose favour Plot No. 8469/75 were to be transferred were likely to swindle them. The defendant averred that the said Zipporah Ndirangu threatened to sue the defendant in the event that the said property was transferred to the persons whose names had been given as transferees.

The defendant averred that subject to the plaintiffs paying the costs of this suit and agreeing to indemnify the defendant in respect of any action or proceedings that may be brought against the defendant relating to the transfer of the suit properties to the persons whose names have been proposed by the plaintiffs, it was ready and had always been ready and willing to transfer the suit properties to whoever the plaintiffs would choose for that purpose or as may be directed by the court. The plaintiffs filed a reply to defence on 27th February, 2018 in which they reiterated the contents of their plaint.

At the trial, the 1st and 4th plaintiffs gave evidence on behalf of all the plaintiffs. The 1st plaintiff, John Wakaba Njau (PW1) adopted his witness statement dated 16th April, 2012 as his evidence in chief and produced the documents that were attached to the plaintiffs' list of documents and supplementary list of documents dated 18th September, 2012 and 22nd July, 2019 respectively as exhibits. PW1 told the court that even after paying the defendant the full purchase price and an additional sum of Kshs. 154,000/- for survey and processing of titles for the suit properties, the defendant had refused to transfer the same to the plaintiffs and instead had continued demanding more payments that had not been agreed upon before it could effect the transfer. PW1 told the court that since the suit properties were not yet registered in the name of the plaintiffs, the plaintiffs were not liable to pay land rates and land rent for the same. PW1 stated further that the plaintiffs were not liable to pay charges that were being demanded by the defendant on behalf of an organization known as OKOA. PW1 told the court that there was no dispute as to whom the suit properties were to be transferred. He stated that the suit properties were to be transferred to the Chairman, Secretary and Treasurer of Mutu-ini 1962 Age Group Association to hold in trust for the members of the group. PW1 stated that Zipporah Wanjiku Kariuki was one of the members of Mutu-ini 1962 Age Group Association and that because of disagreement with the other members, she was paid her dues and removed from the group. PW1 reiterated that the defendant gave the plaintiffs the original title for Plot No. 8469/75 but refused to execute the instrument of transfer in respect thereof and also refused to release to them the original title for Plot No. 8469/76. PW1 urged the court to protect the plaintiffs from the defendant's unending demands.

Samuel Nguku Kariuki (PW2) adopted his witness statement filed in court on 7th March, 2017 as his evidence in chief. He told the court that he was the treasurer of Mutu-ini 1962 Age Group Association. He stated that the defendant had admitted selling the suit properties to the plaintiffs and that the internal wrangles amongst the plaintiffs which the defendant used as an excuse not to transfer the suit properties to the plaintiffs did not exist. PW2 stated that no further payments were due from the plaintiffs to the defendant.

Irene Sonia Mumbi (DW1) gave evidence for the defendant. She told the court that she was a director of the defendant and that the plaintiffs were known to her. DW1 adopted her witness statement filed in court on 6th December, 2017 as her evidence in chief. She also produced the documents attached to the defendant's list of documents dated 30th November, 2017 as exhibits. In her witness statement, DW1 admitted that

the defendant sold the suit properties to the plaintiffs who referred to themselves as Mutu-ini 1962 Age Group Welfare Association. DW1 stated that at the point of transferring the suit properties to the plaintiffs, the defendant advised the plaintiffs to register a limited liability company to which the properties could be transferred since the group was unregistered. DW1 stated that the plaintiffs agreed to the proposal initially but changed their minds later and instructed the defendant to transfer the suit properties to the chairman, secretary and treasurer of the group. She stated that it was at that point that some of the members of the group led by Zipporah Kariuki raised an objection to the three officials of the group that the plaintiffs had proposed as transferees and threatened to sue if the defendant proceeded with the transfer.

DW1 stated that the defendant was willing to transfer the suit properties to the plaintiffs in the manner they had proposed provided the plaintiffs give the defendant an indemnity against any claims that may be brought against it in respect of the said transfers and also pays the costs of this suit in which they were wrongly sued as the dispute that the plaintiffs had was an internal affair. DW1 stated that the defendant had never refused to transfer the suit properties to the plaintiffs and that it had no intention of selling the suit properties to third parties.

After the close of the defendant's case, the parties were directed to make closing submissions in writing. The plaintiffs filed their submissions on 25th September, 2019 while the defendant filed its submissions on 13th January, 2020. I have considered the evidence on record and the submissions by the respective advocates for the parties. The following in my view are the issues that arise for determination in this suit;

1. Whether the defendant has refused without any reasonable cause or lawful excuse to transfer the suit properties and to deliver the original title for Plot No. 8469/76 to the plaintiffs.
2. Whether the plaintiffs are entitled to the reliefs sought in the plaint.
3. Who is liable for the costs of the suit?

Whether the defendant has refused without any reasonable cause or lawful excuse to transfer the suit properties and to deliver the original title for Plot No. 8469/76 to the plaintiffs.

