



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO.1607 OF 2001**

**IGAINYA LIMITED.....1<sup>ST</sup> PLAINTIFF**

**ISABELLA NYAGUTHII WANJOHI.....2<sup>ND</sup> PLAINTIFF**

**ISAAC GATHUNGU WANJOHI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**GEOFFREY KARURI GITHAE.....1<sup>ST</sup> DEFENDANT**

**DIANA GATHONI KINYUA.....2<sup>ND</sup> DEFENDANT**

**VICTOR WACHIRA MURIUKI.....3<sup>RD</sup> DEFENDANT**

**JAMES GUANDARU KIBERA.....4<sup>TH</sup> DEFENDANT**

**ESSENTIAL HIRE PURCHASE LIMITED.....5<sup>TH</sup> DEFENDANT**

**NAIROBI CITY COUNCIL.....6<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. In the Further Amended Plaintiff dated 16/9/2002, the Plaintiff seeks a mandatory injunction directing the Defendants to give vacant possession to the Plaintiffs of L.R. No. 1/421 situated along Ngong Road, Nairobi which is developed with four maisonettes (“the Suit Property”) and hand over the Suit Property by physically pointing out the beacons and removing or introducing the tenants occupying the Suit Property to the Plaintiffs failing which the court is to issue an order directing the Defendants to vacate the Suit Property. The Plaintiffs also seek a declaration that the allocation of part of the Suit Property to the 5<sup>th</sup> Defendant is null and void and that he should give vacant possession to the Plaintiffs.

2. The Plaintiffs also seek mesne profits at a rate to be determined by the court from 1/9/2000 until the Suit Property is handed over to the Plaintiffs as well as general damages or loss of revenue or rent. In the alternative, the Plaintiffs seek a refund of the purchase price of Kshs. 10,000,000/= plus interest from the date of payment or purchase of the Suit Property.

3. The Plaintiffs claim that the 1<sup>st</sup> to 4<sup>th</sup> Defendants were trading in the name and style of Winky Enterprises and were the registered proprietors of the Suit Property. They offered to sell the Suit Property to the Plaintiffs on or about 2000 at the sum of Kshs. 10,000,000/=. The Plaintiffs accepted the offer and entered into an agreement for sale with the 1<sup>st</sup> to 4<sup>th</sup> Defendants on 11/8/2001. The agreement was subject to the 1989 Law Society Conditions of Sale. Completion of the contract was to be upon execution and registration of the transfer in favour of the purchasers. The Plaintiffs claim that they were duly registered as the proprietors of the Suit property on 24/8/2000 and that they paid the balance of the purchase price to the 1<sup>st</sup> to the 4<sup>th</sup> Defendants. The 5<sup>th</sup> Defendant sought to be joined as a party to the suit claiming a purchaser’s interest. The Plaintiffs contend that the 5<sup>th</sup> Defendant’s claim to a portion of the Suit Property is null and void since the Suit Property has never been subdivided and that House A which the 5<sup>th</sup> Defendant claims does not exist.

4. The 6<sup>th</sup> Defendant applied to be joined to these proceedings in February 2002 claiming that its staff were occupying the houses comprising the Suit Property and that the Suit Property still belongs to it. The Plaintiffs claim that being the registered owners of the Suit Property, they have indefeasible rights over the suit land and that the 6<sup>th</sup> Defendant duly transferred the Suit Property to the Plaintiffs’ predecessors in title and that the transfer was signed by the Mayor and Town Clerk under seal. They claim that the 6<sup>th</sup> Defendant issued rates demand notes and a rates clearance certificate to the Plaintiffs’ predecessor in title prior to the transfer of the Suit Property to the Plaintiffs.

5. In its defence filed on 8/11/2002, the 6<sup>th</sup> Defendant denied allocating the Suit Property to the 1<sup>st</sup> to 4<sup>th</sup> Defendants. It maintained the purported sale of the Suit Property on 4/7/2000 was void since it was not signed by the Town Clerk or an employee of the 6<sup>th</sup> Defendant. The 6<sup>th</sup> Defendant further averred that there was no resolution authorising the allocation and subsequent transfer of the Suit Property to the 1<sup>st</sup> to 4<sup>th</sup> Defendants. The 6<sup>th</sup> Defendant stated that it has always maintained possession of the Suit Property which it uses to house its employees in line with its staff regulations and rules. It contended that the Plaintiffs failed to investigate the title over the Suit Property before purchasing it from 1<sup>st</sup> to 4<sup>th</sup> Defendants. It maintained that the suit discloses no reasonable cause of action against it.

