



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NAIROBI**

**CASE NO. 563 OF 2010**

**PETER KARONG'A KURIA.....PLAINTIFF**

**VERSUS**

**MARGARET WAIRIMU KIMANI.....DEFENDANT**

**J U D G M E N T**

1. The Plaintiff instituted the instant suit vide a plaint dated 18<sup>th</sup> November 2010 filed in Court on the same date. The Plaintiff averred in the plaint that he had purchased land parcel **Ng'enda/Mutomo/T.41** (hereinafter referred to as **"the suit property"**) from the Defendant pursuant to a sale agreement dated 26<sup>th</sup> October 2005 with the knowledge that the property was then registered in the name of Kimani Ngoro, the Defendant's late husband. The understanding was that when the Defendant processed succession in regard to her late husband's estate, she would effect transfer of the suit property to the Plaintiff. The Plaintiff averred that although the Defendant finalized the succession proceedings and caused the suit property to be transferred to him, she has failed to give vacant possession of the land to the Plaintiff.

2. In the premises, the Plaintiff prays for judgment against the Defendant for:-

- 1. That the Defendant's personal representatives, agents and assigns be evicted from land parcel number Ng'enda/Mutomo/T.41.**
- 2. Mesne profits from 16<sup>th</sup> February 2006 when she was supposed to give vacant possession.**
- 3. Costs of the suit.**

3. The Defendant filed her statement of defence dated 28<sup>th</sup> October 2015 on the same date after an ex parte judgment that had been entered against her was set aside on her application. In her defence, the Defendant stated that she was the administrator of her late husband's estate. She stated that her late husband's estate was granted to her and her three children in equal shares as per the confirmed grant in Thika Succession Cause No. 225 of 2005. She denied that she knew the Plaintiff or that she had entered into a sale agreement with him for the sale to him of the suit property. She denied receiving any money from the Plaintiff towards the purchase of the suit property or signing any documents of transfer for the property. The Defendant averred, any transfer of the suit property to the Plaintiff could only be obtained through fraud and/or misrepresentation. She sought judgment against the Plaintiff for:-

- 1. Cancellation of the title issued to the Plaintiff.**
- 2. A declaration that the Defendant and her three sons are the beneficial owners of the Title No. Ng'enda/Mutomo/T.41.**
- 3. Costs of the suit.**

The suit was heard before me on 4<sup>th</sup> December 2018 when both the Plaintiff and the Defendant testified as the only witnesses in support of their respective cases.

4. The Plaintiff testified that he had known the Defendant for over 20 years and that he also had known the Defendant's deceased husband very well. The Plaintiff stated that he had indeed commenced the purchase of the suit property with the Defendant's husband when he was alive and that he had paid him kshs.5,000/= towards the purchase. He stated that he formalized the purchase of the suit property with the Defendant by entering into a sale agreement dated 26<sup>th</sup> October 2005 (**"PEX.1"**). The Plaintiff stated further that as the suit property was in the Defendant's deceased husband's name the Defendant had to pursue succession in order to have the property transferred to him.

5. The Plaintiff testified that the Defendant filed a succession cause in the Chief Magistrate's Court at Thika vide Succession Cause No. 225 of 2005 and after due process a certificate of confirmation of grant was issued on 3<sup>rd</sup> February 2010 and under the distribution schedule

appended thereto land parcel **Ng'enda/Mutomo/T.41** was awarded to him (Plaintiff) as purchaser absolutely. The Plaintiff explained that he fully paid the full purchase price of kshs.200,000/= to the Defendant which she duly acknowledged. He stated the Defendant executed the transfer and that the transfer was registered and he was issued title to the suit property on 10<sup>th</sup> September 2010 as per the exhibited abstract and copy of the title.

6. The Plaintiff explained that the Defendant had indicated the original title to the suit property was lost and reported the loss to the Juja Police Station and a police abstract was issued produced as **"PEX.4"**. He stated that the Land Registrar Gazetted the loss before registering the transfer and issuing the title in his name (Plaintiff). The Plaintiff further stated the transfer was by way of transmission as he had been included in the succession cause as purchaser of the suit property. The Plaintiff stated that after he was registered as proprietor of the suit property the Defendant refused to yield possession and continues to allow third parties to utilize the land thereby denying the Plaintiff the use of the land.

7. In cross examination, the Plaintiff explained that he, the Defendant and the Defendant's son-in-law, one Paul Munyaga acted together when they were pursuing the succession matter at the Thika Law Courts. He stated the Defendant and her son-in-law were present when the agreement for sale of land was prepared at P. S. Kimiti Advocate's office and when they forwarded to the Government Printer the Notice of Loss of Title for publication. The Plaintiff further stated they were both present at Mwhaki Njuguna Advocate's office where they executed the transfer and the Defendant was at the time accompanied by her son in law Paul Munyaga.

