



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. SUIT NO. 664 OF 2011

DR. PETER WAINAINA KAMAU.....PLAINTIFF

VERSUS

NAOMI WANJIKU KINYANJUI.....1ST DEFENDANT

CO-OPERATIVE BANK OF KENYA LTD...2ND DEFENDANT

JUDGEMENT

1. John Joseph Kinyanjui (now deceased) who was the father of the 1st Defendant was the registered proprietor of L.R. No. Kiambaa/Kihara/62 situated in Kiambaa Division of Kiambu County measuring approximately 5 acres (“the Suit Property”). He entered into agreements dated 13/12/2008 and 20/1/2009 in which he offered to sell to the Plaintiff two acres which was to be excised from the Suit Property. The Plaintiff paid the sum of Kshs. 4,980,000/= to the late John Kinyanjui on diverse dates between 13/12/2008 and 28/9/2009.

2. The Plaintiff learnt on 29/6/2010 through a newspaper advertisement that the Suit Property was scheduled to be sold by public auction. He also learnt that it was charged to the 2nd Defendant to secure a loan advanced to River Side Farm Nursery School which was owned by John Kinyanjui and other persons.

3. On learning this, the Plaintiff entered into an agreement dated 8/7/2010 with the late John Kinyanjui for the purchase of the remaining three acres of the Suit Property at the agreed price of Kshs. 8,442,772.9/= which included Kshs. 4,442,772/= that was due to the 2nd Defendant on account of the bank loan .

4. The 2nd Defendant accepted payments from the Plaintiff on various dates between 9/7/2010 and 8/4/2011 amounting to Kshs. 4,675,772/=. The 2nd Defendant undertook to release the original title and discharge of charge to the Plaintiff once the loan was paid. The Plaintiff claims that over and above the purchase price agreed on, he paid a further sum of Kshs. 1,826,771/= to the late John Kinyanjui which included monies paid to the 2nd Defendant. The late John Kinyanjui refused or failed to transfer the Suit Property to the Plaintiff.

5. The Plaintiff claims that the 2nd Defendant reneged on its undertaking to release the title documents and discharge of charge to the Plaintiff and that the unlawful actions of the 1st Defendant made it impossible to obtain the consent of the Land Control Board. Despite orders being issued restraining dealings with the Suit Property, the late John Kinyanjui interred his wife on the Suit Property and was also buried on the suit land.

6. The Plaintiff claims he has suffered loss and damage as he has not been given quiet enjoyment of the land and that of the two acres that he is in possession of, graves were dug on the land he had purchased and lost use of the land. He seeks a permanent injunction to restrain the 1st Defendant from dealing with the Suit Property. He also seeks a mandatory injunction to compel the Defendants to transfer the Suit Property to him and deliver up the original title and discharge of charge for the Suit Property. He seeks an order for exhumation of the remains of the 1st Defendant’s parents, general damage for breach of contract, auctioneers fees, costs and interest in the Amended Plaintiff dated 31/7/2017.

7. In the 1st Defendant’s Amended Defence and Counterclaim dated 25/8/2017/=:, the 1st Defendant admits that the Suit Property was charged to the 2nd Defendant. She admits that her late father entered into a sale agreement as pleaded in the Amended Plaintiff but argues the agreements are not enforceable since no consent of the Land Control Board was ever obtained and those dealings were on agricultural land. The 1st Defendant admitted that her late father received a number of payments from the Plaintiff but denied that he received the payments set out in the Amended Plaintiff.

8. In the counterclaim, the 1st Defendant claims that the loan secured by the charge over the Suit Property in favour of the 2nd Defendant was repaid in full by 12/4/2011 and the 2nd Defendant ought to have returned the title deed together with the duly executed discharge of charge to

her late father for registration at the Lands Office. She seeks a declaration that any purported sale between the Plaintiff and her late father of the Suit Property was void for want of the land board consent and seeks a mandatory injunction to compel the Plaintiff to vacate the Suit Property and cease any further trespass on it; general damages against the Plaintiff for trespass and illegal occupation of the Suit Property; an order directing the 2nd Defendant to release the original title deed and a duly executed discharge of charge in respect of the Suit Property to her together with the costs of the suit and counterclaim.

9. The 2nd Defendant in its Defence dated 25/8/2017 admitted that the late John Kinyanjui charged the Suit Property to it. It admitted that the Suit Property was advertised for sale by public auction on 28/6/2010 by its auctioneers. It also admitted receipt of payment of Kshs. 4,826,771/= from the Plaintiff on account of the late John Kinyanjui but denied that it made any commitment to release the title over the Suit Property to the Plaintiff.

