



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 42 OF 2013

DANIEL KAMAU MWANGI, HANNAH WANJIRU

MWANGI (Suing as the administrators of the estate

of the late PAUL MWANGI KAMAU).....PLAINTIFFS

VERSUS

JOSEPH CHRISTOPHER NJIRIRI.....1ST DEFENDANT

BARCLAYS BANK OF KENYA LIMITED.....2ND DEFENDANT

JUDGMENT

(Suit by plaintiffs seeking transfer of land sold by defendant; the consideration being money and exchange of other land; counterclaim by defendant for eviction of the plaintiffs; suit land never transferred to purchaser and was under a charge; no consent of the Land Control Board issued; defendant however obtaining a transfer of the land given in exchange and later selling it; argument that agreement is void for want of consent of the Land Control Board; agreement actually void; however defendant can only get back the suit land if he transfers back the other land that was given in exchange and refunds the monetary part of the consideration; in default the plaintiffs be entitled to transfer of the suit land as a discharge of charge has now been issued)

1. This suit was commenced by way of plaint filed on 23 May 2013. The plaintiffs are the administrators of the estate of the late Paul Mwangi Kamau. In this suit, they have pleaded in the plaint that by an agreement dated 25 February 19993, Paul Mwangi Kamau purchased the land parcel Njoro/Ngata Block 1/103 (hereinafter described as the suit land) from the 1st defendant, Joseph Christopher Njiriri. At the time of purchase, the said property had been charged to Barclays Bank Limited, who were named as 2nd defendant. It is pleaded that the loan was paid but Barclays Bank refused to surrender the original title to the plaintiffs or discharge the charge thus frustrating the plaintiffs from transferring the property. It is pleaded that as part consideration for the purchase of the suit land, the late Paul Mwangi Kamau transferred to the 1st defendant an unsurveyed hotel site plot situated in Naivasha Town, which the 1st defendant took possession of and which has since been sold to 3rd parties. It is pleaded that sometimes in November 2012 and March 2013, the 1st defendant threatened to evict the plaintiffs and sell the entire land. In the suit, the plaintiffs have asked for the following orders (slightly paraphrased):-

(a) A permanent injunction to restrain the defendants from alienating, selling, transferring or charging or howsoever interfere with the plaintiffs' ownership, use, possession and occupation of

the suit land.

(b) A declaration that the plaintiffs are the owners of the suit land.

(c) That the defendants do deliver to the plaintiffs the original title deed to the suit land.

(d) That in the alternative the Deputy Registrar do execute all the necessary documents to facilitate the discharge of charge and register the property in the names of the plaintiffs.

(e) Any other relief.

(f) Costs and interest.

2. On 18 February 2016, the case against the 2nd defendant was withdrawn, with Mr. Matiri, counsel for the plaintiff stating that the Bank had forwarded to his clients, the Discharge of Charge. The suit thus only remains against Joseph Christopher Njiriri as the sole defendant.

3. The defendant filed a statement of defence and counterclaim. He pleaded that he has donated a power of attorney to one Charles Maina Gathungu to conduct this suit on his behalf. He pleaded that the contract of sale needed consent of the Land Control Board. He pleaded to be the owner of the suit land and holder of all proprietary rights. He pleaded that the plaintiffs do not deserve to have the property transferred to them as the late Paul Mwangi Kamau, breached the terms of their contract. He pleaded that he was never availed the unsurveyed hotel site in Naivasha as provided in their sale agreement. He also pleaded that this suit is res judicata the case *Nakuru HCCC No. 538 of 1998, Elizabeth Nyambura Kamau vs Joseph Christopher Njiriri & Another*.