6. The 1<sup>st</sup> Defendant filed its defence on 26/7/2018 in which he denied that the Plaintiffs are entitled to the reliefs they seek on the basis that this is was defeated by paragraph 14 of the Law Society Conditions of Sale (1989 Edition). He claimed that any right the Plaintiffs may have had was extinguished under the doctrine of laches. The 1<sup>st</sup> Defendant averred that the Suit Property was handed over to the satisfaction of the Plaintiffs' advocate who went ahead to demand rent from the tenants in the Suit Property. The 1<sup>st</sup> Defendant denied that the Plaintiffs were losing any revenue from the Suit Property.

7. The 3<sup>rd</sup> Plaintiff gave evidence. He claimed that after receiving the offer to purchase the Suit Property from the 1<sup>st</sup> to 4<sup>th</sup> Defendants, he instructed their advocate to do due diligence and investigate the title over the Suit Property. Being satisfied as to the propriety of the title, the Plaintiffs accepted the offer and entered into a sale agreement with the 1<sup>st</sup> to 4<sup>th</sup> Defendants on 11/8/2000. He produced a copy of the sale agreement which identifies the vendors as the 1<sup>st</sup> to 4<sup>th</sup> Defendants. He produced a copy of the provisional conveyance dated 4/7/... without the year which transferred the Suit Property from the City Council of Nairobi to the 1<sup>st</sup> to 4<sup>th</sup> Defendants and which indicates the consideration as Kshs. 1.1 million. This was registered on 4/7/2000. He produced a copy of a receipt dated 4/7/2000 issued by the Lands' Office in respect of the conveyance over the Suit Property. Another conveyance dated August 2000 was registered in favour of the Plaintiffs on 24/8/2000.

8. The copy of the title shows that the conveyance dated 18/8/2000 was registered in favour of the Plaintiffs on 24/8/2000. He claimed he instructed his lawyers to release the purchase price to the 1<sup>st</sup> to 4<sup>th</sup> Defendants, which he claims was done. The Plaintiffs advocates wrote to the tenants in the four maisonettes in the Suit Property informing them that they would be required to pay rent of Kshs. 40,000/= per month to the Plaintiffs. He produced copies of the correspondence exchanged with Muriuki and Company Advocates on the issue of vacant possession including a letter dated 10/7/2001 which showed that the 1<sup>st</sup> to 4<sup>th</sup> Defendants were prepared to buy back the Suit Property at Kshs. 11 million.

9. The witness stated that the Plaintiffs paid the purchase price save for the sum of Kshs. 135,000/= and that all the completion documents were availed to them. He reiterated that the issue of vacant possession did not form part of the sale agreement and the Plaintiffs expected to take over the tenants who were in the premises. He claimed that the Plaintiffs paid the sum of Kshs. 10 million as the purchase price to the 1<sup>st</sup> to 4<sup>th</sup> Defendants but did not produce any evidence to prove this. He confirmed that the tenants informed the Plaintiffs that they were paying rent to the 6<sup>th</sup> Defendant yet the 1<sup>st</sup> to 4<sup>th</sup> Defendants had indicated that rent would be paid to the Plaintiffs. The witness claimed that the 6<sup>th</sup> Defendant transferred the Suit Property to the Plaintiffs and relied on the 6<sup>th</sup> Defendant's letter dated 19/2/2018 addressed to Mugambi and Kariuki Advocates in which the 6<sup>th</sup> Defendant confirmed that the rateable owner of L.R. No. 1/421 was Godfrey Karuri and others. The letter advised the advocates to conduct an official search at the land's office.

10. The Plaintiffs called Mary Ngima Mwangi, an advocate of the High Court of Kenya who represented the Plaintiffs in the purchase of the Suit Property as a witness. She stated that the vendors deposited the conveyance documents with her based on which she carried out due diligence and drew up the sale agreement. She stated that the Plaintiffs deposited the sum of Kshs. 10 million with her awaiting the registration of the conveyance. She prepared the transfer documents and caused them to be registered in the lands office and released the money to the vendors when the transaction was completed. After that she wrote to the tenants residing in the four maisonettes on the Suit Property informing them that the new monthly rent would be Kshs. 40,000/=. The 1<sup>st</sup> to 4<sup>th</sup> Defendants did not hand over vacant possession to the Plaintiffs. She claimed that the 1<sup>st</sup> to 4<sup>th</sup> Defendants offered to buy back the Suit Property at Kshs. 11 million. She produced the conveyance documents she prepared in evidence and confirmed that the sale agreement was silent on vacant possession but that it was subject to the Law Society Conditions of Sale which incorporate giving vacant possession. She stated that the Plaintiffs learnt from the vendors that the Suit Property was up for sale. She did not provide evidence of payment of the purchase price and maintained that the vendors had never disputed receiving payment. She stated that the Mayor who was personally known to her executed the conveyance on behalf of the 6<sup>th</sup> Defendant.

