



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 121 OF 2017

JAMES NJUGUNA KIMANI PLAINTIFF

VERSUS

BEATRICE WANDIA KARIUKI1ST DEFENDANT

JOSEPHINE NJERI NJOROGE2ND DEFENDANT

JUDGMENT

1. By plaint dated 20th March 2017 and filed in court on the same date, the plaintiff sought judgment against the defendants jointly and severally for:

- a. A declaration that the plaintiff is the lawful owner of land parcels No. Kabazi/Munanda Block 2/894 (Maombi ona), Kabazi/Munanda Block 2/895 (Maombi Ona) and Kabazi/Munanda Block 2/896 (Maombi Ona).
- b. An order for the defendant in their capacity as administrators of the estate of Laurent Muitiriri Njoroge to execute all documents necessary to effect transfer of land parcels No. Kabazi/Munanda Block 2/894 (Maombi ona), Kabazi/Munanda Block 2/895 (Maombi Ona) and Kabazi/Munanda Block 2/896 (Maombi Ona) into the name of the plaintiff.
- c. Alternatively a declaration that the defendants hold land parcels No. Kabazi/Munanda Block 2/894 (Maombi ona), Kabazi/Munanda Block 2/895 (Maombi Ona) and Kabazi/Munanda Block 2/896 (Maombi Ona) in trust for the plaintiff.
- d. Costs of the suit.
- e. Any other or further relief that this honourable court may deem fit and just to grant.

2. The defendants responded to the suit by filing a defence and counterclaim in which they sought dismissal of the plaintiffs' claim and judgment for:

- a. Mesne profits from 1st March 2001 till payment in full of the sum found to be due.
- b. Interest on mesne profits.
- c. Vacant possession.
- d. Loss and damages.
- e. Interest.
- f. Costs.

3. The aforesaid defence was signed by the 1st defendant who also attended court at the hearing. She told the court that she had authority from the 2nd defendant who is her daughter, to represent her in court. There was however no written authority filed. Nevertheless, the 2nd defendant was served with notice of hearings.

4. At the hearing, the plaintiff testifies as PW1 and told the court the husband of the 1st defendant was one Laurent Njoroge. PW1 stated that he is married to Laurent Njoroge's sister. Laurent Njoroge was therefore PW1's brother in law. Laurent Njoroge (deceased) passed away on

7th October 2003. He added that he started renting plots number Kabazi/Munanda Block 2/894 (Maombi Ona), Block 2/895 and Block 2/896 in 1996 from the deceased together with the 1st defendant. The plots are next to each other and measure 3.5 acres in total. The deceased owned the plots. PW1 rented them until the year 2000 when the deceased asked him if he wished to buy them. PW1 accepted and they agreed on a price of KShs 200,000/= per acre. Ultimately, they agreed on a round figure of KShs 600,000/=. At that time, PW1 was working at Agrochemical at Muhoroni. He transferred KShs 100,000/= from National Bank Muhoroni to the deceased's account at Tom Mboya in the year 2000. He however lost the bank slip for the transaction. He later paid KShs 320,000/= by cheque which was issued on his behalf by his uncle the late David Mwaura Waiguri. This was because his uncle owed him money from another transaction. He produced a copy of payment advice dated 28th February 2001 from Kenya Commercial Bank (P.Exb1). He later made another payment of KShs 120,000/= on 18th March 2001 through Standard Chartered Bank. He produced the bank slip (P.Exb2). The KShs 120,000/= was acknowledged by the deceased through a note dated 20th March 2001. There was another acknowledgement dated 1st March 2001 in respect of a banker's cheque for KShs 320,000. Yet again, there was another acknowledgement of KShs 20,000/= dated 1st April 2003. On 19th May 2003, there was another acknowledgement of KShs 30,000/=. He produced the acknowledgements as exhibits (P.Exb.3 (a) to 3 (d)). On 25th March 2001 PW1's uncle David Mwaura wrote a letter to him updating him on payments the uncle had made on PW1's behalf to the deceased. His uncle also swore an affidavit on 24th September 2014 in which he confirmed that he had made full payment to the deceased on PW1's behalf.

