



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 105 OF 2013**

**EMMA WANJIKU**

**(ATTORNEY FOR ROSELYNE MARY NJERI**

**AND GERALD NJOROGE MBUGUA).....PLAINTIFF**

**VERSUS**

**MARY KWAMBOKA .....DEFENDANT**

**JUDGMENT**

*(Plaintiffs seeking declaration that they are the proprietors of the suit property and an eviction order against the defendant; the plaintiffs and vendor initially entered into a sale agreement for 4 acres out of the total 5 acres of the suit property; the plaintiffs paid the full purchase price for the 4 acres; the defendant was on occupation of the 5<sup>th</sup> acre as at the time the initial sale agreement for 4 acres was signed; the plaintiffs alleging that they subsequently entered into a second sale agreement with vendor wherein the 5<sup>th</sup> acre then occupied by the defendant was also sold to the plaintiffs; the plaintiffs admit not paying the full purchase price for the 5<sup>th</sup> acre; the plaintiffs obtain transfer of the entire suit property including the 5<sup>th</sup> acre to themselves; the defendant counterclaims disputing the alleged sale of the 5<sup>th</sup> acre to the plaintiffs; defendant alleges that she bought the 5<sup>th</sup> acre from vendor and paid for it in full; vendor is now deceased; defendant urges court to declare that plaintiffs are entitled only to 4 acres while defendant entitled to one 1 acre; held that plaintiffs are entitled only to 4 acres while defendant entitled to one 1 acre; plaintiffs' certificate of title cancelled; land registrar ordered to issue a new title for 4 acres to the plaintiffs and another for 1 acre to the defendant)*

1. This suit was commenced by way of plaint filed on 31<sup>st</sup> March 2011. The Plaintiff accused the Defendant of illegally entering into and remaining on the parcel of land known as LR. No. 13287/185 IR No.94867/1). The Plaintiff subsequently filed an amended plaint on 15<sup>th</sup> July 2011 wherein judgment for the following is sought against the defendant:

***a. A declaration that Roselyne Mary Njeri, and Gerald Njoroge Mbugua are the lawful and legal absolute proprietors of LR. No. 13287/185 (IR No. 94867/1) and that the defendant is a trespasser.***

***b. A permanent injunction restraining the defendant by herself, agent and/or servant howsoever from carrying of any development, alienating, leasing, or in any way dealing with LR. No. 13287/185 (I.R No. 94867/1) in a manner adverse to the interest of the plaintiff.***

***c. An order of eviction.***

**d. Costs.**

2. Though the defendant was granted corresponding leave to file and serve an amended defence, none seems to have been filed. Instead, what remains on record is the defendant's defence and counterclaim filed on 27<sup>th</sup> April 2011. The defendant averred that she bought 1 acre out of the suit property. She urged the court to dismiss the plaintiff's case and to enter judgment in her favour for:

**a) A declaration that the plaintiff's ownership of land parcel LR. No. 13287/185 (IR No. 94867/1) (sic).**

**b) Cancellation of the plaintiff's ownership of LR. No. 13287/185 (IR No. 94867/1) registered on 24<sup>th</sup> January 2007.**

**c) The defendant gets one (1) acre and the plaintiff to acquire the four (4) acres.**

**d) Costs of this suit and the counter claim together with interest thereon for such period and at such rate as this Honourable court may deem appropriate.**

3. The plaintiff testified as PW1 in support of her case and called no other witness. She testified that Roselyn Mary Njeri and Gerald Njoroge Mbugua are her children and that she has presented this case as their parent and pursuant to a power of attorney donated to her by the said Roselyn Njeri and Gerald Njoroge on 22<sup>nd</sup> July 2010. She produced the said power of attorney as plaintiff's exhibit No.1. She told the court that Robert Onsare Osiemo sold to her the plot known as LR No. 13287/185, situated in Ngata. The sale was in the year 2006. A sale agreement was executed between Robert Onsare Osiemo as vendor and the purchasers were Gerald Njoroge Mbugua and Roselyn Mary Njeri. The agreement was dated 7<sup>th</sup> January 2006. The acreage sold was 4 acres. The price per acre was KShs 360,000. Gerald and Roselyn paid the purchase price. When they went to complete the transaction at the advocates, the vendor said that there was an extra acre and he was ready to sell it the purchasers so as to make it 5 acres in total. PW1 produced the sale agreement dated 7<sup>th</sup> January 2006 as plaintiff's exhibit 2.

