



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 56 OF 2012**

**GERTRUDE N WANYONYI.....PLAINTIFF**

**VERSUS**

**MARY NEKESA NANDOKHA**

**SARAH NAJUMBIA**

**MARTHA NASIKE**

**(Suing as the Administrators on behalf of the Estate of**

**ALFRED NANDOKHA SINDANI) .....DEFENDANTS**

**JUDGMENT**

**The plaintiff's case**

1. The plaintiff originally filed a plaint dated **14/4/2012** which she later amended on **1/3/2019**. In the amended plaint she sought the following orders against the defendants:-

- (a) **A declaration that the plaintiff is lawfully entitled to six (6) acres from title number Bungoma/Tongaren/491 and the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are legal administrators do transfer the same to the plaintiff.**
- (b) **Cost.**
- (c) **Interest.**
- (d) **Any other relief/order the court may deem just in the circumstances.**

2. According to the plaint the defendants are the legal administrators of the estate of one **Alfred Nandokha**, the original defendant in this suit who passed on during its pendency, and from whom the plaintiff purchased **eight (8) acres** of land out of land parcel number **Bungoma/Tongaren/491** in **July, 2009**. According to the plaintiff, she was put into possession and she paid an aggregate of **Kshs. 1,440,000/=** to the deceased before the deceased for some unknown reason declined to receive any further payment towards the completion of the purchase price hence this suit. The plaintiff claims that the Kshs. 1,440,000/= paid so far is the equivalent of 6 acres of land and prays for an order that she is lawfully entitled to 6 acres.

**The Defendant's Defence and Counterclaim**

3. The original defendant had entered appearance and filed defence dated **7/6/2012**. According to that defence, the defendant denied the transaction alleged by the plaintiff and also denied having received any money from the plaintiff. He in the alternative pleaded that the plaintiff and one John Nyongesa Kundu approached the defendant intending to purchase only 2 acres at Kshs. 480,000/= which is the only money ever paid to the defendant, and that he is only willing to sell those 2 acres. He also denied that any money was to be paid to the defendant through the bank account of the said John Kundu and averred that the latter defrauded the plaintiff leading to the institution of criminal case **Webuye PMC Criminal Case No. 855 of 2011** in connection with the receipt thereof. He avers that the plaintiff took possession of eight acres without his consent and without making any payment to him. The defendant alleges that the plaintiff and John Nyongesa Kundu attempted to defraud him of six acres of land. He prayed that the plaintiff's claim be dismissed with costs.

**The Plaintiff's Reply to Defence**

4. In his reply to defence filed on **18/6/2012** the plaintiff joined issues with the defendant on the matters contained in the defence and reiterated the contents of the plaint. She denies any conspiracy to defraud the plaintiff, or that she took possession of six acres by force and avers that she is in occupation of the only portion granted to her by the defendant. She adds that it is the defendant who agreed to have the consideration paid through John Kundu's account and that the same was indicated in the agreement for sale.

5. The defendant also made an application for leave to issue a third party notice against John Nyongesa Kundu on **4/7/2012** on the basis that the Kshs. 1,440,000/= was deposited into his account and that the defendant never received it, and that the said John Nyongesa Kundu had been charged in **Webuye Criminal Case No. 855 of 2011** for stealing. In the affidavit in support to that application the defendant admitted that the plaintiff intended to purchase 8 acres at Kshs. 240,000/= per acre, that he received Kshs. 480,000/= only; that the plaintiff never paid the balance but made an arrangement to pay the money to John Kundu; that after investigations he confirmed that John Kundu had received the money which he never transmitted to him and the defendant reported the matter to the police and John was charged with the offence of stealing from the plaintiff. He intended to counterclaim against the intended third party for the amount paid to him.

6. This suit was at one time dismissed and an application for revival was successfully made on 9/1/2019; orders were sought in the same application for the current defendants to be enjoined as administrators of the estate of the original defendant who reportedly passed on 31/5/2013. The plaint was amended on 1/3/2019.

### **The Plaintiff's Evidence**

7. This court has only the plaintiff's evidence to consider in this case which proceeded *ex-parte* on **9/5/2019** when the plaintiff and her one witness testified.

8. The plaintiff reiterated the contents of her plaint and the reply to defence. She also adopted her written statement dated 22/3/2019 as part of her evidence-in-chief. She stated that she is 80 years old and that the defendant had sold her 8 acres; that the plaintiff and the defendant signed the agreement; that the consideration was to be paid into an account held by John Kundu in Equity Bank; that John Kundu is the deceased's brother in law; that she used to give PW2 monies which he paid into the account as consideration; that the Chief, Tongaren had attested to the agreement; that the defendant put the plaintiff into possession of 3 acres before his death; that at one point the deceased had refused to take the monies sought to be paid as consideration; that the defendants' advocates had at one time written to the plaintiff indicating that she was entitled to only two acres. However she maintained that her proper entitlement is for 6 acres.

