



**REPUBLIC OF KENYA**

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

**E.L.C CASE NO.307 OF 2013**

**HANIF MOHAMMED YUSUFALI.....1<sup>ST</sup> PLAINTIFF**

**HANIF MOHAMMED YUSUFALI**

**(As Administrator Ad Litem of the Estate**

**of MOHAMMED YUSUFALI).....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**THOME FARMERS NO. 5 LIMITED.....1<sup>ST</sup> DEFENDANT**

**JORETH LIMITED.....2<sup>ND</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. The 1<sup>st</sup> Plaintiff filed this suit on 28/2/2013 on his own behalf and as administrator of the estate of the late Rafiq Mohammed Yusuf Ali claiming that he and the late Rafiq Mohammed Yusuf Ali entered into an agreement on 28/8/1993 with Cornelius Muthuri for the sale of one ordinary share in the 1<sup>st</sup> Defendant Company at the agreed consideration of Kshs. 1 million. The Plaintiff avers that by virtue of that share they purchased, they were entitled to plot number 073 measuring approximately 0.2203 ha in the 1<sup>st</sup> Defendant's residential scheme situated in Garden Estate, of Thika Road, Nairobi.

2. The Plaintiff claims that they paid the purchase price in full to the vendor with the knowledge of the 1<sup>st</sup> Defendant and further paid the transfer fee to the 1<sup>st</sup> Defendant who issued share certificate number 1350 dated 7/10/1993 to the Plaintiffs. The Plaintiffs claim that they subsequently paid the requisite survey fees, land rates and other charges to facilitate the formal demarcation and issuance of title deeds. Upon completion of survey, plot number 073 became L.R. No. 13330/1 Nairobi ("the Suit Property"). When the title was processed it came out in the 2<sup>nd</sup> Defendant's name. The 2<sup>nd</sup> Defendant started harassing the Plaintiff by demanding additional payment.

3. The 2<sup>nd</sup> Defendant filed **HCCC No. 6206 of 1992** against various purchasers and later entered into a consent with some of the purchasers who agreed to pay additional consideration. The Plaintiffs claim that they have been in open and uninterrupted occupation of the Suit Property for over 19 years since 1993 and they claim to have invested heavily in the land which they have been using as a garage for their transport business.

4. The Plaintiffs seek a declaration that they are the lawful owners of the Suit Property pursuant to the sale transaction or in the alternative, through adverse possession. They seek an order of specific performance directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to execute the transfer of the Suit Property in their favour failing which the Registrar of the High Court is to execute the transfer to the Plaintiffs' names. They also seek a permanent injunction to restrain the Defendants from dealing with the Suit Property.

5. The 1<sup>st</sup> Defendant did not file a defence. The 2<sup>nd</sup> Defendant in its defence filed on 3/3/2017 denied the Plaintiff's claim and averred that it was the owner of L.R. No. 13330 having been registered on 19/12/2000 following the amalgamation of its parcels of lands known as L.R. No. 4920/3 and 4921/3, being titles it had held since the early 1950s. It denied that L.R. No. 13330/1 which is the subdivision of L.R. No. 13330 had ever been registered in the 1<sup>st</sup> Defendant's name. The 2<sup>nd</sup> Defendant denied that at no point did the Suit Property ever vest in Cornelius Muthuri or the 1<sup>st</sup> Defendant to enable them pass any interest in the land to the Plaintiffs. The Plaintiffs denied averments in the 2<sup>nd</sup> Defendant's Counterclaim through their Reply to Defence and Defence to Counterclaim filed in court on 11/10/2017.

6. The 2<sup>nd</sup> Defendant admitted that it filed **HCCC No. 6206 of 1992** against various persons who had trespassed on its land, L.R. No. 13330

and averred that this suit was compromised through a consent order. The 2<sup>nd</sup> Defendant denied that the Plaintiffs occupation of the Suit Property had been in uninterrupted based on the suit it filed in 1992.