4. In his counterclaim, he pleaded that on 25 February 1993, at the offices of M/s Sheth & Wathigo Advocates, he, Paul Mwangi Kamau and one J.F. Kigen, entered into a sale agreement to exchange their respective parcels of land. Paul Mwangi Kamau and J.F. Kigen were to buy the suit land at Kshs. 1.2 Million which would be paid by exchange of the Plot No. 1144/1299 (the unsurveyed hotel site in Naivasha) which was valued at Kshs. 1.6 Million. The defendant was thus to add a sum of Kshs. 400,000/=. It is pleaded that the other parties did not avail the original title deeds or certificate of lease for the Naivasha plot nor provide transfer instruments. It is pleaded that the defendant proceeded to the Naivasha plot and fenced it only to be informed that the land was public land meant for parking and loading goods and that the only portion left for private use was a one acre portion which it is pleaded was way below the agreed price of kshs. 1.6 Million. It is pleaded that another agreement was entered into after the defendant complained about the Naivasha plot. It is pleaded that Paul Mwangi Kamau could not refund the defendant the sum of Kshs. 400,000/= and offered to give him alternative plots that he had in Nairobi, Thika and Nanyuki but these plots were not favourable to the defendant. He has pleaded that their agreement was thus terminated by virtue of breach. In his counterclaim, he has asked for the following orders :-

(a) A declaration that the sale agreements entered on 25 February 1993 and 27 January 1994 are time barred and are null and void for lack of the Land Control Board consent since the sale involved agricultural land.

(b) A permanent injunction to issue against the plaintiffs restraining them from the land parcel Njoro Ngata/ Block 1/103 and an order for vacant possession failure to which an eviction order do issue.

(c) An order directing the Land Registrar Nakuru to remove the cautions placed on the suit land.

(d) Costs of the suit and counterclaim.

5. PW-1 was Daniel Kamau Mwangi. He is son to Paul Mwangi Kamau (hereinafter the deceased) and he testified that the deceased died in the year 1996. He produced letters of administration showing that he

and Hannah Wanjiru Mwangi were appointed administrators of his estate on 21 November 2000. He testified that his late father entered into an agreement on 25 February 1993 whereby he exchanged his land in Naivasha for the suit land. After this, they moved into the suit land and have been there since the year 1993. His father was indeed buried here. Later the defendant came and advised them that if they want title to the land, they cede 2 acres of it and he will give them title to the remaining 4 acres, the whole land being 6 acres. That was not agreeable hence this suit.

6. In cross-examination, another agreement dated 25 February 1994 was put to him. There is a clause therein which states that if there is a dispute over the Naivasha land, then the defendant would not transfer the suit land. He was not aware whether his mother had filed a separate suit over the same matter. He stated that they filed this case in 2013 because it was in the year 2012 that the defendant demanded to have 2 acres of it (though he later said that it was in the year 2005). He admitted to not having seen a transfer or a consent of the Land Control Board. He stated that the defendant did take over the Naivasha land and he was not aware of any claim by third parties over it.

7. In re-examination, he testified that transfer could not be done because the title was charged to Barclays Bank.

8. Mr. Charles Gathungu Maina testified on behalf of the defendant. He testified that he holds his power of attorney as the defendant lives in the United States of America. He is also the elder brother of the defendant. He testified that the deceased was a friend to his brother and they agreed to exchange their respective parcels of land. The deceased owned land in Naivasha which was 3.2 Ha, and registered as LR No. 1144/1299. The suit land measured 2.451 Ha. The Naivasha land was valued at Kshs. 1.6 Million whereas the suit land was valued at Kshs. 1.2 Million, thus the defendant was to add Kshs. 400,000/=. He testified that the Naivasha land was set apart for a hotel whereas the suit land was agricultural land. He stated that the balance of Kshs. 400,000/= was paid by the defendant to the deceased. The defendant took over the Naivasha land and started fencing but this fence was destroyed by other persons on claims that the land was public land for loading trucks. Because of this issue, a second agreement dated 26 January 1994 was entered into, so that in case the third party claims were valid, the defendant would be compensated by other land, either in Thika or Nairobi. He stated that the defendant appointed a surveyor, a Mr. Vaughan, to undertake survey and the same revealed that only about 1 acre of the land could be used by the defendant. He produced a letter said to be showing this written by Mr. Vaughan and the Municipal Council of Naivasha. He stated that the defendant could not therefore put up a hotel. He stated that the defendant went to the USA in the year 1999 and has never come to demand 2 acres. He stated that their agreement had no consent of the Land Control Board and that the defendant has been paying rates for the suit land. He stated that a similar suit had been filed being HCCC No. 538A of 1998 and he presented a ruling to show that the same was dismissed. He stated that the defendant is no longer interested in the Naivasha land and wants back the suit land.

