



**Thuku v Kariamburi & another (Land Case 237 of 2016)
[2024] KEELC 1085 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1085 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
LAND CASE 237 OF 2016
L WAITHAKA, J
FEBRUARY 29, 2024**

BETWEEN

JOHN GATHUA THUKU PLAINTIFF

AND

JAMES NDIRITU KARIAMBURI 1ST DEFENDANT

MARY WAMBUI KIBE 2ND DEFENDANT

JUDGMENT

1. On 3rd November 2016, the plaintiff herein, John Gathua Thuku, instituted this suit seeking judgment against the defendants for:-
 - a. An order of permanent injunction restraining the defendants by themselves, their servants, agents and/or anyone claiming under them from alienating, entering and/or in any other manner interfering with his (plaintiff's) possession and use of 43.9 acres of the parcel of land known as Land Reference No.25103/2 Kamatongu area within Nyeri which he occupies;
 - b. An order of specific performance directing the 1st defendant to execute and surrender all completion documents necessary to confer ownership of the suit property to the plaintiff in default of which the executive officer of the court to execute all documents as may be necessary to confer ownership of the suit property to the plaintiff;
 - c. In the alternative to prayer (a) and (b) a refund of the full consideration paid with interest as per the agreement of sale and/or compensation for the value of the property;
 - d. Cost of the suit and interest.
2. As can be discerned from the plaint, the suit is premised on the grounds that on 18th October 2013, the plaintiff entered into an agreement with the 1st defendant, through the 2nd defendant, for sale of 49.3 acres of land to be excised from land reference number 25103/2 Kamatongu area within Nyeri



(hereinafter referred to as the suit property); that pursuant to the agreement, the plaintiff paid the purchase price being Kshs. 13, 960,000/- to the defendants; that upon paying the purchase price, the plaintiff took possession of the suit property and had been enjoying quiet possession of it awaiting issuance of ownership documents in the name of the 1st defendant.

3. Explaining that he has heavily invested in the suit property, the plaintiff faults the 1st defendant for disregarding the agreement entered into between them and for leasing the suit property to a third party.
4. Contending that it's unlawful, unjust and irresponsible for the defendants to dispossess him of the suit property and at the same time keep the consideration they received for the suit property, the plaintiff seeks the reliefs listed herein above.
5. The 1st defendant filed a statement of defence dated 23rd November 2016, in which he denies the averments contained in the plaint. Terming the plaintiff a trespasser to the suit property and an intermeddler in the estate of Alexander Kariamburi Kagumba who should be evicted from the suit property, the defendant contends that the agreement relied on by the plaintiff is not his deed and is invalid for lack of the necessary ingredients of a valid agreement hence null and void. The 1st defendant also claims that no valuable consideration passed from the plaintiff to him.
6. Terming the 2nd defendant a thief and a fraudster who had no title to pass to the plaintiff, the 1st defendant terms the plaintiff's suit bad in law, frivolous, vexatious and an abuse of the process of the court for inter alia non compliance with section 6 of the Land Control Act, Cap 302, Laws of Kenya.
7. The plaintiff filed a reply to defence, dated 14th December, 2016 denying the 1st defendant's contention that he is a trespasser and/or intermeddler in the estate of Alexander Kariamburi Kagumba. The plaintiff contends that he is a bona vide purchaser of the suit property who was put into possession of the suit property in an open, transparent and in a manner devoid of any violations of the law. The plaintiff maintains that the 2nd defendant is the 1st defendant's attorney.
8. The 2nd defendant neither entered appearance nor filed a statement of defence.

DIVISION - **EVIDENCE**

Plaintiff's Case.

9. When the suit came up for hearing, the plaintiff who testified as PW1, relied on his witness statement recorded and signed on 2nd November 2016 after it was adopted as his evidence in chief. The plaintiff also produced the documents contained in his list of documents filed on 3rd November 2016 as Pexbt 1 to 8 and the supplementary list of documents filed on 31st January 2018 as Pexbt 9 and 10. These are:-
 - i. Power of attorney No. P/A 59831/1 dated 8th April 2013;
 - ii. Agreement of Sale dated 18th October 2013;
 - iii. Copy of title deed for LR No.25103/2 Kamatongu area within Nyeri;
 - iv. Copy of sketch showing location of the suit land;
 - v. Certificate of confirmation of grant dated 12th October 2016;
 - vi. Copy of lease agreement dated 31st October 2016;
 - vii. Letter dated 28th September 2016 forwarding transfer documents for execution;
 - viii. Not a document;



- ix. Report and valuation by Real Appraisal Limited dated 30th November 2017 and
 - x. Confirmation of receipt of full payment.
10. He urged the court to also rely on his application for injunction and annexures in support of his case.
11. The 1st defendant's Counsel did not attend court and in his absence, the 1st defendant elected not to cross examine the plaintiff.