5. PW1 further stated that when payment for the purchase of the land started, he stopped paying rent. He added that he was in occupation of the land as at the date of his testimony and had even constructed a house on it with the deceased's consent. The deceased passed away two and a half months after PW1 had cleared the payments. At the time of the deceased's death, PW1 and his wife who was the deceased's sister were residing at Muhoroni. The 1st defendant did not inform PW1 and his wife that the deceased had passed away. When PW1 raised the issue of the sale of the land by the deceased to him after the burial, a meeting was held. The deceased's three brothers including Joseph Mithanga Muitiriri (PW2) attended. It was agreed that the 1st defendant would look for the documents of title. She said that she was not aware of where the documents were. Being a relative, PW1 did not insist on having the documents but waited for almost two years before reporting the matter to the chief at Kabazi. The chief wrote a letter dated 4th May 2005 to the 1st defendant asking her to attend and bring the titles. She did not attend the chief. The chief then referred the matter to the District Officer Bahati who in turn referred it to the Land Disputes Tribunal through letter dated 26th May 2005. The tribunal summoned the 1st defendant through summons dated 6th June 2006 but she did not attend. PW1 later discovered that she had obtained grant in Nairobi High Court Succession Cause No. 3316 of 2003 and that the grant had been confirmed. The three parcels of land were distributed to the 1st and 2nd defendants who were also the administrators of the deceased's estate. Since PW1 was not mentioned as a beneficiary, he filed an application seeking to be enjoined in the succession cause. In a judgment dated 20th January 2017 the certificate of confirmation of grant was amended so as to delete the three plots from the distribution schedule. PW1 was granted 366 days to obtain relevant orders from this court.

6. The defendants opted not to cross examine PW1.

7. The plaintiff next called Joseph Mithanga Muitiriri who testified as PW2. He told the court that the 1st defendant is the widow of his younger brother Laurent Njoroge Muitiriri (deceased) and that Laurent passed away around late 2002. He added that the plaintiff herein is married to his younger sister Njoki. He further testified that the deceased sold to the plaintiff land in Maombi Farm in Bahati and that there was a meeting at home in Turi early in the year 2002 at which the deceased told him that he sold the land to the plaintiff. PW2 added that he wrote a letter dated 8th March 2007 addressed to the Chairman, Land Board, Bahati Division over the matter. He produced a copy (P.Exb.11). He added that he would not like to see friction between the 1st defendant who is his sister in-law and the plaintiff who is his brother in-law.

8. Once again, the defendants opted not to cross examine PW2. The plaintiff's case was thereby closed.

9. For the defence, the 1st defendant testified as DW1 and stated that Lawrence Njoroge (Deceased) was her husband. They have two daughters: Josephine (the 2nd defendant) and Nanette. Her husband died on 7th October 2003 and since then she has not had a peaceful day. She has been battled by neighbours and relatives as they scramble for her husband's assets. Two weeks after burying her husband, she started seeing government agents including the local chief, at her gate. The chief was sent by the plaintiff and he wanted title deed for the suit properties. She asked them to give her time to recover from the shock of her husband's sudden death but they would hear none of it. Instead, the plaintiff filed this case.

10. She added that the transaction the plaintiff is claiming is an imaginary one and that there was no such transaction between the plaintiff and her husband. Since the plaintiff's wife is DW1's husband's sister, the plaintiff and his wife had just been given the plot to cultivate. The plaintiff had entered into a lease agreement with her husband. As soon as her husband died the plaintiff rushed into the land and built a house for his mother on it without DW1's permission. Later the mother died and the plaintiff wanted to bury her on that piece of land. He stopped when he learnt that DW1 was in the process of getting an injunction to stop him. He buried her on his own plot which is nearby. She added that according to Kikuyu custom, it is a taboo to buy land from your in-laws and that her and the entire family had no knowledge of any sale of land the plaintiff.

11. DW1 further testified that she together with 2nd defendant petitioned for letters of administration in respect of her husband's estate in Nairobi succession cause No. 3316 of 2003 and were issued with letters of Administration on 15th March 2004. They then transferred the plots known as Kabazi/Munanda Block 2/894 (Maombi Ona), Kabazi/Munanda Block 2/895 (Maombi Ona) and Kabazi/Munanda Block 2/896 (Maombi Ona) to their joint our names on 25th June 2014. She added that they hold them in trust for Nanette. She urged the court to order the plaintiff to vacate the land, pay for losses, damages and costs of this case.

12. Under cross-examination, DW1 stated that she saw a document (PExb 1) showing that KShs 320,000/= was deposited in her husband's account but did not know the purpose of the deposit. She further admitted seeing papers showing another deposit of KShs 20,000/= as well as acknowledgements written by her husband where he acknowledged payments for land deal. The acknowledgments did not specify any particular land. She also stated that she knew Joseph Mithaga Mwitiriri as her husband's step brother and that the plaintiff raised the issue of the land before her husband was buried.

13. The defence case was thereby closed. Directions were then given that parties file and exchange submissions. The plaintiff filed submissions on 15th March 2018 while the defendants filed submissions on 17th April 2018.

