



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 446 OF 2013**

STANLEY MICHIEKA.....PLAINTIFF

VERSUS

JAMES DAVIDSON GIKANDI.....I ST DEFENDANT

MRS HELENA GIKANDI.....2 ND DEFENDANT

THOME FARMERS NO. 5 LIMITED.....3 RD DEFENDANT

VEMA AGENCIES LIMITED.....4TH DEFENDANT

JORETH LIMITED.....5TH DEFENDANT

KIMANI KAHIRO T/A

KIMANI KAHIRO & CO. ADVOCATES.....6 TH DEFENDANT

CHEGE WAINAINA T/A

CHEGE WAINAINA & CO. ADVOCATES.....7 TH DEFENDANT

**JUDGMENT**

1. On 11/4/2013, the plaintiff brought this suit against the defendants seeking the following orders:

- a) *A permanent injunction to restrain the defendants, their agents, servants and or employees from alienating, selling, charging, transferring and or in any other way interfering with the plaintiff's interest and or quiet possession of Plot No. 364 L.R.No. 13330/234 and or Plot No. 364 in Thome Farmers No. 5 Limited L.R 4921/R.*
- b) *A permanent mandatory injunction directed to the defendants to effect transfer of Plot No. 364 L.R No. 13330/234 and or Plot No. 364 in Thome Farmers No. 5 Limited L.R. 4921/R in favour of the plaintiff.*
- c) *An order for specific performance of the agreement made on 8th December 1989 and any subsequent agreement in respect of the suit property.*
- d) *Alternatively damages being the current market value of the suit property.*
- e) *Costs of the suit.*

2. The case of the plaintiff was that he was the beneficial owner of a piece of land situated in Thome 5 Estate, formerly designated as Plot Number 364 and subsequently surveyed as Land Reference Number 13330/234, having purchased the same from the 1st and 2nd defendants at Kshs 170,000 in 1989. He contended that the defendants had failed to cause the said piece of land to be conveyed to him despite having paid full purchase price together with attendant disbursements, and having been issued with a share certificate by the 3rd defendant. He averred that he had possession of the suit property.

3. The 1st to 5th defendants neither entered appearance nor filed defences.

4. The 6th defendant in its defence dated 16/7/2013 denied all the allegations in the plaint. It was the 6th defendant's case that he was an

advocate discharging his mandate as an agent of the 5th defendant and his mandate was limited to receiving money on their behalf. He denied being in breach of any agreement as alleged by the plaintiff.

5. The 7th defendant in his statement of defence filed on 29/4/2013 denied the plaintiff's allegations. His case was that he was appointed by the 5th defendant to prepare transfers in favour of purchasers who had complied with all the 5th defendant's requirements for transfer of land in the Estate. He urged the court to dismiss the suit against him because he was acting as an agent of the 5th defendant, a disclosed principal.

6. It was noted from the court record that on 29/11/2013, the plaintiff filed an affidavit of service sworn by Lawrence Maanzo Mutua on 30/10/2013, indicating that he had on diverse dates in April 2013 served summonses to enter appearance upon the 1st, 3rd, 4th, 5th, 6th and 7th defendants. On 29/5/2014, the plaintiff filed another affidavit sworn by Lawrence Maanzo Mutua on 26/5/2014 indicating that he had served the 2nd defendant with summons to enter appearance. The 1st – 5th defendants did not enter appearance. On 12/3/2015, Nyamweya J directed the 6th and 7th defendants to file and serve their witness statements and bundle of documents and granted the plaintiff the liberty to set down the suit for hearing. On 16/5/2016, Okongo J certified the matter ready for hearing and directed the parties to set down the matter for hearing. On 17/9/2018, the matter came up for hearing before me and Ms Otanga, counsel for the plaintiff, informed the court that the 1st - 5th defendants had not entered appearance despite having been served. Hearing proceeded on 17/9/2018 in the presence of the 7th defendant but in the absence of the rest of the defendants.

7. The plaintiff testified as PW1. He adopted his written statement as his sworn evidence in Chief. His testimony was that in December 1989, he signed a land purchase agreement with the 1st and 2nd defendants and purchased the suit property at Kshs 170,000. He duly performed his part of the contract by paying the agreed purchase price. Consequently, the 3rd defendant issued him with a share certificate. He subsequently paid Kshs 310,000 to the 6th defendant as required by the 5th defendant. The 6th defendant was the 5th defendant's duly appointed advocate. Subsequent to that, the 5th defendant who was still registered as proprietor of the larger parcel out of which the suit property was parceled changed advocates and instructed the 7th defendant to complete conveyance to various land purchasers. Upon being retained, the 7th defendant demanded a further sum of Kshs 578,000 which he (the plaintiff) objected to. He subsequently brought the present suit. He produced the following documents as exhibits.

