



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO.626 OF 2009

1. MARY NJERI KIARIE

2. GITHUNGURI NJIRU FARM (1966) LTD..... PLAINTIFFS

VERSUS

TAFUTA DEVELOPMENT COMPANY LIMITED.....DEFENDANT

JUDGMENT

1. The 1st plaintiff is the widow and one of the administrators of the estate of Samuel Kiarie Kirimire, deceased (hereinafter referred to only as “the deceased”). The 2nd plaintiff is a limited liability company incorporated in Kenya. The 2nd plaintiff was incorporated with the objective of among others buying land and allocating the same to its shareholders. The deceased was at all material times a shareholder of the 2nd plaintiff. The 2nd plaintiff had allocated to the deceased as its shareholder a parcel of land known as Plot No. 225 which after survey was given L.R No. 6845/154(hereinafter referred to as “the suit property”). Upon the death of the deceased, the suit property was given to the 1st plaintiff during the distribution of the estate of the deceased to hold in trust for her children.

2. Through amended plaint dated 28th May, 2013 filed herein on 11th June, 2013, the plaintiffs sought the following reliefs against the defendant:

- a. An order for the eviction of the defendant from the suit property.
- b. A permanent injunction restraining the defendant from trespassing on, subdividing, disposing of, occupying, transacting any business in relation to and or interfering in any manner whatsoever with the suit property.
- c. Costs of the suit.

In the amended plaint, the plaintiffs averred that the suit property was still registered in the name of the 2nd plaintiff which was in the process of transferring the same to the 1st plaintiff as the beneficiary thereof. The 1st plaintiff averred that in the year 2007, she engaged a surveyor to locate and identify the suit property on the ground. The 1st plaintiff averred that when the said surveyor identified the suit property, she found that the same had been encroached by a number of people who claimed that the property had been sold to them by the defendant. The 1st plaintiff averred that following a search that she conducted on the defendant, she found that one of the directors of the defendant, George Matenjwa was her neighbor and was known to her and the deceased having been a councilor of Karuri Ward where she resides. The plaintiffs averred that the defendant had no right to sell the suit property to the third parties who had encroached thereon.

3. The defendant filed a statement of defence on 13th February, 2014 in which it denied the plaintiffs’ claim in its entirety. The defendant denied that the 1st plaintiff was a beneficiary of the suit property. The defendant contended that the suit property did not form part of the estate of the deceased. The defendant averred that the suit property was held by the 2nd plaintiff merely as a trustee thereof. The defendant averred that the plaintiffs’ contention that the suit property was held by the 2nd plaintiff for the estate of the deceased was contrary to the agreement which the deceased had entered into with the defendant’s director. The defendant averred that it acquired the suit property for valuable consideration pursuant to an agreement for sale that was entered into between the deceased and its director. The defendant contended that it had a right to deal with the suit property.

4. By way of a counter-claim, the defendant averred that one of its directors entered into an agreement for sale with the deceased in respect of the suit property and paid the full purchase price for the same. The defendant averred that it was the responsibility of the deceased to effect the transfer of the suit property to the defendant’s said director. The defendant averred that since the deceased did not transfer the suit property to its said director, the defendant was entitled to compensation or an order for specific performance against the legal representatives of the estate of the deceased. The defendant averred further that having paid the full purchase price for the suit property, it had an equitable interest over the same.

5. The defendant sought judgment against the plaintiffs by way of a counter-claim for; specific performance of the agreement entered into between the deceased and the defendant's director and in the alternative, compensation for the loss of the suit property at the prevailing market value; a permanent injunction restraining the plaintiffs from trespassing on the suit property or interfering with its title thereto, and the costs of the suit.

6. The plaintiffs filed a reply to defence and defence to counter-claim on 18th March, 2014. The 1st plaintiff averred that the agreement for sale which the defendant claimed to have been entered into between the deceased and the defendant's director was a forgery. The 1st plaintiff termed the defendant's counter-claim a sham and accused the defendant's directors of grabbing and selling the suit property to third parties.

