



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 1077 OF 2016 (O.S)

IN THE MATTER OF: TITLE NUMBER NAKURU/MOI NDABI/584

AND

IN THE MATTER OF: APPLICATION FOR DETERMINATION OF QUESTIONS ARISING OUT OF/OR CONNECTED TO THE SALE OF THE PROPERTY KNOWN AS TITLE NUMBER NAKURU/MOI NDABI/584 TRANSACTED AT NAIROBI ON OR ABOUT 15TH JANUARY, 2015

BETWEEN

PETER KIMANI IRUNGU.....1ST PLAINTIFF

MICHAEL KIARIE GATHUA.....2ND PLAINTIFF

AND

JUSTUS NJUGUNA WAINAINA.....DEFENDANT

JUDGEMENT

1. The Plaintiffs entered into an agreement with the Defendant for the purchase of the land known as Nakuru/Moi Ndabi/584 measuring five acres situated in Nakuru County at the consideration of Kshs. 9,600,000/= through an undated sale agreement. The Plaintiffs were to pay Kshs. 4,000,000/= to the Defendant on execution of the agreement and the balance of Kshs. 5,600,000/= would be paid through the exchange of a further title of Kajiado Kaputiei North which the Defendant was to provide.

2. In the Originating Summons dated 4/5/2016 and filed on 6/9/2016, brought under Order 37 Rules 3 and 14 of the Civil Procedure Rules, the Plaintiff sought a determination of the following questions:

i. Whether the Defendant or his advocates, Mugambi & Kariuki and Company Advocates should procure the necessary consent, pay the requisite stamp duty, rates and other outgoings and subsequently register the transfer over Nakuru/Moi Ndabi/584 in favour of the Plaintiffs;

ii. Whether the Defendant or his advocates Mugambi & Kariuki and Company Advocates should be directed to procure the necessary consents including the Land Control Board Consent, pay the requisite stamp duty, rates and all other outgoings and subsequently register in favour of the Plaintiffs the land known as Nakuru/Moi Ndabi/584 within 30 days or as the court may direct;

iii. Whether the Defendant should deliver vacant possession;

iv. Whether in the event that Mugambi & Kariuki and Company Advocates cannot procure the consents and register the transfer in respect of Nakuru/Moi Ndabi/584 in favour of the Plaintiffs, the Defendant should be directed to refund the amount he received on account and in default the Plaintiff be at liberty to execute; and

v. Whether Mugambi & Kariuki and Company Advocates should be directed to release the completion documents to the Plaintiffs or the Plaintiffs' advocate for execution by the Deputy Registrar of this court at the Defendant's costs.

3. The originating summons was supported by the 1st Plaintiff's affidavit. He deponed that the Plaintiffs paid the sum of Kshs. 9,600,000/= to the Defendant pursuant to the sale agreement entered into in 2015 in Nairobi. He averred that the Defendant was supposed to transfer the Suit Property to the Plaintiffs upon execution of the sale agreement. He stated that the Plaintiffs and the Defendant executed the transfer instrument and surrendered the completion documents including the application for Land Control Board Consent to Mugambi & Kariuki and

Company Advocates to enable them procure the necessary consents and subsequently register the transfer in favour of the Plaintiffs, which the Defendant and advocate had failed to do despite numerous demands. The Plaintiffs maintained that the Defendant's conduct smacked of impropriety, bad faith, illegality and was in breach of the sale agreement.

4. The Plaintiffs indicated on 9/5/2019 that they would proceed with the hearing of the originating summons through affidavit evidence while the Defendant's advocate sought time to respond to the Plaintiffs' claim. The court granted the Defendant leave and directed him to file his response within 14 days. This did not happen and the Plaintiffs filed submissions.

5. The Plaintiffs attached the title deed in respect of Nakuru/Moi Ndabi/584 registered in the Defendant's name, a copy of the sale agreement, a handwritten note confirming that the original title for Nakuru/Moi Ndabi/584 together with the application for consent duly signed and copies of the identity cards and PIN certificates were received on 15/1/2015 from the vendor and purchaser. He produced copies of the transfer of land duly executed with the photographs of the seller and both buyers of the land affixed to the transfer. He also produced photocopies of the identity cards and letters dated 15/4/2015 and 1/12/2015 addressed to Mugambi & Kariuki and Company Advocates.