*a. Agreement for sale dated 8th December 1989*

*b. Note from M/s Kimani Kahiro & Associates Advocates setting out the sums payable*

*c. Share Certificate Number 1161*

*d. Receipt dated 18th June 1990*

*e. Receipt dated 9th February 2006*

*f. Receipt dated 20th April 2009*

*g. Letter dated 30th April 2012*

*h. Letter dated 15th May 2012*

*i. Letter dated 16th October 2012*

8. The plaintiff filed written submissions dated 31/10/2018 in which he argued that the plaintiff, was the legal owner of the suit property having purchased it from the 1st and 2nd defendants. It was further submitted that the plaintiff was in occupation of the suit property. Reliance was placed on Ndiege Oach Atieno v Ndire Nyasore [2016]eKLR. It was also submitted that the plaintiff was entitled to specific performance because he had discharged his contractual obligations. Reliance was placed on Manzoor v Baram (2003) 2 E.A where the court held that the appellant was entitled to specific performance. The plaintiff submitted that he had proved to the court that the suit property belonged to him.

9. The 7th defendant submitted that it did not have the mandate to transfer the property to the plaintiff because the same was registered in the name of the 5th defendant.

10. I have considered the pleadings evidence and submissions on record. I have similarly considered the relevant law and jurisprudence. The 1st – 5th defendants did not contest the plaintiff's claim. The claim against the five defendants is therefore undefended. The 6th and 7th defendants contested the claim against them and contended that they were advocates retained to act for known principals. They denied liability. They did not however lead evidence.

11. Two issues fall for determination in this suit. The first issue is whether the prayers sought in the plaint would lie against the defendants in the circumstances of this case. The second issue is whether the 6th and 7th defendants are liable in the circumstances of this case.

12. It is common ground that the suit property is a piece of land within a larger parcel which was registered in the name of the 5th defendant. It is also not in dispute that when the plaintiff purchased the suit property from the 1st and 2nd defendants, they did not have a title in their names; they were merely members of Thome 5 Company Limited which had entered into a purchase agreement with the 5th defendant. Thome 5 Company Limited similarly did not have a title in its name. To process titles, the 5th defendant required various purchasers to pay certain moneys to the 6th defendant who was its advocate. The plaintiff duly paid the sum which the 5th defendant had demanded following a consent order which had been procured in the High Court. Before the title was processed, the 5th defendant terminated the services of the

6th defendant and engaged the 7th defendant.

**13.** The evidence on record clearly shows that the plaintiff paid the 6th defendant who was the 5th defendant's advocate Kshs 310,000. Out of this sum, Kshs 200,000 was money which the 5th defendant demanded as additional purchase price which each land buyer was to pay it. There is therefore no good reason proffered as to why the 5th defendant was demanding a further sum of Kshs 578,000 from the plaintiff. Secondly, the plaintiff having paid the original purchase price to the 1st and 2nd defendants, share certificate money to the 3rd defendant, and additional money to the 5th defendant, the defendants were obligated to facilitate conveyance of title to the suit property to plaintiff. I am therefore satisfied that the 1st to 5th defendants are liable to the plaintiff in terms of prayers (a), (b) and (e) of the plaint.

**14.** The 6th and 7th defendants were merely advocates retained by known principals. The mandate of the 6th defendant ceased when he ceased to have instructions from the 5th defendant. The 7th defendant is similarly an agent acting for a known principal and is bound by any court order directed against the 5th defendant. There is therefore no need for an order against the 7th defendant. My finding on the 2nd issue therefore is that the 6th and 7th defendants being agents of known principals are non-suited in the circumstances of this case.

**15.** It is therefore my finding that the 1st, 2nd, 3rd, 4th and 5th defendants are obligated to cause the suit property to be transferred to the plaintiff. I accordingly enter judgment in favour of the plaintiff against the 1st, 2nd, 3rd, 4th and 5th defendants in terms of prayers (a), (b) and (e). The claim against the 6th and 7th defendants is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF MAY 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Musili hoding brief for Mr Mutua for the plaintiff

June Nafula - Court Clerk