



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 658 OF 2012

MWANGI KIARIE.....PLAINTIFF

VERSUS

JORETH LIMITED.....1ST DEFENDANT

LAZARUS WAIRAGU.....1ST DEFENDANT

PATRICK NGUGI WAIRAGU.....3RD DEFENDANT

JUDGEMENT

1. The Plaintiff claims that he purchased plot number 295 also known as L.R. No. 13330/47 situated at Thome Farmers No. 5 Company Limited from Ngotho Njenga in August 1985 and moved into the plot. He claims that he has been in occupation to date. Ngotho Njenga believed that the plot formed part of Thome 5 Estate which Thome Farmers No. 5 Company Limited subdivided into plots and allocated the plots to shareholders including Ngotho Njenga. Sometime in 2005 Joreth Limited claiming to be the registered owner of L.R. No. 13330, advertised in the newspaper that shareholders of Thome Farmers No. 5 interested in buying their plots could have the plots transferred to them upon payment of Kshs. 200,000/=. Based on this offer, the Plaintiff claimed that he paid the sum of Kshs. 220,000/= in respect of his plot and was issued with a deed plan for plot No. 13330/47 and told to wait for the title to be issued to him. The 1st Defendant failed to issue a title to the Plaintiff which necessitated the filing of this suit.

2. Joreth Limited filed a defence in April 2014 denying the Plaintiff's claim while averring that it is the registered owner of L.R. No. 13330 having been registered on 19/12/2000 following the consolidation of the two parcels of land known as 4920/3 and 4921/3. L.R. No. 13330/47 was created from a subdivision of L. R. No. 13330. The 1st Defendant maintained that L.R. No. 13330 has never been registered in the name of Thome Limited or any other person. It denied that there was any relationship between it and Thome Farmers No. 5 and further that any share certificates or receipts or other documents acknowledging membership in Thome Farmers No. 5 would have no effect on Joreth Limited. Joreth Limited confirmed that it sold L.R. No. 13330/47 to Lazarus Wanjohi Wairagu and Patrick Ngugi Wairagu, sued as the 2nd and 3rd Defendants.

3. Joreth Limited counterclaimed for an order for eviction against the Plaintiff and his removal of the structures he had erected on L.R. No. 13330/47 together with a permanent injunction to restrain the Plaintiff from interfering with the Defendants' rights to the Suit Property.

4. The Plaintiff amended his plaint on 27/6/2014 and added Lazarus Wanjohi Wairagu and Patrick Ngugi Wairagu to the proceedings as the 2nd and 3rd Defendants respectively. The Plaintiff maintained that having offered to sell the Suit Property to the Plaintiff through its advertisement in 2005 and having received payment of Kshs. 200,000/= from the Plaintiff, Joreth Limited did not have capacity to sell the same Suit Property to any other person including the 2nd and 3rd Defendants. The Plaintiff claimed that he has been in possession and sought an order cancelling the transfer of L.R. No. 13330/47 from Joreth Limited to the 2nd and 3rd Defendants and an order to have the Plaintiff registered as the proprietor of this land. He sought a declaration that the sale of the Suit Property to the Defendant was null and void.

5. The 2nd and 3rd Defendants filed their defence on 5/11/2014 in which they admitted that they purchased the Suit Property from the 1st Defendant after confirming that the 1st Defendant was registered as the proprietor and that the Suit Property was vacant. They claim that to be *bona fide* purchasers for value and that when the Plaintiff learnt that the Suit Property had been transferred to the 2nd and 3rd Defendants he attempted to take possession of the Suit Property by putting up a temporary structure on it which nobody occupied.

6. The Plaintiff gave evidence. He stated that he purchased a piece of land known as plot No. 295 at Thome Farmers No. 5 on Thika Road from Ngotho Njenga for Kshs. 55,000/=. The agreement addressed "To Whom It May Concern" stated that the certificate number was 365

and the entry number was 5. He produced a copy of Ngotho Njenga's letter of 16/8/1985 addressed to Thome Farmers No. 5 Limited requesting the Company to transfer plot number 295 to him. He produced copies of receipts issued on payment of transfer fees to Thome Farmers No. 5 Limited together with the copy of the share certificate issued by Thome Farmers No. 5 Limited.

7. He stated in his evidence that L.R. No. 4920/3 and 4921/3 were later amalgamated to create L.R. No. 13330 which was subdivided by Thome Farmers No. 5 Limited into plots, which the company allocated to its members. The Plaintiff learnt in 1992 that the land was not owned by Thome Farmers No. 5 Company Limited, it was owned by Joreth Limited which was claiming that the shareholders of Thome No. 5 Limited who had built on that land were trespassers.