4. PW1 further testified that they executed another sale agreement dated 3<sup>rd</sup> February 2006 in respect of the extra acre. Gerald and Roselyne paid a down payment of KShs 100,000/= for the extra acre. The vendor said that the balance was to be paid after the vendor evicts a person who was occupying the extra acre. The person occupying was Mary Kwamboka. The vendor did not succeed to evict Mary Kwamboka but he handed over to the plaintiffs the title of the plot. PW1 produced the sale agreement dated 3<sup>rd</sup> February 2006 as plaintiff's Exhibit 3. A transfer dated 27<sup>th</sup> February 2006 was executed. It was signed by the vendor, Gerald Njoroge Mbugua and Roselyne Mary Njeri. The plaintiffs lodged it at the lands registry on 24<sup>th</sup> January 2007. They were issued with the title. Entry No.4 shows transfer on 24<sup>th</sup> January 2007 to Gerald Njoroge Mbugua and Roselyne Mary Njeri. The plaintiffs paid KShs 36,010/= as stamp duty on 22<sup>nd</sup> January 2007. PW1 produced the transfer dated 27<sup>th</sup> February 2006 as plaintiff's Exhibit 4 and a copy of the certificate of title as plaintiff's exhibit No.5. She also produced the receipt for stamp duty as plaintiff's exhibit No. 6.

5. PW1 also testified that at the time the plaintiffs were purchasing, Mary Kwamboka was occupying the extra 1 acre. She physically identified Mary Kwamboka in court and added that Mary Kwamboka is still occupying the plot while PW1 is in possession of the other 4 acres. PW1 added that the vendor passed away before evicting Mary Kwamboka. The balance of KShs 260,000 due from the plaintiffs in respect of the extra acre has not been paid up to now. The plaintiffs do not know who to pay since the vendor passed away. PW1 concluded her evidence in chief by telling the court that the suit property belongs to Gerald and Roselyn as they are the registered proprietors.

6. Under cross examination, PW1 stated that her power of attorney is dated 2010 and that the plaintiffs paid the entire purchase price save for the balance in respect of the extra acre. She stated that she spoke with the defendant, showed her the title and asked her if she could refund the Ksh100,000/= so that PW1 gives her the 1 acre but she refused. PW1 stated that she does not know if the defendant had bought it

and that if she were shown documents showing that defendant bought the property before the plaintiffs then she would say it is ok. She concluded by stating that when the transfer was registered the vendor was alive and that he went to register it himself.

7. The defendant Mary Kwamboka also testified in support of her case as DW1 and also called another witness Susan Osiemo as DW2. DW1 testified that it is not true that the property known as LR No. 13287/185 belongs to the plaintiffs. The whole property is 5 acres. She bought 1 acre out of the 5 acres on 7<sup>th</sup> January 2004. The plaintiff only owns 4 acres. She produced a copy of a receipt for KShs 270,000 dated 7<sup>th</sup> January 2004 being the purchase price as defence exhibit No.1. She stated that she paid in full. She also stated that she only has the receipt. The sale agreement was with her advocate Mr. Motende who is now deceased. She stated that the said Mr. Motende was to be her witness. He signed a witness statement dated 10<sup>th</sup> April 2011. She produced the witness statement as defence exhibit No.2.

8. DW1 added that Evans K. Nyariki, her grandson, bought for her the plot. She stated that the plaintiff bought her 4 acres in the year 2006 and had not paid for DW1's 1 acre. She added that there is no way the plaintiff could have bought the 1 acre without paying for it in full. She stated that the 1 acre belongs to her and that she does not know how the plaintiff acquired it. She concluded her evidence in chief by praying that she be granted her plot and by further stating that if the plaintiff has any claim then she should direct it against the vendor.

