



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.62 OF 2018

IRENE WANGUI MURUGURUPLAINTIFF

VERSUS

GRACE WANGARE MURUGURU.....DEFENDANT

JUDGMENT

By a Plaint dated **27th February 2018**, the Plaintiff herein filed this suit against the Defendant seeking for orders that;

- 1. A declaration that the Plaintiff is the bonafide beneficial owner of Plot No. 12 (a portion of L.R No. 23309-Kiganjo Estate)**
- 2. An order of permanent injunction restraining the Defendant whether by herself, her servants or agents and or otherwise howsoever from threatening to evict the Plaintiff's tenant, entering, remaining on, continuing with the offending activities or in any other manner interfering with the Plaintiffs quiet possession of the piece of land known as Plot No. 12 (a portion of L.R No. 23309-Kiganjo Estate)**
- 3. Costs of the suit.**

In her statement of Claim, the Plaintiff averred that she was registered proprietor of **L.R No. 23309**, situated in Kiganjo which land underwent subdivision to give rise to various plots amongst them the suit property. It was averred that the Plaintiff entrusted the Defendant with overseeing the subdivision, which entailed looking for a surveyor to do the work to completion and although the land was subdivided, titles in respect of the resultant plots are still in the process.

The Plaintiff further averred that upon completion of subdivision, the Defendant allocated herself the suit plot without her knowledge and permission as she has been working in the United Kingdom.

It was further averred that in clear breach of trust, the Defendant without the Plaintiff's permission undertook to build a residential house on the suit property using part of the money meant to compete the subdivision process and that the Plaintiff only learnt of the said activities when she visited Kenya in the year **2014**, and the issue was discussed and the Defendant agreed to vacate the suit property upon payment of **Kshs. 2.5 million** which she had allegedly spent on construction. That pursuant to the said agreement, the Plaintiff transferred the said money to her Advocates who paid the Defendant through RTGS on **17th October 2014** and the Defendant voluntarily vacated the suit property and handed vacant possession and the suit property has since been occupied by the plaintiff's tenants.

Further that in **February 2018**, the Defendant served a notice to the Plaintiff's tenant demanding the tenant vacate or face forceful eviction. Further that the Defendant served the Plaintiff with a demand letter dated **16th February 2018** and upon reporting the matter to the police station, a **Mr. Kibet** called the Plaintiff and insisted that the Defendant is the owner of the suit property.

It was contended that the Defendant relinquished her interest in the suit property the moment the two of them signed the agreement and Defendant was paid what she demanded and that unless the Defendant is restrained the Plaintiff is faced with real loss.

The suit is contested and the Defendant filed a statement of Defence dated **6th April 2018**, and denied all the allegations made in the Plaint but admitted that the Plaintiff was the registered owner of **L.R 23309**. She averred that she subdivided the land as per the Plaintiff's instructions and bought the suit property. The Defendant further averred that with the instructions from the Plaintiff, she paid **Kshs. 105,000/=** being school fess for the Plaintiff's son which amount settled for the plot. She averred that she did everything with the Plaintiff's approval and after constructing the said house, a family get together was held. That the Plaintiff and her Advocate on record misdirected her to sign the Memorandum of Understanding without knowledge of what could have been written in the agreement. The Defendant further contended that she vacated the suit premises due to the Plaintiff's pressure.

After close pf pleadings, the matter proceeded by way of viva voce evidence herein the Plaintiff testified for herself and the Defendant gave

evidence for herself and called three witnesses.

PLAINTIFF'S CASE

PW1 Irene Wangui Muruguru, adopted her witness statement dated 27th February 2018 and testified that she has worked in the **United Kingdom** since 2001. She further produced her list of documents as Exhibit 1. It was her testimony that she is the registered owner of **L.R No. 23309**, but the Defendant took possession of it. She produced the Original Title Deed as Exhibit 2. Further that in the Memorandum dated 1st October 2014, made between her and her sister **Grace Wangui**, her sister demanded that she pays her **Kshs.2.5 million** so that she could vacate the suit land. That she paid the money and the Defendant vacated the suit property. However, the Defendant stated that amount of money was cost of construction of the house.

