



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI LAW COURTS

ELC NO. 1321 OF 2006

KENNETH CHEGE KAMAU & 2 OTHERS.....PLAINTIFFS

VERSUS

THOME FARMERS NO.5 LTD & 3 OTHERS.....DEFENDANTS

JUDGEMENT

1. Plaintiffs are the administrators of the Estate late Jackson Kamau Gaichinga (deceased) who died on 14th December 1996. The deceased was a member of Thome Farmers No.5 Limited (Thome Five). Thome Five was a land buying company which had entered into an informal agreement with Joreth Limited (Joreth) for purchase of two parcels of land namely **LR No.4920/3 and LR 4921/3**.

2. Thome Five is the 1st defendant whereas Joreth is the 4th defendant. The two parcels were later amalgamated and they became LR No. 13330. As the transaction between Thome Five and Joreth went on, Thome Five was allowed to subdivide the two parcels. It is apparent that even before the transaction was sealed, Thome Five carried out a balloting exercise and settled its members on the two parcels.

3. The deceased who was entitled to one share which was equivalent to one plot of half an acre was allocated plot No.456. According to the evidence of the plaintiffs, the deceased took possession of plot No.456 which they say is the one which upon registration became LR No.13330/345 (suit property). The suit property is now registered in the name of the 2nd and 3rd defendants. It is the plaintiffs contention that the deceased had constructed a house on the suit property where a caretaker used to stay. The caretaker died and as the deceased had also died, the suit property was left to a neighbour to graze his animals on it as he watched over it. The suit property is on the second row from Thika Road near Safari Park Hotel.

4. In 2006, the 1st plaintiff went to check on the suit property where he found that some construction was going on. He was informed that it is the 2nd and 3rd defendants who were constructing. He sought the intervention of the local administration and the police who did not assist. This is how this suit was filed in which the plaintiffs are seeking the following reliefs.

a. A declaration that land No.LR No.13330/345 also known as plot No.456 Thome farmers No.5 Limited belongs to the deceased – Jackson Kamau Gaichinga and that the plaintiffs and the beneficiaries to the estate are entitled to beneficial ownership of the same.

b. A declaration that the sale and transfer dated 25th September 2006 of the suit property LR NO.13330/345 (also known as plot No.456 in Thome farmers No.5 Limited by the 4th defendant to the 2nd and 3rd defendants was fraudulent, illegal null and void and an order that the registration of the 2nd and 3rd defendants as proprietors of the suit property LR No.13330/345 be cancelled forthwith and the plaintiffs be registered as proprietors of the suit property forthwith.

bb) In the alternative the defendants do pay compensation to the plaintiffs equivalent to the current market value of the suit property to be based on a valuation to be undertaken and tendered in court at the hearing of this suit.

c. A permanent injunction restraining the 2nd ,3rd and 4th defendants whether by themselves , their servants employees and or/ agents howsoever from entering ,developing, alienating remaining thereon, disposing ,trespassing on the suit premises namely L.R No.13330/345, Plot No.456 and order of eviction of the 2nd and 3rd defendants from the suit property forthwith.

d. General damages

e. Costs of this suit and interest thereon.

5. The plaintiffs discovered that the suit property had been advertised for sale in 2006 by Joreth. The suit property was then purchased by the 2nd and 3rd defendants who have since obtained title over the same. It is the plaintiffs' case that Joreth had no authority to sell the suit property to the 2nd and 3rd defendants as it had knowledge that the suit property had been sold to the deceased who had taken possession. The plaintiffs therefore contend that the transfer of the suit property to the 2nd and 3rd defendants by Joreth was fraudulent and ought to be cancelled.

6. The 2nd and 3rd defendants' case is that in 2006 the second defendant saw an advertisement in the press calling for persons interested in purchasing properties along Thika Road to proceed to the firm of Kimani Kahiro & Co. Advocates. The 2nd defendant and his wife the 3rd defendant proceeded to the firm of Kimani Kahiro where they were given details of properties which were on offer. They proceeded to the ground where they identified the suit property which was vacant. They carried out due diligence and confirmed that the suit property belonged to Joreth. The purchase price was Kshs.2.8 Million which was paid to Joreth's lawyers who processed transfer into their name.

7. The 2nd and 3rd defendants have since put up a four storey building which they have rented to tenants. The plaintiffs went to claim the suit property when they were already doing the second floor. The 2nd and 3rd defendants were given a go ahead to proceed with construction as the plaintiffs had no ownership documents.

