



REPUBLIC OF KENYA



Gacheru & another v Karuga & 8 others (Environment & Land Case 72 of 2019) [2024] KEELC 5858 (KLR) (27 August 2024) (Ruling)

Neutral citation: [2024] KEELC 5858 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 72 OF 2019**

**BM EBOSO, J
AUGUST 27, 2024**

BETWEEN

STANLEY THUO GACHERU 1ST PLAINTIFF

GODWIN WANGONG’U 2ND PLAINTIFF

AND

JOHN MIRINGU KARUGA 1ST DEFENDANT

MARY WAMBUI KARUGA 2ND DEFENDANT

JOAN WAIHERA NJIRI 3RD DEFENDANT

HANNAH WANJIKU MIRINGU 4TH DEFENDANT

GRACE NDUTA MIRINGU 5TH DEFENDANT

MARY PRISCILLA WANJIRA MIRINGU 6TH DEFENDANT

WILFRED KOINANGE MIRINGU 7TH DEFENDANT

MARTIN WAIGANJO MIRINGU 8TH DEFENDANT

JOSEPH NJOROGE MIRINGU 9TH DEFENDANT

RULING

1. The two plaintiffs initiated this suit on 17/4/2019. They itemized five prayers that they sought in the plaint, numbered (a) to (e). Part of the text relating to prayer (b) is missing from the plaint that is contained in the bound bundle that is in the court file. It is nonetheless clear from the plaint that the two plaintiffs sought orders of specific performance in relation to three separate sale agreements they entered into with the defendants in relation to what the parties to the three agreements described as portions of Land Reference Number 20920/4.



2. The three agreements were contained in the accompanying List and Bundle of Documents. They were as follows:
 - a. Sale agreement dated 28/9/2012 between John Miringu Karuga [the vendor] on one part and the two plaintiffs [the purchasers] on the other part;
 - b. Sale agreement dated 21/7/2014 between Mary Priscilla Wanjira Miringu, Wilfred K. Miringu, Martin Waiganjo Miringu and Joseph Njoroge Miringu [the beneficial owners] of the first part; John Miringu Karuga [the vendor] of the second part; and the two plaintiffs [the purchasers] of the third part;
 - c. Sale agreement dated 27/8/2014 between Mary Wambui Miringu, Joan Waithera Njiri, Hannah Wanjiku Miringu and Grace Nduta Miringu (the beneficial owners] of the first part; John Miringu Karuga [the vendor] of the second part; and the two plaintiffs [the purchasers] of the third part.
3. Upon being served with court papers, the defendants appointed advocates who appeared before this court on their behalf severally. Parties subsequently filed a consent dated 9/9/2019. Parties requested the court to adopt their consent and the court [Gacheru JJ] duly adopted the consent as an order of the court.
4. The consent order which the parties presented to the court and which the court adopted on 5/11/2019 reads as follows:

“It is hereby ordered by consent:

1. That the defendants directly or indirectly either by themselves or through their nominees, personal representatives, assignee, representatives, agents or servants from interfering, offering for sale, charging or dealing with any manner detrimental with the plaintiffs current occupation and/or ownership of property known as Land Reference No. 20920 being (a) portion measuring approximately sixteen (16) acres (Portion A), (b) a portion measuring approximately Six Decimal Two (6.72) acres (Portion B) and (c) another portion measuring Six Decimal Seven Two (6.72) acres (Portion C) which portions are to be excised from the property hereinafter referred to as the “suit property” until they transfer the suit property to the plaintiffs.
2. That the defendants undertake to comply with their obligations and/or specifically perform their obligations contained in Sale Agreements dated 28th September 2012, 21st July 2014 and 27th August 2014 in respect of property known as Land Reference No. 20920 being (a) portion measuring approximately sixteen (16) acres (Portion A), (b) a portion measuring approximately Six Decimal Seven Two (6.72) acres (Portion B) and (c) another portion measuring Six Decimal Seven Two (6.72) acres (Portion C) which portions are to be excised from the property hereinafter referred to as the “suit property” by delivery of completion documents upon determination of Nairobi Succession Cause No. 998 of 2006 (In the Matter of Estate of Charles Karuga Koinange (Deceased)).
3. That this Consent is entered into by the parties voluntarily and without any coercion, force or duress.