7. The 2<sup>nd</sup> Defendant filed the counterclaim seeking an order for eviction to remove the Plaintiffs or their agents together with any structures they have erected on the Suit Property and a permanent injunction to restrain the Plaintiffs from trespassing onto its land. The 3<sup>rd</sup> Defendant filed its defence on 9/7/2013 and denied the Plaintiffs claim

8. The Plaintiff gave evidence. He stated that he purchased the Suit Property with his brother Rafiq Mohammed Yusuf Ali who died on 27/9/2007. He obtained limited grant of letters of administration on 5/11/2012 to represent his late brother's estate. He produced a copy of the certificate of death and limited grant. They purchased the Suit Property from Cornelius Muthuri who held share certificate number 840 that entitled him to plot number 073. He stated that they paid the requisite fees and was surprised when the title was processed and issued in the 2<sup>nd</sup> Defendant's name. He averred that other buyers in the housing scheme were also harassed by the 2<sup>nd</sup> Defendant over the land they occupy.

9. He claimed that they took possession of the Suit Property upon completing the purchase in 1993 and produced a copy of the sale agreement. The sale agreement mentioned the 1<sup>st</sup> Defendant and stated that the vendor was the owner of one share which she was selling to the purchasers at Kshs. 1 million. The completion date was left blank. The vendor undertook to execute documents to effectively vest the beneficial ownership of the share to the purchasers.

10. The Plaintiffs also called Lewis Ndirangu Kibui, who resides in Thome, Nairobi to give evidence. He stated that he is the 1<sup>st</sup> Plaintiff's neighbour. He further stated that the 1<sup>st</sup> Defendant had a residential scheme situated at Garden Estate formed by Arthur Magugu in 1974. He stated that Arthur Magugu was a director of the 2<sup>nd</sup> Defendant and further that at the time the plots were purchased in Thome, the 1<sup>st</sup> Defendant held itself out as the proprietor of the land and the witness came to learn later that the 2<sup>nd</sup> Defendant was being run by Arthur Magugu, Njenga Karume, Peter Muigai Kenyatta and Duncan Ndegwa.

11. He explained how the 1<sup>st</sup> Defendant divided the Thome land into half acre plots and offered these for sale to its shareholders. He bought his own plot in 1978 from Joyce Wangui Mwangi and that on being surveyed his land became L.R. No. 13330/2. He admitted that they were sued by the 2<sup>nd</sup> Defendant in 1992 over the Suit Property. Following negotiations, parties recorded a consent where it was agreed that each individual occupying a plot would pay Kshs. 200,000/= to the 2<sup>nd</sup> Defendant. The consent was recorded in court on 27/6/2002. Mr. Kibui paid the sum required and was issued a title in 2014.

12. Robertson Nderitu gave evidence on behalf of the 2<sup>nd</sup> Defendant. He stated that at no point had ownership of the Suit Property vested in Cornelius Muthuri or the 1<sup>st</sup> Defendant since the Suit Property is registered in the name of the 2<sup>nd</sup> Defendant. He explained that L. R. No. 13330 resulted from the amalgamation of L.R. No. 4920/3 and 4922/3. He denied that there was any relationship between Joreth Limited, the 2<sup>nd</sup> Defendant and Thome Farmers Number 5 Limited which is the 1<sup>st</sup> Defendant. He stated that any share certificates or other receipts acknowledging payment for membership in the 1<sup>st</sup> Defendant had no effect on the 2<sup>nd</sup> Defendant.

13. He confirmed that the 2<sup>nd</sup> Defendant filed HCCC No. 6206 of 1992 against 24 persons including the 1<sup>st</sup> Plaintiff who had trespassed on L.R. No. 13330. A consent was recorded in this case to the effect that every person who was occupying land in the scheme would pay an all-inclusive sum of Kshs. 200,000/= to the 2<sup>nd</sup> Defendant to enable it transfer the plots to the individual Defendants in that suit. He maintained that the Plaintiffs were not among the persons who complied with the terms of that consent.

14. He denied that the letter purportedly written by the late Arthur Magugu who was a shareholder of the 2<sup>nd</sup> Defendant could be relied on to confirm that the plots were not sold fraudulently by the 1<sup>st</sup> Defendant.