8. On its part, Joreth states that it was the registered owner of two properties namely LR No.4920/3 and 4921/3 which were later amalgamated and became LR No.1330. The property was then subdivided into sub plots of which the suit property is one of them. Sometime in 1992, squatters invaded the property belonging to Joreth. Joreth was forced to file **Nairobi HCCC No.6206 of 1992 Joreth Limited Vs Lewis Kibue & Others** seeking eviction of the trespassers. A consent was later entered between Joreth and some of the trespassers. Joreth thereafter put up press adverts calling upon other persons who wished to take advantage of the consent to come up and pay KShs.200,000/=. So that the plots they were occupying could be transferred to them.

9. The persons who responded to the press advertisement and complied with conditions given had their respective plots transferred into their names. In 2006 Joreth advertised for sale of plots whose owners had not come out to take advantage of the period given. This is how the 2nd and 3rd defendants came up and purchased the suit property. Joreth denies that it entered into any contract with the deceased or that it had any relationship with Thome Five.

10. I have gone through the evidence adduced by the plaintiffs as well as the evidence of the 2nd to 4th defendants. I have also gone through the submissions by the plaintiffs, those of the 2nd and 3rd defendants as well as those of the 4th defendant. A look at the documents produced herein shows that this is a case where two parties who had trusted each other began a transaction of sale of parcels of land without any firm committal in writing. The two trusting parties are Joreth and Thome Five. Thome Five never filed a defence in this case but one of its director's one Joseph Wambaa had sworn an affidavit in opposition to an application by Joreth for interlocutory orders. This affidavit shows the origin of the trust between the two and how that trust would later turn to haunt some members of Thome Five like the administrators of the deceased who have filed this case.

11. The revelations in Joseph Wambaa's affidavit clearly shows that Thome Five had indeed entered into negotiations with Joreth for the purchase of two parcels owned by Joreth. The person who came up with the idea of incorporating Thome Five was Arthur Kinyanjui Magugu who was also a director of Joreth. The members of Thome Five were mainly from Githunguri constituency where Mr Magugu was a member of parliament. The contributions of members of Thome Five were placed in a fixed deposit account from where it was disbursed to the directors of Joreth on instructions given by Mr Magugu.

12. The correspondence produced herein show that it is Thome Five's monies which were used to carry out the subdivision of the two parcels. The members of Thome Five were put in possession after payment of a substantial payment of the purchase money but there was no transfer of ownership from Joreth to Thome Five. In **1992 Joreth filed Nairobi HCCC No.6206 of 1992 Joreth Ltd Vs Lewis Kibue & 23 others.** Thome Five was later joined as the 24th defendant. In this case, Joreth turned against members of Thome Five terming them trespassers who should be evicted. Mr Magugu wrote a letter dated 26th February 1993 in which he disassociated himself from the suit. In this letter Mr Magugu reiterated the position that the ongoing sale transaction between Joreth and Thome Five had not been rescinded and that he could not understand how Thome Five's members on the two parcels could be termed as trespassers.

13. On 23rd January 1987, the Ministry of Lands and Settlement wrote to the firm which was carrying out subdivision that a final approval of the sub-division scheme had been given. On 23rd February 1987, the Ministry wrote to Mr Magugu and asked him to facilitate transfer of the two parcels to Thome Five. From this time, Mr Magugu who appeared to be on the side of Thome Five went quiet. The two parcels that is **LR No.4920/3** and **4921/3** were amalgamated and one title came out under **LR 13330**.

14. As per the affidavit of *Joseph Wambaa*, Joreth tactfully abandoned NBI HCCC No.6206 of 1992 after 6 of the 24 defendants entered into a consent. It is after this consent that Joreth called on those who were in occupation to take advantage of the consent which had been recorded. The call was through advertisement in the press. Those who heeded the call and paid additional monies had their plots transferred to them.

15. I have repeated the background as given by Joseph Wambaa to show that indeed there was intention by Joreth to sell the two parcels before amalgamation to Thome Five but things changed when prices of land began to appreciate. In the 70's when the sale idea started, members of Thome Five were paying a modest amount for a share. In the 90's when Joreth manifested its intention to renege on their gentleman agreement with Thome Five, Joreth demanded that those in occupation had to pay an additional Kshs.200,000/= for transfer to be effected. Those who were unable to meet the demands of Joreth had their plots advertised for sale and in 2006 half of an acre was going for close to 3 million shillings. The 2nd and 3rd defendants bought theirs in 2006 at 2.8 million shillings.

16. Having set out the background of this case, the issues which emerge for determination are first whether the deceased's plot No.456 is the one which became LR No. 13330/345. Second, whether the 2nd and 3rd defendants had any knowledge that the suit property belonged to the

deceased. Third whether the transfer of the suit property into the 2nd and 3rd defendants was fraudulent. Fourth, whether the plaintiffs are entitled to the prayers in the plaint. Lastly, which order should be made on costs?