8. The Defendant testified and her evidence was to the effect that she did not know the Plaintiff and that she never sold the suit property to the Plaintiff. She denied she signed any sale agreement for sale of the suit property to the Plaintiff at P. S. Kimiti Advocate's office. She stated she does not know P. S. Kimiti Advocate. She denied she ever received any money from the Plaintiff and further denied executing any transfer of the suit property in favour of the Plaintiff. Surprisingly, the Defendant insisted that her husband died some 48 years ago despite being shown a Gazette Notice of 6<sup>th</sup> May 2005 that carried notification of her husband's death for purposes of succession that clearly indicated the date of death to be 15<sup>th</sup> May 1994.

9. The Defendant however, admitted her son in law, Paul Munyaga assisted her in pursuing the succession matter at Thika Law Courts in regard to her late husband's estate. The Defendant could not remember when she filed the succession as she claimed it was such a long time. She denied the original title had at any time been lost as she still held the original in court. She stated she had never reported the loss of the title. The Defendant admitted that her sons were always accompanying her to court at Thika although she stated she was not aware of the contents of the documents that were obtained from the Court which she stated were in the custody of her son in law, Paul Munyaga who was now deceased.

10. Following closure of the trial, the parties were directed to file their final written submissions. The Plaintiff filed his submissions on 13<sup>th</sup> February 2019. The Defendant did not file any submissions. I have considered and reviewed the pleadings and the evidence adduced by the parties and the following issues arise for determination:

**(i) Whether the Plaintiff entered into a sale agreement with the Defendant for purchase of land parcel number Ng'enda/Mutomo/T.41?**

**(ii) Whether land parcel number Ng'enda/Matomo/T.41 was transferred to the Plaintiff by the Defendant through transmission following Thika CM's Court Succession Cause No. 225 of 2005?**

**(iii) Whether the Plaintiff obtained transfer of the suit property through fraud or misrepresentation?**

**(iv) What orders and/or reliefs should the court grant?**

11. The Plaintiff in his evidence relied on the documents contained in the bundle of documents filed by him. These documents included the sale agreement dated 26<sup>th</sup> October 2005; initial Certificate of Confirmation of a Grant dated 3<sup>rd</sup> February 2010; amended Certificate of Confirmation of a grant dated 15<sup>th</sup> March 2012; Gazette Notices dated 6<sup>th</sup> May 2005 and 23<sup>rd</sup> July 2010 respectively, police abstract dated 24<sup>th</sup> May 2010, copy of title for land parcel **Ng'enda/ Mutomo/T.41** in name of Peter Karonga Kuria dated 10<sup>th</sup> September 2010 and copies of transfers by transmission to Margaret Wairimi Kimani dated 28<sup>th</sup> May 2010 and from Margaret Wairimu Kimani to Peter Karonga Kuria dated 28<sup>th</sup> May both registered on 23<sup>rd</sup> August 2010.

12. From the evidence adduced by the Plaintiff, there is no doubt he knew the late husband of the Defendant and the Defendant as well. I do not think the Defendant was being truthful when she stated she did not know the Plaintiff and that she only met him in court. The Plaintiff struck me as a truthful witness. He was candid in his testimony. I accept his evidence that he had commenced purchase of the suit property during the lifetime of the Defendant's deceased husband, Kimani Ngoro and that following the Defendant's husband's death, he (the Plaintiff) and the Defendant entered into the agreement dated 26<sup>th</sup> October 2005 which was duly attested by P.S. K Kimiti Advocate. The agreement acknowledges the defendant was the widow of the registered owner and was entitled to inherit the suit property wholly and the Defendant had on that basis agreed to sell and transfer her beneficial interest in the property to the Plaintiff at the consideration of kshs.200,000/=. Although the Defendant feigned ignorance of the agreement and denied executing the same, I did not think she was being truthful. My view was the Defendant had deliberately sought to deny each and every document associated with the Plaintiff to divert focus from the real issues in the matter.

13. While the Defendant acknowledged that she and her children had filed a succession matter relating to the estate of her deceased husband at Thika Law Courts vide Thika Succession Cause No. 225 of 2005 she was quick to disown the Certificates of Confirmation of Grant issued by the court showing the Plaintiff was granted land parcel **Ng'enda/ Mutomo/T.41** absolutely as purchaser in the succession cause. The initial Certificate of Confirmation of Grant was issued to the Defendant on 3<sup>rd</sup> February, 2010 and carried a schedule respecting the distribution of the Defendant's deceased husband properties. The Defendant and her 3 sons apart from actively participating in the

Succession Cause at Thika Law Courts were beneficiaries of the deceased estate.