14. I have considered the pleadings, the evidence and the submissions. The dispute herein involves close relatives. The plaintiff claims that he bought the parcels of land known as Kabazi/Munanda Block 2/894 (Maombi ona), Kabazi/Munanda Block 2/895 (Maombi Ona) and Kabazi/Munanda Block 2/896 (Maombi Ona), all collectively referred to hereinafter as the suit properties, from Laurent M. Njoroge, hereinafter referred to as deceased. The plaintiff is married to the deceased's sister. The deceased was the husband of the 1st defendant and father of the 2nd defendant.

15. The issues that emerge for determination are firstly whether the suit is barred by **Section 7 of Limitations of Actions Act**; secondly, whether there was a sale contract between the deceased and the plaintiff in regard to the suit properties; thirdly, if so, whether it is a valid contract in view of the provisions of **Section 3(3) of the Law of Contract Act**; fourthly, whether the defendants hold the suit properties in trust for the plaintiff; fifthly, whether the transaction is void for want of consent of the Land Control Board; and lastly, what reliefs should issue?

16. The defendants averred at paragraph 7 of their defence that the suit is statutorily barred by virtue of the provisions of **Section 7 of Limitations of Actions Act**. The section provides:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

17. The foregoing provisions address a situation where a land owner brings a suit to recover possession. In this case, there is no claim by the plaintiff to recover possession since he is in fact in possession. I therefore resolve issue number one in the negative: the plaintiff's suit is not statutorily barred by virtue of the provisions of **Section 7 of Limitations of Actions Act**.

18. On the second issue as to whether there was a sale contract between the deceased and the plaintiff in regard to the suit properties, the plaintiff gave detailed testimony on how he entered the suit properties as a tenant of the deceased and the 1st defendant way back in the year 1996 and how the deceased offered to sale the properties to him in the year 2000. A price of KShs 200,000 per parcel was agreed thus making a total of KShs 600,000 for all three properties. The plaintiff demonstrated how the entire purchase price was paid by producing acknowledgments signed by the deceased and banking slips. During her testimony, the 1st defendant recognised the handwriting and signatures in the acknowledgments as being of her deceased husband. It is important to note that in the acknowledgments dated 1st March 2001 and 19th March 2001, the deceased stated that the payments were towards a "shamba deal". I understand this to mean that the deceased and the plaintiff were referring to a land sale transaction. It has not been shown that they were referring to any other parcel of land besides the one the plaintiff was already occupying. In the acknowledgment dated 1st March 2001, the deceased stated that the balance as at that date was KShs 180,000 while in the acknowledgment dated 19th May 2003, hardly 5 months before he passed away, he stated the entire amount had been paid. I further note that PW2 who is an elder brother to the deceased and David Mwaura Waigiri corroborated the plaintiff's testimony as to existence of a sale contract between the deceased and the plaintiff in regard to the suit properties. It is important to note that David Mwaura Waigiri who swore an affidavit to support the plaintiff's version of events was a witness to the various acknowledgments produced by the plaintiff.

19. Although the 1st defendant dismissed the plaintiff's claim of there being a sale contract between him and the deceased as imaginary, I note that the defendants have not disputed that the plaintiff remained in occupation of the suit properties even after the lease arrangement between him and the deceased ended in the year 2001. He remained in occupation as at October 2003 when the deceased passed away and is in occupation even now. Besides the counterclaim filed herein by the defendants on 3rd April 2017, a whole 16 years after the lease arrangement ended, no attempt has ever been made either by the deceased or even the defendants to remove the plaintiff from the premises. Further, although the defendants acknowledge that the deceased signed the acknowledgements for the various amounts that the plaintiff maintains were part payments of the purchase price, they have not offered any explanation as to what those payments were for, if not purchase price. I also find it telling that the defendants, who are the administrators of the deceased's estate, have not made any suggestion on what would become the fate of the amounts paid by the plaintiff if the court were to accept their position that there was no sale. In view of the foregoing, I find and hold that there was a sale contract between the deceased and the plaintiff in regard to the suit properties.

20. Now onto the third issue, whether the contract is valid in view of the provisions of Section 3(3) of the Law of Contract Act. The defendants averred in their defence that any contract between the deceased and the plaintiff is invalid contract in view of the provisions of **Section 3(3) of the Law of Contract Act**. **Section 3** provides in part as follows:

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive

trust.

....

(7) The provisions of subsection (3) shall not apply to any agreement or contract made or entered into before the commencement of that subsection.

21. The contract between the plaintiff and the deceased is comprised in the series of acknowledgments the earliest of which is dated 1st March 2001 and the latest of which is dated 19th May 2003. Pursuant to the provisions of subsection (7) as captured above, the provisions of subsection (3) do not apply to any agreement or contract made or entered into before the commencement of that subsection (3). **Section 3(3) of the Law of Contract Act**, came into effect on 1st June, 2003. The contract between the plaintiff and the deceased thus predates **Section 3(3) of the Law of Contract Act**. It is therefore not affected by the section.