8. The Plaintiff later came to discover that Joreth Limited filed a case in court against those who had trespassed on its land. The suit was settled on condition that the shareholders were to each pay Joreth Limited Kshs. 200,000/= as consideration for a plot to be transferred to a shareholder. Joreth Limited placed an advertisement in the *Daily Nation* newspaper in 2005 inviting persons who owned plots in Thome No. 5 to take advantage of the consent order made in **HCCC No. 6206 of 1992** by paying their Advocates M/s Kimani Kahiro & Associates Kshs. 200,000/= each within 30 days so that they could have the plots transferred to them.

9. The Plaintiff claims that he went to Joreth Limited's Advocates, M/s Kimani Kahiro & Associates and was allowed to pay Kshs. 233,576/= by instalments. He produced copies of the receipts issued by Kimani Kahiro & Associates showing that he paid Kshs. 100,000/= on 9/10/2008; Kshs. 70,000/= on 14/10/2008, Kshs. 40,000/= on 22/5/2005, Kshs. 10,000/= on 30/6/2005 and Kshs. 13,576 on 14/10/2008. He also produced a copy of the Newspaper advertisement that appeared in the *Saturday Nation* of 23/7/2005 which invited individuals to take advantage of the court order by contacting Kimani Kahiro & Associates as the advocates for Joreth Limited. On completion of payment, the Plaintiff claims that he was issued a deed plan by the 1st Defendant's advocate and told to wait for the processing of a transfer. He produced a copy of deed plan number 258852 dated 14/3/2005 in respect of L.R. No. 13330/47.

10. He was not given the title deed for this parcel of land despite making several visits to the advocates for Joreth Limited. He learnt from the defence filed by Joreth Limited that the suit land had been transferred to the 2nd and 3rd Defendants. When he went to the offices of Kimani Kahiro & Associates in September 2009 he was informed that Joreth Limited had terminated the services of this law firm and taken all the documents in the advocate's possession.

11. He stated that he was told by Kimani Kahiro & Associates that the purchase price of Kshs. 200,000/= that he had paid to these lawyers had been forwarded to Joreth Limited. He produced a copy of a letter dated 22/9/2009 on the notepaper of Joreth Limited which terminated the services of Kimani Kahiro & Company Associates and asked these lawyers to release the files in respect of that company to Hon. James Karume and Mrs. Margaret Magugu or their agent Mr. L. W. Wairagu. He stated that he had been in occupation of the land and produced photographs to show the developments he had carried out on the suit land. He conceded that he originally purchased the land from Thome Farmers No. 5 and not Joreth Limited. He claimed that he had paid Kimani Kahiro Advocates a total of Kshs. 233,000/=. He confirmed that he made payments outside the 30 days stipulated in the advertisement in the newspaper and maintained that this is the agreement he had reached with the advocates for Joreth Limited. He confirmed that he did not enter into any sale agreement with Joreth Limited.

12. The Plaintiff called Charles Mwangi Gathuku to give evidence on his behalf. Charles was employed at Kimani Kahiro & Associates Advocates as a clerk. He stated that Kimani Kahiro Advocates acted for and on behalf of Joreth Limited from 2001 to 2009. He confirmed that following the consent recorded in the case filed by Joreth Limited, it was agreed that the Defendants in that suit were to pay Joreth Limited Kshs. 200,000/= each to have the plots transferred to them. The consent was extended by Joreth Limited in 2005 to people who were not parties in the civil suit. He stated that he was instructed by Joreth Limited to show potential customers plots that had been re-possessed where the person failed to pay Kshs. 200,000/=.

13. He stated that the Plaintiff was one of the occupants of a plot and that he paid the required sum of Kshs. 200,000/= for his plot number 13330/47 to the firm of Kimani Kahiro Advocates and that this money was forwarded to Joreth Limited in 2009 through its directors James Njenga Karume and Duncan N. Ndegwa. The witness confirmed that he worked as a cashier at Kimani Kahiro Advocates and that he issued the receipts to the Plaintiff in October 2008 when he paid the sum of Kshs. 100,000/=: 70,000/= and Kshs. 13,576/=. He claimed that he had been given the register of shareholders in Thome Farmers No. 5 Limited which he would use to verify whether a person was a shareholder before accepting payment and issuing a receipt. He also stated that those who went to pay were shareholders of Thome Farmers No. 5 Limited and owned a plot each. He produced a copy of the schedule of payments which include the Plaintiff's name with the remarks DP with MK. He stated that Joreth Limited received the Plaintiff's payment of Kshs. 200,000/= in 2009.