That she had instructed her bank to transfer the money to the Defendant and she produced a copy of the transfer as Exhibit 3. Further that though the Defendant received the money, she did not raise any issue, she still gave the Plaintiffs tenant a **notice** to vacate and forcefully evicted them. She denied selling the land to the Defendant nor that the Defendant paid school fess for her son as she educated her children.

She further denied any knowledge of the agreement or signing for the plot allocation

That the Defendant is living on her land and that she forged her signature and further denied knowing the Directors of **John Gathogo Kamau's company**. She further testified that **Gathogo** gave the mother title to the Defendant and she subdivided the land and sold the plots as the land was hers. It was her evidence that she mandated **Gathogo** to sell the subdivided plots on her behalf and he paid the Defendant so that she could vacate the suit property. That she gave the subdivision work to **Mr. Gathogo**, who later gave the work to her sister and denied ever selling the property to the Defendant.

She further testified that the Defendant gave **Mr.Kimani Kshs.500,000/=** and that she sold the plot for Kshs.7.5 million which she later refunded and subdivided the land into several plots.

DEFENDANT'S CASE

DW1 Joyce Njambi Muruguru testified that the Plaintiff and the Defendant are her daughters. That the Land belongs to the Plaintiffs. It was her evidence that Mr. **Gathogo** was given the land to subdivide and that **Wangare** was employed by **Mr.Gathogo** to sell the plots. She told the Court that the Defendant sold a house on the plot that had remained. She further testified that she did not know that **Wangare** was putting up the said house. That later **Irene** took over the said house. It was her evidence that **Grace** built the house, although she did not know about the construction of the said house as she is only aware of the house **Warming Party**.

On cross examination, she testified that she did not know who built the house and that It was built on the Plaintiff's land. She further testified that she was not aware if **Wangare** was paid **Kshs. 2.5 million** to vacate the land and that **Wangare** did not live on the said house.

DW2 Veronica Mwihaki testified that the Plaintiff and the Defendant are her sisters. It was her testimony that the Plaintiff gave the Defendant the suit property and that she found a contractor on behalf of the Defendant who built the house wherein the Defendant stayed with her father. That upon their father's demise, the Plaintiff came for the burial and claimed the House. Further that the land belonged to the Plaintiff and she wanted to subdivide it and the Defendant built on a small portion.

On cross examination, she testified that she had recorded a statement and that the Defendant was given the land by the Plaintiff but that she was not present when the Plaintiff gave the Defendant the land. It was her further testimony that **Gathogo** gave the Defendant the mandate to look for buyers and she was not aware if the Defendant was paid money by the Plaintiff. She further testified that she brought the Defendant two masons who built the house and she had a house Warming Party where all their family members were present.

DW3 Brian Nganga Njiru testified that the Defendant is his mother. It was his testimony that the Defendant was selling plots for the Plaintiff and she was to remain with one plot. That he assisted the Defendant to build the house and that his mother used her own money to build the house.

He further testified that he signed a statements which his mother brought to him to sign but that he did not know what was in the statement. He acknowledged that the property is owned by the Plaintiff and he was not aware of any agreement between the Plaintiff and the Defendant as he only assisted in construction. That his mother was evicted from the house and she did not contest.

DW4 Grace Wangare Muruguru the Defendant herein adopted her witness statement as her evidence in Court. It was her testimony that she built the house in issue in the year 2013 and moved in in **August 2013**. It was her evidence that the plot was for the Plaintiff but she subdivided it and sold **24 plots** and she was selling the plots. That when the Plaintiff came to Kenya for their father's burial, she visited her home and liked it and told her she would deposit some money into her account. It was her evidence that she went to the Advocates office and was informed that some money would be deposited into her account but that she did not know what she was signing. She further testified that the Plaintiff paid her **Kshs. 2.5 million** and asked the Defendant to follow the deed plans. That she paid the surveyor **Kshs. 500,000/=** and she also paid for the Deed plan. That after the sale of **Plot No. 7**, which was supposed to be the Plaintiff's, the Plaintiff asked her to vacate the suit property and she rented a house at Mwiki.