9. Under cross examination, DW1 stated that she bought 1 acre from Robert Osiemo, the vendor. The sale agreement in respect of the 1 acre was with the late Mr. Motende, her lawyer. She paid KShs 270,000 as purchase price. The receipt (D. Exhibit 1) shows that it was issued by Mr. Motende. She stated that she did not have any document to show that Mr. Osiemo received the money. She maintained that she knew that he received it and that the widow would come to court to confirm. She added that Mr. Osiemo received the money in his hand in the presence of his wife. She stated that she bought the 1 acre and has even constructed on it and that when the plaintiff bought her portion she DW1 was already in occupation of her portion. PW1 found her there. The sale agreement for her portion was between Mr. Osiemo and Evans, her grandson who was buying for her.

10. Susan Osiemo DW2 testified that she knows the defendant as someone who purchased a plot from her late husband, Robert Onsare Osiemo. She testified that the defendant bought 1 acre. She added that she also knows Emma Wanjiku but not so well. Emma Wanjiku bought 4 acres from her husband. She stated that the defendant paid KShs 270,000 to her husband. She adopted her witness statement filed herein on 27<sup>th</sup> April 2011 as her testimony. She added that the plaintiff never bought 5 acres. She only bought 4 acres. The total size of the plot was 5 acres. The remaining 1 acre was bought by the defendant. The sale agreement was drawn by the late Mr. Motende, Advocate.

11. Under cross examination, DW2 testified that her husband told her that he and the defendant had a written agreement. She was not present when the agreement was executed and was also not present when the KShs 270,000 was paid. Her husband however told her that he was paid. When shown the sale agreement that was produced as plaintiff's exhibit 3 she stated that her husband sold only the 4 acres that remained.

12. At the close of defence case, parties agreed to file written submissions. In that regard, plaintiff's submissions were filed on 5<sup>th</sup> July 2017 while the defendant's submissions were filed on 31<sup>st</sup> July 2017.

13. In submissions filed on behalf of the plaintiff, counsel for the plaintiff argued that there being no dispute that the plaintiffs are the lawful proprietors of 4 acres of the suit property, the only bone of contention is the 1 acre which the defendant is claiming. Referring the court to the copy of the Certificate of Title for the suit property which was produced as plaintiff's exhibit No.5, counsel submitted that the plaintiffs were entitled to the whole of the suit property since the certificate of title conferred on them the rights and privileges referred to under Article 40 of the Constitution and Sections 24 to 26 of the Land Registration Act. In support of this contention, counsel cited the authorities of **Evelyn College of Design Ltd -v- Director of Children's Department & Another [2013] eKLR** and **Kibusia Arap Konga -v-**

**Evans Obonyo Obiero & Another [2017] eKLR.** Counsel further submitted the plaintiffs' claim to the whole of the suit property was further fortified by the fact that the plaintiff had produced a sale agreement and a transfer. The plaintiffs thus urged the court to enter judgment for them against the defendant as prayed in the amended plaint and to dismiss the counter claim.

14. In the submissions filed on behalf of the defendant, counsel for the defendant submitted that the plaintiffs had failed to prove legal ownership of the 1 acre claimed by the defendant. Counsel submitted that the plaintiff admitted in her testimony that the plaintiff obtained title to the whole of the 5 acres despite there being a balance of KShs. 260,000 in respect of the purchase price. It was further submitted on behalf of the defendant that the defendant bought her portion in the year 2004 compared to the plaintiffs who bought in 2006. Counsel further referred the court to the witness statement by the late Evans Getenya Motende, Advocate, wherein he states that he prepared a sale agreement on 7<sup>th</sup> January 2004 between Robert Osiemo Onsare and the defendant wherein the defendant bought an acre to be hived off the suit property. Similarly, counsel referred the court to the evidence of DW2 to show that the defendant fully paid the purchase price.

