



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

E.L.C. NO. 253 OF 2010

CHARLES K. MURUTHI.....PLAINTIFF

VERSUS

KAMITI FARMERS COMPANY LIMITED.....1ST DEFENDANT

REGINA NYAKIO KARAU.....2ND DEFENDANT

ABRAHAM GITAU NDUNGU.....3RD DEFENDANT

NAOMI WANYI GITAU.....4TH DEFENDANT

HON ATTORNEY GENERAL.....5TH DEFENDANT

JUDGEMENT

1. The 1st Defendant sold L.R. No. 8570/196 located at Kahawa, Nairobi to the 2nd Defendant on 29/1/1987. The 2nd Defendant sold a portion of that plot which was subsequently given L.R. No. Nairobi/Block 117/412 to the Plaintiff at the agreed consideration of Kshs. 200,000/= in 2004. The Plaintiff claims that he took possession of the plot upon purchasing it and was given the documents by the 2nd Defendant. He pleads that the 2nd Defendant, in breach of the sale agreement, refused to complete the sale transaction and transfer the portion of the property to him. The Plaintiff claims that the 2nd Defendant colluded with the 1st Defendant and caused the suit land to be transferred to the 3rd and 4th Defendants in a fraudulent manner.

2. Prior to filing this suit, the Plaintiff filed **ELC No. 405 of 2009** against the 3rd Defendant which he indicated that he intended to withdraw. The Plaintiff seeks an injunction to restrain the 3rd and 4th Defendants or their agents from evicting him or interfering with his occupation of the suit property; a declaration that he is the owner and entitled to a portion of Nairobi/Block 117/412; an order directing the 5th Defendant to rectify the register by deleting the names of the 3rd and 4th Defendants and reflecting the Plaintiff as the correct registered proprietor of a portion of Nairobi/Block 117/412. In the alternative the Plaintiff seeks a refund of the sum of Kshs. 200,000/= he paid as the purchase price with interest thereon at bank rates from 2004 until the suit is determined together with the current value of the developments he has carried out on the land.

3. The 2nd Defendant admits that the 1st Defendant inadvertently sold L.R. No. Nairobi/Block 117/412 to the 3rd and 4th Defendants without knowing that the plot had already been allotted to the 2nd Defendant. The plot was transferred to the 3rd and 4th Defendants who were registered as proprietors on 9/7/2001. The 2nd Defendant admits entering into an oral agreement with the Plaintiff in 2004 for the sale of a portion of the suit land at Kshs. 200,000/= out of which she was paid Kshs. 160,000/=. She avers that she was under the mistaken belief that she was the owner of the suit property. She later learnt that the plot had been sold to the 3rd and 4th Defendants who were already registered as the owners. She disclosed this fact to the Plaintiff and offered to refund the purchase price to the Plaintiff but the Plaintiff declined the offer.

4. The Defendants maintained that the Plaintiff was not in possession of the Suit property until January 2010 when he forcefully entered the suit premises in disregard of the court order issued in **HCCC No. 405 of 2009** which he filed against the 3rd Defendant claiming that the 3rd Defendant was trespassing on the suit premises. The 3rd and 4th Defendants denied any collusion or fraud with the 2nd Defendant urging that their title was issued in 2001 before the Plaintiff purchased a portion of the same land in 2004.

5. The Defendants denied that the Plaintiff had suffered any loss or damage by the confusion or mistake by the double sale of the suit plot to the 2nd Defendant on one hand, and the 3rd and 4th Defendants on the other hand since this was disclosed to the Plaintiff in time and an offer

was made to refund what the Plaintiff had paid to the 2nd Defendant which he adamantly refused. The Defendants maintain that the Plaintiff cannot claim to be paid the value of developments which he has put on the suit premises since he erected the structures after the court had restrained him from dealing with the suit property.

