



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 443 OF 2016

EDWIN KIPKORIR NGETICH.....PLAINTIFF

VERSUS

ANN SIMATEI.....1ST DEFENDANT

JOSEPH SIMATEI.....2ND DEFENDANT

ELIZABETH CHEPNGETICH KORAT.....3RD DEFENDANT

RULING

(Suit by plaintiff seeking specific performance; sale entered by a husband who has 2 wives; spousal consent only availed by one spouse; other spouse contesting the sale; consent entered compromising the suit; spouse who did not issue spousal consent objecting to the consent; whether consent should be adopted; consent will deny one defendant opportunity to present her case; consent rejected).

1. This suit was commenced by way of a plaint that was filed on 17 October 2016. The case revolves around a sale agreement entered into between the plaintiff as purchaser and the 2nd defendant as vendor. The 1st and 3rd defendants are wives to the 2nd defendant. The subject agreement was entered into on 2 April 2016 vide which the plaintiff purchased from the 2nd defendant the land parcels Rongai/Rongai Block 4/178 and Rongai/Rongai Block 4/179 at a consideration of Kshs. 3,500,000/= and full payment was made. The plaintiff has averred that at the time of agreement, the 2nd defendant was accompanied by the 3rd defendant as his wife, and that the 3rd defendant signed a spousal consent agreeing to the transaction. The parties applied for consent of the Land Control Board but it emerged that the 1st defendant, the other wife of the 2nd defendant, had lodged a restriction on 5 April 2016. The plaintiff has averred that the 1st defendant claims to be a beneficiary of the two suit properties yet she has been given her portion of 4 acres in the land parcel Rongai/Rongai Block 4/177. In this suit, the plaintiff has asked for specific performance of the agreement and an order directing the 2nd defendant to ensure that he obtains the Land Control Board consent; an order lifting the restriction lodged by the 1st defendant; and an order of injunction to restrain the defendants from interfering with the plaintiff's possession of the suit properties.

2. Upon service, the 1st defendant entered appearance and filed a defence to the suit. She is represented by the law firm of M/s Nancy Njoroge & Company Advocates. She has admitted that the suit properties are registered in the name of the 2nd defendant but has contended that the same was held in trust for her and her children long before the 3rd defendant joined the family. She has averred that the sale agreement

in issue is void for want of her consent, as spouse to the 2nd defendant, and that she has been in occupation of the land from the year 1975. She is a stranger to any exchange of money between the plaintiff and the 2nd defendant. She has stated that she first lodged a caution in the year 2012 which was removed, unprocedurally in her view, and that she registered another caution on 29 March 2012. She has denied being given 4 acres in the land parcel Rongai/Rongai Block 4/177. She has also argued that the agreement between the plaintiff and the 2nd defendant is void for want of consent of the Land Control Board. It is her view that the sale is a fraudulent one and that her husband caused the 3rd defendant, who is his second wife, to give spousal consent yet it is she (1st defendant), who lives on the suit properties.

3. The 2nd and 3rd defendants also entered appearance and are both represented by the law firm of M/s Makori & Rioba Advocates. They have not filed any statement of defence.

4. There was an application for injunction filed by the plaintiff which was compromised by an order of status quo on 20 March 2017. I then scheduled a mention on 15 May 2017 to confirm readiness for trial. On this day, Ms. Muthoni for the plaintiff, and Ms. Karimi for the 2nd and 3rd defendants, wished to have the following consent recorded and adopted as an order of the court.

"By consent, judgment be entered against the 2nd and 3rd defendants as prayed in the plaint with no orders as to costs. The 2nd and 3rd defendants be witnesses of the plaintiff as against the 1st defendant."

5. Ms. Njoroge for the 1st defendant opposed the adoption of this consent by this court. Owing to her opposition, I need to make a ruling on whether or not that consent should be adopted.

6. In her submissions, Ms. Njoroge argued that what the parties are doing is to justify an illegal act and asked the court to find that the consent is not made in good faith. She averred that the consent is meant to defeat justice to the 1st defendant.

7. Both Ms. Muthoni and Ms. Karimi were of the view that the consent should be adopted by this court. Ms. Muthoni submitted that the 2nd and 3rd defendants are in agreement that they sold the land and that the 1st defendant will have her day in court. Ms. Karimi added that the 2nd and 3rd defendants admit the plaintiff's case and admit selling the land and therefore do not wish to defend the case.

8. I have considered the consent. In as much as parties are free to enter into consents, the court is not necessarily bound, and can make a decision either to accept or reject the consent. The court has a supervisory role to play and ensure that agreements of the parties pass the test of legality and public policy.

9. In our case, the agreement herein will essentially allow the plaintiff's case and pave way for the registration of the land in the name of the plaintiff. If the consent is adopted, it will have the effect of having the case decided without the input of the 1st defendant. The 1st defendant is the most aggrieved by the sale and deserves to be heard in contesting the sale. It was argued by counsels for the plaintiff and 2nd and 3rd defendants, that the 1st defendant will have her day in court, but I am afraid that there will be no day for the 1st defendant in court if the consent is adopted, for the matter will already have been decided in the plaintiff's favour and the land transferred to him. I also doubt the legality of the consent given the provisions of the Land Control Act, Cap 302, Laws of Kenya. This statute requires that consent of the Land Control Board be given for such transactions and pursuant to Section 8 of the said statute, such application for consent is supposed to be lodged within 6 months of the agreement. In as much as the plaintiff claims to have lodged such an application, I have not seen any proof of it, and that is a matter that needs to go for hearing on merits.

10. For the above reasons, I regret that I am unable to adopt the consent between the plaintiff and the 2nd and 3rd defendants, in so far as it attempts to enter judgment for the plaintiff as prayed in the plaint. The same is hereby rejected. On whether or not the 2nd and 3rd defendants need to file defence, it is their choice to either file one or not. It is also up to them, to decide whether to testify for the plaintiff, if they so wish.

11. With the above orders, I direct parties to prepare their respective cases for trial.

12. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 14th day of June 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Ms. Gitau holding brief for Ms. Muthoni for the plaintiff.

Ms. Nancy Njoroge present for the 1st defendant.

Ms. Karimi present for the 2nd and 3rd defendants.

Court Assistant :Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU