



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 78 OF 2014**

**REGINA WANGUI GATIMU.....PLAINTIFF**

**-VERSUS-**

**JAMES MUKABURU KANYI.....1<sup>ST</sup> DEFENDANT**

**PETER MAHUGU WAIRERA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein, Regina Wangui Gatitu, who is the administratrix of the estate of Simon Gatimu Ndebu (deceased), brought the suit herein seeking judgment against the defendants for: -

**(a) An order directing the defendants to surrender to her the title to land parcel number Euwaso Nyiro/Ipejeta/Block 1/1160 free from any claim and encumbrance forthwith;**

**(b) An order directing the excision and transfer to the plaintiff of a portion of land measuring 6.55 ha out L.R No. Euwaso Nyiro/Suguroi/Block V/220 registered in the name of the 2<sup>nd</sup> defendant.**

**(c) Costs of the suit and interest.**

2. The plaintiff's claim is premised on the ground that the deceased person herein who was her husband, had entered into an agreement with the defendants pursuant to which the deceased offered their land to wit **EuwasoNyiro Olpejeta/ Block1/1160** (hereinafter referred to as the suit property) to the 1<sup>st</sup> defendant to secure a loan he (the 1<sup>st</sup> defendant) obtained from Kenya Commercial Bank (herein after referred to as the bank).

3. Explaining that under the agreement executed between her deceased husband and the defendants herein the 1<sup>st</sup> defendant was obligated to discharge the charge in respect of the suit property within 6 months from the date of execution of the agreement, failing which the 2<sup>nd</sup> defendant would compensate her husband with a portion of land measuring 6.55 ha excised out of the 2<sup>nd</sup> defendant's parcel of land known as **Euwaso Nyiro/Suguroi/Block V/220** measuring about 15 hectares, the plaintiff laments that the defendants failed to meet their respective obligations under the aforementioned agreement causing her a lot of loss and prejudice (the suit property remains encumbered). According to the plaintiff, that has been the case despite the defendants having on several occasions committed themselves to honouring their obligations under the agreement.

4. Through their statement of defence dated **4<sup>th</sup> July 2014**, the defendants acknowledge having entered into the agreement referred to herein above with the plaintiff's husband but contend that the 1<sup>st</sup> defendant met his obligation to the bank and blames the bank for having failed to discharge the charge in respect of the suit property to enable the 1<sup>st</sup> defendant return the title to the suit property to the plaintiff. The defendants deny having refused and or ignored to return the title in respect of the suit property to the plaintiff and explain that their efforts to return the title have been frustrated by the bank. The defendant prays for more time to pursue the title from the bank.

5. Concerning the plaintiff's plea for transfer of a portion of Euaso Nyiro/Il pejeta/Block V/220, the defendants have averred that in the event that the court is inclined to allow that prayer, then the 2<sup>nd</sup> defendant should be allowed to take the title to the suit property after the same is discharged by the bank.

**EVIDENCE**

**The plaintiff's case**

6. When the matter came up for hearing, the plaintiff reiterated the averments contained in her plaint and produced the following documents in support thereof:

- (i) Certificate of death in respect of her husband, **Pexbt 1**;
- (ii) Limited grant of letters of administration ad litem in respect of her husband's estate, **Pexbt 2**;
- (iii) Agreement of guarantee executed between the defendants and her husband, dated 20<sup>th</sup> June, 1990, **Pexbt 3**;
- (iv) Certificate of official search in respect of the suit property Eawaso Nyiro/Suguroi Block v/220 dated 7<sup>th</sup> October, 2013 showing that the suit property is charged in favour of the bank, **Pexbt 4**.
- (v) Agreement executed between the defendants and herself through which the defendants requested for 3 months to avail the title to the suit property dated 23<sup>rd</sup> October 2013 and the translation in respect thereof, **Pexbt 5(a) and (b)**.
- (vi) Search in respect of Eawaso Nyiro/Suguroi Block v/220 showing that it is still registered in the name of the 2<sup>nd</sup> defendant, **Pexbt 6**.
- (vii) Demand letter which her advocate wrote to the defendants after they failed to honour their promise to avail the title to the suit property to her dated 28<sup>th</sup> January 2014, **Pexbt 7**.