14. As per the distribution schedule appended to the Certificate of Confirmation of grant dated 3<sup>rd</sup> February 2010 the deceased land parcels **LR 10087/6, 10090/99** and **Laikipia/Nyahururu/6865** were to be shared equally by the Defendant and her 3 sons named therein. The Plaintiff was to solely get **LR No. Ng'enda/Mutomo/T.41** as purchaser. The certificate and the schedule was duly signed by L. M. Wachira Resident Magistrate, Thika. The record shows that the Defendant applied to rectify the Certificate of Confirmation of Grant issued on 3<sup>rd</sup> February 2010 for the names of one of the beneficiaries Joseph Maina to be corrected to correspond with the names in his identity card Joseph Maina Nderitu for purposes of effectuating the distribution. The amended Certificate of Confirmation of Grant was issued on 15<sup>th</sup> March 2012 and even in the amended grant, the Plaintiff was indicated as the sole beneficiary of **LR Ng'enda/Mutomo/T.41**. The Defendant, it is evident was aware that the Plaintiff had been awarded the suit property in the succession cause. The assertion by the Defendant that she did not know how the Plaintiff's name was included in the schedule of distribution is not believable.

15. My view is that the Defendant entered into the sale agreement dated 26<sup>th</sup> October, 2005 with the Plaintiff and it was on that basis the Plaintiff's name was included in the distribution schedule of the deceased assets as a purchaser. The Plaintiff's evidence that the Defendant reported the loss of the original title to Juja Police Station and the loss was subsequently gazetted in the Kenya Gazette is supported by the copy of the certified police abstract record by the OCS Juja Police Station of OB 32/24/10 and Gazette Notice No. 8485 carried in the Kenya Gazette of 23<sup>rd</sup> July 2010. The Gazette Notice notified the loss of the original title deed to the suit property and the intention to dispense with the production of the original after the expiry of 30 days and to proceed to register Form RL 19 and RL 7 which had been prepared pursuant to Thika Succession Cause No. 225 of 2005.

16. Form RL 19 was the application by the Defendant to be registered as proprietor by transmission of the suit property dated 28<sup>th</sup> May 2010. The form was duly thumb printed by the Defendant as the administrator of Kimani Ngoro's estate and was attested by Mwhaki Njuguna & Co. Advocates. The Defendant acknowledged the photograph affixed thereon to be hers. Form RL 7 was the Transfer by Personal Representative of the deceased to the Plaintiff being a person entitled as a purchaser under an intestacy. Similarly, this form was thumb printed by the Defendant and was signed by the Plaintiff as transferee and the execution by both the Defendant was attested by Mwhaki Njuguna & Co. Advocates. The forms RL 19 and RL 7 were registered on 23<sup>rd</sup> August 2010 and title to the suit property was issued to the Plaintiff on 10<sup>th</sup> September 2010 as per the abstract of title exhibited at page 23 of the Plaintiff's bundle of documents. It could not have been coincidence that the Defendant was registering a form RL 19 and RL 7. The Gazette Notice respecting loss of the title had clearly indicated those forms were pending registration.

17. On the basis of the evidence and having regard to the documents tendered in evidence, I am persuaded that the Plaintiff purchased the suit property from the Defendant and that the Defendant and the other beneficiaries of the estate of Kimani Ngoro consciously included him as a beneficiary (as a purchaser) after he had fully paid the purchase price to the Defendant in terms of the agreement they had entered. The denials by the Defendant of knowledge of the Plaintiff is a late attempt to wriggle out of the agreement in the hope of undoing that which she had voluntarily done. The court cannot permit such an attempt to succeed when all the evidence points to the defendant having been a willing participant in the sale transaction upto its completion.

18. It is my conclusion that the Plaintiff properly obtained title to the suit property through transmission pursuant to Thika Succession Cause No. 225 of 2005. Although the Defendant has alluded that the transfer to the Plaintiff was obtained fraudulently, there was absolutely no evidence of fraud against the Plaintiff tendered. Proof of fraud is on a standard higher than on a balance of probabilities though not so high as to be proof beyond a reasonable as in criminal cases. It is not enough to allege fraud. There must be clear evidence establishing such alleged fraud.

19. The Plaintiff in the plaint prays for an order of eviction and for mesne profits. While I am satisfied the Plaintiff has proved he is validly registered as proprietor of land parcel **Ng'enda/Mutomo/T.41**, I am not persuaded he has laid a proper basis upon which an award of mesne profits could be awarded. On what basis would the court assess mesne profits? In his evidence, the Plaintiff merely stated the Defendant does not reside on the suit property but has allowed third parties to cultivate thereon. According to the Plaintiff he has never gained any entry to the suit property and he did tender any evidence of any use he wished to put the property to and the court cannot make a presumption. I find myself unable to make any award for mesne profits and this prayer fails.

20. The net result is that I find and hold that the Plaintiff has proved his case on a balance of probabilities and I enter judgment in his favour on the following terms:-

**1. That the Plaintiff is validly registered as the owner of land parcel Ng'endo/Mutomo/T.41.**

**2. The Defendant, her agents, assigns and/or servants should vacate and deliver vacant possession of land parcel No. Ng'enda/ Mutomo/T.41 within 30 days from the date of this Judgment failing which an eviction order for their forcible eviction to issue upon application by the plaintiff.**

**3. The costs of the suit awarded to the Plaintiff.**

**JUDGMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MAY 2019.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

N/A for the Plaintiff

N/A for the Defendant

Musyoki Court Assistant

**J. M MUTUNGI**

**JUDGE**