



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 459 OF 2010

JAMES GITINGU WAMAGATA.....1ST PLAINTIFF

JOSPHAT MAINA MACHARIA.....2ND PLAINTIFF

VERSUS

DAVID MIGICHI KAGENI.....DEFENDANT

JUDGEMENT

1. The 1st Plaintiff was the lawful owner of Dagoretti/Kinoo/4176 which measured 0.15 ha. He entered into an agreement with the Defendant on 26/9/2008 for the sale of a portion of this land measuring 0.1 ha. The remainder measuring 0.05 ha was to revert to the 1st Plaintiff upon subdivision and completion of the sale. The 1st Plaintiff entered into another agreement with the 2nd Plaintiff for the sale of 0.05 ha of the remainder which was to be transferred to the 2nd Plaintiff upon subdivision.

2. The 1st Plaintiff contends that the Defendant fraudulently and without his consent transferred the entire parcel of land measuring 0.15 ha to himself contrary to the agreement and refused to surrender the remainder of 0.05 ha to the 1st Plaintiff to his loss and prejudice. The 1st Plaintiff claims that the Defendant evicted him and failed to pay for the cost of improvements or developments he had made on the suit land. The 1st Plaintiff also claim that the Defendant failed to pay the balance of Kshs. 1,400,000.00 of the agreed purchase price.

3. The Plaintiffs seek an order of injunction to restrain the Defendant from constructing, selling, transferring, alienating, leasing or in any way dealing with the land known as Dagoretti/Kinoo/4176. They also seek a declaration that the transfer of this land to Defendant's name was unlawful. The 1st Plaintiff seeks an order for the Defendant to pay the outstanding purchase price of Kshs. 1,400,000.00 together with compensation for the cost of improvements which were on the suit premises prior to the sale, whose value is to be determined by a qualified valuer. He also seeks an order for the subdivision of the land into three portions measuring 0.1 ha, 0.025 ha and 0.025 ha to be transferred to the Defendant, the 1st and 2nd Plaintiffs respectively.

4. The Defendant denied the Plaintiffs' claim in his defence and maintained that he was buying the suit plot with all the improvements on it and that clause 2 of the agreement provided that the price was inclusive of all the improvements on the Suit Property. He claimed that the agreement the 1st Plaintiff was relying on was forged and had other provisions inserted into it. He claimed that the 1st Plaintiff approached him and offered to sell the remainder of the parcel measuring 0.05 ha at Kshs. 200,000/= which he claims to have paid through two instalments.

5. The Defendant averred that previously he had entered into a sale agreement with the 1st Plaintiff over Dagoretti/Kinoo/T366 pursuant to which the Defendant paid the 1st Plaintiff Kshs. 400,000/= but that the 1st Plaintiff fraudulently sold the same plot to a different person.

6. The 1st Plaintiff gave evidence in the matter. He entered into an agreement with the 2nd Plaintiff for the sale of a portion of his land known as Dagoretti/Kinoo/4176 measuring 0.075 ha at the agreed consideration of 650,000/= out of which 400,000/= was to be paid upon execution of the agreement and the balance would be paid 90 days from the date of the agreement. That agreement was executed pending subdivision of the land.

7. In September, 2008, the 1st Plaintiff entered into a second agreement with the Defendant for the sale of 0.1 ha out of Dagoretti/Kinoo/4176. He claimed that the Defendant only paid 400,000/= at the execution of the agreement and the balance was to be paid upon the transfer of 0.1 ha to the Defendant's name. It was agreed that the Plaintiff would transfer Dagoretti/Kinoo/4176 to the Defendant who was to retransfer the remainder portion measuring 0.05 ha to the 1st Plaintiff. He claimed that the Defendant transferred the whole

portion to himself and evicted the 1st Plaintiff's family from the plot. He denied receiving payments of Kshs. 200,000/= and Kshs. 1,500,000.00 from the Defendant. He contended that he only sold the land to the Defendant without the improvements and developments on the land. He confirmed that he gave the Defendant the completion documents. He argued that he had developed his land and was staying on it and that the developments were on the part measuring 0.05 ha which the Defendant was to retransfer to him.