17. I have no doubt that the deceased purchased one share from Mwahe Farmers Company Limited. Mwahe Farmers Company Ltd had shares in Thome Five one of which it sold to the deceased at a cost of Kshs.7000 on 3.6.1984 . The deceased paid transfer fees of Kshs.800/- on 11.6.1984 . The deceased later picked ballot No.7/50 for plot 456. The deceased thereafter paid survey fees of 1,150/=. In the list of members of Thome Five, the deceased is shown as owner of plot 456.

18. Other than the plaintiffs word that plot No.456 given to the deceased is what became the suit property, there is no evidence that that is the plot which was finally registered as the suit property. There are no registers from Thome Five to confirm this. There are no records of subdivision scheme and or maps to show that plot 456 is what became the suit property. In the absence of this, it is difficult to appreciate that plot No.456 is what came to be the suit property.

19. Even if for argument's sake, it is indeed true that plot No.456 is what became the suit property, then the question is, were the 2nd and 3rd defendants aware that the land belonged to the deceased? The 2nd and 3rd defendants purchased the suit property from Joreth. This was after press advertisements. The 2nd and 3rd defendants carried out due diligence and ascertained that the plot was in the name of Joreth. There is no way the 2nd and 3rd defendants would have known that the deceased had interest.

20. Joreth was aware that there were members of Thome Five who were interested in the properties. This is why after the case filed in 1992, it called upon those wishing to take advantage of the consent filed in that suit to pay additional amounts and have the plots they occupied transferred to their names. This press advert was not confined to those who were parties to the suit. Joreth knew that those on the property were claiming through Thome Five who had no title to the property but because Joreth was aware that there was an arrangement to sell the two properties to Thome Five, it agreed to transfer to those who met their conditions

21. The deceased had died as at the time the advert appeared in the press. Though the caretaker who was on the ground had also died, it was expected that the beneficiaries of the estate of the deceased would have been vigilant to follow up on the issue of title. The beneficiaries of the estate of the deceased including the administrators failed to seize the opportunity given to have the land transferred to them. When the period given expired, those who did not take advantage had their plots advertised for sale. This is how the 2nd and 3rd defendants purchased the suit property.

22. It cannot be argued that the advert was not put in the official Kenya Gazette or that the deceased had passed on and therefore the press adverts would not suffice. what Joreth was doing by giving people a chance to have the properties transferred to them upon payment of additional monies was as a result of the inner conscience which was pricking its officials because they knew that they had already taken money from Thome Five and they would not leave its members empty handed.

23. The plaintiffs are contending that the transfer of the suit property into the name of the 2nd and 3rd defendant was fraudulent. As I have said hereinabove, the deal between Joreth and Thome Five had not been sealed. The title to the amalgamated property was still in the name of Joreth . Even if the action by Joreth may appear to be immoral, it was not fraudulent. Joreth had given the occupants a chance to have their properties transferred to them. Some owners like the deceased did not respond through their legal representative as the evidence of the first plaintiff shows there was no one who was taking care of the property after the demise of his father and the caretaker. The evidence of 2nd and 3rd defendants is that they visited the land which they found vacant. The search revealed that it was in the name of Joreth. I do not think that there was anything fraudulent on the part of Joreth or the 2nd and 3rd defendants.

24. The plaintiffs would have been entitled to the prayers in the plaint if it was found that there was anything wrong on their part. Thome Five officials were so trusting as to pay for land without any serious commitment in writing. The trust which appears to have been there stems from the fact that Mr Magugu was the brains behind the incorporation of Thome Five. The offices of Thome Five were at Guithunguri where he was a member of parliament. The idea was to benefit his constituents with land. I do not want to imagine that this idea may have been a plot to fleece the members of Thome Five.

25. Thome Five may not even be existing or may not have any assets. In as much as I sympathise with the predicament in which the plaintiffs found themselves, I do not think that they can get any compensation from either the 2nd and 3rd defendants or Joreth. The plaintiffs have not directed any particulars of fraud against Thome Five. Though the plaintiffs are claiming compensation of **Kshs.70,000,000/=** which is the value of the suit property without any building, there is no basis upon which this court can order that Thome Five pays them. I therefore find that the plaintiffs have failed to prove their claim against the defendants on a balance of probabilities. *The same is hereby dismissed with costs to the 2nd, 3rd and 4th defendants.*

Dated, Signed and delivered at **Nairobi** on this **7th** day of **February 2019**.

E.O.OBAGA

JUDGE

In the presence of;-

Mr Gachuhi for 2nd and 3rd Defendant

Mr Aunga for Mr Kingara for Plaintiff

Court Assistant: Hilda

E.O.OBAGA

JUDGE