6. The 3rd and 4th Defendants in their counterclaim seek an order for demolition of any structures erected on the suit property by the Plaintiff and eviction of the Plaintiff from the suit land since they are the lawful owners of the suit property.

7. All the parties except the 1st Defendant called evidence. The Plaintiff testified and produced copies of the 1st Defendant's letter dated 29/1/1987 confirming the sale of plot number 8570/196 to the 1st Defendant, a copy of the subdivision scheme approval dated 10/9/1999, a copy of the 1st Defendant's letter of 20/2/2003 addressed to the Commissioner of Lands requesting that a lease be issued to the 1st Defendant after payment of legal fees and other charges. He also produced a copy of the receipt for payment of Kshs. 6,500/= on 19/3/2007 which was a fee for issuance of a letter of allotment. The letter dated 20/3/2007 from the 2nd Defendant sought a letter of allotment in favour of the 2nd Defendant. The Plaintiff also produced copies of a handwritten sale agreement dated 21/8/2007 that he claims he entered into with the 2nd Defendant and another one dated 23/8/2007 which the court notes was not executed by the 2nd Defendant. He also produced photographs showing the development he carried out on the Suit property.

8. The 3rd Defendant gave evidence on his behalf and on behalf of 4th Defendant, who is his wife. He produced a copy of the certificate of lease issued on 9/7/2001 over the suit land. He stated that they bought Nairobi/Block 117/412 from the 1st Defendant through a sale agreement dated 7/1/1997. He claimed that they took possession and enjoyed exclusive possession from 1997 until September 2008 when they noticed that some unknown person had subdivided the plot into two portions and was dumping building materials on the plot. The 3rd Defendant reported the matter to Kasarani Police station. Investigations established that the 2nd Defendant had subdivided the land and sold one portion to the Plaintiff. The Parties were advised to go and resolve the dispute with the 1st Defendant.

9. The 2nd and 3rd Defendants went to the offices of the 1st Defendant who verified the documents they both held and established that both the 2nd and 3rd Defendants were bona fide purchasers and had been inadvertently sold the same plot. Since the 3rd Defendant had completed the acquisition process and had already been issued with a title deed over the plot, the 1st Defendant decided that the 3rd Defendant should retain the plot while 2nd Defendant would be allocated a different plot by the 1st Defendant. He stated that the 2nd Defendant communicated this decision to the Plaintiff and offered to refund the purchase price which the Plaintiff had paid to the 2nd Defendant.

10. In September 2009 the 3rd Defendant noticed some people were digging a pit latrine on his plot. When he confronted them they told him they had been engaged by the Plaintiff to dig the pit latrine. The Plaintiff served him with the suit papers in **HCCC No. 405 of 2009**. He filed his response to the Plaintiff's application for injunction. The court dismissed the application for injunction and issued an order restraining the Plaintiff from dealing with the suit property. He averred that the Plaintiff forcefully moved into the suit premises and erected a temporary house in total contravention of the court order. He confirmed that apart from the Plaintiff, he did not know if there were other people living on the plot. He claimed that when he bought the plot he erected a fence but the barbed wire used to fence was stolen and he had to wait until the neighbours moved in and started constructing.

11. The 2nd Defendant gave evidence. She confirmed that she entered into an agreement with the Plaintiff in 2007 to buy half of her plot at the agreed price of Kshs. 200,000. The Plaintiff made a down payment of 160,000/= and was to pay the balance upon transfer of half of the plot to him. She denied that there was no sale agreement to that effect. While following the process of issuance of title they discovered with the Plaintiff that the plot had been sold to another person. She was summoned to Kasarani Police Station with the 3rd Defendant and they were asked to produce documents showing ownership of the plot.