10. The 2nd Defendant averred that the late John Kinyanjui defaulted in the payment of loan balance as a result of which the 2nd Defendant invoked its statutory power of sale over the Suit Property. The late John Kinyanjui filed **High Court Petition no. 63 of 2011** seeking an injunction to restrain the 2nd Defendant from auctioning the Suit Property and the release of original title over the Suit Property to him. The 2nd Defendant claims that it is entitled to the costs of that petition and that they are recoverable as part of the loan. It claims that it has no interest in the Suit Property and is ready to release the Suit Property upon payment of those costs. The 2nd Defendant denies that there is any privity of contract between it and the Plaintiff and urges the court to dismiss the suit and award it costs.

11. The Plaintiff gave evidence. He learnt in 2008 that the late John Kinyanjui was selling his land. They met and agreed that he would purchase two acres of the Suit Property. The late John Kinyanjui was to subdivide the land with a view to excising a portion measuring two acres which he had agreed to sell to the Plaintiff and which included the developments on the land. The purchase price was agreed at Kshs. 3.2 million which was inclusive of the value of the house of Kshs. 1.4 million. He paid the full purchase price on 28/8/2009 and took possession of the two acres as they awaited subdivision and transfer of title. The Plaintiff settled his parents on the Suit Property.

12. In February 2010 the late John Kinyanjui offered to sell the remaining three acres to the Plaintiff at Kshs. 3,750,000/=. This in effect meant that the late John Kinyanjui was selling the entire parcel of land measuring five acres to the Plaintiff. The agreement was amended to show that the purchase price was Kshs. 6,950,000/= which included the initial purchase price of Kshs. 3.2 million. The Plaintiff paid Kshs. 750,000 to the late John Kinyanjui on diverse dates between 24/2/2010 and 10/6/2010.

13. On 29/6/2010, the Plaintiff saw an advertisement for sale of the Suit Property and confronted the late John Kinyanjui who accepted to go with him to the bank to discuss the possible resolution of the matter and stop the impending auction. The late John Kinyanjui took the Plaintiff to the 2nd Defendant's Manager in charge of Recovery and Credit Risk Management at the 2nd Defendant's offices located at Cooperative Bank House in Nairobi. The bank demanded payment of the outstanding sum of Kshs. 4,492,772 failing which the auction would proceed. During the meeting the Plaintiff brought to the attention of the bank the agreements he had entered into with the late John Kinyanjui to purchase the Suit Property. The Plaintiff offered to pay the sum of Kshs. 3 million. The bank asked John Kinyanjui to write to the bank requesting to sell the Suit Property by private treaty to the intended purchaser and the agreement had to ensure that the banks' loan was cleared in full.

14. John Kinyanjui wrote to the bank on 7/7/2010 informing the bank that the Plaintiff was to take over and pay the whole outstanding bank loan of Kshs. 492,772.9/=. The Plaintiff agreed to pay the entire loan and entered into a written agreement dated 8/7/2010 which was forwarded to the bank. In essence, this brought the purchase price for the Suit Property to Kshs. 8,442,772.90/= which was higher than the initial agreed sum of Kshs. 6,950,000/=. The Plaintiff made payments to the bank which gave its conditions but the Plaintiff was to meet for the bank to release the original title and discharge.

15. The Plaintiff made payments of Kshs. 735,000 and 750,000 paid on 16/7/2010; and Kshs. 1 million paid on 18/10/2010 which reduced the debt owed to the Bank to Kshs. 2,185,347/=-.

16. The late John Kinyanjui wrote to the Plaintiff on 7/10/2010 purporting to cancel the agreement for sale. This left the matter in abeyance and the bank issued a notice of its intention to proceed with the sale of the Suit Property. In March 2011 the bank gave instructions to Garam Investments to auction the Suit Property owing to a debt of Kshs. 2,190,771.10 due to the 2nd Defendant as at 21/3/2011.

17. The Plaintiff wrote to the bank and the bank allowed him to make payments. He made payments to the bank of Kshs 2,485,000/=. The late John Kinyanjui wrote to the bank purporting to revoke the sale agreement that he had entered into with the Plaintiff. The bank wanted to auction the property and informed the Plaintiff that the auction would only be stopped if full payment was made before the auction date and if he paid the costs incurred from the auction process. The Plaintiff paid Kshs. 2,190,771.10/= on 7/4/2011 and the bank instructed the auctioneer to cancel the intended sale of the Suit Property. The Plaintiff also paid the auctioneers fees of Kshs. 151,000/=. The late John Kinyanjui wrote to the bank on 24/8/2011 demanding that the title be released to him because the loan had been paid in full.

