



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT

E.L.C. NO.74 OF 2013

JAMES MUNENE NDUMBI.....PLAINTIFF

VERSUS

SOSPETER MURIMI KARITU.....DEFENDANT

J U D G M E N T

James Munene Ndumbi (*hereinafter referred to as the plaintiff*) has sued Sospeter Murimi Karitu (*hereinafter referred to as the defendant*) by plaint dated and filed on 23/4/2013. The plaintiff avers that by sale agreement dated 26/2/2013 made between the plaintiff as the purchaser on the other part and **Paul Wanjohi Kinyua** as the vendor on the second part, it was agreed inter alia that the land parcel No. Mwerua/Kanyokora/131(*hereinafter referred to as the suit land*) registered in the name of **Paul Wanjohi Kinyua** be sold to the plaintiff at an agreed sum of Kshs.7,000,000/= in the same state and condition as it was at the date of execution of the sale agreement. The vendor was to execute all necessary documents and in addition ensure that the suit land was to be transferred free from all encumbrances. That it was an implied term that the purchaser was to take possession of the same upon execution of the sale agreement.

That pursuant to the terms and conditions of the sale agreement, the plaintiff duly paid **Paul Wanjohi Kinyua** a total sum of Kshs.7,000,000/= and the suit land was transferred to him as per the agreement. The plaintiff ensured that the sale of the suit property was above board by obtaining all necessary consents and conducting due diligence. Thereafter the plaintiff charged the suit land on the 4/4/2013 and obtained a credit facility from Fortune Sacco Society Ltd of Kshs.6,500,000/=. The Fortune Sacco society Ltd however later on declined to release the said amount citing information that the property was encumbered. Upon inquiring the plaintiff was issued with a letter from Kariithi & Co. Advocates the defendant's advocate. The said letter cautioned Fortune Sacco Ltd from releasing the charged amount alleging that the plaintiff was out to defraud the financial institution as he had no intention of paying the said amount. The plaintiff avers that the defendant alleges that he was owed by David Mugo Murimi Kshs.5,696,733 on account of a judgment delivered with regard to the suit property in Nyeri High Court Suit No.472 of 1986. The plaintiff believes that the defendant has employed malicious means in his attempt to recover an alleged debt from a third party. The plaintiff avers that he is a bonafide purchaser for value without notice and any dispute on the suit land must be resolved without involving the suit property. The plaintiff further avers that the defendant is malicious in dragging him into a dispute that he is not privy to. Despite demand being made and notice of intention to sue being given the defendant has refused and/or neglected to make good the plaintiff claim. He claims that the suit land at the root of this suit is situated in Nyeri within the jurisdiction of this honorable court.

The plaintiff prays against the defendant for a declaration that the plaintiff is the a bonafide owner of the

suit land. A declaration that the suit land is un-encumbered with regard to the claim by the defendant. Damages as against the defendant and costs of this suit and interest thereon at such period of time as this honorable court may deem fit.

The defendant entered appearance on the 6/5/2013 and filed defence on the 7/5/2013 admitting the contents of the plaint save the particulars of malice as itemized in paragraph 12 of the plaint. He averred that he had been in quiet possession of the suit premises and that the plaintiff had never at any one time been in possession of the same. The defendant further averred that the plaintiff's title was not clean as the same was tainted with irregularities on how it was acquired. Finally he avers that this court lacks territorial jurisdiction to entertain the suit and vowed to raise a preliminary objection at the opportune time.

Though the suitland is situated in Kirinyaga as pleaded by the defendant the preliminary objection was not raised and therefore hearing of the suit commenced on the 7/6/2013 at 11.25 am when the plaintiff testified that on 26/2/2013, he entered into a sale agreement with **Paul Wanjohi Kinyua**. They went to the Land Control Board and obtained consent to transfer dated 21/3/2013. The suit land was finally transferred in his name and he was issued with a title deed. He sought to charge the suit land with the Fortune Sacco Ltd for Kshs.6.5 million but did not receive the money as there was a complaint by the defendant. The charge was registered as an encumbrance to the title however the property was not in possession of any person. He prays the court to give him orders to use his land and prayers as sought in the plaint.

