



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C NO. 92 OF 2016

THOMAS CYRUS WACHIRA.....PLAINTIFF

VS

JOSEPH MUIGAI KAMAU.....DEFENDANT

JUDGMENT

1. The Plaintiff filed a suit on the 4.2.2016 against the Defendant, Joseph Muigai Kamau seeking the following orders; -

- a) A declaration that the Defendant holds LR No.4885/122(4885/111/12) also known as Plot 'C' measuring 100x100 feet in trust for the Plaintiff.
- b) A permanent injunction restraining the Defendant by himself, his servants, agents or anyone acting upon his instructions from alienating, selling, charging, being on, or in any way interfering with the Plaintiff's title, occupation and quite enjoyment of the suit property.
- c) An order that the Defendant transfers or causes the transfer of L.R No. 4885/122 (4885/111/12) also known as Plot 'C' measuring 100x100 feet to the Plaintiff.
- d) An order that failure by the Defendant to comply with Prayer (c) above, the Deputy Registrar or the Court does sign all the necessary papers and the Defendant do surrender the Original deed plan No. 315705 and Title Deed for Kikuyu/Rironi/4487 to the Plaintiff to facilitate transfer.
- e) Damages for unlawful and wrongful deprivation of title to property and mental torture together with interest until payment in full.
- f) Cost of the suit together with interest until payment in full.

2. It is the Plaintiff's case that having purchased Plot No. C (LR No 4885/2/22 and taken possession, the Defendant has refused to transfer the said suit property to him despite demand being made to him to do so.

3. Vide a statement of defence filed on 31.5.2016, the Defendant denied the Plaintiff's claim save for the admission that the Plaintiff bought the suit property and paid the full purchase price. He explained that the reason why he had not transferred the property to the Defendant is because there were summons for revocation of grant dated the 9th April 2009 issued vide HCCC No. 799 of 2009 where the grant of administration in respect to the suit land seeking to revoke the grant. He alleged that these orders restrained any dealings on the said property and that the orders were still in force.

4. He further stated that he has not refused to consummate the agreement but his ability to perform his obligations as per the contract was limited or hampered by the summons for revocation of grant in HCCC No. 799 of 2009 which in effect challenged the Defendant's right to the suit property. He blames the orders and declares that he is not to blame. He further terms the agreement of sale voidable as it does not provide for remedies in case of breach and that as a result the Plaintiff claim is unmeritorious. In answer to whether there existed a constructive trust, the Defendant maintains that there was none whatsoever as the relationship between him and the Defendant was contractual. On a without prejudice basis he offered to refund the full purchase price to the Defendant on a purely gratuitous basis.

5. When the matter came up for pretrial/compliance of order 11 of the Civil Procedure Act, the Defendant though represented by counsel did not comply twice in a row. On the 18/5/17 when the matter came up for hearing the Defendant did not attend Court despite having been served through his advocate on record M/s Njeru Ngari & Co. Advocates. The affidavit of service dated 10. 5.2017 and filed on the same day refers.

6. The Court being satisfied that in view of the proper service on the Defendant being effected and noting that the Court had issued directions on the 30.11.16 in the following terms:

“a) The Defendant to comply with the orders given herein on 6th October 2016 within 21 days from the date hereof failure to which he shall not be permitted to call any witness or produce any document at the trial.

b) The Plaintiff shall be at liberty to set down the matter for hearing at the registry at the expiry of the 21 days”.

Proceeded with the hearing of the case and except what is stated in the defence statement the Plaintiffs claim is uncontroverted and unchallenged.

7. The Plaintiff testified in the case and adopted his witness statement together with the bundles and the annexures produced in Court and urged the Court to grant him the prayers as set out in the Plaint. In addition, the Plaintiff filed submissions which I have considered in arriving at my determination.

8. The issue for determination is one -whether there was a valid agreement of sale between the parties and whether the Plaintiff is entitled to the prayers sought.

9. The Defendant admits albeit partly, the existence of an agreement of sale between him and the Plaintiff at Paragraph 2 of his statement of defence. According to the said agreement entered between the Plaintiff and the Defendant on 2. 9.2008, the Defendant sold his beneficial interest in a portion of 100x100 feet of all that Land Ref. Limuru/Rironi/4487/4 measuring 0.25 of an acre. By then the Defendant vide a confirmed grant in CMCC No. 364 of 1997 had received 3.90 acres which was clearly described under clause 2 of the agreement of sale. The 100x100 plot is also described as plot C on the site plan attached to the agreement of sale.