8. The 2nd Plaintiff gave evidence. The 1st Plaintiff offered him part of his land measuring 0.075 ha to purchase for Kshs. 600,000/= out of which he paid a deposit of Kshs. 400,000/= and was to pay the balance when the transfer documents were ready. He learnt that the Defendant had transferred the whole parcel to himself and lodged a complaint with the police. He stated the agreement he entered into with the 1st Plaintiff indicated that he was buying 0.05 ha from the 1st Plaintiff.

9. The Plaintiffs also called the property consultant who drew the sale agreement to give evidence. Meshack Kibunja disowned the sale agreement relied on by the Defendant stating that it did not have the witness clause and that the fonts were different. He confirmed that he had prepared the sale agreement between the 1st Plaintiff and the Defendant. He denied adding the clause in the agreement stating that the sale of land included the improvements on it.

10. The Defendant gave evidence. He stated that in April 2005 the 1st Plaintiff offered to sell to him ½ of the land known as Dagoretti/Kinoo/T366 for Kshs. 600,000/= He paid for the land and they signed the agreement on 12/4/2005. The title was still registered under the 1st Plaintiff's father's name. He claimed that he made a down payment of Kshs. 100,000/= and gave the 1st Plaintiff's wife Kshs. 25,000/= on 7/6/2005.

11. He relied on the clause in the sale agreement which imposed a fine of 200,000/= on a defaulting party. Later, he realised that the 1st Plaintiff had sold Dagoretti/Kinoo/T366 to somebody else and sued him in **Milimani CMCCC No. 3968 of 2006**. He obtained the decree and was awarded the costs of the suit. When he failed to get the land he had purchased, he placed a caution on the 1st Plaintiff's other parcel of land known as Dagoretti/Kinoo/4176 on 27/3/2007.

12. The 1st Plaintiff engaged him and requested him to remove the caution and offered to sell the land to him. He maintained that one of the conditions of the second sale was that the money he had paid earlier for the purchase of Dagoretti/Kinoo/T366 was to be applied towards the second transaction and the 1st Plaintiff's family had to consent to the transaction. He maintained that he paid the purchase price for Dagoretti/Kinoo/4176 in full. This included the sum of Kshs. 400,000/= he paid earlier to the 1st Plaintiff in the transaction relating to Dagoretti/Kinoo/T366. He claimed he paid the 1st Plaintiff Kshs. 400,000/= on 26/9/2008 when they executed the sale agreement. He also stated that he paid the 1st Plaintiff Kshs. 595,000/= which included the sum Kshs. 505,000/= that he had withdrawn from Equity Bank.

13. He argued that for the 1st Plaintiff to have transferred the land to his name, it was an acknowledgement by the Plaintiff that he had paid the full purchase price. The agreement stated that the whole parcel of land known as Dagoretti/Kinoo/4176 measuring 0.15 ha was to be transferred to him and upon subdivision he was to retransfer the remainder of 0.05 ha to the 1st Plaintiff.

14. He claimed that the 1st Plaintiff asked him to buy the remaining portion and that they jointly took measurements of that remaining portion. They agreed that the price for the remaining portion would be Kshs. 200,000/= which he claims he paid in two instalments of Kshs. 100,000.00 each on 24/10/2008 and 31/10/2008. In total he claimed he paid Kshs. 2.1 million to the 1st Plaintiff.

15. The issues for determination are:

- a) Did the 1st Plaintiff sell the remainder part of the land measuring 0.05 ha to the Defendant?
- b) Did the Defendant pay the full purchase price for Dagoretti/Kinoo/4176 to the 1st Plaintiff?
- c) Did the 1st Plaintiff sell the land measuring 0.1 ha to the Defendant together with the improvements on it?
- d) Are the Plaintiffs entitled to the prayers they seek in the plaint?