11. The Plaintiffs called Joseph Kahuthia Kibui to give evidence on their behalf in relation to the valuation of the Suit Property. Mr. Kibui produced the valuation report he prepared in evidence. The report indicates that as at 15/3/2018 the expected rent for the Suit Property was Kshs. 1,020,000/= per month. He estimated the rent in 2000 to have been Kshs. 54,000/= per month for each maisonette.

12. The 1<sup>st</sup> Defendant gave evidence. He stated that he was trading as Winky Enterprises with the 2<sup>nd</sup> to 4<sup>th</sup> Defendants and that they were allocated the Suit Property upon payment of the requisite stand premium. He stated that the Suit Property was situated along Ngong Road and had four maisonettes on it and that these were fully developed by the 6<sup>th</sup> Defendant. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants informed him in August 2000 that they had found a purchaser for the Suit property at Kshs. 10 million. He stated that the Plaintiffs were aware that there were tenants in the Suit Property at the time it was sold to them. He denied that the Plaintiffs' failure to get rent from the tenants could be attributed to his own fault. He stated that it was the 3<sup>rd</sup> Defendant who did the negotiations for the sale. He maintained that they transferred a good title to the Plaintiffs and that they were allocated the Suit Property in 1987. He confirmed that the 1<sup>st</sup> to 4<sup>th</sup> Plaintiffs had not started collecting rent from the Suit Property. He did not know how the 1<sup>st</sup> to 4<sup>th</sup> Defendants got to be allocated the Suit Property and insisted that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were key in the transaction. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants are now dead. The 1<sup>st</sup> Defendant stated that he was not sure whether the sum of Kshs. 10 million being the purchase price was paid. He stated that he was given a token of Kshs. 350,000/= by the 3<sup>rd</sup> Defendant.

13. The 6<sup>th</sup> Defendant did not call any evidence. The Plaintiffs, 1<sup>st</sup> and 6<sup>th</sup> Defendants filed submissions which the court has considered. The

issues for determination are:

- a. Was the sale and transfer of the Suit Property to the Plaintiffs proper?
- b. Are the Plaintiffs entitled to mesne profits from 1/9/2000?
- c. Who should pay the costs of this case?

14. The Plaintiffs submitted that it was only the 6<sup>th</sup> Defendant who contested the sale and transfer of the Suit Property to the Plaintiffs but had failed to produce evidence to contradict the Plaintiff's evidence. The Plaintiffs relied on the 6<sup>th</sup> Defendant's letter dated 19/2/2018 which stated that the 1<sup>st</sup> to 4<sup>th</sup> Defendants were the rateable owners of the Suit Property. They claimed that the 6<sup>th</sup> Defendant had failed to prove fraud in the alienation of the Suit Property.

15. The 6<sup>th</sup> Defendant relied on Section 144 (5) of the Local Government Act which provided that a local authority could grant a license to any person to occupy any land which it possessed with the consent of the Minister for Local Government Act. The 6<sup>th</sup> Defendant submitted that the transfer of the Suit Property to the Plaintiffs was improper since there was no resolution given by the City Council of Nairobi pursuant to Standing Order number 46 in the Second Schedule to the Local Government Act. It also relied on Section 26 of the Land Registration Act which protects the sanctity of title except where fraud or misrepresentation is proved and to which the holder of the title is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The 6<sup>th</sup> Defendant further contended that the Suit Property is public land and was not available for alienation to any person. It submitted that the conveyance was registered in favour of the 6<sup>th</sup> Defendant on 21/10/1967 and that the Council held it in trust on behalf of the public.

16. The 6<sup>th</sup> Defendant also argued that Article 40 of the Constitution only guarantees the right to own property which is not found to have been unlawfully acquired. Further, the 6<sup>th</sup> Defendant relied on Section 158 of the Land Act which states that nothing in that Act is to be construed as validating, affirming, authenticating or giving any legal effect to any grant of public land which was obtained or induced by corruption on the part of the government official whether or not such official was directly involved in the transaction.

17. It also relied on Article 62 (2) of the Constitution which states that public land is to be held by a county government in trust for the people resident in that county. The 6<sup>th</sup> Defendant relied on the case of **Republic v Commissioner of Lands and 2 others, Ex parte Associated Steel Limited [2014] eKLR** in which the court held that the disputed plot having been set aside as a public utility plot was held in trust by the 1<sup>st</sup> Respondent for the public and public purposes and was not available for further alienation and could not be allocated to a private developer as a commercial plot.