On cross-examination by **Mr. Igati Mwai** he states that he bought property from Paul Wanjohi Kinyua for 7 million. In the green card it was indicated the value of the land as 200,000/= because he did not want to be highly charged with stamp duty. The value in the green card is different from market value. Paul Wanjohi Kinyua bought the property from David Mugo Murimi for Kshs.200,000/=. Entry No.5 is withdrawal of caution under Civil Case No.31 of 2013 SPM Kerugoya.

The withdrawn caution was lodged by Sospeter Murimi Karitu the defendant herein. Paul Wanjohi Kinyua and David Mugo Murimi were parties in the Kerugoya case abovementioned when the caution was removed but the plaintiff was not a party in that case initially but was added after being registered as the owner.

PW4, David Mugo Murimi states that he knows the defendant as they litigated with him in Nyeri HCCC No.472 of 1986 in respect of the suit Land which was concluded and judgment given and that he has a title deed in respect of the land. He sold the land to Paul Wanjohi Kinyua in 1985 and was paid **Ksh 200000** in two installments. He was given a consent by the Land Control Board and nobody protested.

On cross-examination he states that he sold the land in 1985 to Paul Wanjohi Kinyua and was paid and does not know why he was taken to court. On the issue of the concluded suit no Nyeri 472 of 1986 he states that the suit was commenced in 1986 after he sold the land and that the court decided that he pays the defendant ksh 6.5 million. He transferred the said land to Wanjohi on 25/1/2013. On the issue of the caution he states that the same was placed by Sospeter Murimi Karitu whom he did not know and removed by the court in his absence on 18/1/2013. He recorded consent and signed a letter dated 16/1/2013 addressed to the Senior Principal Magistrate stating that the caution be removed. The land was registered in the name of Paul Wanjohi Kinyua. They went to Land Board on a date he cannot remember and signed some papers. He admitted suing the defendant in Kerugoya HCC No.790 of 2013 filed on 7/11/201 for payment of Kshs.400,000 through the firm of Mr. Ongoto.

PW5, Mr. Paul Wanjohi Kinyua states that David Mugo Murimi sold him the suit land for KSH1.8 million. He used to pay him in installments that is the reason why Mugo took time to transfer the land. He had refused to do so until Paul had paid him all the money. He decided to sell the land to James Munene Ndumbi to clear his debts. He was paid by the plaintiff Kshs.5,800,000/= hence he went to the land board and transferred the land. Nobody raised an objection.

On cross-examination, he states that David Murimi Mugo whom he knew in 1986 sold him the land for

kshs.1.8 million. He paid the 1st installment in 1986 of Kshs.40,000 and the last installment in 2006. He went to court in 2013 as David Murimi Mugo had failed to transfer the land to him as agreed. He went to the lands office with the agreement and found that there was a caution placed by Sospeter Murimi Karitu whom he did not know at the time. He agreed with David to remove the caution which caution was removed on 18/1/2013 and this enabled them to move to the Land Control Board. The land was transferred on 25/1/2013 to Wanjohi after the removal of the caution and Wanjohi transferred the land to the plaintiff on 22/2/2013. He took the plaintiff to the board before payment of the money. He was paid 1.2 million before transfer and 5.8 million after the transfer.

On cross-examination, he states that before buying the land he did a search and established that David Murimi Mugo had a title. The figures in the green card was placed by the lands office. He sold the land to the plaintiff who paid him Kshs.7 million.

The defence called the defendant who testified that they had a case with the plaintiff in Kerugoya senior Principal Magistrates court thus case No.3 of 2013 in respect of a caution on the suit land which he had placed on 12/8/1986. The suit was filed by Paul Wanjohi Kinyua against David Mugo Murimi and James Munene Ndumbi who was joined later. He went to the lands registry and found the caution had been removed and the plaintiff whom he did not know at the time had applied for a loan of 6,500,000 using the suit land as security.