7. At the trial, the plaintiffs called six (6) witnesses while the defendant called one (1) witness. In her evidence, the 1st plaintiff (PW1) reiterated the contents of the plaint that I have highlighted earlier in this judgment. The 1st plaintiff testified as follows. After obtaining a confirmed grant of letters of administration in respect of the estate of the deceased, she visited the office of the 2nd plaintiff and was given a letter. She thereafter proceeded to the suit property. On reaching the suit property, she found that the same had been subdivided. The occupants of the suit property told her that the same had been sold to them by the defendant. One of the directors of the defendant, George Gachau (Matenywa) was known to her having been a councilor of the area where she resides. She did not know how the defendant acquired the suit property. The suit property was not sold by the deceased to the defendant. She was informed by the 2nd plaintiff that the suit property was still in the name of the deceased in their records.

8. The next to give evidence was the 2nd plaintiff's director and chairman, Peter Kamiti Kamitha (PW2). He stated as follows in his evidence. The suit property was allocated by the 2nd plaintiff to the deceased who was a shareholder of the 2nd plaintiff. The 1st plaintiff and her son visited the office of the 2nd plaintiff and furnished the 2nd plaintiff with copies of the Grant of Letters of Administration in respect of the estate of the deceased and the certificate of confirmation of the said Grant. The said Grant of Letters of Administration mentioned the suit property as one of the assets of the deceased. The 1st plaintiff asked to be shown the location of the suit property. The 2nd plaintiff gave the 1st plaintiff the Deed Plan for the suit property and advised her to appoint a surveyor to help her identify the property. After the suit property was identified, the 1st plaintiff came back to the office of the 2nd plaintiff and reported that the suit property was occupied. The 1st plaintiff was informed that according to the records held by the 2nd plaintiff, the suit property had not changed hands from the deceased to any other person. PW2 explained to the court the procedure that was to be followed in case a shareholder wanted to sell his land. He stated that that procedure was not followed in respect of the suit property.

9. The plaintiffs' third witness was, the 1st plaintiff's son, David Nganga Kiarie (PW3). In his evidence in chief, PW3 adopted the contents of his witness statement that was filed in court on 11th June, 2013. In the statement, PW3 stated that the plaintiffs brought the present suit because the defendant was selling the suit property to third parties. PW3 stated that the defendant had claimed that it had purchased the suit property from the deceased through a written agreement for sale that was witnessed by an advocate. PW3 stated that his inquiries with the Law Society of Kenya did not find the advocate who is said to have witnessed the purported agreement for sale between the deceased and the defendant. PW3 stated that the deceased was sick for over a year before his death on 22nd August, 1993. He stated that the deceased could not have sold the suit property without informing any of his wives. PW3 stated that after the death of the deceased, it took about a week before his burial. He stated that nobody came during this period or on the day of the burial to inform the family about the alleged sale of the suit property. PW3 stated that the 2nd plaintiff was also not notified of the alleged sale of the suit property. He stated that when he visited the suit property with a surveyor, he found part of the suit property developed by strangers. He stated that he learnt that it was the defendant which subdivided the suit property and sold portions thereof to the said strangers.

10. The plaintiffs' fourth witness was Joshua Nduralhugo (PW4). PW4 told the court that he was instructed by the 1st plaintiff to investigate and find out the name of the people who were developing the suit property. He carried out investigation and prepared a report that he submitted to the 1st plaintiff. He produced the report in evidence as an exhibit. The next witness was Peter Wakohora Kanyugo (PW5). PW5 was a valuer. He told the court that he was instructed by the 1st plaintiff to value the suit property. He carried out a valuation and submitted his report dated 9th July, 2007. According to the report, the value of the suit property as at 9th July, 2007 exclusive of developments was Kshs. 7.5 million.

11. The plaintiffs' last witness was Jacob Oduor (PW6). PW6 was a forensic document examiner. He told the court that he examined known signatures of the deceased that were contained in a delivery note and an earlier agreement with the disputed signature of the deceased that was contained in the agreement for sale dated 10th September, 1992 said to have been made between the deceased and one, Stephen Mutua Mbithi and concluded that the signature in the said agreement for sale was not that of the deceased. He stated that the signature in the said agreement for sale purporting to be that of the deceased was a forgery. He produced his report in evidence as an exhibit.

12. Stephen Mutua Mbithi (DW1) gave evidence on behalf of the Defendant. He stated as follows in his evidence. He was an estate agent and one of the directors of the defendant. He purchased the suit property from the deceased on 10th September, 1992. He was introduced to the deceased by his (DW1's) father who knew the deceased. After inspecting the suit property, they agreed on the terms of sale. They later on met and went to the office of the deceased's advocate who drew a sale agreement which was executed by them. His signature was witnessed by his father, Simon Mbithi Kimeu while the deceased's signature was witnessed by a Mr. Kabucho. It was a term of the agreement for sale that he was to pay a sum of Kshs. 400,000/- to the deceased and the balance of the purchase price in the sum of Kshs. 92,000/- to the City Council of Nairobi on account of rates. He produced the agreement for sale dated 10th September, 1992 as an exhibit.

He stated that the defendant was incorporated in 1995 and as his contribution to the share capital of the defendant he transferred the suit property to the defendant. He stated that in December, 1992, he visited the office of the 2nd plaintiff with the deceased so that the deceased could transfer the suit property to him. They met a Mr. David who was the chairman of the 2nd plaintiff who told them that the 2nd plaintiff would call for a meeting of its directors to deliberate on the issue. They were told that they would be advised when the meeting would be held. After sometime, he was informed that the deceased had died. He stated that the deceased looked normal when he entered into the said agreement for sale. He stated that the defendant subdivided the suit property and sold portions thereof to third parties. The subdivision was

carried out in 1998. DW1 urged the court to dismiss the plaintiffs' claim so that the administrators of the estate of the deceased could transfer the suit property to the third parties to whom the same had been sold by the defendant. He stated that the title deed for the suit property should be processed and issued to the defendant by the 2nd plaintiff.

13. After the close of evidence, the parties made closing submissions in writing. The plaintiffs filed their submissions on 15th February, 2017 while the defendant filed its submissions on 5th July, 2017. I have considered the pleadings, the evidence tendered by the parties in support of their respective cases and the closing submissions by the parties' respective advocates. The parties did not agree on the issues for determination by the court. From the pleadings and the evidence on record, the following are the issues that arise for determination in this suit:

- I. Whether the defendant acquired the suit property lawfully?
- II. Whether the subdivision of the suit property and sale of portions thereof by the defendant to third parties were lawful?
- III. Whether the plaintiffs are entitled to the reliefs sought in the amended plaint?
- IV. Whether the deceased breached the agreement for sale dated 10th September, 1992 between him and one, Stephen Mutua Mbithi?
- V. Whether the defendant is entitled to the reliefs sought in the counter-claim?

14. The first issue:

It is not disputed that the deceased was a shareholder of the 2nd plaintiff and that the suit property was allocated to the deceased by the 2nd plaintiff by virtue of that shareholding. It is also not disputed that the deceased died in the year 1993 and that the 1st plaintiff is his widow and one of the administrators of his estate. It is also not disputed that during the distribution of the estate of the deceased, the suit property was given to the deceased to hold in trust for her children. The 1st plaintiff has contended that the defendant unlawfully entered the suit property, subdivided the same and sold portions thereof to third parties. The defendant has contended in his defence that the suit property did not form part of the estate of the deceased and as such the 1st plaintiff has no interest in the same. The defendant has contended that the suit property was sold by the deceased to one of its directors, Stephen Mutua Mbithi (DW1) on 10th September, 1992 and that the defendant's said director subsequently transferred the suit property to the defendant. The plaintiff has contended that the defendant trespassed on the suit property. The defendant has contended on the other hand that it was within its right to enter the suit property and to deal with the same in whatever manner it deemed fit.

