



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 976 OF 2015

(FORMERLY CIVIL SUIT NUMBER 2182 OF 1995)

EDITH MATIBA (Suing as legal representative to the

Estate of Wamere Hellen Mwangi Dadet).....PLAINTIFF

VERSUS

DAVID NJOGU GACHANJA.....DEFENDANT

JUDGEMENT

1. The dispute relates to four parcels of land known as Ruiru/Ruiru East Block 7/3, Ruiru/Ruiru East Block 7/81, Ruiru/Ruiru East Block 7/82 and Ruiru/Ruiru East Block 7/154 (“the Suit Properties”). The late Wamere Hellen Mwangi Dadet was a director and coordinator of Varsityville Limited, which purchased a large parcel of land and caused it to be subdivided into plots that were then sold to individual purchasers, some of whom were employees of Kenyatta University. The Defendant through his firm D. Njogu & Company Advocates, was retained by Varsityville Limited to carry out the conveyancing transactions in the sale of the plots.

2. The Plaintiff was substituted in the suit by the administrator of her estate upon her demise. Her claim was that the Defendant paid for two plots after the subdivision but could not be traced for purposes of the transfer as a result of which the contract between the Defendant and Varsityville Limited became null and void under the Land Control Act. The Plaintiff claimed that she learnt in January 1995 from the District Land Registrar at Kiambu that the Defendant had fraudulently and illegally transferred the Suit Properties to his name. The transfer was effected pursuant to a court order issued in **RMCC No. 760 of 1994 – David Njogu Gachanja v. Wambui Njenga** and another filed at Sheria House Nairobi.

3. In the Amended Plaintiff dated 31/5/2013, the Plaintiff sought several orders against the Defendant. In his statement of defence filed in court on 15/9/2008, the Defendant denied the Plaintiff’s claim and averred that he purchased two plots from Varsityville Limited but that the Plaintiff secretly and fraudulently caused the Suit Properties to be transferred to her own name without his knowledge or that of her co-directors and also without any consideration. He maintained that the Suit Properties were transferred to him by a court of competent jurisdiction in Nairobi **RMCC No. 760 of 1994**, which decree has never been set aside, reviewed or in any other way vacated.

4. Parties recorded a consent to the effect that the issue of RMCC No. 760 of 1994 would be abandoned and the case would start afresh and be determined on the basis of the issue framed as follows:

“Whether the Defendant purchased plot numbers Ruiru/Ruiru East Block 7/3, 7/81, 7/82 and 7/154 from Varsityville Limited.”

5. The Plaintiff gave evidence and produced the grant of letters of administration. Eugenie Muthoni Dadet, the daughter of the late Wamere Hellen Mwangi Dadet gave evidence. She produced the documents her late mother held over the land transaction. She maintained that there was no evidence that the Defendant bought the Suit Properties from her late mother’s company. She relied on her mother’s replying affidavit in which she had deposed that the Plaintiff had been allocated two plots which were different from the 4 plots he is now claiming. She relied on the information her mother gave that the Defendant did not go to complete the transactions to effect a transfer. She stated that there was no evidence that the Defendant bought two extra plots from Varsityville Limited.

6. She disowned the handwritten note dated 3/2/1987 by Wambui Njenga as director of Varsityville Limited addressed to the Defendant which stated that she had received Kshs. 40,000/= being payment for two additional one acre plots at Varsityville Limited. The letter stated that a formal receipt would follow. Her contention was that her own mother did not sign the handwritten acknowledgement. She also disputed a copy of the receipt dated 2/1/1987 issued to the Defendant on payment of the sum of Kshs. 40,000/= in respect of the first two plots.

7. She conceded that she did not have any other receipts issued by Varsityville Limited to compare the receipt with. She also conceded that her mother admitted that the Defendant paid Kshs. 40,000/=. She relied on the document entitled “Order of Payments” which had an entry

under Ref. 14/V/88 dated 21/10/1988 which gives the Defendant's names against which two plot numbers being 18(B2) and 174(E) are noted against his name. The documents on the order of payments has three pages with the last page having some entries made by hand.