16. The Defendant produced a copy of the title deed issued to him on 6/10/2008 which shows that he is registered as the absolute proprietor of Dagoretti/ Kinoo/4176 measuring 0.15 ha.

17. The sale agreement dated 26/9/2008 indicated that the Defendant was buying 0.1 ha of Dagoretti/ Kinoo/4176 from the 1st Plaintiff. The sum of Kshs. 400,000/= was to be paid on signing of the agreement while the balance would be paid upon transfer. The whole piece of land was to be transferred to the Defendant who in turn was to retransfer 0.05 ha to Plaintiff. Page 2 of that agreement was executed by the 1st Plaintiff and the Defendant as well as some witnesses. The Defendant produced acknowledgements dated 24/10/2008 and 31/10/2008 showing the 1st Plaintiff received Kshs. 100,000/= from the Defendant on both dates which adds up to Kshs. 200,000.00. The Plaintiff denied receiving these payments. Paragraph 2 of the Defendant's agreement stated that the price was inclusive of the improvements contained in the property.

18. A copy of the abstract of title shows that the Defendant had previously placed a caution against Dagoretti/ Kinoo/4176 claiming interest as a purchaser. A copy of the Defendant's bank statement for October 2008 shows that he transferred Kshs. 500,000.00 to Wamagata and Peter Waweru who he claimed were the 1st Plaintiff's sons whom he had authorised to receive payment on his behalf. The statement shows that he withdrew Kshs. 405,000.00 in October 2008 which he claims was part of the sum of Kshs. 595,000.00 which he paid to 1st Plaintiff on 4/10/2008.

19. He also relied on the handwritten letter to the Kiambu Land Control Board by the 1st Plaintiff's family members dated 29/9/2008 stating they had no objection to consent being given for the transfer of Dagoretti/ Kinoo/4176.

20. The Plaintiff produced a copy of the decree issued in Nairobi CMCCC No. 3968 of 2006 through which the court ordered that Dagoretti/ Kinoo/T366 was to be transferred to him. He did not attach a copy of the plaint or any other pleadings filed in that suit.

21. He also produced a copy of the sale agreement dated 12/4/2005 between him and the 1st Plaintiff for the sale of Dagoretti/ Kinoo/T366 for Kshs. 600,000. The agreement imposed a fine of Kshs. 200,000.00 on a party who defaulted in completing the sale. The 1st Plaintiff signed this agreement. Another sale agreement further to that of 12/4/2005 was signed and shows that a further payment of Kshs. 25,000.00 was made to the 1st Plaintiff.

22. The Defendant claimed that he later agreed with the 1st Plaintiff to purchase from him the portion measuring 0.05 ha that he was to retransfer to the 1st Plaintiff. He relied on the fact that the 1st Plaintiff's family had already moved out of this land. By that time Dagoretti/ Kinoo/4176 measuring 0.15 ha had already been transferred to the Defendant. The Defendant neither produced any evidence to prove the existence of the agreement for the sale of the remainder portion measuring 0.05 ha from the 1st Plaintiff, nor did he adduce evidence to confirm that he had paid Kshs. 200,000.00 to the 1st Plaintiff as consideration for the portion measuring 0.05 ha. The court is not persuaded that the 1st Plaintiff sold the remainder part measuring 0.05 ha to the Defendant.

23. It is not clear what sums the Defendant paid to the 1st Plaintiff towards the purchase of Dagoretti/ Kinoo/4176. The Defendant mixed up the payments he made for plot numbers T366 and 4176. Paragraph 16 of his Defence mentioned that he had paid Kshs. 400,000.00 to the 1st Plaintiff for plot no. T366. Paragraph 23 of the defence mentions the decree in CMCCC No. 3968 of 2006 being for Kshs. 600,000.00 which he claims he deducted from the purchase price for 4176 when the 1st Plaintiff fraudulently sold that plot to a third party. It is not clear why the Defendant did not execute that decree against the 1st Plaintiff or why this decree was not mentioned in the sale agreement.