6. The court has looked at the evidence adduced by the Plaintiffs and considered the Plaintiffs' submissions together with the authorities cited. The issue for determination is whether the court should grant the orders sought in the originating summons. The Plaintiffs contend that the parties were bound by the sale agreement which they entered into in January 2015. The Plaintiffs submitted that they paid the purchase price and the Defendant undertook to obtain the necessary consents and transfer the suit land to the Plaintiffs. They submitted that despite numerous demands the Defendant had refused to transfer the suit land to the Plaintiffs.

7. Looking at the agreement made in 2015 and which has no date or month, it seems to have been an agreement acknowledging a debt of Kshs. 9,600,000/= which the Defendant owed the Plaintiffs. The agreement states in the recital that the vendor (the Defendant in this case) had received Kshs. 9,600,000/= and in consideration of settling the amount had agreed to transfer the land known as Nakuru/Moi Ndabi/584 valued at Kshs. 4 million to the purchasers (the Plaintiffs). The Defendant was to execute a transfer in favour of the Plaintiffs which he appears to have done based on the copy of transfer produced by the Plaintiffs, which is not dated. Another plot in Kajiado Kaputiei North was to be transferred to the Plaintiffs for the balance of the debt of Kshs. 5,600,000/=. No evidence was given of whether the Defendant transferred this piece of land to the Plaintiffs.

8. Clause 6 of the agreement stipulated that the title referred to as Kajiado Kaputiei North would cover the whole amount of Kshs. 9,600,000/=. Clause 7 which is also ambiguous stated as follows: "*The purchaser undertakes to retransfer the title aforesaid to the vendor in the event the title is registered in favour of the purchasers*".

9. The Plaintiffs attached an acknowledgement on the letterhead of Mugambi & Kariuki Company Advocates handwritten by T. Murage acknowledging receipt from parties of the original title deed for Nakuru/ Moi Ndabi/584, a signed application for consent and copies of identity cards and PIN certificates. The 1st Plaintiff also attached a copy of the transfer executed by the Plaintiffs and the Defendant which was witnessed by Mugambi S. Gathungu advocate, copies of the Plaintiffs' identity cards, a copy of the 1st Plaintiff's PIN certificate and the demand letters written by the Plaintiffs' advocates to Mugambi & Kariuki & Company Advocates.

10. Looking at all the questions framed by the Plaintiffs and based on the terms of the sale agreement, there is nothing to show that the firm of Mugambi & Kariuki and Company Advocates were under any obligation to procure the consents, pay stamp duty and other outgoings or register the title over Nakuru/Moi Ndabi/584 in favour of the Plaintiffs. The agreement was between the Plaintiffs and the Defendant. In the circumstances, it is not proper for the court to direct these advocates to procure the consents necessary for the transfer and pay stamp duty as the Plaintiffs seek.

11. The court notes that the agreement was silent on who was to pay the stamp duty on the transfer of the land, which burden would then have to be borne by the purchasers. There were no details given by the Plaintiffs of how the debt in respect of which the parties entered into the sale agreement arose, yet this seems to have been the consideration for the agreement.

12. The agreement did not stipulate when possession would be given. It may well be that the Defendant already sold Nakuru/Moi Ndabi/584 to a third party. The court declines to direct the Defendant or the Deputy Registrar to execute the transfer over Nakuru/Moi Ndabi/584 to the Plaintiffs. The Plaintiffs have failed to prove their claim to the suit land and the court declines to make the determinations framed by the Plaintiffs in the originating summons dated 4/5/2016. There will be no orders as to costs.

Dated and delivered at Nairobi this 18th day of October 2019

K.BOR

JUDGE

In the presence of: -

Ms. S. Wairimu holding brief for Mr. H. Kago for the Plaintiffs

Mr. V. Owuor- Court Assistant

No appearance for the Defendant