On the 18/6/2009 he was awarded a figure of Kshs.3,500,000 and a refund of the purchase price in Nyeri HCCC No.472 of 1986 and was not evicted from the land. On 13/5/2013 he filed a bill of costs against David Murimi Mugo and the court awarded him Kshs.85,000. David Murimi Mugo was substituted in the place of his father Murimi Kario as he knew what was happening. David Mugo Murimi later sued the defendant in HCCC No.790 of 2013 at Kerugoya praying for Kshs.400,000 per month and mesne profits.

The defendant entered the land in 1968 by agreement of David Mugo Murimi and his father and therefore prays that the title of James Munene Ndumbi be declared illegally obtained and the court reinstates the caution that was on record and the court to take action against who removed a caution.

On cross-examination by Mr. Ongoto he stated that the land belonged to David Mugo Murimi who sold the land to the defendant. They had a case and the court ordered he be paid. Upon payment of the damages the defendant was to leave the premises and the land was to remain in the name of David Mugo Murimi. There was no court order that he vacates the land. The plaintiff had not developed the land. The defendant has no documents to show that he has title. The judgment does not state that the land should be security for the decretal amount. The defendant prays he be paid all the amount and he will leave the land. The defendant does not stay in the land. He has not claimed against the plaintiff but David Mugo Murimi. The plaintiff was not involved in the removal of caution but bought the land after removal of the caution.

After hearing the evidence, parties were given time to file submissions.

Mr Ongoto for plaintiff submits that the plaintiff was the bonafide owner of the suit property as he purchased the suit property without Notice of any encumbrance. He had a valid title to the suit property and such he was entitled to quiet possession and that included offering the property for sale. The plaintiff argues that the defendant does not fall within the confines of the bonafide purchaser for value as he has never held title to the suit property. He argues that the defendant rights were spelt out in the judgment made by Justice Makhandia on the 18/6/2009 in Nyeri High Court Civil Suit No.472 of 1986. He abandoned the judgment and occupied the suit property in effect reaping the profits from the property while reserving the option to execute the judgment.

On the issue as to whether the defendant had any right in stopping the disbursement of the charged amounts to the plaintiff the plaintiff submits that the defendant did not have any ownership rights and yet he instructed Kariithi & Co. advocates to write a letter to the Fortune Sacco Society Limited to stop disbursement.

On his part, **Mr Igati Mwai** for the defendant submits that the plaintiff did not have a clean title and the same was irregularly acquired as the defendant had cautioned the land and yet was not involved in the proceedings that caused the caution to be removed.

The second issue raised by the defendant is the collusion between the plaintiff and the interested parties in removing the caution. The cautioner who is the defendant was not informed about the removal of the caution. Moreover, he was not informed about the filing of the suit. No papers were served upon him.

This court finds that the register in respect of the suitland was opened on **31/3/1960** in the name of **Mugo Murimi**. The land measures approximately 2.46 Ha as depicted on registry map sheet No.4 opened on 31st March 1960.

On the **9/10/1984**, the name was corrected to read David Mugo Murimi alias Mugo Murimi and a land certificate was issued.

On the **12/8/1986**, the defendant lodged a caution in the parcel of land claiming a purchaser interest. He also filed a suit in this court being **Nyeri HCCC No.472 of 1986 (hereinafter referred to as the former suit)** claiming as against Murimi Kario and David Mugo Murimi for the transfer of the suit land to himself and a declaration that the David Mugo Murimi had breached the contract and or his undertaking and or his obligation.

In the alternative the defendant prayed for a refund of the purchase price and compensation by the defendant in the former suit of all developments he had effected on the suit premises.

The matter was resolved amicably when parties agreed that the dispute be settled. Mr. Kariithi advocate for plaintiff in the former suit suggested that the plaintiff therein (**the defendant herein**) be refunded the purchase price paid as pleaded in the plaint plus interest and that the developments on the suit premises made by him be valued and suitably compensated.

The defendant in the former suit (**David Mugo Murimi**) was not averse to the proposal, however he was only prepared to pay the plaintiff Kshs.700,000 in full and final settlement of the entire claim. The judge directed that the District Agricultural Officer Kirinyaga District do visit the suit land and value the tea plants standing thereon and file further report on or before 29/1/2008.

On the 18/6/2009 Hon. Justice M.S.A. Makhandia made a decision in the former suit that the defendant therein to pay the plaintiff therein (**The defendant herein**)

1. **Kshs.3,500/= being a refund of the purchase price.**
2. **Kshs.3,680,000/= being the total value of tea and arrow roots on the suit premises.**
3. **Kshs.1,111,864/80 being the total value of the trees on the suit premises.**
4. **Costs and interest.**

The said amounts were to attract interest at court rates from the date of judgment. Nothing happened in respect of this matter until on the 18/1/2013 when the caution lodged on 12/8/1986 was removed by court order. On the 25/1/2013 the property was transferred to Mr. Paul Wanjohi Kinyua and a title deed issued accordingly. On the 22/2/2013 the said property was transferred to the plaintiff herein and a title deed issued on the same date. A caution was lodged on the 4/4/2013 in favour of the defendant. This was followed by the order of this court made on 23/4/2013 that was entered in the register on 24/4/2013. The last entry in the register was made on 21/5/2013 thus status quo to remain until the matter was finalized. The case proceeded for hearing and all parties were given an opportunity to be heard and call witnesses.

The court having heard the evidence of the parties finds the issues for determination as follows:-

- *What is the implication of the decision of Justice Makhandia made on 18/6/2009 ?*
- *Was the plaintiff an innocent purchaser for value?*
- *Was the 1st interested party David Mugo Murimi the initial proprietor of the parcel of land?*
- *Did he defendant acquire any property interest in the suit land?*
- *Is The plaintiff a bonafide owner of the property in dispute?*
- *Whether the defendant had any right to stop the transaction by the plaintiff in respect of the property?*

On the first issue, this court finds that the defendant filed suit No.472 of 1986 (**former suit**) at the High Court of Kenya at Nyeri based on breach of contract claiming against David Mugo Murimi and Murimi Kario for the transfer of the suit land to himself. The alternative prayer was for a refund of the purchase price and compensation for all the developments effected on the suit land.

The former suit was based on facts that in the said suit, the 1st defendant was the real father of the 2nd defendant. The plaintiff averred that by an agreement dated 14/1/1986 entered between the plaintiff and the 1st defendant in the former suit, the 1st defendant agreed to sell to the plaintiff the suitland measuring 7 acres at an agreed purchase price of Kshs.3500/=. The said land was registered under the name of the 2nd defendant in trust for the 1st defendant and that It was under the terms and conditions of their agreement that the 1st defendant was to cause the 2nd defendant who was not a grown up to transfer the said land to the plaintiff after attaining the age of majority.

The plaintiff in the said suit averred further that he started occupying the suit land during the year 1968 with the knowledge and authority of the 1st defendant and that he had already planted over 19,000 tea plants which covers over 6 acres within the said piece of land. He had been developing the said land with the knowledge of the defendants and without any interruption from the defendants and value of the development on the suit land was at the time over 900,000/=.

He further averred that in breach of the said agreement the 1st defendant had refused and or neglected to cause the 2nd defendant to transfer the suit land to the plaintiff. In the premises the plaintiff's claim against the defendants was for an order requiring the 2nd defendant to transfer the suit land to the plaintiff and for a declaration that the 1st defendant was in breach of his obligation or undertaking.

The defendant's response to the plaintiff's claim was that Murimi Kario (deceased) had no capacity to sell the suit land as the same was not his. The defendant denied that the suit land was registered in his name as a trustee for Murimi Kario (deceased). He stated that he was the absolute proprietor as well as the sole beneficiary of the whole land parcel to the exclusion of all other persons. He capped his pleadings by stating that he had neither a legal nor equitable obligation to transfer his own land to the plaintiff as there was no privity of contract.

This case took of when the plaintiff in the former suit began testifying but through his lawyer changed tact and decided to enter into a consent whose import was that the plaintiff be refunded the purchase price paid and pleaded in the plaint plus interest and that the development be valued. The defendant did not object but was prepared to pay the plaintiff Kshs.700,000/= only in full and final settlement of the entire claim.