15. He maintained that the Plaintiffs were illegally occupying the Suit Property without the 2<sup>nd</sup> Defendant's consent and that the Plaintiffs were therefore trespassers. He produced a copy of the grant in respect of L.R. No 13330 issued to Joreth Limited on 19/12/2000 giving the size of this land as 154.4 hectares. He also produced copies of the indentures issued to the 2<sup>nd</sup> Defendant and produced the copies of the deed plans for L.R. Numbers 4920/3 and 4921/3. He produced copies of the pleadings filed in HCCC No. 6206 of 1992 which show that the 1<sup>st</sup> Plaintiff was the 3<sup>rd</sup> Defendant suit in that case where an injunction was sought to restrain the Defendants from dealing with L.R. Nos. 4920/3 and 4921/3. He also produced a copy of the consent recorded in that suit on 26/6/2002 to the effect that the 1<sup>st</sup>, 9<sup>th</sup>, 15, 16<sup>th</sup>, 17<sup>th</sup> and 23<sup>rd</sup> Defendants would each pay Kshs. 200,000/= for the individual plot they occupied. That sum was payable within 6 months from the date of the consent. Upon payment of the sum the property was to be transferred to the individual Defendants.

16. The 3<sup>rd</sup> Defendant did not call evidence. In its submissions filed on 19/3/2019, the 3<sup>rd</sup> Defendant maintained that it was not a proper and necessary party to these proceedings since the Plaintiffs do not seek any remedies from the 3<sup>rd</sup> Defendant. The court agrees with the 3<sup>rd</sup> Defendant that it ought not to have been made a party to this suit since no orders are sought against the 3<sup>rd</sup> Defendant.

17. This court is of the view that parties ought not to be joining the Land Registrar as a party to proceedings relating to disputes over ownership of land unless specific claims are made against the Land Registrar which requires the Registrar to defend the claim. In suits where what is sought is to direct the Land Registrar to register one of the parties to the dispute as the owner of the land, the Land Registrar ought not to defend such suits. Once the court gives its orders as to who is to be registered as the owner of the suit land, the decree ought to be extracted and served on the Land Registrar to register against the suit land.

18. The court has looked at the submissions of the Plaintiff and the 2<sup>nd</sup> Defendant. The issues for determination are whether the court should grant the orders sought in the plaint or those sought in the counterclaim. The Plaintiffs urged that since the late Hon. Arthur Magugu was a

director and shareholder of both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the 1<sup>st</sup> Defendant therefore transacted on the suit land on behalf of the 2<sup>nd</sup> Defendant. The Plaintiffs relied on a resolution from the 2<sup>nd</sup> Defendant to the effect that the 2<sup>nd</sup> Defendant was to sell L.R. No. 4920/3/2 and L.R. No. 4921/3/1 to Thome Farmers Limited at a consideration to be agreed in support of the averment that the 2<sup>nd</sup> Defendant was aware of the transactions the 1<sup>st</sup> Defendant was carrying out on the suit land.

19. The Plaintiff urged the court to find that they properly acquired the Suit Property. They further relied on the consent filed in HCCC No. 6206 of 1992 vide which the 2<sup>nd</sup> Defendant invited any individuals, corporations or societies to make payment through the firm of Kimani Kahiro and Company Advocates in respect of the plots they occupied. The consent required the individuals to pay Kshs. 200,000/= to Kimani Kahiro Advocates within six months. The Plaintiffs claimed that they paid Kshs. 20,000/ in respect of L.R. No. 13330/1 to Kimani Kahiro Advocates on 22/2/2007 and that they had agreed that the balance would be paid upon the transfer of the suit land to the Plaintiffs. The Plaintiffs urged the court to make a finding that the deposit of Kshs. 30,200 was made to the 2<sup>nd</sup> Defendant and that the sale transaction was still valid. They urged the court to make a finding that the Suit Property should be transferred to the Plaintiffs' name upon payment of the balance of the purchase price of Kshs. 200,000/=.

20. The 2<sup>nd</sup> Defendant maintained that the Suit Property had all along belonged to it and has never been the property of the 1<sup>st</sup> Defendant. It urged that its certificate of title was conclusive proof of ownership of the Suit Property. The 2<sup>nd</sup> Defendant pointed out that by the Plaintiffs calling Lewis Ndirangu Kibui to testify on their behalf, they were acknowledging that the Suit Property belonged to the 2<sup>nd</sup> Defendant since Lewis Ndirangu Kibui entered into the consent filed in court in HCCC No. 6206 of 1992 and paid Kshs. 200,000/= following which he was issued a title deed over his land.