12. It emerged that the suit plot had been sold to her by previous committee officials of the 1st Defendant while the 3rd Defendant bought the same plot from the new committee members who succeeded the ones who sold her the plot in office. It was resolved that the 3rd Defendant would retain the suit plot since he was already registered as the owner and the 1st Defendant was to allocate the 2nd Defendant an alternative plot. She appraised the Plaintiff of this position and told him to wait until she was allocated the alternative plot by the 1st Defendant so that she could give the Plaintiff half of the plot or in the alternative she would refund the down payment of Kshs. 160,000/= which the Plaintiff had paid. The Plaintiff was not happy and stated that he would not take any other plot and that he did not want a refund of the money he had paid. The Plaintiff insisted on occupying the suit property and sued the Defendant in 2009. She stated that she had no interest to sell in the suit land which was already registered in the names of the 3rd and 4th Defendants.

13. Parties filed submissions. The issue for determination is who between the Plaintiff and the 3rd and 4th Defendants has a better title to the Suit property? It is not in dispute that the 2nd Defendant purchased the suit property from the 1st Defendant before the 3rd and 4th Defendants purchased the same plot 10 years later. The 3rd and 4th Defendants purchased the plot on 7/1/1997. The 1st Defendant wrote to the Commissioner of Lands on 23/2/1999 and requested the Commissioner of Lands to issue a lease to the 3rd and 4th Defendants. A subdivision scheme approval was issued to the 3rd and 4th Defendants on 10/9/1999. A lease was prepared and registered in favour of the 3rd and 4th Defendants in July 2001 and a certificate of lease issued on 9/7/2001. That was prior to the 1st Defendant's request to the Commissioner of Lands to issue a lease to the 2nd Defendant which it made through the letter of 20/2/2003. From the Plaintiff's documents, the Plaintiff cleared payments to the 1st Defendant in March, 2007. The 2nd Defendant wrote to the 1st Defendant seeking to be issued with a lease on 20/3/2007.

14. The issue of double allocation was brought to the attention of the Plaintiff at the meeting held to resolve the dispute with the 1st Defendant's officials. It is clear from the evidence that the Plaintiff proceeded to construct on the suit property after he had learnt that there was a dispute over relating to the double allocation of the same plot. It was improper for the Plaintiff to proceed and erect a structure on the suit land after the court had restrained dealings in the suit land.

15. The court has considered the submissions of parties. Section 26 of the Land Registrations Act enjoins the court to take as *prima facie* evidence a certificate of title issued to the person named as proprietor of the land as being the absolute and indefeasible owner, subject to the encumbrances and conditions endorsed on the certificate of title. Such title can be challenged on the grounds of fraud or misrepresentation where the person is proved to be a party. Such title can also be challenged where it has been acquired illegally, unprocedurally or through a corrupt scheme.

16. The Plaintiff does not hold any title over the suit land. He claims a portion of the plot owned by the 3rd and 4th Defendants. The 3rd and 4th Defendants were registered as proprietors of the land the Plaintiff claims before the Plaintiff purchased the plot from the 2nd Defendant. He did not prove that the 3rd and 4th Defendants were party to any fraud or misrepresentation in their acquisition of the suit land.

17. The Plaintiff has failed to prove his case on a balance of probabilities. The court directs the 2nd Defendant to refund the purchase price paid by the Plaintiff together with interest at court rates. The court declines to grant interest at commercial rates since an offer to refund the purchase price was made to the Plaintiff before he commenced construction on the Suit property.

18. The court finds that the 3rd and 4th Defendants have proved the counterclaim on a balance of probabilities and allows the counterclaim. The Plaintiff is directed to demolish the structures he erected on the suit property and vacate the suit land within 90 days of the date of this judgement. If the Plaintiff fails to comply with this order, then the Officer in Charge of Kasarani Police Station is to supervise the demolition of the structures erected by the Plaintiff on the suit plot. Each party will bear its own costs.

Dated and delivered at Nairobi this 13th day of November 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Nzuva for the Plaintiff

Mr. G. Kimani holding brief for Mr. Gichachi for the Defendants

Mr. V. Owuor- Court Assistant