With the concurrence and consent of the parties and their advocates, it was agreed that the District Agriculture Officer Kirinyaga District do visit the land parcel and value the tea plants standing therein and file further report on the land generally on or before 29/1/2008.

The court made its decision after receiving the report and upon submissions of parties. The plaintiff therein having abandoned the prayer for transfer of the suit land, the court ordered that he be refunded the

purchase price, be paid the value of the tea, arrow roots and the total value of the trees to the suit land.

The import of the decision was that the suit land remained the property of David Mugo Murimi who was ordered to compensate the plaintiff therein. The plaintiff did not take any action to execute the decree issued on the 22nd day of June 2010. This court finds that the defendant herein who was a plaintiff in the former suit slept on his rights by failing to execute the decree to recover damages for breach of contract.

Moreover, the defendant in Nyeri HCCC No.472 of 1986 remained the bonafide owner of the property upon delivery of judgment. The plaintiff's remedy was in damages and not the land and this court holds that a decree holder has no lien over the property of the judgment debtor as the process of execution must be undertaken

What was the fate of the caution lodged in the land registry by the plaintiff before the case was filed in view of the decision of the court?

This court finds that upon the determination of the suit in the favour of the plaintiff in Nyeri HCCC No.472 of 1986, the caution became subsumed in the decision of the court. The caution had been lodged by the plaintiff claiming purchasers interest, hence upon the determination of the suit that he be compensated, his interest in the property was determined and could only execute the judgment in accordance with the law but could not retain the caution on the register.

This court finds that at the time of transfer of the property by David Mugo Murimi to Paul Wanjohi Kinyua the former was the absolute proprietor of the suit land.

The relevant law is the Land Registration Act No.3 of 2012. Section 24 provides that 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.***

Mr. David Mugo Murimi being the first registered owner of the land his rights could not be defeated by a purchaser's interest whose interests were reduced to damages by the court. His interest could only be defeated by overriding interest such as ***customary trust, spousal rights, compulsory acquisition inter alia.***

On the issue of removal of caution, though the defendant was not involved and yet he had placed the caution, this court finds that the plaintiff was not a party in the case SPMCC No.3 of 2013 at Kerugoya. Moreover, the caution had been overtaken by the decision of Justice Makhandia on 18/6/2009.

The fact that the defendant has commenced the process of executing the decree in Civil Suit No.472 of 1986 by initiating taxation as shown in ***Dexh.9a*** presupposes that he has chosen to pursue the judgment therein. This court cannot allow the plaintiff to pursue the said judgment at the same time retaining the suit land, he has to elect one.

The upshot of the above is that the plaintiff has demonstrated that he followed the procedure in acquiring the suit property by paying the purchase price, obtaining consent of Land Control Board, executing the transfer and being registered as the proprietor pursuant to the powers of the Land Registration Act. I do find that the plaintiff is the bonafide owner of the suit property and that there is no evidence of fraud against him. He obtained the land for value without notice and therefore entitled to quiet possession of the property.

On the other hand the defendant has not demonstrated that he has any proprietary interest in the property save judgment delivered on 18/6/2009 that gave him both special and general damages that he has a right to execute and recover within 12 years from the date of judgment.

On loss and damages the plaintiff has proved that he was about to obtain a loan facility of Kshs.6,500,000 which had been granted but stopped by the defendant. However, this court finds that the plaintiff has not proved that he lost the facility as the same can still be obtained from the bank. The bank did not cancel

the loan but was stopped from disbursing the same. The only remedy the court can offer to plaintiff is loss of business by the plaintiff, but the same has not been pleaded and no evidence has been offered to enable the court make such a remedy.

Ultimately, this court makes a declaration that the plaintiff is bonafide owner of the suit land and that the suitland is not encumbered with regard to the claim by the defendant hence the plaintiff has the right to entry and all rights and privileges belonging or appurtenant thereto. The claim for damages is disallowed as it was not proved. Cost of the suit to the plaintiff. Orders accordingly.

Dated, signed and delivered at Nyeri this 29th day of October 2014.

A. OMBWAYO

JUDGE