



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 2325 OF 1995

JOHN WALLACE MATHARE.....1ST PLAINTIFF

DENNIS WAWERU RIMUI.....2ND PLAINTIFF

VERSUS

JOYCE WANJA GITAU.....1ST DEFENDANT

GEORGE HEZRON MWAURA GITAU.....2ND DEFENDANT

CHARLES KARATHE KIARIE.....3RD DEFENDANT

THOMAS WANYOIKE WAINAINA.....4TH DEFENDANT

JAMES MAINA.....5TH DEFENDANT

ERIC MWANIKI.....6TH DEFENDANT

KALANG ENTERPRISES.....7TH DEFENDANT

RULING

The Plaintiff brought this suit on 1st July 1995 seeking the following reliefs;

- (i) A declaration that the agreement for sale dated 2nd June 1995 between the 3rd and 4th Defendants and the 2nd Defendant and the subsequent transfer was fraudulently entered into to defeat the Plaintiff's title and interest in LR No. 13459/4/(I.R No. 53362) and consequently the same is null and void.
- (ii) An order for specific performance of the agreement dated 18th September 1990 between the Plaintiffs and the 1st Defendant.
- (iii) Alternatively but without prejudice to (i) and (ii), damages for breach of contract.
- (iv) Costs

(v) Any other or further relief deemed fit to grant.

The suit was heard by Angawa J. who in a judgment delivered on 16th August 1999 made the following orders in favour of the Plaintiffs;

(i) That the Plaintiffs are entitled to specific performance.

(ii) That the title deed registered and issued by the 3rd Defendant, Charles Karathe Kiarie on 23rd October 1992 infavour of the 7th Defendant, Kalang Enterprises be and is hereby cancelled due to fraud.

(iii) That the Plaintiffs should have their portion of the property transferred to them from the 2nd Defendant's title.

(iv) That the Defendants do pay the costs of the suit.

The Defendants were dissatisfied with the decision of Angawa J. aforesaid and filed an appeal to the Court of Appeal against the same namely, **Court of Appeal at Nairobi, Civil Appeal No. 225 of 2006, Charles Kiraithe Kiarie and 2 others Vs. The Administrator of the estate of John Wallace Mathare (deceased) and 5 others.** In the meantime, the Defendants filed an application for stay of execution of the said decision pending appeal. The Defendant's application for stay was allowed by Angawa J. on 22nd September 1999 on the following conditions;

(i) That the Plaintiffs were to remain in possession of the suit property without any interference with their quiet enjoyment thereof.

(ii) That the Defendants were to provide security in the sum of Kshs.800,000/= to be deposited in court within 30 days.

(iii) That all the titles deeds were to be deposited with the Registrar forthwith.

(iv) That in default in compliance with the foregoing, the stay order was to lapse without any further orders by the court.

The Defendants filed another application for stay of execution in the Court of Appeal, namely, **Court of Appeal Civil Application No. Nai.294 of 1999, Charles Karathe Kiarie & 2 Others vs. John Wallace Mathare & another.**

Like the High Court, the Court of Appeal granted to the Defendants conditional order of stay of execution. The Court of Appeal granted to the Defendants stay of execution on condition that the Plaintiffs remain in possession of the suit premises and the title documents in respect of the suit premises remain in the custody of this court until the final determination of the Defendants appeal to the Court of Appeal.

The Defendants appeal was ultimately heard by the Court of Appeal. In a judgment that was delivered on 26th April 2013, the Court of Appeal dismissed the appeal with costs but ordered the Plaintiffs to pay to the estate of the 1st Defendant a sum of Kshs.201,650/=. The Defendants sought leave of the Court of Appeal to appeal to the Supreme Court which leave was denied by the Court of Appeal in a ruling delivered on 8th November 2013. The Defendants did not give up. They filed an application in the Supreme Court seeking a review of the Court of Appeal's decision denying them leave to appeal to the Supreme Court. The Defendants' application was dismissed by the Supreme Court on 16th October 2015.