1st Defendant's case

12. The 1st defendant disowned his statement dated 22nd November 2016 and urged the court to rely on his pleadings. He acknowledged that the power of attorney produced in evidence belongs to him but denied having signed it. He informed the court that he wrote a letter dated 24th August 2015 revoking the power of attorney. He further informed the court that he was not aware that the 2nd defendant sold his land. He had information that the plaintiff was in possession and use of the suit property.
13. At close of hearing, the plaintiff filed submissions dated 20th March 2019, which submissions I have read and considered.

Analysis and Determination

14. The sole issue arising from the pleadings, evidence and the submissions by the plaintiff is whether the plaintiff has made up a case for being granted the orders sought or any of them.
15. With regard to that issue, from the pleadings filed in this case and the evidence adduced in support thereof, it is clear that at the time the agreement purportedly entered into between the plaintiff and the 1st defendant, through his attorney, the 2nd defendant, the suit property belonged to the estate of Alexander Kariamburi Kagumba. It is also not in dispute that the estate of Alexander Kariamburi Kagumba had not been administered as by law required when the sale agreement entered into between the plaintiff and the 1st defendant through the 2nd defendant was entered into. That being the case, an issue of law arises regarding the legal propriety or otherwise of the sale agreement executed between the plaintiff and the 2nd defendant concerning the suit property. The issue is whether the defendants had legal capacity to enter into the agreement relied on by the plaintiff in support of his claim. In addressing that issue, I adopt the decision in the case *Re Estate of John Gakunga Njoroge (2015) e KLR* where it was held:-

“A person can only deal with the estate of a deceased person pursuant to a grant of representation made to him under the *Law of Succession Act*. In this regard, the jurisdiction of the court to protect the estate of a deceased person set out in section 45 of the *Law of Succession Act*...For the transaction between the applicants and the beneficiaries of the estate of the deceased entered into before the grant of letters of administration to them and before the confirmed grant, the contracts of sale are invalid for offending the provisions of section 45 and 82 of the *Law of Succession Act*. Even if the sale transaction were by the administrators, the dealings with immovable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under section 82(b) proviso (ii) which provides that:-

‘No immovable property shall be sold before confirmation of the grant’



16. Also see the case of Re Estate of Paul M’ Maria (Deceased) (2017) e KLR where it was held:-

“The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the Law of Succession Act is tainted with killer poison; and is unlawful acquisition; thus, land so acquired does not enjoy the protection of property rights under article 40(6) of the Constitution. See the claw-back provision of the Constitution that: Rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

17. Arising from the foregoing factual situation and legal position, I find and hold that the contract purportedly entered into between the plaintiff and the defendants in respect of the suit property was invalid, illegal and null and void for being contra statute.

18. In the circumstances of this case, besides seeking an order of specific performance of the invalidated contract the plaintiff sought refund of the purchase price or compensation for the value of the property.

19. Based on the plaintiff’s evidence which was not in any way controverted or shaken by the defendants and in particular the 1st defendant, I do find that the 1st defendant through his attorney, the 2nd defendant, did receive the purchase price being Kshs. 13,960,000/-. The consideration in respect of which the defendants received the said amount of money having failed, I find and hold that the plaintiff is entitled to refund of the consideration with interest at court rate from the time of filing of this suit to payment in full. In that regard, see the case of Peter Maina Munina v Anne Wanjiru Wachira (Suing as Attorney of Samuel Nduati Njuguna) (2020)e KLR where it was stated:-

“This Court is both a Court of equity and a Court of law. Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrong doing; and equity detects unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.”

33. It is the finding of the Court that allowing the Appellant to hold the land and the purchase price is inequitable. The justice of the case is that the Appellant must refund the purchase price together with interest. The Court will grant appropriate orders in the end.”

20. The upshot of the foregoing is that the plaintiff’s suit has merit and is allowed to the extent contemplated in this judgment.

21. Having succeeded in his case, the plaintiff shall also have costs of the suit.

22. Orders accordingly.

DATED AND SIGNED AT ITEN THIS 16TH DAY OF FEBRUARY, 2024

L. N. WAITHAKA

JUDGE

Read, signed and delivered at Nyeri this 29th day of February 2024.

J. O Olola



JUDGE

NYERI ELC NO. 237 OF 16 (JUDGMENT) Page 4 of 11