18. The 6<sup>th</sup> Defendant denied receiving payment of Kshs. 1,100,000/= from the Defendants as consideration for the Suit Property. It urged that the evidence given by the 1<sup>st</sup> Defendant was that he did not contribute towards the payment of the purchase price and that he did not handle the sale transaction. The 6<sup>th</sup> Defendant took issue with the fact that the 1<sup>st</sup> to 4<sup>th</sup> Defendants sold the Suit Property to the Plaintiffs for Kshs 10 million barely a month after acquiring it from the 6<sup>th</sup> Defendant for Kshs. 1.1 million. The 6<sup>th</sup> Defendant submitted that the haste with which the Suit Property was sold was questionable and the rate of appreciation of the value of the land within a month was untenable. It also challenged the fact the 1<sup>st</sup> to 4<sup>th</sup> Defendants disposed of the Suit Property without taking possession and the Plaintiffs went ahead and bought the land without insisting on vacant possession being given to them. The 6<sup>th</sup> Defendant urged the court to protect and safeguard the Suit Property which it claimed is reserved for public utility for the greater public interest and public good.

19. The Plaintiffs submitted that they are entitled to mesne profits on the basis of being the legitimate and bona fide owners of the Suit property yet the 6<sup>th</sup> Defendant has been receiving rent from the tenants in the Suit Property. The Plaintiffs submitted that they had a legitimate right and expectation to receive rent from the Suit Property and that this right is protected by Article 40 of the Constitution and Section 25 of the Land Registration Act. They urged that the fact that they demanded rent from the tenants which was not paid in itself amounts to trespass on the part of the tenants and the 6<sup>th</sup> Defendant who has been collecting rent.

20. In his submissions the 1<sup>st</sup> Defendant maintained that the Plaintiffs purchased the Suit Property on "as is basis" with full knowledge of the existing tenancies. The 1<sup>st</sup> Defendant submitted that the suit premises were handed over to the satisfaction of the Plaintiffs' advocate who went ahead to demand rent from the tenants in October 2000. The 1<sup>st</sup> Defendant submitted that once the title passed to the purchasers, the vendors had no capacity or legal right to evict the tenants or ask them to pay rent. The 1<sup>st</sup> Defendant maintained that he was not a key player in the transaction which was undertaken by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. He faulted the Plaintiffs for declining to accept the 3<sup>rd</sup> Defendant's offer to re-purchase the land from them. The 6<sup>th</sup> Defendant expressed doubts as to Plaintiffs' seriousness in light of the long period it has taken the Plaintiffs to prosecute their case. The 1<sup>st</sup> Defendant submitted that the Plaintiffs were not entitled to the orders they seek against him.

21. The court has analysed the evidence adduced and considered the submissions of the parties. No evidence was led to show that the 6<sup>th</sup> Defendant was paid any consideration for the Suit Property. The Local Government Act set out the procedure for a local authority to let or grant a person a license to occupy any land it possessed. To do this, the consent of the Minister for Local Government was necessary under Section 144 (5) of that Act.

22. Section 144 (6) empowered the local authority to sell any land it possessed which it did not require for the purpose for which it was acquired or being used with the consent of the Minister. The Plaintiffs have not shown that the sale of the Suit Property by the officials of the 6<sup>th</sup> Defendant to the 1<sup>st</sup> to 4<sup>th</sup> Defendants was done with the consent of the Minister as the law then required.

23. The 6<sup>th</sup> Defendant stated in its evidence that its officers till occupy the four maisonettes on the Suit Property, which confirms that the 6<sup>th</sup> Defendant has been using and still requires to use the Suit land for the purposes for which it was acquired and that it ought not to have been sold pursuant to Section 144 (6). This fact was also confirmed by the Plaintiffs whose advocate wrote to the 6<sup>th</sup> Defendant's tenants indicating an increment in rent to Kshs. 40,000/= per month. The tenants did not hand over possession of the Suit Property prompting the Plaintiffs to file this suit in which they seek mesne profits from 2000 to date. No explanation was given by the Plaintiffs for the delay in having this suit which was filed almost twenty years ago heard and determined expeditiously.

24. The Plaintiffs have failed to prove their claim on a balance of probabilities, it is dismissed. Each party will bear its own costs.

Dated and delivered at Nairobi this 4<sup>th</sup> day of April 2019

**K.BOR**

**JUDGE**

**In the presence of:-**

Ms. A. Ogange holding brief Ms. Ndungu for the Plaintiffs

Mr. Charles Kimathi for the 1<sup>st</sup> Defendant

Mr. S. Ombati holding brief for Mr. Oange for the 6<sup>th</sup> Defendant

Mr. V.Owuor- Court Assistant