4. That the Plaintiffs will be at liberty to apply for contempt proceedings in the event of the defendants breach of terms of paragraph (1) above of this consent.
5. The dispute having been settled in terms of the above consent, nothing happened in this file until October 2022 when the plaintiffs brought an application dated 5/10/2022 seeking contempt orders against the defendants. Subsequent to that, the defendants brought a notice of motion dated 27/9/2023 seeking, among other reliefs, an order setting aside the above consent order. This ruling relates to the two parallel applications. The court will first dispose the application that seeks an order setting aside the consent order.

Application dated 27/9/2023

6. The application dated 27/9/2023 seeks, among other reliefs: (i) an order setting aside the consent recorded and issued by the court on 5/11/2019; (ii) declarations that the above three sale agreements are illegal, irregular, void and unenforceable; and (iii) an injunction restraining the plaintiffs against disposing, letting, selling, transferring, or otherwise dealing with LR No 20920/4, pending the hearing and determination of this suit. The application is premised on the grounds outlined on the face of the notice of motion and in the supporting affidavit sworn on 25/9/2023 by Joseph Njoroge Miringu. The application was canvassed through written submissions dated 5/2/2024, filed by M/s Simon Wachira & Company Advocates.
7. The case of the applicants is that the suit property, LR No 20920/4, was at all material times registered in the name of the Charles Karuga Koinange [referred to in this ruling as “the deceased”] and formed part of his estate. They contend that the suit property vested in the personal representatives of the estate of the deceased, adding that the vendor and the other parties to the three sale agreements did not have the legal capacity to sell the suit property to the plaintiffs. They term the parties to the three sale agreements as intermeddlers in the estate of the deceased, contending that the plaintiffs cannot enforce the three sale agreements.
8. The applicants add that the requisite consents of the Land Control Board were not obtained hence the sale agreements are void. It is the position of the applicants that the sale agreements are incapable of being enforced, adding that parties cannot consent to an illegality. Lastly, the applicants argue that LR No 20920/4 does not exist, contending that the parcel had not been registered at the time Charles Karuga Koinange died.
9. The plaintiffs opposed the application through a replying affidavit sworn on 16/10/2023 by Stanley Thuo Gacheru and written submissions dated 27/11/2023, filed by Mboya Wangong’u & Waiyaki Advocates. The case of the plaintiffs is that the defendants have not satisfied the criteria for setting aside a consent order or a consent judgment. The plaintiffs contend that prior to his death, the deceased had parceled out the suit land and had generated a deed plan, adding that the deceased had executed a proper instrument conveying the suit property to the 1st defendant as a gift *inter vivos*. They add that prior to his demise, the deceased had obtained the relevant consent of the Land Control Board. It is the case of the plaintiffs that the suit land does not form part of the estate of the deceased because it had been gifted to the 1st defendant as a gift *intervivos*. The plaintiffs add that through the application, the defendants are using this court to run away from their contractual obligations after pocketing over Kshs. 60,000,000/- paid to and received by them as part-payment of the agreed purchase price.
10. The court has considered the application, the response to the application, and the parties’ respective submissions. The court has also considered the legal frameworks and the jurisprudence relevant to the key issues that fall for determination in the application. The two key issues that fall for determination in the application dated 27/9/2023 are: (i) Whether the application meets the threshold for setting aside



a consent order or a consent judgment; and (ii) Whether the application meets the criteria for grant of interlocutory injunctive orders. I will analyse and dispose the two issues sequentially in the above order.

