



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 113 OF 2014

MARY NJERI MUGO.....PLAINTIFF

VERSUS

JANE WAKINI GATIMU.....1ST DEFENDANT

FRANCIS MBUI MBORA.....2ND DEFENDANT

JUDGEMENT

BACKGROUND

In an amended plaint dated 26.10.15 the plaintiff sued against the defendants jointly and severally for the following orders:

(a) Land parcel No. MUTIRA/KAGUYU/2948 be reverted back to its original position of 9.4.2014.

(b) The agreement dated 30.1.2013 between the 2nd defendant and the plaintiff be declared null and void.

(b) (a) compensation of destruction of the properties on the suit land as per paragraph 20 (b) at a rate calculated by a qualified Agricultural officer and payment of 600 Kgs at Kenya Tea Development rate.

(c) Costs of the suit.

The defendants filed separate statements of amended defence and counter-claims denying the plaintiff's claim and seeking numerous orders in their respective counter-claims.

PLAINTIFF'S CASE

The plaintiff testified on oath and stated that when her husband passed on, the 2nd defendant approached her promising to assist her file succession cause. She stated that she wanted to obtain orders so that she would change the land title No. MUTIRA/KAGUYU/2948 from her late husband to her name to hold in trust for her seven (7) children. She had no money but the 2nd defendant told her that he was going to assist her. There was also another land which had gotten lost and wanted the 2nd defendant to assist in locating and including in the succession cause. They agreed with the 2nd defendant that if he assists her to trace her late husband's land which got lost, she was going to give him half acre. She stated that she does not know how to read or write. They went to a firm of Advocates practicing in the name and style Ichaigah who was to do the succession cause.

She was referred to her statement dated 5.5.2014 which she adopted in her evidence. She denied having signed any sale agreement disposing her portion of their family land which was still in her late husband's name. She was surprised when the 1st defendant came and destroyed their coffee and other developments on the suit land.

1ST DEFENDANT'S CASE

The 1st defendant recalled that on 22.5.2014, she went to the offices of her lawyer and recorded a statement. She also signed a further statement on 30.11.2015 she adopted both statement in her evidence. She also prepared a list of documents on 22.5.2014 and 30.11.2015 which she also produced in her evidence as Defendant's Exhibits.

According to her, she was approached by the plaintiff and the 2nd defendant sometime in April 2014 with an intention of selling their land

parcel No. MUTIRA/KAGUYU/2948 measuring 0.44 Ha at a cost of Ksh.1,650,000/=. Upon conducting an official search at the Land Registry within Kerugoya town, she confirmed that the aforesaid land was registered in the names of both the plaintiff and the 2nd defendant.

On 24th April 2014 they proceeded to the firm of M/S Ngigi Gichoya & Co. Advocates where an agreement for sale in respect of the said property was prepared. Thereafter she paid the purchase price of Ksh.1,650,000/= jointly to the plaintiff and 2nd defendant. The 2nd defendant took the money and gave the plaintiff the sum of Kshs. 700,000/= and retained Kshs.950,000/=.

The 1st defendant further stated that she later learned that the plaintiff deposited Kshs.500,000/= in her account No. 1149 held at Bingwa Society Sacco Ltd. within Kerugoya town but obtained Ksh.750,000/=. On 5th May 2014, she was called to the District Criminal Investigation Office at Kerugoya town where the plaintiff had lodged a complaint. She explained everything and gave them documents relating to the sale transaction and the payments.

DW1 - The 1st defendant called Samuel Ngigi Gichoya Advocate who confirmed that on 28.4.2014, the plaintiff and the two defendants visited his office accompanied by three other people who introduced themselves as witnesses to the land transaction which they had.

The parties wanted him to prepare a sale agreement. The plaintiff and the 2nd defendant were the vendors while the 1st defendant was the purchaser.