18. The Plaintiff stated that after this suit was filed, there were several developments in the matter. Advocates for the parties recorded a consent on 1/3/2012 in which the late John Kinyanjui agreed to subdivide the land into two portions and obtain the relevant Land Control Board consent.

19. The Plaintiff bought the land for his parents who were affected by the post-election violation in 2007/2008. He took possession of two acres of suit land. The parties' intention at the time the consent was recorded was that the two acres would be transferred to the Plaintiff and the rest of the claim would proceed for hearing. When the Plaintiff's mother died in October 2013, the late John Kinyanjui objected to the Plaintiff's mother being buried on the suit land and she had to be buried at Lang'ata Cemetery. The late John Kinyanjui buried his late wife on the Suit Property in May 2016 despite an order being issued on 19/5/2015 barring her burial on the suit land. The Plaintiff filed an application for contempt of court against the late John Kinyanjui but unfortunately he died before that application was heard.

20. The 1st Defendant gave evidence. The late John Kinyanjui was her father and had charged the Suit Property to the 2nd Defendant. She stated that despite the loan to the 2nd Defendant being repaid in full by 12/4/2011, the 2nd Defendant did not release the original title documents together with the discharge of charge to her father to enable him register the documents at the lands office in Kiambu. The 1st Defendant was aware that her late father entered into an agreement for the sale of a portion of the suit land but maintained that the sale agreement was void for want of consent from the Land Control Board. In the absence of the consent from the land board, she argued that the purchase was illegal and amounted to trespass.

21. The 1st Defendant did not know when the Plaintiff entered the suit land. She did not know who paid off the loan to the bank. She conceded that it was her father who should have obtained the consent of the Land Control Board. She did not know if this ever happened. She stated that she came to know that her father had charged the suit land to the 2nd Defendant. She claimed that some payments were made by her late father and others by the Plaintiff to settle the debt owed to the 2nd Defendant. She did not produce evidence of the payments her late father made to the Bank. She claimed that her grandmother, her dad and her uncle were buried on the Suit Property.

22. The 2nd Defendant called Jacquelyn Khadambi, who works as the Head of Remedial Department to give evidence. She confirmed that the late John Kinyanjui charged the Suit Property to the 2nd Defendant and that the 2nd Defendant advertised the Suit Property for auction on several occasions when the late John Kinyanjui defaulted in repaying the loan. She confirmed that the late John Kinyanjui wrote the 2nd Defendant on 7th July 2010 requesting to be allowed to sell the Suit Property held by the bank as security by private treaty to the Plaintiff.

23. The bank wrote to the late John Kinyanjui on 13/7/2010 accepting the request to sell the suit land by private treaty to Plaintiff on four conditions. Firstly, the sale proceeds would be remitted to the bank. Secondly, the auction scheduled for 13/7/2010 was withdrawn upon receipt of Kshs. 735,000/= from the Plaintiff. Thirdly, the balance of the loan had to be paid within 60 days from the date of the agreement of 8/7/2010 which fell on or before 9/9/2010. Fourthly, the bank would release the original title and discharge of charge to the Plaintiff upon full settlement of the debt. The auctioneers sent their fee note to the bank.

24. The late John Kinyanjui wrote to the Plaintiff on 7/10/2010 and copied the letter to the bank purporting to terminate the sale. He also requested the 2nd Defendant not to release the original title and the discharge of charge to the Plaintiff.

25. The bank wrote to the late John Kinyanjui on 12/10/2010 demanding payment of the outstanding balance of Kshs. 3,185,347.10 within 7 days failing which the property would be re-advertised for sale by public auction. The late John Kinyanjui wrote to the bank on 19/10/2010 requesting for a grace period of three months to enable him sale the property by private treaty and settle the bank's debt. The bank rejected the request by its letter of 27/10/2010. John wrote to the bank on 7/2/2011 seeking to know the outstanding balance. In the letter he noted that the Plaintiff had paid some money in the account after the bank's letter of 12/10/2010.

26. The bank instructed auctioneers to sell the security by auction on 21/3/2011. The Suit Property was advertised for sale by public auction on 12/4/2011. John Kinyanjui filed **High Court Petition number 63 of 2011** seeking a declaration that the intended auction was unconstitutional while seeking an injunction to stop the sale of the Suit Property. The court gave a conditional injunction for the late John Kinyanjui to pay Kshs. 1 million on that day which he failed to pay. Somehow, the auction of the Suit Property did not take place on that day. The late John Kinyanjui withdrew the petition on 14/8/2014 and refused to pay the bank loan.

