



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1189 of 190

JAMES MUIRURI MWAURA GATHAIRO..... PLAINTIFF

VERSUS

JOSEPH NJENGA MBUTHIA..... DEFENDANT

JUDGMENT

Plaintiff is the registered owner of land parcel No.Naivasha/Mwichiringiri - Block K2/111 comprising seven acres whichhe bought from Mary Njeri Gitau. The reliefs sought in the plaintare:

- (a) An Order of injunction to restrain defendant from trespassing entering or interfering withthe plaintiff’s use of the land.
- (b) An order of eviction.
- (c) General damages
- (d) costs
- (e) Any other relief.

Defendant filed a statement of Defence and counter claim. Hepleads that the entire transaction of sale of the land wasfraudulent and contrary to law and therefore null and void. Hepleads further that he is entitled to four acres (4) as a purchaserand or beneficiary and/ or adverse possession, He counter claims for four acres out of the total acreage of the land by virtue of being purchaser and or beneficiary and or adverse possession.

There is undisputed evidence that Gitau mbuthia who was thehusband of Mary Njeri Gitau (PW1) bought a share from "ARIM aLIMURU buying company in about 1965. The company had land inNaivasha and the share had to be paid for fully. In about 1966Gitua Mbuthia who died in about 1974 asked defendant a grandson tolook after the land according to the evidence of PW1. Butaccording to the defendant deceased Gitau had only paid shs 100 forthe share and deceased asked him to pay the balance. Defendant thenpaid shs 1000 and went to the company's offices and was shown landrepresenting the deceased share. According to him he paid fullyfor the share as follows:

12.8.78..... shs 700

19.8.78..... shs 455

21.8.78..... shs 860

7.10.78shs 85

10.8.81..... shs 200

10.8.81..... shs 1000

.....3,300

Defendant produced receipt to verify these payments. The last payment of shs 200 and shs 1000/= respectively was for survey fees.

Defendant testified that in 1979 he balloted for the land and was allocated two plots no 99A - 7 acres in fertile land and No. 38B - 11.3 acres in an arid land. He produced the two ballot papers and the allocation as exhibits. It is the defendant's case that he has been cultivating the portion of the seven acres until 1981 when Mary Njeri Gitau (PW1) claimed the land. There was a dispute which was heard by the elders and defendant was awarded 4 acres while Mary Njeri Gitau was awarded 3 acres and the land sub-divided. It is the defendant's case that when Mary Njeri Gitau sold the whole of the 7 acres he was not aware and that plaintiff - the purchaser has not taken possession of the 7 acres.

On the other hand John Muiruri Mwaura Gaitharo (PW2), the plaintiff in the suit gave evidence to show that; he entered into a sale agreement with Mary Njeri Gitau (PW1) on 24.4.85 for the sale of the land at a consideration of shs 140,000 which he paid by installments; that consent of the land control Board was obtained in 18.8.87 and that the land was registered in his name on 8.3.88 and a title deed issued to him on the same day. That evidence is supported by documents and by the evidence of Mary Njeri Gitau.

PW2 testified that he was shown the land he was buying in 1984 - 1985 and that he found cultivations on the land and some sub Divisions that he inquired from PW1 who told him that he did not know the people cultivating except Joseph Njenga; that he did not talk to Joseph Njenga to find out why he was cultivating the land; that he finished paying for the land on 5.4.89 and that it is after he got the title Deed when he learnt that there was a land dispute.

PW1 testified that she did not inform the defendant when she was selling the land that at the time of sale defendant was cultivating the land that plaintiff knew that defendant was cultivating the land and that the elders met after death of her husband and sub-divided the land into two portions giving her 3 acres but she did not agree with the decision.

There is evidence to show that there were disputes about the Land between defendant and PW1 before PW1 sold the land and that defendant had filed Civil case No. 6/84 in RM's court Naivasha for enforcement of the elders award.

PW2 testified that she filed a succession case after death of her husband and claimed the land in dispute as part of the estate of her deceased husband. The Abstract of title shows that the Government of Kenya was registered as the first proprietor of the land on 9.1.85 and on the same day PW1 was registered as the second proprietor. Plaintiff lodged a caution on 8.2.88 which he withdrew on 8.3.88

I have considered the evidence and the counsels submissions one of the defendant's contentions is that as the agreement of sale dated 24.4.85 was not signed by all the parties, it is not an agreement within the law and cannot be relied on to support the title of the plaintiff. But plaintiff's counsel submits that as defendant was not privy to the contract of sale he can neither sue plaintiff in respect of the contract nor can his counterclaim for four acres succeed.