The end result of the foregoing is that the decision of Angawa J. made on 16th August 1999 remains undisturbed and binding upon the Defendants. What is now before me is the application by the Plaintiffs

brought by way of Notice of Motion dated 19th March 2014 seeking an order that the title deeds for LR No. 13459/44, 13459/45, 13459/46, 13459/47 and 13459/48 which were deposited in court pursuant to the order that was made by Angawa J. on 22nd September 1999 and issued on 8th October 1999 be released to the Plaintiffs. The application is supported by the affidavit and supplementary affidavit sworn by the Plaintiffs' advocate Mr. Austin Ayisi. The application was opposed by the Defendants through a replying affidavit sworn by the 3rd Defendant, Charles Kirathe Kiarie on 28th April, 2014.

When the Plaintiffs' application came up for hearing on 9th May 2016, the advocates for the Defendants did not appear in court. After satisfying myself that the Defendants' advocates were duly served with a hearing notice, I allowed Mr. Nyaribo advocate who appeared for the Plaintiffs to proceed with the application the absence of the Defendants notwithstanding. Mr. Nyaribo submitted in support of the application that, the Plaintiff has paid to the estate of the 1st Defendant a sum of Kshs.201,650/= in accordance with the decision of the Court of Appeal that was made on 26th April, 2013. Mr. Nyaribo submitted that the Defendants having lost an application for leave to appeal against the said Court of Appeal decision both in the Court of Appeal and at the Supreme court, there is no valid reason why the titles which were deposited in court should not be released to the Plaintiffs so that they may present the same to the Land Registrar for cancellation and issuance of a new title to the Plaintiffs in accordance with the judgment of this court that was made by Angawa J. on 16th August 1999.

I have considered the Plaintiffs' application. There is no dispute that judgment was made herein in favour of the Plaintiffs by Angawa J. on 16th August 1999. There is also no dispute that the court ordered that the title that was issued by the 3rd Defendant in favour of the 7th Defendant be cancelled and that the Plaintiffs do get their portion of the suit property from the 2nd Defendant. It is not in dispute that the Defendants appealed against the said judgment to the Court of Appeal and that as a condition for granting a stay of execution pending appeal, the Defendants were ordered both by this court and the Court of Appeal to deposit the titles for the suit premises in court pending the hearing and determination of their appeal. There is also no dispute that the Defendants complied with the orders of the two courts and deposited the said titles with the court through a covering letter by Mbigi Njuguna and Company Advocates dated 24th September 1999. It is common ground that the Defendants' appeal to the Court of Appeal was dismissed with costs. There is also no dispute that the Plaintiffs have paid through the 1st Defendant's advocates a sum of Kshs.201,650/= that they were ordered to pay to the estate of 1st Defendant by the Court of Appeal. There is also no dispute that the Defendants' application for leave to appeal to the Supreme Court against the decision of the Court of Appeal was dismissed by the Court of Appeal and an application made to the Supreme Court to review that decision was similarly dismissed.

The determination of the Defendants appeal in the Court of Appeal in favour of the Plaintiffs paves the way for execution of the judgment of Angawa J. The Plaintiffs have argued that the release of the title documents which were deposited by the Defendants in court on 24th September 1999 would aid the execution process. As I have stated above, the said title documents were deposited in court pending the hearing and determination of the defendant's appeal to Court of Appeal which has now been determined. This court as I have stated above had ordered the cancellation of the 7th defendant's title and the issuance of a new title to the Plaintiffs. The Defendants have not denied that this process would require the surrender of the titles issued earlier for cancellation to enable the Land Registrar issue a title in favour of the plaintiffs as ordered by the court. I am satisfied that the plaintiff's application has merit. The Notice of Motion dated 18th March 2014 is allowed in terms of prayer 2 thereof. The Plaintiffs shall have the costs of the application.

Delivered and Dated at Nairobi this 4TH day of November, 2016

S. OKONG'O

JUDGE

In the presence of

Mr. Nyaribo

for the Plaintiffs

Mr. Benji

for the Defendants

Kajuju

Court Assistant