9. In cross-examination, he testified inter alia that the defendant took possession of the Naivasha land and built a fence but it was demolished on the claim that it was reserved for parking of trucks. He stated that the defendant never took ownership of the land. He did state that at some point the property in Naivasha was to be auctioned by the Bank but he was not aware if the Bank sold it. He assumed that it had a loan although he later affirmed that indeed the defendant had taken a loan with the Naivasha property as security. He agreed that the Naivasha land had a road cutting it into two portions and he stated that the title issued did not indicate that it had a road. He agreed that the defendant benefited from a loan obtained using the Naivasha property. He however stated that the property had not been sold by the Bank. He testified that the suit land also had a charge but the loan over the Naivasha property came later. He said that this loan has been paid but the title has not been released by the Bank. He stated that the second agreement was to effect that the deceased would offer alternative land if the land in Naivasha became problematic but he was not aware of any further agreement on other alternative land. In re-examination, he stated that the defendant could not develop the Naivasha property given the problem that arose. He contended that the exchange never materialized.

10. I was not too sure of the position of the Naivasha property and I requested for the Land Registrar to attend as a witness to shed light on the ownership of this land. A search was availed and I have gone

through it. It shows that the said property was first registered in the name of Johnson Francis Kigen and Paul Mwangi Kamau as a leasehold of 99 years from 1 November 1992. On 23 August 1993, a transfer was registered in the name of Joseph Christopher Njiriri and on the same day, the property was charged to Barclays Bank to secure the sum of Kshs. 1.5 Million. The charge was discharged on 30 August 2000, on which day, the property was transferred to one David Mburu Githere in consideration of Kshs. 1 Million. On 24 October 2014 a transfer to Stephen Kingara Ndungu was registered for a consideration of Kshs. 6 Million. On the same day another transfer was registered in favour Simon Gashwe Mukuha and Monica Wanjiru Gashwe for a consideration of Kshs. 10 Million. This is the last entry in the register of the said land.

11. I invited counsels to file submissions and they did. In his submissions, Mr. Matiri for the plaintiff inter alia submitted that the search of the Naivasha title shows that the defendant took ownership of that land and later sold it after charging it to Barclays Bank. He also submitted that the defendant surrendered possession of the suit land after sale and never exercised any proprietary rights after selling it.

12. On the other hand, Ms. Muthoni Gathecha for the defendant, submitted inter alia that this is not a case of adverse possession but a case based on the sale agreements of 1993. She drove the point that the long possession by the plaintiffs counted for nothing. She submitted that no good explanation has been tendered in delaying this case yet letters of administration were issued way back in the year 2001. She submitted that the plaintiffs chose to ignore the case filed by their mother in the year 1998 only to file this suit. It was her view that the case is time barred by virtue of the Limitation of Actions Act. She further submitted that the sale was subject to the Land Control Act and consent of the Land Control Board needed to be given.

13. I have considered the matter. The plaintiffs' case is essentially one seeking the transfer of the suit land in line with the agreement entered into by the parties. On the other hand, the defendant wants the plaintiffs evicted on 25 February 1993 from this land and a permanent injunction to restrain them from the same. The matters as between the plaintiffs and defendants can be resolved together and I think the following issues have been raised and are open for determination :-

(i) *Whether this suit is res judicata.*

(ii) *Whether this suit is time barred.*

(iii) *Whether the agreement of the parties is void for reason of lack of Land Control Board consent.*

(iv) *What is the position of the agreement given that part of the consideration was exchange of land.*

(v) *What are the final orders to give.*

Issue 1 : Is this suit res judicata?