On this aspect of the dispute there is overwhelming evidence that Mary Njeri Gitau was registered as proprietor of land in dispute on 9.1.85 and she sold the land to plaintiff for valuable consideration and that plaintiff was eventually registered as proprietor of the land on 8.3.88. Although the agreement of 'sale was

not signed and although the balance of purchase price was paid one year after plaintiff was registered as proprietor, there is no dispute between plaintiff and Mary Njeri Gitau. The transaction of the sale of the land was completed without any hitch, as between vendor and purchaser. The issue of lack of a written agreement or lack of an act of part performance would only have arisen if Mary Njeri Gitau failed to honour the contract and if plaintiff had filed a suit for specific performance of the contract against Mary Njeri Gitau in that case Mary Njeri Gitau would rely on the lack of signed Agreement or lack of an act in part performance of the contract as a defence. Defendant who was not a party to the contract cannot validly challenge the sale on the ground that there was no written Agreement or that there was no act of part performance.

Defendant however says that part of the land (4 acres) which Mary Njeri Gitau sold to plaintiff belongs to him. There was ample evidence from defendant supported by receipts to show that Gitau Mbuthia who was allotted a share by ARIMIA LIMURU Co., Ltd had only paid shs 100/= for the share and that he asked defendant to occupy the land and pay the balance of the purchase price of the share. The evidence shows that Gitau Mbuthia did not even ask the company to show him the land represented by the share. Kimamo was Kahiri (PW3) - Plaintiff's witness supports the defendant's evidence on this aspect of the dispute. It is PW3 evidence that Gitau Mbuthia told defendant who was landless to go and live on the land and cultivate the land and feed his children. Mary Njeri Gitau testified that she did not know if the defendant paid for any share on behalf of her husband. But she agreed in her evidence in cross examination that her husband had not paid fully for the share.

She testified further in her evidence in cross-examination that she used to give money to defendant to pay for the share. She did not however give the specifics. I prefer the evidence of the defendant that he is the one who fully paid for the share from his own resources and proceeded to ballot for the land. The dispute between Mary Njeri Gitau and the defendant was heard by the elders who awarded Mary Njeri Gitau 3 acres and defendant four acres.

As it is the defendant who contributed a substantial portion of the purchase price of the share in his character as a purchaser there is a resulting trust in his favour equal to the proportion of his contribution. That means that Gitau Mbuthia held the land in trust for the defendant to the extent of defendant's contribution to the purchase price. The elders assessed defendant's beneficial interest in the land as 4 acres and I agree with them. When then the land was registered in the name of Mary Njeri Gitau as legal representative of Gitau Mbuthia she was so registered subject to the defendant's beneficial interest of 4 acres. When Mary Njeri Gitau sold the whole land to plaintiff she was in fact defrauding the defendant. But by S. 39(2) of the Registered Land Act the title of plaintiff as a purchaser for valuable consideration cannot be defeated by the fact that Mary Njeri Gitau was in breach of the trust. Plaintiff could be deemed to hold the land in trust for the defendant to the extent of four acres only if the land was transferred to him without valuable consideration (See S. 29 of the Registered Land Act) This is not the case here. Never the less the court can order rectification of the Register and award defendant the four acres in the circumstances of this case if it is proved that plaintiff had knowledge of fraud by Mary Njeri Gitau or that plaintiff caused the fraud or substantially contributed to it by his act neglect or default {Section 143(2) RLA}