The property being sold was LR. No. MUTIRA/KAGUYU/2948 measuring 0.444 Ha. The consideration was Ksh. 1,650,000/=. The purchaser who had been accompanied by his husband and Joel Gatimu proceeded to Barclays Bank Kerugoya Branch where the husband withdrew Ksh. 1,540,000/=. The 1st defendant then took the purchase price and gave it to the 2nd defendant who shared with the plaintiff. The plaintiff was given Ksh. 700,000/= while the 2nd defendant retained Kshs.950,000/=. He then prepared the agreement which he read and explained to both the sellers and the purchaser in Kikuyu and English who after they understood signed with their witnesses. The consent allowing the transfer had been issued by the Kirinyaga Central Land Control Board.

Both the plaintiff and the 2nd defendant forwarded their I/D Cards, passport size photographs, P.I.N certificate, and the old title deed. He proceeded and registered the transfer form and a title deed was issued in favour of the 1st defendant.

There after a complaint was lodged at the DCI Kerugoya and the Police called him and after he explained the role he played in the sale transaction, the file was closed. Later, the children of the plaintiff filed an application in the High Court for revocation of the grant which had been issued in Succession Cause No. 294 of 2013. The High Court revoked the grant on grounds of concealment of material facts. The file was later transferred to Baricho Law Courts where it was registered as Case No. 22/2016. The suit property was distributed to the plaintiff and her children according to the succession cause.

2ND DEFENDANTS CASE

The 2nd defendant stated that on 30.1.2013 the plaintiff approached him with a view of selling him a portion of land measuring 0.20 Hectare out of L.R. No. MUTIRA/KAGUYU/2948 measuring 0.44 Ha and which parcel of land was by then registered in the name of her late husband Benson Mugo Karuga.

The plaintiff was by then in the process of conducting succession proceedings under the Estate of her husband vide Succession Cause No 294 of 2013 (Kerugoya). They agreed the purchase price at Ksh.450,000/= which he paid in full awaiting conclusion of the succession case.

Upon conclusion of the succession cause, the entire land was registered in the name of the plaintiff after which they agreed to sell the land to the 1st defendant and on 28.4.2014 they entered into a sale agreement with the 1st defendant and sold the whole parcel for Ksh.1,650,000/=.

He stated that they had already applied for and were granted a consent of the relevant Land Control Board to transfer the land to the 1st defendant on 24.4.2014 and upon receipt of the purchase price, the land was transferred to the 1st defendant.

The 2nd defendant also called one Amos Lukenya Murigu Advocate who stated that on 31.1.2013 he was at his offices situated at Baricho when he received four (4) people namely Mary Njeri Mugo, Francis Mboi Bora, James Muriithi Mwangi and Fredrick Irungu Muriuki who indicated they wanted to enter into a sale agreement.

The vendor was Mary Njeri Mugo while the buyer was Francis Mboi Bora and the other two people were their witnesses. The subject matter of the sale was a portion of land reference No. MUTIRA/KAGUYU/2948 equivalent to 0.44 Ha. The purchase price was Kshs.450,000/=.

The agreed purchase price was paid to the vendor upon execution of the sale agreement in his presence. He also witnessed and signed on his part. His legal fees of Ksh.2000/= was paid and he issued a receipt.

ISSUES FOR DETERMINATION:

The following are issues for determination:-

(1) Whether the sale of a portion L.R. MUTIRA/KAGUYU/2948 measuring 0.20 Ha by the plaintiff to the 2nd defendant on 30.1.2013 is binding in law?

(2) Whether or not the registration of the 2nd defendant as joint proprietor of L.R MUTIRA/KAGUYU/2948 together with the plaintiff was fraudulent, irregular or tainted with any irregularity?

(3) Whether the plaintiff and the 2nd defendant entered into a legally binding sale agreement between themselves and the 1st defendant over L.R MUTIRA/KAGUYU/2948 measuring 0.44 HA on 28.4.2014?

(4) Whether the plaintiff and the 2nd defendant passed a clean title to the 1st defendant in respect of L.R. No. MUTIRA/KAGUYU/2948?

(5) Whether the plaintiff and the 2nd defendant received the purchase price of Ksh. 1,650,000/= from the 1st defendant pursuant to the sale agreement dated 28.04.2014?

(6) Whether the 1st defendant has any reasonable cause of action against the plaintiff and the 2nd defendant?

(7) Who is liable to pay the costs of this suit?

(1) Whether a sale of a portion of L.R MUTIRA/KAGUYU/2948 measuring 0.20 Ha. by the plaintiff to the 2nd defendant on 20.1.2013 is binding in law?

The plaintiff and the 2nd defendant entered into a sale agreement of a portion of land out of L.R MUTIRA.KAGUYU/2948 on 30.1.2013. The purported sale was illegal and indeed irregular since the suit property was still registered in the name of Benson Mugo Karuga (deceased) and no letters of administration had been issued. The plaintiff could not have had capacity to sell any interest in the Estate of her deceased husband without first obtaining letters of administration.

(2) Whether or not the registration of the 2nd defendant as a joint proprietor of L.R MUTIRA/KAGUYU/2948 together with the plaintiff was fraudulent, irregular or tainted with any irregularity?

I have pronounced myself on the illegally and irregularity of the agreement between the plaintiff and the 2nd defendant dated 30.1.2013. If the agreement between the plaintiff and the 2nd defendant was irregular and tainted with illegality, their registration as joint proprietors of L.R MUTIRA/KAGUYU/2948 cannot be a clean title sale capable of being protected in a Court of law. The title arising from such illegality cannot be said to enjoy any legal sanctity in the eyes of the law.

(3) Whether the plaintiff and the 2nd defendant entered into a legally binding sale agreement with the 1st defendant over L.R MUTIRA/KAGUYU/2948 measuring 0.44 HA on 28.4.2014?

In this issue, it is clear that from the first sale transaction between the plaintiff and the 2nd defendant that there was no legally binding agreement and therefore the title deed obtained in the joint ownership of the two is not indefeasible.

As such, the sale agreement between the plaintiff and the 2nd defendant on one part and the 1st defendant on the other is not also binding in law.

(4) Whether the plaintiff and the 2nd defendant passed a clean title to the 1st defendant?

The plaintiff and the 2nd defendant acquired title to the suit property illegally and irregularly. As such, they did not have a good title to pass to the 1st defendant.

(5) Whether the plaintiff and the 2nd defendant received the sum of Ksh.1,650,000 from the 1st defendant as the purchase price of the suit property L.R MUTIRA/KAGUYU/2948 ?

From the evidence of the 1st defendant and her witnesses, it is clear that both the plaintiff and the 2nd defendant received the sum of Ksh. 1,650,000/= from the 1st defendant being the purchase price of the suit property. The evidence adduced also shows that both the plaintiff and the 2nd defendant received the said amount.

(6) Whether the 1st defendant has any reasonable cause of action against the plaintiff and the 2nd defendant?

It is clear from my analysis of the issues that the plaintiff and the 2nd defendant received the sum of Ksh. 1,650,000/= from the 1st defendant being the purchase price of the suit property. L.R MUTIRA/KAGUYU/2948. As such, the 1st defendant has a reasonable cause of action against the two in law.

Having analyzed and evaluated the evidence of the parties and attempted to answer the issues raised for determination in the dispute between the parties, I now enter judgment in the following terms:-

(1) The suit property L.R MUTIRA/KAGUYU/2948 registered in the name of the 1st defendant be and is hereby cancelled and the same reverted back to the original proprietor DANSON MUGO.

(2) The agreements dated 30.1.2013 entered between the plaintiff and the 2nd defendant be and is hereby declared illegal, null and void.

(3) The 1st defendant, his agents and/or servants are given six (6) months to vacate from the suit property No. MUTIRA/KAGUYU/2948 failing which she shall be evicted.

(4) The plaintiff and the 2nd defendant are hereby ordered to pay the 1st defendant's consideration/purchase price of Ksh.1,650,000/= plus interest at Court rates from 24.04.2014 until payment in full.

(5) The costs of this suit shall be borne by the plaintiff and the 2nd defendant jointly and severally.

READ and DELIVERED in open Court at Kerugoya this 14th day of June, 2019.

E.C. CHERONO

ELC JUDGE

14TH JUNE, 2019

In the presence of:

(1) Ms Nyangati holding brief for Mr. Kahiga for 2nd Defendant

(2) Ms Kimotho holding brief for Mr. Ngigi for 1st Defendant

(3) Mr. Nganga holding brief for Mr. Igati Mwai for Plaintiff