7. Terming the allegation by the defendants that the 1<sup>st</sup> defendant has fulfilled his obligation to the bank untrue, the plaintiff urged the court to order the 2<sup>nd</sup> defendant to transfer a portion of his land, Eawaso Nyiro/Suguroi Block V/220, as per the agreement executed between the defendants and her deceased husband.

8. Upon being cross examined by the 2<sup>nd</sup> defendant, the plaintiff admitted that it is the 1<sup>st</sup> defendant who borrowed the money and explained that she sued the 2<sup>nd</sup> defendant because in the agreement executed between the defendants and her husband, the 2<sup>nd</sup> defendant acted as a guarantor and had committed himself to give her husband land equivalent to the land contained in the suit property, 6.55 hectares (16 acres) in case the 1<sup>st</sup> defendant defaulted in his obligation under the agreement.

#### **The defence case**

9. The 2<sup>nd</sup> defendant who testified as D.W.1 urged the court to consider his witness statement alongside his statement of defence.

10. Explaining that he was merely a guarantor in the agreement executed between them and the plaintiff's husband, he contended that it was the 1<sup>st</sup> defendant to be pursued because he is still alive.

11. In cross examination, he acknowledged having visited the office of Nyawira Gitonga Advocate on 20<sup>th</sup> June, 1990 for execution of the contract of guarantee though he could not confirm whether the contract shown to him by the plaintiff's advocate was the one he executed. He also stated that he could not remember whether he agreed to give a portion of his land (6.5 hectares) to the plaintiff's husband if the 1<sup>st</sup> defendant defaulted in his contractual obligations to the plaintiff's husband. He acknowledged that after the plaintiff's husband passed on, they entered into an agreement with the plaintiff through which the 1<sup>st</sup> defendant was supposed to expedite surrender of the title deed to the plaintiff.

12. He admitted that he has not given the plaintiff any portion of land from his property, (1160) but maintained that the 1<sup>st</sup> defendant as the beneficiary of the suit property is the one who should give the plaintiff land.

13. D.W.2, James Mukaburu Kanyi, acknowledged having received the title to the suit property from the plaintiff's husband to secure a loan he had obtained from the bank. He informed the court that despite having faithfully paid the loan, in 2014 the bank informed him that he owed it 1, 400,000/=. He made appeals to the bank to release the plaintiff's title in place of his own title in vain.

14. He urged the court to find a way to have the bank take his title in place of that of the plaintiff's husband.

15. In cross examination, he admitted that he did not honour the agreement executed between himself and the plaintiff's husband which required him to repay the loan within six months and acknowledged that before the plaintiff's husband died, he kept asking him to repay the money and give back his title.

16. He also acknowledged that after the plaintiff's husband passed on, he has held several meeting with the plaintiff's family over the issue. He also acknowledged having asked for three months to sort the issue through the agreement produced by the plaintiff as Pexbt 5(a).

17. Explaining that he has not sorted the issue, he informed the court that under their 1990 agreement, the 2<sup>nd</sup> defendant would excise a portion of his land and give it to the plaintiff's husband.

18. As to why he had not enjoined the bank to the suit despite having intimated a desire to do so in his statement of defence, he explained that he did not sue the bank because it reduced the loan from Kshs. 3, 500,000/= to 1,400,000/=

19. At close of hearing, parties filed submissions which I have read and considered.

### **Plaintiff's submissions**

20. On behalf of the plaintiff, an overview of the cases urged by the parties to this suit is given and submitted that there is no dispute that parties entered into the agreements on which the plaintiff's claim is premised. Arguing that the parties are bound by the terms of the agreements they entered into and have a duty to fulfill their obligations under the agreements, the plaintiff submits that it is in the interest of justice that both the 1<sup>st</sup> and 2<sup>nd</sup> defendants be made to fulfill their obligations under the agreement they executed with her husband.

21. According to the plaintiff, the 2<sup>nd</sup> defendant should be made to fulfill his obligations under the contract executed between him and her husband by excising and transferring a portion of his land to her as provided in the agreement.