8. The Defendant gave evidence. He is an advocate of the High Court of Kenya. He relied on the receipt issued by Varsityville Limited on 2/1/1987 in support of his contention that he paid for the plots. The receipt was for Kshs. 40,000/=. He also relied on the handwritten note dated 3/2/1987 which he stated was handwritten by a director of Varsityville Limited while at Barclays Bank of Kenya when he had gone to introduce the directors of Varsityville Limited to the Bank officials to facilitate the opening of a bank account in the company's name. He did not have his bank statements to confirm that he had withdrawn the sum of Kshs. 40,000/= and given it to the directors of Varsityville Limited as the minimum sum for the account to be opened in the company's name since this was almost 30 years after the transaction.

9. He conceded that the plot numbers indicated against his name in the document known as the Order of payments prepared by Varsityville Limited were not the parcel numbers for the Suit Properties. He explained that when he bought the plots from Varsityville Limited, the survey work had not started. He maintained that the list produced by the Plaintiff giving the names of those who purchased plots from Varsityville Limited was not the final list. He stated that at the time he made payment, the plots had not been given numbers. He confirmed that there were approximately 182 plots created when the land was subdivided. Apart from those reserved for the school, church and shopping centre, the other plots sold measured an acre each.

10. The issue the court has to determine is whether the Defendant paid for the four plots as he claims. The Defendant is an advocate who was involved in the purchase of the piece of land by Varsityville Limited that was later subdivided to create plots which were sold to members of the public. One would have expected the Defendant to have kept proper records and documents regarding the transactions. The Defendant was a cousin to M/s Wambui Njenga who was a director in Varsityville Limited. It is clear from the late Plaintiff's affidavit and the Defendant's witness statement that a dispute arose among the directors of Varsityville Limited and that Wambui Njenga was ultimately removed from being a director of Varsityville Limited. Other directors were appointed.

11. The court has looked at the documents and notes that the late Wamere Hellen Dadet stated in her Reply to Replying Affidavit of David Njogu Gachanja & Wambui Njenga sworn on 17/10/1995 at paragraph 16 that before Njogu (the Defendant) vanished and closed down his offices, he had bought two plots from the company. She went further to state that that was prior to the balloting but that Njogu did not pick the plots after balloting.

12. The late Wamere Hellen Dadet stated in the same affidavit at paragraph 11 that Mr. Njogu charged each plot purchaser Kshs. 4980/- to cover stamp duty, legal fees and other expenses and that he was paid Kshs. 400,000/= in total. She referred to an attached list of the purchasers. The list seems to be the one that appears at page 117 of the bundle of documents and which was referred to extensively during the hearing. The list is entitled "Varsityville Limited, Order of Payments". The amount paid is recorded against each purchaser's name and the plot numbers. The payments reflected range from 2000 to 35,000. The sum 4980 appears severally on the list against only one parcel of land.

13. The Defendant's name is on this list but no amount is reflected against his name under the column for payment. Two plot numbers are indicated against his name. If indeed the Defendant prepared this list, then he would not have been expected to indicate that he had paid the legal fees to himself as the other purchasers did.

14. Based on the affidavit of the late Wamere Hellen Dadet and the document titled "Order of Payments", the court is persuaded on a balance of probabilities that the Defendant paid for two plots from Varsityville Limited.

15. The parties had framed this issue for determination by the court. The court finds that the Plaintiff is entitled to two plots while the Defendant is entitled to retain two plots. Each party will bear its own costs, the Plaintiff having succeeded partially in her claim.

Dated and delivered at Nairobi this 11th day of October 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Kitololo for the Plaintiff

Ms. Lianza holding brief for Mr. Njogu, the Defendant

Mr. V. Owuor- Court Assistant