I have re-examined the evidence. According to Mary Njeri Gitau defendant was cultivating the land and was in possession through his son when she sold the land. She took plaintiff to the land. She had never lived on the land. She told plaintiff that defendant was cultivating the land and according to her evidence plaintiff also knew that defendant was cultivating the land. Plaintiff conceded in his evidence in cross examination that he was taken to the land before he entered into an agreement of sale he saw cultivations and sub divisions on the land. He asked Mary Njeri who the people were and she said that she did not know them except the defendant. According to him he knew that was somebody in possession of the land who was cultivating and letting portions. He conceded that he did not talk to defendant to find out why he was occupying the land. The agreement of sale was entered on 24.4.85. The consent of the land control Board was given on 18.8.87 but the transfer was executed on 8.3.88. The balance of purchase price was paid on 5.4.89, plaintiff only asked defendant to vacate the land after he was registered as a proprietor on 8.3.88. The land dispute between Mary Njeri Gitau and defendant started in about 1980 and in 1984 the dispute was heard by the D.O. who awarded Mary Njeri Gitau 3 acres and defendant 4 acres. The land

dispute was still in want in 1986 But according to plaintiff he came to learn of the land dispute in 1989 and it is not in dispute that plaintiff has never taken possession of the land. Mary Njeri Gitau concedes that she never informed the defendant that she was selling the land and that when she attempted to take possession of the land she was chased away by sons of the defendant. Why didn't plaintiff take possession of the land immediately after the agreement of 24.4.85 although he had paid a substantial part of the purchase price? Why didn't plaintiff ask defendant to vacate the land until after he had been registered as proprietor three or so years after the agreement. Why didn't plaintiff make an inquiry of the defendants possession of the land at all? Why wasn't the transfer executed immediately after the agreement as Mary Njeri Gitau was willing to execute a transfer even before payment of full purchase price? From all the above circumstances it is improbable that plaintiff was not aware of the defendants claim to the land and the existing land dispute before the transfer was executed. It is probable from the circumstances that plaintiff was aware of the fraud. If he was not aware of the fraud he substantially contributed to it by his neglect or default in failing to make an inquiry regarding defendants possession of the land, On that ground alone defendants counterclaim should succeed. Secondly, the consent of the land Control Board dated 18.8.87 does not appear on the face of it to be valid. According to S. 6(1) of the land Control act the on the consent of the land control board has to be given in accordance with the land Control Act. Section 2(1) of the Land Control Act provides inter alia that the application for consent in respect of a controlled transaction has to be made to the Land Control Board within six months of the making of the agreement, The Agreement of sale relied on by the plaintiff was made on 24.4.85 and there is no evidence that a fresh agreement was made thereafter. An application was made to the land Control Board for its consent but that application is undated. The letter of consent itself shows that the application is undated. Both the plaintiff and Mary Njeri Gitau did not disclose the date on which the application was made.

But if the application for consent of the land Control Board was made within 6 months of the Agreement of 24.4.85 it is improbable that the Board win have taken about two years to consider it. Although the current land Control \$board should give or refuse the consent, the Land Control Board is supposed to give its decision within a reasonable period.

The case of Karuru Munyororo versus Joseph Ndimia Murage - CA Mp 149 of 1986 (Unreported) is a binding authority for the proposition that although by virtue of S. 8(2) of the Land Control Act the decision of the Land Control Board is final and conclusive and should not be questioned in any court subject to Appeal, the Law presupposes that the provisions of the Land Control Act shall have been followed by the Board before making a decision and that when the Board has given its consent in contravention of the land Control Act, the court can look behind the consent and not only declare it invalid but also the whole controlled transaction void.

This is a case where the Land Control Board should not have given consent as the transaction had already become void by failure to make the application for consent within the prescribed time. The plaintiff would not have been registered as proprietor of the land unless he had a valid consent of the Land Control Board. The Board gave the consent by mistake resulting in the registration of the plaintiff by mistake. From the circumstances of the case, plaintiff knew that the application for consent of the land control Board was not made within the six months from the date of the agreement.

Further he caused or substantially contributed to the mistake leading to his registration as a proprietor without a valid consent of the Land Control Board. In those circumstances the Register can be rectified on the ground of mistake and since defendant had proved that he was entitled to four acres the registration of the plaintiff by mistake deprived him of four acres and the Register can be rectified on this ground.

For those reasons I dismiss the suit with costs and allow the counterclaim with half the costs. I order that the Register of land title No. Naivasha /Mwicingiri Block 1/111 be rectified by cancellation of entry No. 6 dated 8.3.88 registering plaintiff as the sole proprietor of the suit land and substituting thereof the registration of plaintiff as proprietor of three acres (3) and defendant as proprietor of 4 acres.

E. M. Githinji

Judge

3.12.98