Based on the case of **Nakana Trading Company Ltd V. Coffee Marketing Board (1990-1994) EA 448** where it was stated: -

**“In contract, a breach occurs when one or both parties fail to fulfill the obligations imposed by the terms since the contract between the parties was reduced into writing, the duty of the court is to look at the document and determine whether it applies to existing facts;”**, it is submitted that the defendants are bound by the agreement of 20<sup>th</sup> June, 1990.

22. Concerning the 2<sup>nd</sup> defendant's bid to wrestle himself out of the agreement, it is submitted that the 2<sup>nd</sup> defendant cannot excuse himself from the agreement because it is not palatable to him.

### **2<sup>nd</sup> Defendant's submissions**

23. In his submissions, the 2<sup>nd</sup> defendant argues that he was not party to the agreement executed between the bank, the 1<sup>st</sup> defendant and the plaintiff's husband. He wonders how the orders sought against the bank can issue yet the bank was not made a party to the suit. For those reasons, he urges the court to exonerate him from blame.

24. From the pleadings and the submissions filed in this matter, the sole issue for determination is found to be whether the plaintiff has made up a case for being granted the orders sought or any of them.

25. With regard to this issue, it is common ground that the plaintiff's husband and the defendants entered into an agreement through which the plaintiff's husband gave title in respect of the suit property to the 1<sup>st</sup> defendant to guarantee his loan obligation to the bank. Through that agreement, which was produced by the plaintiff as Pexbt 3, the 1<sup>st</sup> defendant bound himself to repay the loan in six 6 months' time and return the title to the lender, (plaintiff's husband), after expiration of the said period (clause 1 of the agreement).

26. Under clause 2 of the agreement, the 2<sup>nd</sup> defendant undertook to excise for the lender (plaintiff's husband), an equal portion to the portion the plaintiff's husband had offered as security to the bank from his parcel of land No. Euwaso Nyiro/Suguroi Block V/220.

27. The evidence adduced in this suit shows that the 1<sup>st</sup> defendant defaulted in his obligation to the bank and that despite having been indulged by the plaintiff's husband and family by extending the time within which he ought to have surrendered the title to the suit property to the plaintiff, he has to date not fulfilled his obligations both to the bank and the plaintiff.

28. The 2<sup>nd</sup> defendant who had undertaken to make good any loss occasioned by the 1<sup>st</sup> defendant's breach of the agreement herein also failed to fulfill his obligation to the plaintiff under the agreement rendering this suit necessary.

29. It is noteworthy that apart from claiming that he should not be made to honour his contractual obligation to the plaintiff because the 1<sup>st</sup> defendant is still alive and that he was not the beneficiary of the agreement, the 2<sup>nd</sup> defendant does not deny having entered into the agreement.

30. Having freely entered into the agreement which the plaintiff now seeks to enforce, I agree with the plaintiff's counsel that the 2<sup>nd</sup> defendant cannot pull out of the agreement merely because its terms are unpalatable to him or on the ground that the 1<sup>st</sup> defendant is still alive.

31. Since no orders affecting the rights of the bank can issue against the bank because it was not made a party to the suit, the only order that commends itself in the circumstances of this suit and which I hereby make in favour of the plaintiff, is an order compelling the 2<sup>nd</sup> defendant to excise a portion of his land measuring 6.55 hectares out of his parcel of land to wit Euwaso Nyiro/Suguroi Block V/220 and transfer it to the plaintiff in accordance with clause 2 of the agreement executed between the defendants and the plaintiff's husband's on 20<sup>th</sup> June, 1990.

32. Upon excision and transfer of the portion contemplated in paragraph 31 above, all the rights in the suit property shall stand vested in the 2<sup>nd</sup> defendant who shall have the right to have the same transferred to him after it is discharged by the bank.

33. As the plaintiff has succeeded in her case against the defendants, I award her costs of this suit.

Orders accordingly.

**Dated, Signed and Delivered in open court at Nyeri this 2nd day of August, 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

Mr. Kimunya for the plaintiff

Plaintiff present in person

N/A for the defendants

Court assistant - Esther