11. The first issue will be analysed in the context of the key grounds that the applicants relied on in urging the court to set aside the consent order issued on 5/11/2019. Before I do that, I will outline the principle which guides our courts when exercising jurisdiction to set aside a consent order or a consent judgment.
12. The principle that guides our courts when exercising jurisdiction to set aside consent orders or consent judgments is well settled. The Court of Appeal outlined the principle in *Board of Trustees National Social Security Fund vs Michael Mwalo* [2015]eKLR as follows:

“The law pertaining to setting aside of consent judgments or consent orders has been clearly settled. A court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of court.”
13. Gicheru J [as he then was] outlined the above principle in *Wasike vs Wamboko*. Similarly, Githinji J outlined the criteria in *Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd*. I now turn to the key grounds which the applicants raised in urging the court to set aside the consent order.
14. The applicants contended that LR No 20920/4 does not exist and therefore the consent recorded on 5/11/2019 should be set aside. Does LR No 20920/4 exist as an identifiable piece of land? At the time of entering into the three sale agreements, the defendants had no doubt that LR No 20920/4 existed as an already surveyed and identifiable subdivision out of LR No 20920, measuring 12.33 hectares [approx. 30 acres]. It was on that basis that they sold a total of 29.44 acres to the plaintiffs through three different sale agreements. It is also on that basis that the defendants are alleged to have, todate, received from the plaintiffs approximately Kshs. 60,000,000/- as purchase price. It is also on that basis that the defendants procured the impugned consent from this court, which consent enabled them to receive additional monies from the plaintiffs towards purchase price.
15. The defendants are now, through the application dated 27/9/2023, contending that LR No 20920/4 does not exist. Is this factual? I do not think this is factual. In their own application, the defendants confirmed that LR No 20920/4 was a 30 acre subdivision out of LR No 20920 which was gifted to John Miringu Karuga intervivos by the late Charles Karuga Koinange [the deceased]. They, however, contend that the subdivision was incomplete and that the gift was not “a perfect gift intervivos” because “the same was incomplete and the same was therefore included in the estate of the deceased for distribution.”
16. Among the documents exhibited by the plaintiffs is Deed Plan No. 196072 relating to LR No. 20920/4. The Deed Plan is expressed as having been authenticated by G.O Obara on behalf of the Director of Surveys on 8/6/1995. Also exhibited by the plaintiffs is a deed of indenture dated 1/11/1999 expressed as executed by the deceased, vesting LR No. 20920/4 in the 1st defendant. That is not all.
17. The defendants exhibited a Partial Certificate of Confirmation of Grant issued by the High Court at Nairobi [Machelule J - as he was then] on 18/12/2019 in Succession Cause No. 998 of 2006 in relation to the estate of the late Charles Karuga Koinange. Part A of the Partial Certificate of Confirmation of Grant reads as follows:

“A. The following gifts intervivos are not in dispute;



1. Plot Nos 20920/4, 20920/5, 20920/6, 20920/7, 20920/8 & 20920/9 Ngorongo – each plot being 30 Acres, gifted inter vivos to the late Ernest Ngugi Karuga, Leonard Kangethe Karuga, the late William Kihara Karuga, Paul Mbiyu Karuga, Peter Mbiyu Koinange and John Miring’u Karuga.
2. L.R No. 5999 Kiambu – Murita Farm
Gifted inter vivos to Mary Wanjiru Koinange 12 acres and Late Wilfred Koinange Karuga 89 acres.
3. Plot No. 820 “A” Thembegwa/Kiambaa, Kiambu District
Gifted inter vivos to the late Ernest Ngugi Karuga, Leonard Kang’ethe Karuga, the late William Kihara Karuga, Paul Mbiyu Karuga.
4. Plot No. 820 “B” Thembegwa/Kiamba, Kiambu District
Gifted inter vivos to Mary Njoki Karuga.
5. L.R. No. 209/8165 Nairobi Petrol Station, Likoni Road
Gifted inter vivos to the late Ernest Ngugi Karuga
6. L.R. No. 209/8405/19 Nairobi – Riverside Drive
Gifted inter vivos to the late William Kihara Karuga.
7. Gigiri Plot No. 17 – (Nairobi/Block 91/256)
Gifted inter vivos to Mary Wanjira Koinange.
8. Gigiri Plot No. 18 (Nairobi/Block 91/257)
Gifted inter vivos to Mary Wanjira Koinange.
9. Banana Hill Plot No. 11 (Shop)
Gifted inter vivos to John Miring’u Karuga.
10. Banana Hill Plot
Gifted inter vivos to Jaine Kariuki.
11. Karuri/Kiambaa Plot T/906
Gifted inter vivos to Isabella Wanjiku Karanja.
12. Kiambaa/Kanunga Plot No. 376
Gifted inter vivos, Marion Wambui Koinange.
13. Raini Market Plot No. 494/4
Gifted inter vivos to the late William Kihara Karuga.
14. Kigutha Development Limited, gifted inter vivos to Leonard Kang’ethe Karuga.
15. Shares in Gatatha Farmers Co. Ltd, gifted inter vivos to