It was not disputed that the plaintiffs purchased the suit properties from the defendant and paid the purchase price in full. It was also not disputed that the plaintiffs made further payment on account of surveys fees and processing of titles for the suit properties. The defendant admitted these facts in its statement of defence. In her witness statement that she adopted as her evidence in chief, the defendant's director, Irene Sonia Mumbi(DW1) stated that the only reason why the defendant had not transferred the suit properties to the plaintiffs was because of the internal wrangle that the plaintiffs had over the persons to whom the suit properties were to be transferred. In its defence, the defendant stated that it was willing and had always been willing to transfer the suit properties to the plaintiffs so long as the defendant was indemnified of any claim that may arise as a result of the transfer of the suit properties to the persons whose names the plaintiffs had given and it was also paid the costs of this suit. The averment was repeated in DW1's statement. Although DW1 claimed in cross-examination that the defendant was owed some money by the plaintiffs which were to be paid as a precondition to the suit properties being transferred to the plaintiffs, these debts are not mentioned either in the defendant's statement of defence or in DW1's statement.

I am satisfied from the evidence on record that the plaintiffs fulfilled their obligations to the defendant in respect of the agreement that the parties had entered into for the sale of the suit properties. The plaintiffs not only paid the full purchase price but also made payment for survey and processing of titles. In my view, the defendant has not given any good reason why it refused to transfer the suit properties to the plaintiffs. The defendant had no business entertaining the objection by Zipporah Kariuki to the instrument of transfer that the plaintiffs had drawn and forwarded to the defendant for execution in respect of Plot No. 8469/75. If Zipporah Kariuki had any objection to the transfer, it was open to her to take the dispute to court and obtain appropriate orders to protect her interest. The defendant had no basis for taking sides in the dispute that Zipporah Kariuki had with the other plaintiffs. I also found no basis upon which the defendant could claim further payments from the plaintiffs as a condition for effecting transfers of the suit properties in their favour. From the evidence on record, the plaintiffs had made all requisite payments to the defendant when the defendant handed over to them the original title for Plot No. 8469/75 together with an instrument of transfer and promised to deliver the original title for Plot No. 8469/76 shortly thereafter. There is no evidence that the defendant informed the plaintiffs that there will be further payments when the original title for Plot No. 8469/76 would be handed over to them. The defendant has not given any justification for the additional payments that DW1 called for in her evidence.

Due to the forgoing, it is my finding that there was no reasonable cause or lawful excuse for the refusal by the defendant to transfer the suit properties to the plaintiffs and to hand over to them the original title for Plot No. 8469/76.

Whether the plaintiffs are entitled to the reliefs sought in the plaint.

The plaintiffs have sought several reliefs in their plaint. I am satisfied that the plaintiffs having proved that the defendant had no reasonable cause for refusing to transfer the suit properties to them and also to hand over the original title for Plot No. 8469/76. In the circumstances, the plaintiffs are entitled to prayers (a) and (b) of the plaint. None of the parties produced in evidence a copy of the agreement for sale that the parties had entered into. It was common ground that the agreement was verbal evidenced only by the plot certificates and the receipts that were issued by the defendant to the plaintiff upon receipt of the purchase price and other payments made by the plaintiffs. In the absence of a written agreement or other evidence in writing to the effect that the defendant was liable to pay land rates, land rents and consent to transfer fees after the titles for the suit properties had been issued and were ready for transfer to the plaintiffs, I am unable to order the defendant to bear these expenses. I will however order the defendant to provide the completion documents demanded by the plaintiffs but at the cost of the plaintiffs. I believe that once the plaintiffs have been issued with the original titles for the suit properties and executed instruments of transfer, they should be able also at their costs to obtain some of these documents. Since the defendant who sold the suit properties to the plaintiffs is available to effect the transfer thereof, there is no basis for an order vesting the properties upon the plaintiffs. The plaintiffs had also sought an order for possession. DW1 had contended that the defendant gave the plaintiffs possession of the suit properties in 1990s. In their evidence, the plaintiffs did not tell the court who was in possession of the suit properties and whether the defendant had prevented them from taking possession. There is also no evidence as to what the parties had agreed on as concerns granting of possession. In the circumstances, I am unable to make an order for possession. The plaintiffs' prayer for injunction is spent as the same was sought pending the

earing and determination of the suit.

Who is liable for the costs of the suit?

In the circumstances of this suit, I am of the view that justice would be served if each party bears its own cost.

Conclusion:

In conclusion, I hereby enter judgment for the plaintiffs against the defendant as follows;

1. The defendant shall forthwith execute and handover to the plaintiffs the instruments of transfer of L.R No. 8469/75 and L.R No. 8469/76 (the suit properties) in the form in which the same are drawn by the plaintiffs.
2. The defendant shall forthwith deliver to the plaintiffs the original title for L.R No. 8469/76.
3. The defendant shall deliver to the plaintiffs the necessary completion documents such as the Land Rates Clearance Certificate, Land Rent Clearance Certificate and consent of the National Land Commission/Commissioner of Lands to transfer the suit properties provided that the plaintiffs shall be responsible for the payment of any outstanding land rates and land rent and any statutory fee payable for the consent.
4. Each party shall bear its costs of the suit.

Delivered and Dated at Nairobi this 9th Day of July 2020

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams video conferencing platform in in the presence of;

Koki Mbulu for the Plaintiffs

N/A for the Defendant

Ms. C. Nyokabi-Court Assistant