



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 649 OF 2014**

**REBECCA WAITHIRA JOSEPH**

**ABEL NGURU KIMONDO ..... PLAINTIFFS**

**VERSUS**

**HANNAH WAMBUI KIBUU ..... DEFENDANT**

**JOSEPH MWAURA & 30 OTHERS ... INTERESTED PARTIES**

**JUDGMENT**

1. By a plaint dated **17th October, 2001** the plaintiffs herein instituted this suit seeking judgment against the defendant for:

- (i) Transfer of 8.281 hectares from land parcel No.Nyandarua/Ndaragwa/Kahutha/Block 1/3;**
- (ii) Costs of this suit and interest thereon at court rates;**
- (iii) Any other or better ruling (read reliefs) which the court may deem fit to grant.**

2. The plaintiffs' case is premised on an agreement allegedly entered into between them and the defendant. The agreement was that the defendant would give them 8.281 hectares out of the suit property in consideration for the role they played in getting the suit property transmitted to the defendant and because they had purchased 4 ½ acres out of the suit property.

3. The plaintiffs' blame the defendant for having failed to honour that agreement.

4. Vide her statement of defence dated **27th December, 2001** the defendant denied all the allegations levelled against her and contended that even if there was an agreement for sale of a portion of the suit property to the plaintiffs, the same was null and void because no consent was obtained from the Land control board in respect thereof.

5. During the pendency of this suit, the suit property was sub-divided into **L.R Nos. Nyandarua/Kahuthu/Block 1/760, 761,763, 765, 767, 770, 771, 772, 773, 774, 776, 777, 778, 782, 785, 786 and 795** and titles in respect thereof issued to the interested parties herein.

6. Pursuant to an order issued on 15th July, 2008 the interested parties were enjoined into this suit as defendants.

7. In their statement of defence dated **12th July, 2010** the interested parties have denied having knowledge of the plaintiffs' interest in the suit property.

8. Arguing that the suit property is none existent, the interested parties explain that the suit property was sub-divided and the sub-divisions transferred to them through a court process.

9. Maintaining that they are the ones entitled to the resultant sub-divisions of the suit property, the interested parties contend that their parcels cannot be the subject matter of the current suit.

## EVIDENCE

### The plaintiffs case

10. When the matter came up for hearing, **P.W.1, Abel Nguru Kimondo**, informed the court that the defendant sold to them 8.21 hectares from the suit property and that they executed an agreement before the defendant's advocate, Nyawira Gitonga.

11. P.W.1 explained that later on, they recorded a consent for transfer of the portion they claim. He further explained that the consent was adopted as an order of the court on 26th September, 2016.

12. Upon obtaining the order for transfer, the plaintiffs presented it to the Land Registrar, Nyahururu, who informed them that the suit property had already been sub-divided and titles issued to other people.

13. Upon inquiry, they learnt that the defendant had another case with the interested parties.

14. Explaining that they were not parties to the case pursuant to which the suit property was sub-divided and the resultant sub-divisions transferred to the interested parties, P.W.1 urged the court to allow their claim as prayed.

15. In cross examination, P.W.1 admitted that no consent of the land control board was obtained in respect of the transaction.

### The interested parties case

16. **Mr. Michael Ndegwa** who testified on behalf of the interested parties, informed the court that the plaintiffs were not parties to Nyandarua Land disputes Case No.22 of 1999, pursuant to which they obtained titles to resultant sub-divisions of the suit property.

17. He explained that in the Nyandarua case, they sought to compel the defendant to transfer to them their respective entitlements to the suit property, which she had sold to them.

18. According to Mr. Ndegwa, the interested parties have no problem with the plaintiff being given the portion he claims if doing so would not interfere with their respective entitlements to the suit property.

19. In cross-examination, Ndegwa admitted that the consent of the land control board was not obtained before the land was transferred to them but pointed out that they gained their interest in the suit property through a court process.