21. On the claim by the Plaintiffs for adverse possession, the 2<sup>nd</sup> Defendant urged that time stopped running when it filed HCCC No. 6206 of 1992 which it claimed was still pending. However, it did not provide evidence of the status of this suit and the steps taken in the suit after the consent was recorded on 26/6/2002. It may well be that that suit was dismissed for want of prosecution.

22. The 2<sup>nd</sup> Defendant relied on the case of **Philip Kipkorir Rotich v Agnes Omiti [2019] eKLR** on the point that the time taken in litigation on land ought not to be taken into account when computing the time for adverse possession since the filing of the case interrupts the running of time. The 2<sup>nd</sup> Defendant argued that the Plaintiffs had not complied with the terms of the consent recorded on 27/6/2002 in HCCC No. 6206 of 1992 which it claimed was still pending.

23. The Plaintiffs submitted that Cornelius Muthuri whom they bought the land from had been allowed to occupy the Suit Property with the 2<sup>nd</sup> Defendant's knowledge and that the 2<sup>nd</sup> Defendant never took any action against him. They also argued that since Arthur Magugu was a director and shareholder of both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, then whatever actions he took as director of the 1<sup>st</sup> Defendant were well within the knowledge of the 2<sup>nd</sup> Defendant. They urged that the Hon Arthur Magugu had disowned the proceedings in HCCC No. 6206 of 1992 and assured the people occupying the plots in Thome that they were valid owners and not trespassers.

24. They also relied on the payment of Kshs. 20,000/= they made to Kimani Kahiro Advocates on behalf of the 2<sup>nd</sup> Defendant as part payment they made for the suit land while pointing out that this sum was not disputed by the 2<sup>nd</sup> Defendant even though it was paid well after the time specified in the consent filed in HCCC No. 6206 of 1992.

25. In the alternative, the Plaintiffs submitted that they were entitled to the suit land through the doctrine of adverse possession having entered this land in 1989. The suit land is registered in the 2<sup>nd</sup> Defendant's name which is by law a separate legal entity from 1<sup>st</sup> Defendant even if the two companies had common directors and shareholders.

26. The 2<sup>nd</sup> Defendant did not dispute the fact that the Plaintiffs have been in occupation of the suit land and that it was all along aware of this fact. The 2<sup>nd</sup> Defendant did not take steps to evict the Plaintiffs from the suit land until 3/3/2017 when they filed their counterclaim to this suit. The 2<sup>nd</sup> Defendant does not appear to have taken any steps to prosecute HCCC No. 6206 of 1992 after the consent was recorded in 2002 pursuant to which some landowners like the Plaintiffs' second witness made payment of Kshs. 200,000/= and got titles processed over the land they occupied. The 2<sup>nd</sup> Defendant accepted payment of Kshs. 20,000/= from the Plaintiffs in 2007 as part payment of the amount payable under the consent.

27. The 2<sup>nd</sup> Defendant has failed to prove its counterclaim on a balance of probabilities. It is dismissed with costs to the Plaintiff. The court finds that the Plaintiffs are entitled to be registered as the owners of the Suit Property upon payment to the 2<sup>nd</sup> Defendant of the balance of Kshs. 180,000/= being the consent sum together with interest to be calculated at court rates from the date of the consent until payment in full. This sum is payable within 90 days of this judgement. If the 2<sup>nd</sup> Defendant fails to transfer the Suit Property to the Plaintiffs after they have paid the sum ordered together with interest, the Deputy Registrar of this court will execute the transfer.

28. Having failed to pay the consent sum in HCCC No. 6206 of 1992 in full, the court declines to award the Plaintiffs the costs of the suit. The Plaintiffs and 2<sup>nd</sup> Defendant will each bear its own costs. The Plaintiffs will pay costs to the 3<sup>rd</sup> Defendant.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of June 2019**

**K. BOR**

**JUDGE**

**In the presence of: -**

Ms. D. Nakato holding brief for Mrs. Koech for the 2<sup>nd</sup> Defendant

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiffs, 1<sup>st</sup> and 3<sup>rd</sup> Defendants