24. The bank statement the Defendant relied on shows that he transferred the sum of Kshs. 500,000.00 to Wamagata and Peter Waweru on 9/10/2008. That was three days after the title deed over Dagoretti/ Kinoo/4176 had been registered in the Defendant's name. There is no evidence that the sum of Kshs. 405,000.00 which the Defendant withdrew from Equity Bank, Kawangware branch was paid to the 1st Plaintiff. In addition, there was no evidence to support the Defendant's contention at paragraphs 8 and 16 of the defence on the payments he made to the 1st Plaintiff for Dagoretti/ Kinoo/4176.

25. There are two versions of the sale agreement dated 26/9/2008. The agreement presented by the Defendant contained a clause that the purchase price included the improvements on the land while the agreement produced by the 1st Plaintiff does not contain a similar clause. It is not clear why the Defendant did not deem it necessary to have the payments he claimed he had made on account of the sale of Dagoretti/ Kinoo/T366 expressly included in the sale agreement for Dagoretti/ Kinoo/4176. The sale agreement should have expressly provided that the payments made earlier the penalty of Kshs. 200,000.00 for the 1st Plaintiff's failure to complete that transaction would be credited towards the purchase price for Dagoretti/ Kinoo/4176.

26. The property consultant, Meshack Kibunja who drew the sale agreement dated 26/9/2008 between the 1st Plaintiff and the Defendant testified that he prepared the agreement relied on by the 1st Plaintiff and not the one produced by the Defendant. The Defendant did not dispute the fact that the sale agreement for plot number 4176 was drawn by Mr. Kibunja who maintained that he personally typed the sale agreement. Mr. Kibunja claimed that after the agreement had been signed, the Defendant later went to his office and asked him to insert a clause in the sale agreement that the improvements were included in the purchase price but he declined to do that.

27. The court prefers the evidence of Meshack Kibunja over that of the Defendant that the sale price agreed between the 1st Plaintiff and the Defendant did not include the improvements on the plot. Parties agreed that the portion measuring 0.05 was to be transferred back to the 1st Plaintiff. This was the portion with the improvements. The court is persuaded on a balance of probabilities that the sale agreement presented by the 1st Plaintiff was the genuine one.

28. The Defendant's handwritten letter addressed to the Kikuyu Land Control Board dated 29/9/2008 stated that he had paid a down payment of Kshs. 400,000.00 to James Gitingu Wamagata, the 1st Plaintiff. The consent of the land control board was given on 2/10/2008.

29. Having looked at and analysed the evidence adduced in court, the court is persuaded that the Defendant did not pay the full purchase price for Dagoretti/ Kinoo/4176 to the 1st Plaintiff as he claims. Besides the sum of Kshs. 400,000.00 which the 1st Plaintiff admitted, the court finds that the Defendant paid a further sum of Kshs. 500,000.00 to Wamagata and Peter Waweru through a bank transfer on 9/10/2008. He did not pay the balance of the purchase price amounting to Kshs. 1,000,000.00 to the 1st Plaintiff.

30. The 2nd Plaintiff did not prove his claim against the Defendant.

31. The court directs the Defendant to undertake a subdivision of Dagoretti/ Kinoo/4176 into two portions measuring 0.1ha and 0.05 ha within 60 days of the date of this judgement. The portion measuring 0.05 will be transferred to the 1st Plaintiff while the Defendant will retain the portion measuring 0.1 ha. In subdividing Dagoretti/Kinoo/4176, the portion to be transferred to the 1st Plaintiff is the one with the improvements on it. Parties will share the cost of the subdivision. The Defendant will pay the 1st Plaintiff the costs of the suit.

Dated and delivered at Nairobi this 15th day of October 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Nduati for the Plaintiffs

Mr. Majau holding brief for Mr. Muyala for the Defendant

Mr. J. Okumu- Court Assistant