Section 112 of the Evidence Act, Chapter 80 Laws of Kenya provides that:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

The burden of proving the existence of the agreement for sale of the suit property which the deceased is said to have entered into with Stephen Mutua Mbithi (DW1) on 10th September, 1992 and the subsequent transfer of the suit property by the said Stephen Mutua Mbithi to the defendant was upon the defendant. Stephen Mutua Mbithi (DW1) gave evidence on behalf of the defendant. He told the court that he was a director of the defendant. He told the court that he purchased the suit property from the deceased on 10th September, 1992 at a consideration of Kshs. 492,000/- of which he paid to the deceased Kshs. 400,000/- leaving a balance of Kshs. 92,000/- which he was to pay to the Nairobi City Council on account of rates. He produced as an exhibit a copy of an agreement for sale dated 10th September, 1992 between him and the deceased. DW1 told the court that after purchasing the suit property he transferred the same to the defendant as his capital contribution and that the defendant subdivided the suit property into several portions that it sold to third parties.

The agreement for sale dated 10th September, 1992 (Dexh1) that was produced in evidence by DW1 was contested by the plaintiffs. It was common ground that the suit property was at all material times registered in the name of the 2nd plaintiff. The 2nd plaintiff was yet to transfer the suit property to the deceased as at the time this suit was filed. In the circumstances, the deceased held only a beneficial interest in the suit property. The person who could convey legal interest in the suit property to the defendant was the 2nd plaintiff. A part from the allegation by DW1 that he visited the office of the 2nd plaintiff with the deceased for the purposes of having the suit property transferred to his name and were told to come later when a meeting of the directors of the 2nd plaintiff was convened to consider the request, no evidence was placed before the court showing that the 2nd plaintiff was involved in the sale of the suit property by the deceased to the said Stephen Mutua Mbithi (DW1).

PW2 told the court that there was an elaborate procedure that had to be followed by its shareholders who wished to sell their parcels of land. It was not contested that the said procedure was not followed in relation to the transaction between the deceased and DW1. Although DW1 contended that the agreement for sale in contention was drawn by an advocate and witnessed by among others, his father and the said advocate, none of the witnesses to the said agreement was called to give evidence concerning the execution thereof.

In cross-examination, DW1 told the court that he did not know the name of the advocate who drew the agreement. DW1 who claimed to have paid Kshs.400,000/- to the deceased for the suit property did not place any evidence before the court showing how he made the said payment apart from the statement in the contested agreement for sale to the effect that the said amount was paid in cash. PW6, a forensic document examiner testified that the signature of the deceased in the said agreement for sale was forged. PW6 produced a report (Pexh7) on his examination of the deceased's alleged signature in the said agreement for sale and the deceased's known signatures. PW6 concluded in

his report that the signature of the deceased in the agreement for sale in contention was a forgery.

The defendant contested this report arguing that there was no evidence that the deceased's alleged "known signatures" that formed the basis of PW6's conclusions in the said report were indeed the signatures of the deceased. In PW6's report (Pexh7), there is a detailed explanation on how the exhibits that were the subject of examination by PW6 were transmitted to him. According to the report, the same were submitted to PW6 by one, CPL. Sylvester Mango who was investigating a complaint that the 1st plaintiff had lodged against Stephen Mutua Mbithi (DW1). Since CPL. Sylvester Mango was not called to give evidence on how he obtained the exhibits that were submitted to PW6 for examination, I will put little weight on the evidence of PW6. Considering the evidence on record in totality, I am not satisfied that the deceased entered into the agreement for sale dated 10th September, 1992 with DW1.

Apart from proving that the deceased sold the suit property to DW1, the defendant had to prove also that the suit property was sold or transferred to it by DW1. No evidence was placed before the court to show how the suit property that had no title changed hands from DW1 to the defendant. DW1 who claimed to have transferred the suit property to the defendant as his contribution towards the share capital of the defendant placed no evidence before the court in proof of that transaction. DW1 did not place evidence before the court showing the issued share capital of the defendant and the number of shares DW1 held in the defendant. There was also no evidence as to the price at which the suit property was transferred to the defendant. From the evidence before the court, I am not satisfied that Stephen Mutua Mbithi (DW1) and the defendant acquired the suit property lawfully from the deceased.

15. The second issue:

I have already held that the defendant did not acquire the suit property lawfully from the deceased. It follows therefore that the defendant did not have a valid title over the suit property which could entitle the defendant to subdivide and sell portions of the suit property to third parties.