15. I have considered the pleadings, the evidence and the submissions by the parties. There is no dispute that pursuant to sale agreement dated 7<sup>th</sup> January 2006, Gerald Njoroge Mbugua and Roselyne Mary Njeri purchased 4 acres of land to be excised from L.R No. 13287/185. The vendor was Robert Onsare Osiemo and the price per acre was KShs 360,000. The purchasers paid the full purchase price for the 4 acres. L.R No. 13287/185 measured 2.023 hectares or 5 acres. Consequently, upon sale of the 4 acres, there remained 1 acre.

16. There is also no dispute that as at the time the vendor sold the 4 acres to the Roselyne Mary Njeri and Gerald Njoroge Mbugua, the defendant was already in occupation of the remaining 1 acre. Indeed, PW1 confirmed as much in her testimony.

17. In view of the foregoing, the only issues for determination are firstly whether Roselyne Mary Njeri and Gerald Njoroge Mbugua are entitled to the whole of the suit property known as LR 13287/185; secondly whether the defendant is entitled to 1 acre out of the suit property and finally, who bears costs of the case.

18. Gerald Njoroge Mbugua and Roselyne Mary Njeri are currently the registered proprietors of the suit property measuring 5 acres. They became registered proprietors on 24<sup>th</sup> January 2007, upon registration of transfer executed on 27<sup>th</sup> February 2006. The transfer itself was preceded by two Sale Agreements: one dated 7<sup>th</sup> January 2006 evidencing purchase of 4 acres at the price of Kshs.360, 000 per acre and the other dated 3<sup>rd</sup> February 2006 for the whole of LR13287/185 at the price of Kshs.1.8 million. By PW1's own testimony, the purchase price of Kshs.1, 440,000 for 4 acres in respect of the sale agreement dated 7<sup>th</sup> January 2006 was fully paid. In essence, the sale agreement dated 3<sup>rd</sup> February 2006 was to enable the plaintiffs to purchase the remaining 1 acre thus effectively acquiring the whole of LR13287/185. In the said agreement, it was confirmed that the purchasers had paid a total of Ksh.1, 540,000 to the vendor leaving a balance of Kshs.260, 000. PW1 confirmed this when she stated in her testimony that the purchase price of the remaining 1 acre was agreed at KShs 360,000 out of which the plaintiffs paid KShs 100,000.

19. In her testimony, the defendant stated that she bought 1 acre out of the suit property on 7<sup>th</sup> January 2004 at Kshs.270, 000 and paid for it in full. She was already in occupation when the plaintiffs were buying their 4 acres. This is corroborated by PW1's testimony and paragraph 2 of the sale agreement dated 3<sup>rd</sup> February 2006 which acknowledges that "one (1) acre of the land is currently occupied by a third party...."

20. Though not having paid for the whole of the suit property, the plaintiffs managed to have transfer of the whole of the suit property registered in their favour. The transfer that formed the basis of the registration wrongly stated that a consideration of Kshs.1.8 million had been paid. The truth of the matter, as noted above, is that a balance of Kshs.260, 000 remains even today. The plaintiffs now claim that they

are entitled to the suit property in full and cite the provisions of Article 40 of the Constitution and Sections 24, 25 and 26 of the Land Registration Act.

21. Section 24 of the Land Registration Act provides:

**Interest conferred by registration**

**Subject to this Act—**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**

**(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.**

22. Section 26 of the same Act provides:

**Certificate of title to be held as conclusive evidence of proprietorship**

**(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

**(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.**

23. Under Section 26, the title of a registered proprietor shall not be subject to challenge except on grounds of fraud or misrepresentation to which the proprietor is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