14. It has been raised by the defendant that this case is res judicata. The argument of the defendant is that there was a previous suit which dealt with the same issues which are the subject of this case and that is the case *Nakuru High Court Civil Suit No. 538 of 1998, Elizabeth Nyambura Kamau vs Joseph Christopher Njiriri & Barclays Bank of Kenya*. The only material that was presented by the defendant in support of the allegation that this suit is res judicata is a ruling by Mshila J, delivered on 10 July 2014, within the suit Nakuru HCCC No. 538 of 1998, through which she dismissed the case as against Barclays Bank Ltd. I have looked at that ruling. It does not tell what exactly was pleaded in the suit Nakuru HCCC No. 538 of 1998. I have seen that the plaintiff is one Elizabeth Nyambura Kamau but I do not know why she instituted that suit and exactly what orders she sought. I also do not know whether she filed that suit in her own capacity or in the capacity of a legal representative of Paul Mwangi Kamau. Without the benefit of the pleadings in that case, that is the plaint and defence, it is impossible merely by looking at the ruling of 10 July 2014, to make a firm determination that the issues in Nakuru HCCC No. 538 of 1998 and the issues in this case are the same. Where one party wishes to avail himself the plea of res judicata, it is

incumbent on that party to produce material which demonstrates that the two suits in issue are similar. The best, though of course not the only way to do it, is to avail the pleadings in the two suits, because the pleadings will show clearly who the parties are, what subject matter is being litigated, and what the final prayers sought are. I am afraid that the defendants have not presented sufficient material to enable me find that this suit is res judicata the case Nakuru HCCC No. 538 of 1998. I therefore dismiss the argument of the defendant that this suit is res judicata.

Issue No. 2 : Is this case time barred ?

15. The defendant has contended that this case is time barred. It has been pointed out that the agreement sought to be enforced is one that was entered into on 25 February 1993. It is not in doubt that this suit was filed on 23 May 2013. It follows that the case was filed about 20 years after the agreement of sale. It has been argued on behalf of the defendant that under Section 4 of the Limitation of Actions Act, Cap 22, Laws of Kenya, a suit based on contract must be filed within 6 years of the agreement and under Section 7 of the Limitation of Actions Act, a suit for possession of land must be filed within 12 years from the date the cause of action accrued. That indeed is the true construction of the law.

16. The position in this case is that despite the parties having had the agreement in the year 1993, the land could not have been transferred, for the reason that there was a charge over the suit land. So long as the land was still under a charge, the property could not be transferred. The interests of the bank first needed to be sorted out and a discharge prepared before the land could be transferred. I think, in the circumstances of this case, the right of action to sue for transfer of the land could only have arisen after the issuance of the discharge of charge. It is not very clear to me when the Bank issued the discharge of charge, but it does appear to have been fairly recent and must have been prior to this suit being filed, for one of the prayers in the suit as filed, was for the bank to issue a discharge of charge. It will be remembered that the parties compromised the suit as against the bank on 18 February 2016 when it was confirmed that a discharge has been issued. There was indeed a receipt which the defendant sought to produce in respect of the discharge of charge which is dated 18 September 2013. The right to sue for specific performance could only accrue after the discharge of charge. It cannot by any stretch of imagination be said that this suit was filed 6 years or 12 years after the issuance of the discharge of charge. It is on the above reasoning that I do not consider this case to have been caught up by limitation of time. In other words, the suit of the plaintiffs is not time barred.

Issue No. 3 and 4 : Whether the agreement of the parties is void for reason of lack of Land Control Board consent and what is the position of the agreement given that part of the consideration was exchange of land.

17. The sale of the suit land was done partly in cash and partly in exchange of the Naivasha plot. The Naivasha plot which the deceased was giving up, was valued at Kshs 1.6 Million and the suit property (the Kiamunyi plot) was valued at Kshs. 1.2 Million. It was actually the deceased who was ceding the more valuable property meaning that the defendant topped up with Kshs. 400,000/=. The suit land is agricultural land and the provisions of the Land Control Act, Cap 302, Laws of Kenya, therefore apply. Section 6 (1) is operative and it requires that transactions over agricultural land be subject to consent of the Land Control Board. It is drawn as follows :-

6. (1) Each of the following transactions -

(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)...

(c)...

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.