It was her testimony that she still deals with the purchasers who bought the other plots and she built the house with her own money after the death of her husband. That the people living on the suit property do not pay.

Further that she had not given the Deed Plan to the Plaintiff but she purchased the house from the Plaintiff, though she did not have any sale agreement. That she bought a plot of **50 by 100** from the Plaintiff. Further that the Plaintiff bought the suit property in the year **2004** and the

transfer was done in **2011** and **Gathogo** subdivided the land. It was her testimony that from the plot allocation document, her plot is No. 12 and all the title deeds were issued in the Plaintiff's name and the transfers were to be done later. That the Plaintiff did not give her any assignment

That she signed the Memorandum of Understanding and she gave out the account number and the money was deposited in her account. It was her testimony that she was given the assignment by **Gathogo** and she was to be paid by the Plaintiff. She further testified that the Plaintiff's Advocate forced her to sign the Memorandum of Understanding and she reported the matter to the chief. That she paid **Mbaire Kshs. 15,000/=** as she had assisted her to pay school fees and she signed the document authorizing the Advocate to pay the school fees.

It was her evidence that Kshs. **2.5 million** was commission for the work she had done for the Plaintiff and denied giving out the key voluntary after she was paid. That she was paid in the year **2014** and the suit was filed in **2018**. It was her further testimony that there were caretakers in the suit property and she evicted them as he was told to do so by the Chief, though she did not have any Court order.

After close of viva voce evidence, the parties filed written submissions which the Court has now carefully read and considered. The Court finds the issues for determinations are as follows-;

1. Whether the Memorandum of Understanding is valid

2. Whether the Plaintiff/ Applicant is entitled to the orders sought

1. Whether the Memorandum of Understanding is valid

It is not in doubt that the suit property is registered in the name of the Plaintiff. It is further not in doubt that the suit property is a subdivision of **L.R.23309**. The Plaintiff contend that she sought the services of her sister to seek a surveyor to subdivide **L.R 23309** and in doing so, she sought the services of a **Mr. Gathogo** to subdivide the land. That after the subdivision, the Defendant kept the suit property which was part of the subdivision and built a house without the Plaintiff's consent and or permission. However, upon discovering the same the Plaintiff entered into a Memorandum of Understanding with the Defendant that she would pay the Defendant **Kshs. 2.5 million**, to cover the expenses she had incurred and she would then in turn relinquish any interests she had over the suit property and that is how the Memorandum of understanding dated **1st October 2014** was entered into.

However, the Defendant contends that she bought the suit property from the Plaintiff and built the house with the savings that she had got from her husband's gratuity. The Defendant contended that the Plaintiff gave her the work to subdivide the suit property and the **Kshs. 2.5 million** that she was being paid was part payment of her commission as she had also taken the Plaintiff's child to school.

Though the Defendant acknowledges that she did sign the Memorandum of Understanding, it is her contention that the same was signed under duress and undue influence from the Plaintiff. That she did not know what she was signing for and she denied giving up her rights over the suit property.

It is not in doubt that the Plaintiff is the registered owner of the suit property. Though the Defendant has alleged that she bought the suit property, she has not provided any evidence or documents to prove that she ever bought the suit property from the Plaintiff. It is trite that **he who alleges must prove**. It is the Court's considered view that having provided no documentation or sale agreement evidencing that she had bought the suit property, the Court finds and holds that the Defendant never bought the suit property.

Further while the Defendant claims that the monies paid to her by the Plaintiff which monies the Plaintiff has evidenced that she indeed paid and which payment has not been controverted, were to be paid for commission, the Plaintiff testified that she never gave the Defendant the work to subdivide. Indeed even the Defendant's witnesses and the Defendant herself testified that **Mr. Gathogo** was the one who had been contracted to carry out the subdivision and it is he who contracted the Defendant. Again in the absence of any evidence to show that the Defendant was ever contracted to subdivide, the Court refuses to accept the notion that the payment made were in relation to the work done for subdivision and therefore payment as commission.