10. The Defendant also admitted receipt of the full purchase price. Evidence has been led that the Plaintiff was granted possession on payment of the purchase price. In the case of **Macharia Mwangi Maina & 87 Others vs. Davidson Mwangi Kagiri KLR 326** the Court pronounced itself that;-

“the appellants having put the respondents in possession of the suit property created an overriding interest in favour of the appellants”.

In the case of **Mutsonga Vs Nyali (1984) KLR 425 and Kanyi Vs Muthiora (1984) KLR 712** it was held that equitable doctrines of implied, constructive and resulting trusts are applicable. It is the Plaintiffs case that he was granted possession on the payment of the full purchase price. Having received the full purchase price and put the Plaintiff in possession, the Defendant converted the relationship between him and the Plaintiff to that of a constructive trust. Though he may be the registered proprietor of the suit land he is holding it in trust for the Plaintiff. In **Mwangi & Another versus Mwangi supra**, it was held that

the rights of a person in occupation of land are equitable rights which are binding on the land and the land is subject to those rights.

11. The Defendant in his defence contends that the inability to transfer the land to the Plaintiff was impeded by an order restraining any dealings on the land. No evidence was placed before the Court in respect to the summons for revocation of the grant. It is also not stated when the plaintiff became aware of the orders, if any, which restrained the Defendant from transferring the suit land to the plaintiff. Was it at the signing of the agreement for sale, payment of the purchase price or at the taking occupation and possession? The Defendant states in his defense that it is summons for revocation- which means there is no order. In that case summons for revocation does not invalidate the plaintiff's right of claim. If indeed there was a Court order, the same was not produced to the Court by the Defendant. There is no evidence that was led by the Defendant to show any difficulties of transferring the suit land to the plaintiff

12. A rebuttal has been given by the plaintiff that the Defendant has continued to dispose the parcels of land to other third parties as late as 2015 and if indeed there were any orders restraining the Defendant it would have affected the other third parties who have had their titles transferred to them by the Defendant. Though no evidence was led at the trial to support this assertion, it is was not controverted by the Defendant.

13. The claim that the agreement of sale is void able because it did not provide for remedies is I think to my mind another superfluous reason to deny the Plaintiff his right of ownership of the suit property. It is the finding of this Court that indeed there was a valid agreement between the Plaintiff and Defendant.

14. The Plaintiff having demonstrated that there was a constructive trust established in his favour by the Defendant is entitled to have the property transferred and registered in his name. He has established an overriding interest on the property under section 28 of the Land Registration Act. The plaintiff took occupation and possession under his right of purchase. As an owner, his rights were not subject to anybody else. The right of ownership has crystallized and the only thing remaining is the formal transfer of the suit land to him. The Defendant does not deny that he sold the property nor that the Plaintiff paid the full purchase price. He has no justifiable reason why he has not transferred the property to the Plaintiff. He also has not taken any steps however (unjustified), to remove him from the property. To protect the Plaintiff's interest in the suit land the Defendant must be injuncted permanently from interfering with the Plaintiff's quiet enjoyment of the suit property.

15. In respect to the claim for damages unlawful and wrongful deprivation of title brought under Article 23(3) (e), I note that the plaintiff notes that save that it is pleaded, no evidence was led as to the quantification of the loss, if any, to the plaintiff. As a result, this Court is constrained to determine this heading. He who alleges must prove is still applicable in such a case.

16. From the evidence laid before the Court, I find that the plaintiff has proved his case on a balance of probability and judgement is entered in his favour as follows:-

a. A declaration that the Defendant holds LR No.4885/122(4885/111/12) also known as Plot 'C' measuring 100x100 feet in trust for the Plaintiff.

b. The Defendant be and is hereby ordered to forthwith transfer or cause the transfer of LR No. 4885/122 (4885/111/12) also known as Plot 'C' measuring 100x100 feet to the Plaintiff.

c. In default the Deputy Registrar of the Court is hereby directed to sign all the necessary documents in effecting the transfer of the suit land to the plaintiff and the Defendant is hereby ordered to surrender to the Deputy Registrar the Original deed plan No. 315705 and Title Deed for Kikuyu/Rironi/4487 and all the relevant and appropriate documents required to effect the transfer.

d. A permanent injunction restraining the Defendant by himself, his servants, agents or anyone acting upon his instructions from alienating, selling, charging, being on, or in any way interfering with the Plaintiff's title, occupation and quite enjoyment of the suit property.

e. Damages for unlawful and wrongful deprivation of title to property is declined.

f. The Defendant must pay the costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2017

J.G. KEMEI

JUDGE