14. Robertson Nderitu, a director of Joreth Limited gave evidence. Joreth Limited was registered as the owner of L.R. No. 13330 in December 2000 after the consolidation of L.R. Nos. 4920/3 and 4921/3 which Joreth Limited owned from the 1950s. He produced copies of the titles. He also produced a copy of the certificate of title issued to Joreth Limited in respect of L.R. No. 13330/47. This land was transferred to the 2nd and 3rd Defendants on 15/8/2012. He denied that the Plaintiff was a beneficial owner of L.R. No. 13330/47. He also maintained that the payment of Kshs. 10 million made to the directors of Joreth Limited by Kimani Kahiro Limited was in respect of other parcels of land and not the Suit Property. He maintained that the payment the Plaintiff made to Kimani Kahiro Limited was never forwarded to Joreth Limited. He confirmed that Kimani Kahiro Advocates were the agents for Joreth Limited. He confirmed that Joreth Limited could not give vacant possession to the 2nd and 3rd Defendants because the Plaintiff was illegally occupying the land.

15. Patrick Ngugi Wairagu, the 3rd Defendant gave evidence. He stated he identified L.R. No. 13330/47 with the 2nd Defendant who is his father and did due diligence on it before purchasing it. They did a search which confirmed that Joreth Limited owned this plot. They learnt in 2014 that the Plaintiff was claiming ownership of the same plot. He denied that the Plaintiff had paid Joreth Limited the sum of Kshs. 200,000/=. He stated that the suit land was vacant at the time it was transferred to the 2nd and 3rd Defendants. He stated that they bought the Suit Property for Kshs. 10 million and produced the sale agreement dated 21/3/2012 together with a copy of the transfer from Joreth Limited to the 2nd and 3rd Defendant which was registered on 15/8/2012 and the certificate of title issued on the same date. He stated that they completed the purchase in 2012. His father was the Personal Assistant of Duncan Ndegwa when he served as Governor of the Central Bank of Kenya. He confirmed that the files were to be handed over to his father and other people when Joreth Limited terminated the services of Kimani Kahiro Advocates.

16. Parties filed submissions which the court has considered. The issue for determination is who between the Plaintiff and the 2nd and 3rd Defendants has a better claim to the suit land. It is not in dispute that the 2nd and 3rd Defendants hold title over the suit land, and it is not in dispute that the Plaintiff occupies the suit land. It is also not in dispute that the moratorium to pay Kshs. 200,000/= to regularise the acquisition of the plots occupied was extended to shareholders of Thome 5 Limited who occupied the plots. It is admitted that the firm of Kimani Kahiro and Company Advocates were the authorised agents for Joreth Limited mandated to receive payment of Kshs. 200,000/= from the shareholders of Thome 5 Limited. The services of this law firm were terminated in 2009 long after the Plaintiff had paid the consideration for the suit plot. The Plaintiff made most of the payments in 2008 to Kimani Kahiro Advocates who are said to have forwarded payment to the 1st Defendant.

17. The court prefers the evidence of the Plaintiff over that of the Defendants on the point that the firm of Kimani Kahiro Advocates forwarded payment to Joreth Limited which included the Plaintiff's payment. Joreth Limited collected the files from Kimani Kahiro Advocates and was in a better position to ascertain if the Plaintiff's payments were not forwarded. The fact that the Plaintiff's payment was forwarded to Joreth Limited was corroborated by the cashier from Kimani Kahiro Advocates who gave evidence and confirmed that he received the Plaintiff's payments in 2008 and issued the receipts produced by the Plaintiff. The 2nd and 3rd Defendants worked closely with the directors of Joreth Limited. No evidence was led to confirm that the 2nd and 3rd Defendants actually paid the consideration of Kshs. 10 Million to the 1st Defendant in 2012 as they claimed. If no consideration was paid by the 2nd and 3rd Defendants, the contract between the Defendants would fail for want of consideration. Had the 2nd and 3rd Defendants conducted due diligence in 2012 before acquiring title to the Suit Property they would have realised that the Plaintiff was in actual occupation of the land.

18. The court is inclined to believe that the Plaintiff has been in physical occupation of the suit land since 1985 and that he made payment to Kimani Kahiro Advocates on behalf of the 1st Defendant in line with the advertisement placed in the newspapers. Even though the Plaintiff made payments outside the 30 days stated in the advertisement in the newspaper, his last payments were received in 2008 which was well before the time the 2nd and 3rd Defendants are said to have made payment in 2012. The 3rd Defendant who worked closely with a director of the 1st Defendant could have ascertained if the suit plot had been repossessed for resale or not due to his close ties with the 1st Defendant.

19. The Plaintiff has proved his case on a balance of probabilities. The court grants prayers (a), (b) and (c) of the Amended Plaint dated 27/6/2014. The 1st Defendant failed to prove its counterclaim; it is dismissed with costs to the Plaintiff. The Plaintiff will have the costs of the suit.

Dated and delivered at Nairobi this 27th day of February 2019.

K. BOR

JUDGE

In the presence of: -

Mr. S. Oyugi holding brief for Mr. Gichachi for the Plaintiff

Mr. P. Mwangi holding brief for Mrs. Koech for the 1st Defendant

Mr. P. W. Gachuhi for the 2nd and 3rd Defendants

Mr. V. Owuor- Court Assistant