The Court has seen the Memorandum of Understanding dated **1st October 2014** between the Plaintiff and the Defendant. While the Defendant claims, that she signed the Memorandum of understanding under duress, the Plaintiff has denied this claim. In the case of **Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premal Mahajan] ...Vs... Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] [2017] eKLR the court held that**

138. By duress is meant the compulsion under which a person acts through fear of personal suffering, as from injury to the body from confinement, actual or threatened: see Halsbury's Law of England 3rd Ed Vol 8 para 146. Duress essentially occurs where a party to contract has coerced the other and exercised domination as to undermine the others independence of decision substantially. It is all about illegitimate or unlawful pressure. Where proven, the related contract is deemed voidable.

The Defendant has sought to rely on the fact that there was duress and undue influence. **The Blacks Law Dictionary Free Online Legal Dictionary 2nd Ed.** Defines **undue influence** as;

“ persuasion carried to the point of overpowering the will , or such a control over the person in question as prevents him from acting intelligently , understanding and voluntarily and in effect destroys his and constrains him to do what he would not have done if such control had not been exercised.”

Further **duress** is defined as

“term that is used to describe the undue influence that is imposed on one person by another.”

The Court is not convinced that the same existed as no proof of the same has been produced that the Defendant was ever coerced into signing the said Memorandum of Understanding. The Court has already held that there is no evidence that the Plaintiff could have been paying the Defendant for her services, as there were no services that had been contracted and the belief that the Defendant could have been paid for commission for work done was therefore unfounded.

Further the Defendant has alleged that she did not know what she was signing as she did not understand what was in the Memorandum of understanding. Further that the Defendant was not given a chance to seek for legal representation. It is ironical that the Defendant would claim that she did not know what she was signing while in the instant suit the Defendant has ably represented herself. Further DW 3 the Defendant's son also testified that his mother was the one who had drafted his witness statement and given him to sign. The Court can only conclude that the Defendant could not have signed something that she did not understand. The Court therefore finds and holds that the Defendant did not sign the Memorandum of understanding **under duress** or through undue influence

Having held that there was no duress nor undue influence by the Plaintiff when the Defendant signed the Memorandum of understanding, the Fact that the Memorandum has been signed by both parties and has been attested to, the Court finds view that parties are bound by the terms of their contracts. In this case, there is nothing to disqualify the Memorandum of Understanding and the Court finds and holds that the said Memorandum of Understanding is valid.

2. Whether the Plaintiff is entitled to the orders sought

The Plaintiff has sought for a declaration that she is the rightful owner of the suit property. The Court has held and found that the Memorandum of Understanding is valid. While the Court found that the Plaintiff is the registered owner of the suit property, the Court also found that the Defendant had built the house on the suit property. However, the validity of the Memorandum of understanding means that the Defendant relinquished her rights and any interest she had over the said house and the suit property. The Court therefore finds and holds that the prayers sought is merited and the Plaintiff is entitled to the same.

The Plaintiff has also sought for permanent injunction against the Defendant. The Court having held that the Plaintiff is the rightful owner, and the fact that she is the registered owner, it follows that she enjoys all the rights and privileges that appertain to the suit property as provided under the provisions of **Section 24 and 25 of the Land Registration Act**. The Court finds and holds that the prayers sought by the Plaintiff are merited and she is entitled to the same.

Having now carefully read and considered the pleadings by the parties, the evidence adduced and the written submissions, the Court finds and holds that the Plaintiff has proved her case on the required standard of balance of probabilities. Consequently, the Court enters Judgement for the Plaintiff against the Defendant as sought in the Plaint dated 27th **February, 2018**. The Plaintiff's claim is allowed entirely in terms of prayer No. **(a) (b) & (c)**.

It is so ordered

Dated, signed and Delivered at Thika this 3rd day of **December, 2020.**

L. GACHERU

JUDGE

3/12/2020

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 **Ruling** 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 and virtual appearance via video conference – Microsoft Teams Platform

Mr. Mr. Mwangi for the Plaintiff

Grace Wangare the Defendant present in person.

L. GACHERU

JUDGE

3/12/2020