18. The subject transaction involved a sale and/or exchange of agricultural land and consent was therefore required. Indeed, I do not think that there is any contest that consent was required. It will be observed that Section 6 above, declares as void transactions entered into without consent but for which consent is required.

19. The Land Control Act, under section 7 provides for the remedy to be pursued in transactions which are declared void. It provides as follows :-

S. 7. If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.

20. It will be seen from the above that the remedy is for the money or consideration to be recovered as a debt.

21. In my view, the reasoning behind Section 7 of the Land Control Act, is to have the parties taken back to the position that they were in before the transaction in issue, for the reason that the disposition has been voided. But this provision puts us in a bit of difficulty because the consideration for the Kiamunyi land was the plot in Naivasha and Kshs.400,000/=. It follows that although the sum of Kshs. 400,000/= may be pursued as a debt, the Naivasha plot cannot, for it is not money but actually a parcel of land. In essence, for the defendant to have back his Kiamunyi land, and obtain the order of eviction, he must first return the Naivasha plot and add Kshs. 400,000/= to the plaintiffs.

22. It was argued by the defendant that he never took in the Naivasha property since the same had problems on the allegation that it was partly public land. I have not seen the place of this contention by the defendant. I have seen for myself that he did obtain a transfer of the property. He thereafter derived benefit from it by taking a loan. There was talk that the property was sold by public auction but I doubt it. It appears to me that the loan was paid and the property discharged after which it was sold to one David Mburu Githere. The record does not show that this was a transfer by chargee, meaning that it was actually the defendant who sold the property himself and pocketed the purchase price. There is absolutely no way the defendant can claim not to have received the Naivasha plot.

23. I am prepared, for reasons that the agreement did not have the consent of the Land Control Board, to nullify it, but since the defendant received the Naivasha plot and Kshs. 400,000/= he must ensure that the plot in Naivasha, which is LR No. 1144/1299 and the sum of Kshs. 400,000/= is returned to the plaintiff within 30 days from today. If he cannot procure the said land from whoever is registered as proprietor and forward a transfer of the same together with the legal tender of Kshs. 400,000/= within the time frame given, then clearly he will be unable to put back the plaintiffs in the position that they were in prior to the sale agreement and thus the chips must remain where they fall. In such event, it follows that the plaintiffs will be entitled to have a transfer of the suit land in their favour as legal representatives of the deceased and hold in trust for the estate of the deceased.

Issue 5 : What are the final orders?

24. I do not see any other way of resolving the dispute other than as I have explained above and I do now issue the following final orders :-

(i) That in the event that the defendant tenders a transfer of the land parcel LR No. 1144/1299 situated in Naivasha together with the sum of Kshs. 400,000/= within 30 days from today, the plaintiffs to cede possession of the land parcel Njoro Ngata Block 1/103 to the defendant.

(ii) That in the event that the defendant is unable to secure a transfer of the land parcel LR No. 1144/1299 and also tender the sum of Kshs. 400,000/= to the plaintiffs within the stipulated period of 30 days, then the plaintiffs will be entitled to ownership, as legal representative of the late Paul Mwangi Kamau, to the land parcel Njoro Ngata Block 1/103 and the defendant must submit to the

plaintiffs the original title deed to the land parcel Njoro Ngata Block 1/103, the discharge of charge already issued by Barclays Bank Kenya Limited, and all requisite transfer instruments required to transfer the land to the legal representatives of the late Paul Mwangi Kamau and in default the Deputy Registrar of this Honourable Court to proceed to execute all requisite documents needed to transfer the said land to the plaintiffs.

(iii) That if the defendant is unable to abide by order 1 above, the defendant be permanently restrained from the land parcel Njoro Ngata Block 1/103.

(iv) That if the defendant is unable to abide by order 1 above, the plaintiffs to have the costs of this suit and of the counterclaim, but if he complies with the said order, there be no order as to costs.

Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 21st day of March 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr. Biko holding brief for Mr. Matiri for the plaintiffs

Ms. Kipruto holding brief for Ms. Muthoni Gathecha for the defendant

Court Assistant : Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU