



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CIVIL SUIT NO 339 OF 2010

RAMOKIA HOUSING CO-OPERATIVE

SOCIETY LIMITED.....PLAINTIFF

VERSUS

GEORGE KURIA MWAURA.....1ST DEFENDANT

KIMANI KAHUHU.....2ND DEFENDANT

ARTHUR K. WAWERU, ANTONY K. NJUGUNA AND

SAMWEL M. MUNGAI AS TRUSTEES OF

MT. HEBRON SELF HELP GROUP.....3RD DEFENDANT

JUDGEMENT

1. In the Further Amended Plaint filed in court on 12/5/2017, the Plaintiff seeks an order to restrain the Defendants from dealing with the parcels of land known as L.R. No. 9363/191 and L.R. No. 9363/197 measuring approximately 18 acres being part of L.R. No. 9363/85. It also seeks an order cancelling the transfer of these parcels of land to the 3rd Defendant and specific performance of the contract it entered into with the 1st and 2nd Defendants. In addition, the Plaintiff seeks a refund of the purchase price that it paid to the 1st and 2nd Defendants for the 18 acres which it seeks to have assessed based on the market value of the property at the time of judgement. The Plaintiff also seeks damages for breach of contract and costs.

2. The Plaintiff, a cooperative society claims that it entered into an agreement with Kahuhu Kuogothoka on 8/12/2004 for the purchase of 30 acres of the land known as L.R. No. 9363/85 from Kahuhu Kuogothoka. Kahuhu Kuogothoka donated a power of attorney to the 1st and 2nd Defendants granting them authority to deal with L.R. No. 9363/85 (I.R. No. 72020). The Plaintiff was buying the land for purposes of subdividing it and allocating the resultant plots to its members. The Plaintiff claims that it was only able to pay for eighteen (18) acres out of the land it was purchasing and that the 1st and 2nd Defendants authorised it to engage a surveyor who surveyed L.R. No. 9363/85 to create several portions, out of which L.R. numbers 9363/191 and 9363/197 were to be transferred to the Plaintiff. The Plaintiff claims that its members took physical possession and occupation of the plots known as 9363/191 and 9363/197 and were allocated plots to its members numbering over 200 who had subscribed for shares in the land and who commenced developments on the land.

3. On or about March/April 2010, the Plaintiff claims that the 1st and 2nd Defendants invaded the portions known as L.R. No. 9363/191 and 9363/197. The Plaintiff claims that the 1st and 2nd Defendants transferred these two parcels of land to the 3rd Defendant on 21/6/2010. The Plaintiff claims that it had executed transfers in respect of L.R. Nos. 9363/191 and 197 which the 1st and 2nd Defendants are holding in their possession but that they instead entered into a sale agreement with the 3rd Defendant.

4. The 1st and 2nd Defendants filed a statement of Defence and Counterclaim on 12/6/2018 urging that the Plaintiff's suit was defective and incompetent. The 1st and 2nd Defendants averred in their Defence that by the time this suit was filed, L.R. No. 9363/85 claimed by the Plaintiff had ceased to exist. The 1st and 2nd Defendants maintained that the sale agreement dated 8/7/2004 they entered into with the Plaintiff was for the purchase of the entire parcel of land known as L.R. No. 9363/85 measuring 51.16 hectares and that there was no sale agreement entered into between the parties for the sale of 30 acres only. The 1st and 2nd Defendants admitted that parties entered into a second sale agreement dated 8/7/2004, and argued that the Plaintiff breached the agreement for sale by failing to pay the agreed consideration. They admitted that the Plaintiff paid a deposit of Kshs. 4,770,000/= out of the initial purchase price of Kshs. 31,740,000/=. The 1st and 2nd Defendants argued that they are entitled to retain 10% of the deposit and that the Plaintiff was entitled to a refund of Kshs. 1,596,000/= payable by the legal representative of the estate of the late Kahuhu Kuogothoka.

5. The 1st and 2nd Defendants pleaded at paragraph 22 of their Defence that by the sale agreement dated 12/5/2010 the 2nd Defendant sold his suit property being L.R. Numbers 9363/191 and 197 to the 3rd Defendant without the knowledge of the 1st Defendant. The 1st Defendant averred that he only executed the transfer in favour of the 3rd Defendant in terms of the covenant between the 2nd Defendant and the 1st Defendant's father who was the vendor in the sale agreement dated 4/6/2005. The 1st and 2nd Defendants urged that the orders sought by the Plaintiff cannot be granted since the properties are no longer in the possession of the 1st and 2nd Defendants. They believed that the 3rd Defendant amalgamated L.R. Numbers 9363/191 and 9363/197 to form L.R. No. 9363/860 which was further subdivided to create 131 parcels of land that were sold to various persons. The 1st and 2nd Defendants maintained that they paid the sum of Kshs. 4,770,000/= they received from the Plaintiff to the late Kahuhu Kuogothoka and that the Plaintiff should direct any claim it has to the legal representative of the estate of the late Kahuhu Kuogothoka.

6. The 1st and 2nd Defendants filed a Counterclaim seeking an order that the Plaintiff breached the terms and conditions of the sale agreements dated 29/6/2004 and 8/7/2004. Further, the 1st and 2nd Defendants seek an order declaring the Plaintiff's suit as incompetent and unconstitutional for failing to serve summons to enter appearance upon these Defendants. They further seek an order to dismiss the Plaintiff's suit on grounds that it has been overtaken by events. They also seek orders declaring that they were wrongly joined in these proceedings since they are not the administrators of the estate of the late Kahuhu Kuogothoka; an order directing the Plaintiff to comply with the order made by the court on 14/12/2017 requiring the Plaintiff to file a fresh suit against the legal representative of the late Kahuhu Kuogothoka, and an order requiring the Plaintiff to claim damages on the legal representative on the late Kahuhu Kuogothoka.

7. The 3rd Defendant filed its defence on 24/2/2011 through the firm of R. K. Langat & Company who later came on record for the 1st and 2nd Defendants. The 3rd Defendant merely denied the Plaintiff's claim.

8. The Plaintiff called Mr. John Osoro, its Treasurer to give evidence. He stated that between 2004 and 2005 the Plaintiff entered into an agreement for the purchase of land from the 1st Defendant who had a power of attorney from the registered owner, Kahuhu Kuogothoka. The Plaintiff entered into a sale agreement at the agreed price of Kshs. 280,000 per acre and paid the total sum of Kshs. 4,770,000/=, which in his view was equivalent to the purchase of 18 acres. He stated that its members were contributing the payments that were to be made to the vendor at a very slow pace. He claimed that the Plaintiff took possession of the 18 acres which were identified on the ground and surveyed by the vendor's surveyor. The witness claimed that the Plaintiff went ahead to issue letters of allotment to its members who had paid for the plots. He claimed that the 1st Defendant got impatient with the slow pace the Plaintiff was taking in forwarding payments and they agreed to settle on 18 acres. He claimed that the Plaintiff's lawyers had prepared the application for transfer to be presented before the Land Control Board. He claims that the 1st Defendant took some of the completion documents from the Plaintiff's advocate office. The witness stated that Kahuhu Kuogothoka who a registered owner had signed the transfer and application for consent of the Land Control Board. He stated that on or about 9/4/2010, the Defendants accompanied by other unknown persons invaded the Plaintiff's portion of land on L.R. No. 9363/85 without any lawful cause and began to allocate the plots to the 3rd Defendant's members. The 1st and 2nd Defendants instructed people to resurvey the land but they were repulsed by the Plaintiff's members. He maintained that the transfer to the 3rd Defendant was done after the death of Kahuhu Kuogothoka. The Plaintiff maintained that the sale agreement was never cancelled nor was the money paid as the purchase price refunded.

9. He produced copies of the certificate of title in the name of Kahuhu Kuogothoka, the power of attorney dated 22/4/2004 given by Kahuhu Kuogothoka to George Kuria Mwaura and Kimani Kahuhu. He produced a copy of sale agreement dated 8/12/2004 which stated that the Plaintiff was buying 30 acres to be annexed from L.R. No. 9363/85. The agreement gave the completion date as 7/7/2005 and the purchase price as Kshs. 8,400,000/=. The purchaser was to pay a deposit of Kshs. 570,000/=, which was to be transferred from the deposit paid pursuant to the sale agreement dated 8/7/2004. The purchaser was to pay the balance of Kshs 4,230,000/= on the completion date pending registration of the transfer. The agreement set out the completion documents which the vendor's advocate was to deliver to the purchaser's advocate. All outgoings in respect of the property were to be met by the vendor who was also tasked to obtain the requisite consent to transfer as well as the land and rates clearance certificates.

10. The agreement provided that the purchaser would be solely liable for the subdivision of the land and would bear the costs related to the subdivision. The Law Society Conditions of Sale (1989 Edition) would apply to the agreement. Clause 14(a) of the agreement provided that if the purchaser failed to comply with any of the conditions, the vendor was to give the purchaser 21 days' notice in writing specifying the default and requiring the purchaser to remedy the default before the expiry of the notice. The vendor was to retain 10% of the purchase price and rescind the sale agreement if the purchaser failed to comply with the notice. Clause 14(b) of the agreement gave the alternative option in which the vendor was at liberty to instead transfer the equivalent land in acres to the purchaser. The vendor's advocate was to hold the original title document and the purchaser was expected to remit the payment instalments promptly. The sale agreement was executed by the 1st and 2nd Defendants on 8/12/2004. It was also executed by the Plaintiff's office bearers.

11. The Plaintiff also produced a summarised account showing the payments it made on various dates between 8/7/2004 and 30/9/2005 amounting to Kshs. 4,770,000/=. He produced a copy of the statement of account and copies of the cheques paid to George Kuria Mwaura. He also produced copies of unsigned and undated transfers in respect of L.R. No. 9363/191 (2.793 ha) and L.R. No. 9363/197 (3.696). He also produced copies of the correspondence from the Plaintiff's advocate, Maosa and Company Advocates to Kakoi Maina and Company Advocates who were acting for the 1st and 2nd Defendant in the sale transaction.

12. During cross-examination the witness maintained that the Plaintiff entered into one sale agreement with the 1st and 2nd Defendants for the purchase of 30 acres of land. He conceded that there was no agreement executed for the 18 acres the Plaintiff now claims. He stated that the Plaintiff only paid for 18 acres and was unable to pay for entire 30 acres that it was purchasing under the agreement. He maintained that both parties calculated the land equivalent to the sum they had paid and they agreed that that would be 18 acres. He did not have any evidence of this agreement. He did not have copies of the consent for subdivision.

13. The 1st Defendant gave evidence and stated that he was one of the lawful attorneys and agents appointed by the registered owner of L.R. No. 9363/85, the late Kahuhu Kuogothoka to carry out transactions in respect of this land under the power of attorney registered on

22/4/2004 as IP/A 4006. He stated that they entered into the first sale agreement with the Plaintiff on 29/6/2004 in which the Plaintiff agreed to purchase the entire parcel of land measuring 51.16 hectares at the agreed sum of Kshs. 31,740,000/=. The agreement was prepared by the late Joseph Louis Onguto Advocate, who was acting for the vendor. The Plaintiff requested an extension of the agreement which led to the agreement dated 8/7/2004 drawn by Kakoi Maina & Company Advocates.

14. He stated that the last agreement for the sale of 30 acres was entered into when the Plaintiff failed to raise the full purchase price. He maintained that the Plaintiff only paid Kshs. 4,770,000/= and that this sum was paid to the late Kahuhu Kuogothoka before he died on 17/8/2009. He maintained that the Plaintiff breached the sale agreement and denied that there was an agreement to engage a joint surveyor to subdivide L.R. No. 9363/85. He denied that the Plaintiff ever took possession of part of L.R. No. 9363/85 and stated that this land was subdivided to create L.R. No. 9363/191 and 9363/197 which were transferred to the 3rd Defendant. These two parcels of land were amalgamated to create L.R. No. 9363/860 which the 3rd Defendant subdivided into 131 portions. He maintained that the sale agreement entered into with the Plaintiff was frustrated by the Plaintiff's failure to pay the purchase price. He argued that he was wrongly joined to the suit with the 2nd Defendant. He stated that he executed the sale agreements dated 12/5/2010 in respect of L.R. Nos. 9363/191 and 197, which are the sale agreements that transferred the Suit Property to 3rd Defendant. He stated that the power of attorney granted to him and the 2nd Defendant ceased to operate upon the demise of Kahuhu Kuogothoka on 17/8/2009.

15. He produced copies of the letters dated 10/1/2005, 25/1/2005 and 2/10/2005 from the 1st and 2nd Defendants advocates to the Plaintiff demanding payment. The letter dated 2/10/2005 gave the Plaintiff 21 days' notice to pay the outstanding purchase price failing which the sale agreement would stand cancelled. He produced a copy of the power of attorney and one page of the certificate of title issued to the 3rd Defendant in respect of L.R. No. 9363/191. It is endorsed on it that it was presented for registration on 21/6/2010. He produced documents showing the subdivision of L.R. No. 9363/193 into subplots 1 to 26. He also produced copies of cheques payable to Kahuhu Kuogothoka on various dates between 2005 and 2008 including two bankers' cheques issued to Kahuhu Kuogothoka in March and May 2000. He produced copies of the sale agreement dated 12/5/2010 that he entered into with the 3rd Defendant for the sale of L.R. Numbers 9363/191 and 193. He denied that they were holding any money received from the Plaintiff and claimed that they had paid the sum of Kshs. 4,770,000/= paid by the Plaintiff to Kahuhu Kuogothoka.

16. The 2nd Defendant gave evidence along the same lines as the 1st Defendant. He stated that he was not the legal administrator of the estate of the late Kahuhu Kuogothoka. He confirmed that he sold the suit property to the 3rd Defendant after his father had died. He denied that anybody had asked for a refund of Kshs. 4,770,000/=.

17. The 3rd Defendant called Arthur K. Waweru to give evidence on its behalf. He confirmed that the 3rd Defendant purchased L.R. Numbers 9363/191 and 9363/197 from the 1st and 2nd Defendant for valuable consideration. The 3rd Defendant obtained a certificate of title upon purchase of these parcels of land. He claims that the 3rd Defendant had no knowledge of Plaintiff's interest in these parcels of land since the Plaintiff had not registered any cautions against the land. He stated that the 3rd Defendant took vacant possession of the land in dispute. He urged that the 3rd Defendant was wrongly joined since it acquired its title before this suit was filed.

18. Parties filed submissions which the court has considered. The court delivered its ruling on 14/12/2017 in respect of the application by the 1st and 2nd Defendants to be removed from the proceedings. The court declined to remove these parties from the proceedings and expressed the view that it was necessary to have the administrators of the estate of the late Kahuhu Kuogothoka joined as parties to these proceedings. The Plaintiff did not amend its plaint to bring in the legal representative of Kahuhu Kuogothoka to the suit.

19. The 3rd Defendant urged the court to dismiss the suit against it in its submissions on the basis that it bought the Suit Property before this suit was filed. It maintained that there was no privity of contract between it and the Plaintiff. It also argued that the Plaintiff had failed to show that the parcels of land that the 3rd Defendant bought from the 1st and 2nd Defendants were the same pieces of land the Plaintiff intended to purchase from the 1st and 2nd Defendants. It relied on the decision in **William Muthee Muthami v Bank of Baroda [2014] eKLR** on the issue of privity of contract and parties that may be sued based on a contract

20. The 1st and 2nd Defendants based their submissions on the following main grounds. Firstly, that the agreement entered into between the Plaintiff and the 1st and 2nd Defendants was in respect of agricultural land and there could therefore have been no sale without the consent of the Land Control Board. Secondly, that the Plaintiff was required to apply for approval for subdivision from the local authority and the Commissioner of Lands which it failed to do. Thirdly, that the Plaintiff frustrated the contract as a result of which the 1st and 2nd Defendants rescinded it. Fourthly, that the suit was fatally defective for failure to join the legal representative of the late Kahuhu Kuogothoka. Fifth, that the Plaintiff's claim has been overtaken by events following the transfer of land in dispute to the 3rd Defendant vide the transfers dated 15/6/2009.

21. The 1st and 2nd Defendants made a curious argument that the Plaintiff never sought an order to preserve the suit property and that the court did not issue an order for the *status quo* to be maintained before the filing of this suit. That would not have been possible. Further the Defendants argue that the 1st and 2nd Defendants did not breach any court order by transferring the suit property to the 3rd Defendant vide the power of attorney conferred on them. They claimed that the sale to the 3rd Defendant was valid under the law and that title to the suit property passed to the 3rd Defendant legally. These Defendants also advanced the argument that the power of attorney in respect of the suit property ceased to have effect upon the death of Kahuhu Kuogothoka on 17/8/2009. They argued that this suit has no basis in law having been filed after the demise of the donor of the power of attorney and that they were wrongly joined to this suit.

22. In their submissions, the 1st and 2nd Defendants argued that the power of attorney dated 22/4/2004 was valid at the time the suit land was transferred to the 3rd Defendant on 15/6/2009. The court notes that the transfer of L.R. number 9363/191 to the 3rd Defendant was registered on 21/6/2010. The transfer which is only dated July 2009 bore the name of Kahuhu Kuogothoka as vendor and the 3rd Defendant as purchaser. It was executed by George Kuria Mwaura on behalf of Kahuhu Kuogothoka and states that the consideration of Kshs. 2,070,000/=

had been paid to the vendor, who would be Kahuhu Kuogothoka. Title over L.R. No. 9363/197 was issued to the 3rd Defendant on 21/6/2010. The pages attached to the title reflect many transfers dated 11/7/2008 in respect of other portions of L.R. No. 9363/85. Entries number 88 and 89 reflect the transfer to the 3rd Defendant of L.R. No. 9363/191 and L.R. No. 9363/197 on 21/6/2010.

23. The transfer of L.R. number 9363/197 dated 15/6/2009 was registered on 21/6/2010. The parties to the transfer are stated to be Kahuhu Kuogothoka and the 3rd Defendant. This contradicts the evidence of the 1st and 2nd Defendants who argued that L.R. No. 9363/191 and L.R. No. 9363/197 were transferred to the 3rd Defendant before the demise of Kahuhu Kuogothoka. By the time the transfer of L.R. No. 9363/191 and L.R. No. 9363/197 was done to the 3rd Defendant in June 2010, Kahuhu Kuogothoka had died on 17/8/2009. The 3rd Defendant did not produce copies of the sale agreements entered into between the late Kahuhu Kuogothoka and the 3rd Defendant. It did not also produce evidence that L.R. No. 9363/191 and L.R. No. 9363/197 were amalgamated to create another parcel of land or that there had been a further subdivision to create plots which were transferred to third parties. According to the copies of titles produced by the 3rd Defendant, L.R. No. 9363/191 measures 2.793 ha while L.R. No. 9363/197 measures 3.696 ha. The two portions of land measure 16.034 acres in total.

24. The question is, should the court issue an order to restrain the Defendants from dealing with L.R. Nos. 9363/191 and 197 as the Plaintiff seeks in the Further Amended Plaintiff? Should an order for cancellation of the 3rd Defendant's title be granted and specific performance? Or should the 1st and 2nd Defendants be directed to refund the sum of Kshs. 4,770,000/= paid to the 1st and 2nd Defendants based on the current market value of the land?

25. It is not in dispute that the Plaintiff entered into an agreement for the purchase of a portion of L.R. No. 9363/85 with Kahuhu Kuogothoka through the power of attorney donated to the 1st and 2nd Defendants. What is in dispute is the size of land that the Plaintiff was purchasing. The Further Amended Plaintiff mentions 16 and 18 acres in different paragraphs. The sale agreement dated 8/12/2004 produced by the Plaintiff was in respect of 30 acres. The Plaintiff did not produce any other sale agreement. The 1st and 2nd Defendants produced copies of sale agreements dated 29/6/2004 giving the purchase price of Kshs. 31,740,000/- for the whole parcel of land measuring 51.16 ha. Another agreement produced by the Defendants is dated 8/7/2004. Clause 3 of this agreement, which is for the purchase of the whole of L.R. No. 9363/85 acknowledged payment of a deposit of Kshs. 350,000/= and provided for further payments through monthly instalments with the final payment expected to be made on 31/7/2005.

26. A party seeking specific performance must show that it has been ready, able and willing to perform its obligations under the contract. It is not in dispute that the Plaintiff did not pay the full purchase price for the entire 51.16 ha or the 30 acres in respect of which it produced a sale agreement. None of the agreements produced in court mentioned L.R. Nos. 9363/191 and 197. The Plaintiff did not lead any evidence to show that the land it was buying became L.R. Numbers 9363/191 and 197 after subdivision. The 3rd Defendant maintained that it had subdivided these two parcels of land and sold the plots that resulted from the subdivision of the bigger portion created from the amalgamation of L.R. Nos. 9363/191 and 197.

27. The power of attorney donated by Kahuhu Kuogothoka to the 1st and 2nd Defendants to deal with L.R. Nos. 9363/85 lapsed upon his death on 17/8/2009. The court is of the view that the Plaintiff's claim for refund ought to be directed to the legal administrators of the estate of the late Kahuhu Kuogothoka. However, it is not clear how the 1st Defendant was able to transfer L.R. Numbers 9363/ 191 and 197 to the 3rd Defendant without first obtaining letters of administration to the estate of Kahuhu Kuogothoka as required by the Law of Succession Act. Kahuhu Kuogothoka had died by the time the 1st Defendant transferred L.R. Numbers 9363/ 191 and 197 to the 3rd Defendant.

28. The Plaintiff has failed to prove its case on a balance of probabilities, it is dismissed. Each party will bear its own costs.

Dated and delivered at Nairobi this 28th day of February 2019.

K. BOR

JUDGE

In the presence of: -

Mr. A. Kabugu for the Plaintiff

Mr. R. Langat for the 1st and 2nd Defendants

Mr. J. Ondabu for the 3rd Defendant

Mr. V. Owuor- Court Assistant