16. The third issue:

The 1st plaintiff's claim against the defendant is based on trespass. Trespass is any intrusion by a person on the land in the possession of another without any justifiable cause. The 1st plaintiff has demonstrated that she is the beneficial owner of the suit property the same having been allocated to her during the distribution of the estate of the deceased. I have held above that the defendant has no proprietary interest in the suit property. The defendant had no right in the circumstances to enter the suit property. The defendant's entry on the suit property amounted to trespass. The 1st plaintiff as the beneficial owner of the suit property is entitled to an order for possession against the defendant and a permanent injunction to restrain the defendant from committing further acts of trespass.

The defendant led evidence that it had sold the suit property to third parties some of whom had taken possession and developed their respective portions of the property. The defendant did not furnish the court with the particulars of the third parties to whom it sold the suit property. According to the investigation report dated 11th June, 2011 that was produced in evidence as Pexh5, 45% of the suit property was vacant as at the date of that report. This means that only 55% of the property was occupied. The said report was prepared after the court had already issued an order of injunction restraining the defendant from any further disposal of the suit property pending the hearing of the suit. PW4 who prepared the report dated 11th June, 2011 (Pexh5) testified that when he was compiling the report, there were still some plots available for sale within the suit property.

The extent to which the suit property had been sold to third parties by the defendant and the portion thereof that remained as at the time this suit was filed and an order of injunction issued is not very clear from the evidence on record. I am in agreement with the defendant that this court cannot make an eviction order against third parties who are not before it. It is not clear to the court why the 1st plaintiff did not find it necessary to join the third parties who are said to be occupying the suit property to this suit even after PW4 mentioned the names of some of them in his report. The eviction order can only be directed against the defendant in respect of any portion of the suit property in its occupation. The same would apply to the orders of injunction sought by the plaintiffs. The orders shall not extend to the third parties.

17. The fourth and fifth issues:

I have held herein above that there was no valid agreement for sale of the suit property between the deceased and Stephen Mutua Mbithi (DW1). The deceased did not also enter into any agreement with the defendant. In the circumstances, there was no agreement that the deceased could have breached so as to attract an order for specific performance sought by the defendant. In any event, this court would not have granted an order for specific performance against the plaintiffs even if the agreement dated 10th September, 1992 was valid and enforceable. It is not in dispute that the suit property is not registered in the name of the deceased. For that reason, the 1st plaintiff who is the administrator of the estate of the deceased is not in a position to transfer the suit property to the defendant. For the 2nd plaintiff, I have already observed above that it was not a party to the said agreement for sale. The 2nd plaintiff cannot therefore be ordered to perform the said contract in respect of which it is a stranger.

As an alternative to specific performance, the defendant has sought compensation based on the market value of the suit property. I find no basis for this claim. The court has already made a finding that the suit property was not sold by the deceased to the defendant. There is therefore no basis for the compensation sought. In any event, the defendant did not place any evidence before the court on the basis of which the court could have assessed the current market value of the suit property.

The defendant has also sought an order of injunction restraining the plaintiffs from interfering with the suit property. This relief also has no merit. The court has made a finding that the defendant has no proprietary interest in the suit property. The injunction sought has no basis in the circumstances.

18. Conclusion:

In conclusion, it is my finding that the plaintiffs have proved their claim against the defendant on a balance of probabilities while the defendant's counter-claim is not proved. I therefore dismiss the defendant's counter-claim and enter judgment for the plaintiffs against the defendant as follows:

1. The defendant, its agents, servants or employees shall vacate and handover to the 1st plaintiff the portion/s of all that parcel of land known as L.R No. 6845/154 in its possession within sixty(60) days from the date hereof.
2. A permanent injunction is issued restraining the defendant by itself and through its agents, servants or employees from trespassing on, subdividing, disposing of, occupying, transacting any business in relation to and/ or interfering in any manner whatsoever with L.R No. 6845/154.
3. The plaintiff shall have the costs of the suit and the counter-claim.

Delivered and Dated at Nairobi this 9th day of February 2018.

S.OKONG'O

JUDGE

Judgment delivered in open court in the presence of:

Mr. Ouma h/b for Mrs. Kerio for the Plaintiffs

Mr. Rotich h/b for Ms. Mutuku for the Defendant

Catherine Court Assistant