22. The Court of Appeal stated as follows in **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR**:

24. Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested. Section 3(7) of the Law of Contract Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on 1st June, 2003. The trial court found that the sale agreement between the parties was an oral agreement made in 1964 between the appellant and the plaintiff. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows:

(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

(1) Has in part performance of the contract taken possession of the property or any part thereof; or

(11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract. '

25. We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the plaintiff/respondent had to satisfy the trial court that he either, took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence we concur with the finding of the learned judge that the plaintiff/respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous till the filing of the Originating Summons by the Plaintiff in 1991. It is our view that Section 3 (7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3 (3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force. The proviso to Section 3 (3) of the Law of Contract Act applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the Law of Contract Act. [Emphasis supplied]

23. There is no dispute that the plaintiff took possession of the suit properties and remains in possession. He did so in part performance of the contract between him and the deceased. Consequently, **Section 3(3) of the Law of Contract Act** does not affect the transaction between the plaintiff and the deceased. I therefore find and hold that the contract between the plaintiff and the deceased is valid notwithstanding the provisions of **Section 3(3) of the Law of Contract Act**.

24. The fourth issue for determination is whether the defendants hold the suit properties in trust for the plaintiff. In **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** the Court of Appeal stated:

19. Pending the sale of all 240 plots by the respondent, the question that comes to mind is what was to be the legal status and relationship between the respondent and the appellants as purchasers who had paid the purchase price for individual plots? It is our considered view that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots. In Mwangi & another –vs – Mwangi (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under Section 126 (1) of the Registered Land Act is merely permissive and not mandatory. In Mutsonga – vs- Nyati (1984) KLR 425 and Kanyi – vs- Muthiora (1984) KLR 712, it was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of Section 163 of the Registered Land Act which provides for the application of the common law of England as modified by equity.

... In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable

and the respondent cannot renege. ... In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. ...

25. I have noted above that the plaintiff took possession of the suit properties and remains in possession in part performance of the contract between him and the deceased. The plaintiff has demonstrated that he paid the purchase price fully as at 19th May 2003 and took possession with the full knowledge and consent of the deceased. I therefore find and hold that the defendants who are the administrators of the deceased's estate, hold the suit properties in trust for the plaintiff.

26. Regarding the fifth issue as to whether the transaction is void for want of consent of the Land Control Board, the defendants averred at paragraph 13 of the defence that any sale agreement between the plaintiff and the deceased is void for want of consent of the Land Control Board. The requirement for consents in respect of a transaction on agricultural land is found at **Section 6** of the **Land Control Act**. The Section provides:

6. Transactions affecting agricultural land

(1) Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

27. The defendants had a duty to demonstrate that the suit properties are agricultural land and that no consent was obtained. They failed to discharge that duty. Even if they had demonstrated that consent was necessary and was not obtained, I would have taken into account that the plaintiff paid the purchase price in full and was put in possession by the deceased. I would have therefore found that the defendants are barred by proprietary estoppel and doctrines of equity from denying the plaintiff's claim. See Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri (supra) and Willy Kimutai Kitilit v Michael Kibet [2018] eKLR. I therefore find and hold that the transaction is not void for want of consent of the Land Control Board.

28. Regarding the last issue as to what reliefs should issue, the plaintiff has established his case. The defendants' counterclaim which is the antithesis of the plaintiff's case must ipso facto fail. It is hereby dismissed.

29. In the end, I enter judgment in favour of the plaintiff as follows:

a. A declaration is hereby issued that the plaintiff is the lawful owner of land parcels No. Kabazi/Munanda Block 2/894 (Maombi Ona), Kabazi/Munanda Block 2/895 (Maombi Ona) and Kabazi/Munanda Block 2/896 (Maombi Ona).

b. The defendants in their capacity as administrators of the estate of Laurent Muitiriri Njoroge to execute all documents necessary to effect transfer of land parcels No. Kabazi/Munanda Block 2/894 (Maombi Ona), Kabazi/Munanda Block 2/895 (Maombi Ona) and Kabazi/Munanda Block 2/896 (Maombi Ona) into the name of the plaintiff within 30 (thirty) days from the date of delivery of this judgment. In default, the Deputy Registrar of this court to execute all such documents on their behalf.

c. Considering that the parties are close relatives, so as not to cause more friction in the extended family, I order that each party bears own costs.

Dated, signed and delivered in open court at Nakuru this 14th day of December 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Counsel for the plaintiff absent

Plaintiff present in person

The 1st defendant present in person

No appearance for the 2nd defendant

Court Assistants: Gichaba & Lotkomoi