27. The 2nd Defendant's advocate raised a Deposit Requisition Note for Kshs. 116,130 in respect of the petition. The witness produced the bank statement for Riverside Farm Nursery School which shows that the Plaintiff made payments of Kshs. 2,190,772 on 8/4/2011. The bank statement for 2012 reads as follows: "*your cleared balance as at 7/7/2012 was Kshs. 0.0.*" The bank statements further show that as at 15/2/2013 Kshs. 116,130 was outstanding.

28. Parties filed submissions. The Plaintiff submitted that by 28/8/2009 the late John Kinyanjui had received the full price for the two acres with a house that he was selling to the Plaintiff and undertook to avail the completion documents to the Plaintiff's advocate. He entered into the agreement dated 24/2/2010 with the Plaintiff for the sale of the remaining three acres. The Plaintiff made payment.

29. Both Defendants admit that the Plaintiff redeemed the 1st Defendant's loan owed to the bank. The 1st Defendant challenges the sale on the basis that there was no consent from the land control board while the 2nd Defendant denies that there was privity of contract between it and the Plaintiff. The Plaintiff submits that the Defendants are estopped from relying on issue of lack of consent from the land board based on the decision of **John Simiyu v Francis Soita Bungoma ELC No. 26 of 2013**.

30. Further, the Plaintiff submits that the consent recorded in court on 1/3/2012 made it the responsibility of the late John Kinyanjui to obtain the consent of the land board. The late John Kinyanjui never challenged the validity of that consent recorded in court.

31. The Plaintiff submitted that the bank reneged on its position and accepted payment from the Plaintiff to redeem the loan long after September 2010. The Plaintiff relied on the case of **Macharia Mwangi Maina and 87 others v Davidson Mwangi Kagiri [2014] eKLR**.

32. The 1st Defendant relied on Section 6 (1) of the Land Control Act which provides that transactions or other disposal of agricultural land situated within a land control area are controlled transactions for which the consent of the land control board must be obtained otherwise the transaction is void. The 1st Defendant also relied on Section 7 of the Act on the recovery of money paid in respect of a controlled transaction which becomes void. The 1st Defendant argued that the Plaintiff did not seek a refund of the monies paid and that the court cannot grant an order to that effect. She urged the court to dismiss the Plaintiff's suit and enter judgment for her counterclaim.

33. The 2nd Defendant denied that the Plaintiff has a cause of action against it and urged the court to dismiss the suit. It relied on various decisions on the issue of privity of contract. It also relied on its letter dated 13/7/2010 and urged that it did not create any obligations since the Plaintiff failed to comply with the conditions set in the agreement. The bank maintains that the Plaintiff was a stranger to the charge

transaction between the bank and the late John.

34. From the facts of the case, it is clear that the Plaintiff was not a stranger and made payments towards the redemption of the security, which the bank accepted. The Bank accepted payment long after the deadline it had given had passed.

35. The court is of the view that it is dishonest of the bank to accept payment from the Plaintiff in full settlement of the loan owed to it based on a private treaty entered into by the chargor and the Plaintiff with the bank's knowledge, then turn around and say there was no privity of contract between the bank and the Plaintiff. The Plaintiff is not seeking to enforce a contract between it and the 2nd Defendant.

36. The Plaintiff seeks to have the Suit Property transferred to him. The bank is holding the title over the Suit Property as security for the loan which the Plaintiff already cleared when the bank accepted payment from the Plaintiff towards defraying that loan. The bank did not offer to refund the monies which the Plaintiff paid to settle the late John Kinyanjui's loan secured by the charge over the Suit Property.

37. The court is of the view that it is also dishonest of the 1st Defendant to seek the release of the original title and discharge of charge over the Suit Property from the 2nd Defendant yet she did not provide any evidence that her late father paid off the debt to the 2nd Defendant. She admitted that the Plaintiff paid part of the loan and that the Plaintiff had been on a portion of the suit land and that he took occupation before the demise of her father.

38. The Plaintiff seeks an order for the exhumation of the 1st Defendant's parents from the suit land. Section of the Public Health Act sets out the procedure for the exhumation of a body or remains which have been interred. The court declines to grant an order for the exhumation of the remains interred on the Suit Property. The Plaintiff can apply for a permit to exhume the remains interred on the suit land under the Public Health Act.

39. The court has considered the pleadings, the evidence and submissions of the parties. The court finds that the Plaintiff has proved his case on a balance of probabilities and grants prayers a, b, d, e, and f of the Amended Plaint dated 31/7/2017. The 1st Defendant failed to prove her counterclaim. It is dismissed with costs to the Plaintiff.

Dated and delivered at Nairobi this 6th day of December 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Murithi holding brief for Mrs. Githae for the Plaintiff

Mr. Muturi for the 1st Defendant

Mr. Muturi holding brief for Mr. Kimondo for the 2nd Defendant

Mr. V. Owuor- Court Assistant