



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**E.L.C NO.334 OF 2017**

**ALEX KAMAU MAITERI.....PLAINTIFF**

**VERSUS**

**BERNARD WANJAU GICHINA.....1<sup>ST</sup> DEFENDANT**

**JOSEPH MWANGI GICHINA.....2<sup>ND</sup> DEFENDANT**

**ROSEMARY WANJIRA GICHINA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. This suit was filed on 6/4/17 by the Plaintiff against the Defendants for the orders as follows;-
  - a) A declaration that the Plaintiff is entitled to ownership and exclusive use of all that property known as Loc.16/Kiarutara/38.
  - b) IN THE ALTERNATIVE to prayer (a) above, the sum of Kenya Shillings Five Hundred Thousand (Kshs.500, 000/=being the deposit on the purchase price of the suit property together with interest therein.
  - c) Damages for breach of contract and exemplary damages.
  - d) Costs of the suit.
2. The suit has been defended by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who filled their defenses on 22/11/17 and 23/8/17 respectively.
3. The 1<sup>st</sup> Defendant was duly served on 2/5/17 but despite service with the summons to enter appearance as well as various notices did not enter appearance nor file a Defence. The case therefore proceeded undefended against the 1<sup>st</sup> Defendant.
4. In opposing the Plaintiffs claim the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants admitted the Plaintiff's claim but denied receipt of the deposit of Kshs. 500,000/-.

**The case for the Plaintiff.**

5. The Plaintiff led evidence that on or about April 2017 the Defendants represented to him that they had a beneficial interest in all that property known as Loc. Loc.16/Kiarutara/38 which property was registered in the name of Elizabeth Wanjugu Gichina to hold in trust for her children and which property was alleged to form part of her estate. In his written statement dated the 6.4.2016, the Plaintiff averred as follows;

“In or about April 2017 the Defendants represented to me that they had a beneficial interest in all that property known as Loc.16/Kiarutara/38 (hereinafter “the suit property”) which property was at the time registered in the name of ELIZABETH WANJUGU GICHINA (deceased) to hold in trust for her children and which property formed part of the estate of JAMES GICHINA WANJAU (deceased).

The Defendants further represented to me that upon consultation with the rest of the beneficiaries of the said estate, they (the Defendants) had been authorized to dispose the suit property to in order to acquire the funds necessary to pursue and/or conclude succession proceedings in respect of the said estate.

On or about 21<sup>st</sup> April 2011, while genuinely acting on the said representations, I entered into Agreement for sale (hereinafter 'the Agreement') with the Defendants whose effect was to purchase the Defendants beneficial interest in the suit property.

It was expressly agreed between the Defendants and I that the purchase price for the beneficial interest in the suit property would be Kenya Shillings One Million Two Hundred and Sixty Thousand (Kshs. 1,260,000/=) payable as follows;

- i. Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) on or before the execution of the Agreement receipt whereof is acknowledged in the Agreement.
  - ii. Kenya Shillings Seven Hundred and Sixty Thousand (Kshs. 760,000/=) upon transfer and successful registration of the property in the name of the Plaintiff.
- a) The Defendants covenanted to petition for grant of letters of administration to enable them to eventually transfer the suit property to me.
- b) Upon execution of the Agreement, I took vacant possession of the suit property and I have been carrying out agricultural activities thereon to date.
- c) Eventually, on or about 16<sup>th</sup> September 2016, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were granted letters of administration in respect of the estate of JAMES GICHINA WANJAU (deceased) whereafter they proceeded to allocate the suit property to other beneficiaries in total disregard of the Sale Agreement between them and me.
- d) I consider the Defendants actions in willfully and/or deliberately failing to honour the Agreement, while in fact there were signatories thereto, are fraudulent for;
- i. They willfully and intentionally failed to allocate themselves the suit property in order to defeat the Agreement.
  - ii. They willfully and intentionally failed to transfer the suit property to me.
  - iii. They failed to disclose to the Succession Court that they had sold the suit property to me (a third party) thus occasioning an injustice to me and/or other beneficiaries.
  - iv. They have refused and/or failed to refund me Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) which I paid as deposit together with interest thereon despite numerous requests."

6. At the trial the Plaintiff confirmed that the agreement was signed by all the 3 Defendants. That he issued a cheque for Kshs. 500,000/- to the 1<sup>st</sup> Defendant for the benefit of all the Defendants. Indeed, it is alleged that it was paid in the presence of the 2<sup>nd</sup> Defendant.

7. The Plaintiff confirmed that no letters of administration i.e. document No. 5 on the plaintiff list of documents was presented in court.

#### **The case for the 2<sup>nd</sup> Defendant**

8. The 2<sup>nd</sup> Defendant admitted that he and the 1<sup>st</sup> & 3<sup>rd</sup> Defendants are siblings being the children of the late James Gichina Wanjau & Elizabeth Wanjugu Gichina. He admitted entering into the agreement of sale dated 21/4/11 in respect to the suit property which was registered in the name of his mother. The purpose of the sale of the land was to fund the petitioning of letters of administration and subsequent confirmation of the grant. He admits that the Plaintiff paid Kshs. 500,000/- but hastily states that the same was paid to the 1<sup>st</sup> Defendant who allegedly withheld the amount from him and the 3<sup>rd</sup> Defendant.

9. He averred that he has acted in good faith and had no fraudulent intentions in transacting the sale of the land. He supports the claim of the Plaintiff and avers that he has been willing to complete the contract so that the Plaintiff can enjoy the fruit of the acquired property.