### The defence case

20. Despite filing a statement of defence, the defendant did not present her defence.

21. At the close of hearing, parties filed submissions which I have read and considered.

### Analysis and determination

22. From the pleadings filed in this matter, the cases urged in respect thereof and the submissions filed by the respective parties, the sole issue for determination is whether the plaintiffs' have made up a case for being granted the orders sought.

23. With regard to this question, from the consent recorded in court between the plaintiffs' and the defendant and the conduct of the plaintiffs and the defendant, I entertain no doubt that there existed the pleaded agreement for sale of a portion of the suit property by the defendant. However, as pointed out above, the status of the suit property changed during the pendency of this suit, in that it was sub-divided and the sub-divisions therefrom transferred to the interested parties. In my view, the effect of sub-division of the suit property and transfer of the resultant sub-divisions to the interested parties was to render the suit property none existent.

24. Whereas its possible to trace the suit property in the sub- divisions, I note that the plaintiffs' neither urged a case against the sub-divisions nor sought to reinstate the suit property to its status before it was sub-divided and the resultant sub-divisions transferred to the interested parties.

25. It is my considered view that, in the absence of any prayer for restoration of the suit property to the status that obtained before it was sub-divided and the resultant sub- divisions transferred to the interested parties, the orders sought by the plaintiffs cannot issue because they relate to a none existent parcel of land.

26. The case by the plaintiffs is also said to be unmaintainable because no consent of the land control board was issued in respect of the sale agreement on which it is premised. In this regard, reference is made to the cases of **Hirani Ngaithe Githire vs. Wanjiku Munge** (1979) KLR 50; **Samuel Kirubi Njuki v. Margaret Wangari Macharia** (2014) e KLR and **Githu v. Katibi** (1990) KLR 634 and submitted that failure to apply for consent and obtain the same as required by **Section 6(1) and 7** of the Land Control Act, Cap 302 Laws of Kenya rendered the transaction between the plaintiffs and the defendant and also that between the defendant and the interested parties null and void.

27. The common thread in the above cited cases is that failure to obtain the consent of the land control board to transact a controlled dealing renders a controlled dealing void after the lapse of the time stipulated in law for obtaining the consent.

28. In **Samuel Kirubi Njuki v. Margaret Wangari Macharia**, (supra) for instance, the Court of Appeal held:

**“This court holds that the use of the word shall in section 8(1) of the Land Control Act Cap 302 Laws of Kenya is mandatory and imperative and therefore failure to make the application (read application for consent) within 6 months is a serious breach of the provision of the law and therefore any transaction undertaken under the said provision will be a nullity...”**

29. It is clear from the above decision of the Court of Appeal and which decision this court is obligated to follow, that the agreement entered into between the plaintiffs and the defendant became void for all purposes after the parties to it failed to obtain the consent of the land control board within the time stipulated in law for doing so.

30. Because the plaintiffs cannot base their claim on a transaction that was voided by operation of law, I find their claim against the defendant to be unmaintainable.

31. With regard to the titles issued in favour of the interested parties, despite there being evidence that no consent of the land control board in respect thereof was obtained, cognisance of the fact that the titles held by the interested parties were issued pursuant to a court process, I am unable to agree with the defendant's contention that the agreements in respect thereof are void for lack of the consent of the land control board.

32. In my view, before the titles issued to the interested parties can be interfered with a person seeking to interfere with those titles must demonstrate that they were illegally obtained.

33. There being no evidence capable of demonstrating that the titles held by the interested parties were illegally obtained, I find and hold that no case has been made for interfering with those titles.

34. The upshot of the foregoing is that the plaintiffs have not made a case for being granted the orders sought.

35. As the defendant appears to be the cause of the circumstances leading to the filing of this suit, I condemn her to pay the costs of this suit.

36. Orders accordingly.

**Dated, signed and delivered in open court at Nyeri this 27th day of February, 2017.**

**L N WAITHAKA**

**JUDGE.**

In the presence of:

Ms Kaunga h/b for Mr. Kiminda for the plaintiff

Mr. Ndirangu h/b for Ng'ang'a Munene for the defendant

Court clerk - Esther