24. In this case, the registration of transfer in favour of Gerald Njoroge Mbugua and Roselyne Mary Njeri and the subsequent issuance of certificate of title in their favour for the whole of the suit property were all done notwithstanding the fact that they had only paid the purchase price for 4 acres. It was also done notwithstanding PW1's admission that they were aware that the defendant was in occupation of her 1 acre even before the vendors acquired their 4 acres. The plaintiffs acknowledge that they have so far not paid the balance of the purchase price for the extra 1 acre. They have demanded that the defendant refunds them the KShs 100, 000 which they paid to the vendor as part payment for the 1 acre, as a condition for them releasing the 1 acre to the defendant. In view of their admission that they did not pay for 5 acres yet lodged a transfer purporting that they had paid for 5 acres and further in view of their admission that they knew that the defendant had been in occupation of 1 acre before the plaintiffs came onto the scene, I find and hold that the plaintiffs title is tainted by misrepresentation to which the plaintiffs were clearly a party. For the same reasons, I find and hold that the certificate of title was acquired unprocedurally. Normal procedure would demand that the plaintiffs only acquire the 5 acres after fully paying for them. I thus find and hold that the plaintiffs are only entitled to 4 acres out of the suit property. That disposes of issue

No.1.

25. Issue No. 2 goes hand in hand with issue No. 1. As already stated, there is evidence that the defendant was in occupation of her 1 acre before the plaintiffs purchased their 4 acres. I accept the defendant's testimony as well as the witness statement of the late Evans Getenga Motende which was produced as defence exhibit No.2 that the defendant paid Kshs.270, 000 to the vendor for the 1 acre. The defendant's testimony in that regard was corroborated by the testimony of DW2. DW2's testimony makes sense considering that the defendant had been in occupation of the 1 acre long before the plaintiffs came along. Generally, I see more consistency in the defendant's version of events. I thus find and hold that the defendant had bought the 1 acre from the vendor and is therefore entitled to it.

26. Thus, the plaintiffs' claim succeeds partially to the extent that I have found that Gerald Njoroge Mbugua and Roselyne Mary Njeri are entitled to only 4 acres out of the suit property. Similarly, the defendant's case succeeds partially to the extent that the plaintiffs' case is not for dismissal and to the extent that I have found that the defendant is entitled to 1 acre out of the suit property.

27. I am alive to the fact that the plaintiffs maintain that they had paid KShs 100,000 as part payment for purchase of the 1 acre that is also claimed by the defendant. The said amount was not paid to the defendant and the defendant cannot be made to refund it. Gerald Njoroge Mbugua and Roselyne Mary Njeri can pursue its recovery from the vendor or the vendor's estate.

28. In the end, I make the following orders:

a) It is hereby declared that Gerald Njoroge Mbugua and Roselyne Mary Njeri are entitled to only 4 acres of the piece of land known as Land Reference Number 13287/185 (IR No. 94867/1) while Mary Kwamboka is entitled to the remaining 1 acre.

b) Certificate of Title for Land Reference Number 13287/185 (IR No. 94867/1) measuring 2.023 hectares in the names of Gerald Njoroge Mbugua and Roselyne Mary Njeri is hereby cancelled.

c) The District Land Surveyor Nakuru is hereby ordered to survey Land Reference Number 13287/185 (IR No. 94867/1) and create a subdivision measuring 4 (four) acres (or its equivalent in hectares) out of the portion currently occupied by Gerald Njoroge Mbugua and Roselyne Mary Njeri or Emma Wanjiku and a subdivision measuring 1 (one) acre (or its equivalent in hectares) out of the portion currently occupied by Mary Kwamboka.

d) The District Land Registrar Nakuru is hereby ordered to issue a new Certificate of Title in the names of Gerald Njoroge Mbugua and Roselyne Mary Njeri in respect of the subdivision measuring 4 (four) acres (or its equivalent in hectares).

e) The District Land Registrar Nakuru is hereby ordered to issue a new Certificate of Title in the name of Mary Kwamboka in respect of the subdivision measuring 1 (one) acre (or its equivalent in hectares).

f) Each party shall bear own costs of both the suit and the counterclaim.

**Dated, signed and delivered in open court at Nakuru this 16<sup>th</sup> day of November 2017.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Nanda holding brief for Mr. Kipkoech for the plaintiff

No appearance for the defendant

Court Assistants: Gichaba and Lotkomoi