9. **PW2 Brian White Wanyonyi** testified that the plaintiff is his grandmother; that she lives on the suit land; that the larger parcel belonging to the defendants is 26.0 ha; that he was present at the execution of the agreement and that each acre went for Kshs. 240,000/=; that he signed against his name on that document; that it was for 8 acres; that the money was to be paid into account number 03302904878 in Equity bank; that the account belonged to John Wanyonyi Kundu who was the seller's brother in law; that the plaintiff gave PW2 Kshs. 1,438,500/= which he paid into that account; that the whole amount should have been Kshs. 1,440,000/= but Kshs. 1500/= was used up in the reactivation of the account which had been dormant; that while the plaintiff was still intent on paying more money for the land the deceased refused to receive more payments; that the plaintiff had by then been put into possession of 3 acres and according to the payments made she now deserves 3 more acres.

10. With that evidence on the record the plaintiffs closed their case.

### **The Defendant's Evidence**

11. The defendants never testified in this suit though the affidavit of service filed on 23/4/2019 showed that they had been served for the hearing scheduled for 9/5/2019.

### **DETERMINATION**

#### **The issues for Determination**

(1) *How much land did the plaintiff buy from Alfred Nandokha Sindani?*

(2) *Was the plaintiff entitled under the agreement to pay the purchase price through the Bank Account of John Nyongesa Kundu?*

(3) *Is the plaintiff entitled to six acres out of the land Bungoma Tongaren 491?*

(4) *Who should pay the costs of the suit?*

(1) **How much land did the plaintiff buy from Alfred Nandokha Sindani?**

12. The plaintiff produced an agreement dated 2/7/2009 in evidence. It stipulates that the portion of land the deceased was intent on selling the plaintiff was 8.0 acres. The full purchase price was stated as Kshs. 1,920,000/=. It acknowledges that the plaintiff had paid Kshs. 480,000/=. The parties' thumbprints appear on the agreement.

13. The second page of the agreement has some handwritten details, showing that John Kundu of ID Number 7909865 had on 18/2/2010 received Kshs. 480,000/= and Kshs. 360,000/= on 13/4/2010 from PW2 in the presence of two witnesses on each occasion.

14. The letter written on the defendant's behalf by Kimaru Kiplagat & Co. Advocates (P.Exh 3) shows that the plaintiff had intended to purchase 8 acres and alleges that she had paid for only two. That letter demands that she renounce the 6 acres that she has failed to pay for.

15. There is ample evidence that the money was paid into John Kundu's account pursuant to the sale agreement which required as much.

16. John Kundu was a witness to the agreement and has already acknowledged receipt of Kshs. 480,000/= from the plaintiff at the back of the said agreement. That agreement has not been denied. The plaintiff has also demonstrated that she paid a total of Kshs. 1,440,000/= for the land. I find that though the plaintiff was intent on purchasing 8 acres she ended up purchasing only 6.

**(2) Was the plaintiff entitled under the agreement to pay the purchase price through the Bank Account of John Nyongesa Kundu?**

17. The sale agreement dated 2/7/2009 was not denied. I find that since the agreement dated 2/7/2009 stipulates that the sale monies would be paid through the account number of the said John Kundu, and no evidence was brought to dispute the contents of that agreement, it was proper for the plaintiff to remit the purchase price through that account. The plaintiff did not err in paying the money into the account.

**(3) Is the plaintiff entitled to six acres out of the land Bungoma Tongaren 491?**

18. The plaintiff paid for 6 acres as instructed in the sale agreement and took possession thereof. By the time the deceased attempted to compel the plaintiff to accept only 2 acres, she had paid a monetary equivalent of the value of 6 acres that is, going by the terms of the agreement. She should not be condemned for having complied with the agreement in paying for the land through John Kundu's bank account since she had authority to do so under the agreement. She cannot be held accountable for loss of moneys already paid to the account as consideration for the land. She must be credited with land worth the sum she had paid. She is therefore entitled to 6 acres of land out of Bungoma/Tongaren/491.

**(4) What orders should issue?**

19. Consequently I find that the plaintiff has established her claim against the defendants on a balance of probabilities and I hereby enter judgment against the defendants jointly and severally in her favour and I issue the following orders against them:

(1) **The plaintiffs' claim against the defendants succeeds.**

(2) **A declaration that the plaintiff is lawfully entitled to six (6) acres from title number Bungoma/Tongaren/491 and the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are legal administrators shall subdivide Bungoma/Tongaren/491, carve out a parcel of 6 acres to include the area currently occupied by the plaintiff, and transfer the 6 acres to the plaintiff.**

(3) **An order that the defendants shall execute all documents necessary to effect the subdivision and registration of the plaintiff as proprietor of 6 acres out of Bungoma/Tongaren/491 in default of which the Deputy Registrar of this court shall execute all such necessary documents.**

(4) **The defendants shall bear the costs this suit.**

**Dated, signed and delivered at Kitale on this 18<sup>th</sup> day of July, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**18/7/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Mufutu holding brief for Onyancha for Plaintiff

N/A for Defendants

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