#### **The case for the 3<sup>rd</sup> Defendant.**

10. The 3<sup>rd</sup> Defendant too admits signing the agreement of sale in respect to the suit land. He confirms that the deposit of Kshs. 500,000/- was paid to the 1<sup>st</sup> Defendant and never got a single cent. She blames the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who were the administrators of the estate in not allocating the property to the Plaintiff during the confirmation of the grant in respect to the estate of their Mother.

11. She denied any fraud and sought to exonerate herself on the grounds inter alia that she was not an administrator of the estate; she received no monies; that she has filed a suit seeking to revoke the grant dated 20/9/16 in Succession Cause No 2641 of 1995 wherein she has disclosed that the property was sold to the Plaintiff.

12. Parties elected to file written submission which I have considered.

13. I have considered the pleadings and evidence on record, the rival submissions and the issues for determination are:

- a) Whether the Defendants could sell land in the estate of Elizabeth Wanjugu Gichina?

b) Whether Defendants received Kshs 500,000/- from the Plaintiff as purchase price?

c) Whether the Plaintiff is entitled to land or, refund of the money.

d) Who pays the costs of the suit?

14. It is on record that the suit land is registered in the name of Elizabeth Wanjugu Gichina as evidenced by the certificate of search dated the 29.2.16. The case proceeded in the name of James Gichina Wanjugu who was never registered as the owner. Elizabeth Wanjugu Gichina died. The Plaintiffs claim is that the land belongs to James Gichina Wanjau.

15. There is no evidence that the estate of Elizabeth Wanjugu Gichina has been administered. The land sold to the Plaintiff belonged to the Elizabeth Wanjugu Gichina whose grant at the time they entered into agreement had not been obtained. The action of the Defendants therefore was contrary to Section 45 of the Law of Succession Act. The Defendants purported to sell the asset without any locus in law. Their actions therefore cannot bind the estate of Elizabeth Wanjugu Gichina. The estate asset was sold without a grant. The sale having been commenced by receipt of payment was a clear breach of Section 70 of the Law of Succession Act which prohibit the transfer of land before seeking a grant of administration.

16. I have perused the record and the grant that was issued was in the estate of James Gichina Wanjau on 23.1.1996. It is subject to challenge in Court by the 3<sup>rd</sup> Defendant. There is no evidence on record to show that a grant in the estate of Elizabeth Wanjugu Gichina was ever issued. A review of the Plaintiff's list of documents shows that the Plaintiff did not annex document No. 5 which is listed as copy of grant issued on 16.9.2016. It has not been disclosed why it was not annexed and whose grant it was. The suit land was part of the estate of Elizabeth Wanjugu Gichina which remains unadministered on record. The Agreement is therefore null and void. Even if the land formed part of the estate of James Gichina, it cannot be a valid claim on the Defendants unless they have a grant of representation in the estate of Elizabeth Gichina who is stated to have held the land to their credit.

17. The case of the Plaintiff in so far as the agreement is concerned is not tenable. The actions of the parties do not bind the estate of Elizabeth Wanjugu Gichina who was the registered owner of the land. The claim of the Plaintiff to transfer land to him cannot succeed.

18. As to whether the Defendants received Kshs 500,000/- from the Plaintiff as purchase price, on the date they entered agreement, the 3 Defendants acknowledged receipt of Kshs 500,000/- pursuant to para 3 of the agreement of sale that stated;

“The purchase price is Kshs 1,260,00/- payable as follows;

a). Kshs 500,000/- only on signing of this agreement (receipt of which is hereby acknowledged)”.

19. . The evidence on record is that Kshs 500,000/- was presented by a cheque drawn and payable to the 1<sup>st</sup> Defendant. The 3 Defendants acknowledged receipt of the money in the signed agreement of sale dated the 21.4.2011. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant in their defence and evidence denied receiving the money on account that it was paid to the 1<sup>st</sup> Defendant. They are estopped from denying the receipt of the cash in view of the express provision of acknowledgement of receipt of the monies in the agreement of sale aforesaid. The Plaintiff was not in charge of how the sale proceeds were to be shared amongst the Defendants who were also the vendors. If they are mistrusting themselves, they cannot state that they have not received the deposit. The Plaintiff is entitled to a refund of Kshs 500,000/- jointly and severally from all the Defendants.

20. The Plaintiff pleaded a claim for damages for breach of contract which he withdrew at the submissions stage and at the trial did not lead evidence on the part of the claim. The totality of the Plaintiff's claim remained as the alternative claim of a refund of Kshs 500,000/- from the Defendants. His claim for land failed on account of an invalid agreement, but his alternative claim of Kshs 500,000/- has succeeded by reason of acknowledgement of payment of deposit in the agreement by the Defendants.

21. In the upshot I make the following orders:-

(a) The Plaintiff's claim for a declaration that he is the owner of Loc.16/Kiarutara/38 be and is hereby dismissed.

(b) The Defendants jointly and severally do pay to the Plaintiff the sum of Kenya Shillings Five Hundred Thousand only (Kshs.500,000/=being the deposit on the purchase price of the suit property paid by the Plaintiff to the Defendants together with interest thereon at court rates from 21<sup>st</sup> April 2011 until payment in full.

(c) The Defendants to pay the plaintiff 2/3 of the cost of the suit.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 29<sup>TH</sup> DAY OF MAY, 2018**

**J.G. KEMEI**

**JUDGE**