Leonard Kang'ethe Karuga.

16. Shares in Kenyatta Co. Ltd gifted intervivos to Leonard Kang'ethe Karuga.

17. Plot in Embu 53 acres gifted intervivos to Rosemary Gachiku Mugo, but sold by Mary Njoki Karuga to Hon. Njeru Ndwiga. Rosemary Gachiku Mugo requests the family to consider giving her an alternative property as compensation for her loss.

18. Properties in deceased's to be distributed equally as follows:

...”

18. It is clear from the above evidence that LR No 20920/4 is one of the six (6) subdivisions that were surveyed out during the lifetime of the deceased and does exist as a distinct surveyed subdivision out of LR No. 20920. Even though the subdivision title has not been issued, the subdivision exists. Indeed, the administrators of the estate of the deceased confirmed this fact to the Succession Court and procured an order to facilitate completion of the vesting of the land as a gift intervivos. Clearly, the contention by the defendants to the effect that LR No. 20920/4 does not exist is not truthful.
19. The second ground upon which the defendants seek an order vacating the consent order is that the suit property forms part of the estate of the late Charles Karuga Koinange and is supposed to be distributed by the Succession Court as part of his free assets. It is their case that the gift which the deceased intended to effect was not “perfect”. I have reproduced in extenso the Partial Certificate of Confirmation of Grant which the Succession Court issued. The Certificate was exhibited by none other than the defendants. It is clear from the Partial Certificate of Confirmation of Grant that the Succession Court affirmed that the suit land was given by the deceased as an intervivos gift and was not available for distribution as part of the free assets of the deceased. For avoidance of doubt, the properties that were gifted intervivos are clearly itemized and are to be found in Item Nos 1 to 17 in the Partial Certificate of Confirmation of Grant. Those that formed part of the free assets of the estate and were available for distribution by the Succession Court are listed in Item Nos 18 to 27. Based on the above evidence, it is clear that the defendants are deliberately misleading this Court by alleging that LR No. 20920/4 was not gifted to John Miringu Karuga as an intervivos gift.
20. The third ground on which the applicants sought to vacate the consent order is that the vendor and the consenting parties did not have capacity to enter into the three sale agreements. Their argument is that the vendor and the consenting parties are not the legal representatives of the estate of the deceased, hence they did not have capacity to enter into the agreements. The Court has already found that the suit land was gifted to John Miringu Karuga as an intervivos gift, a fact which the Succession Court affirmed. John Miringu Karuga was, in the circumstances, perfectly in order in seeking the consent of his family members and in disposing his interest in the suit land. The transaction did not constitute intermeddling in the estate of the deceased.
21. The last key ground on which the defendants sought invalidation of the consent is that the sale agreements were vitiated by the failure of the vendor to obtain consent of the Land Control Board. The reason why the plaintiffs came to court is that the defendants entered into the sale agreements pursuant to which they received money from the plaintiffs. It was the case of the plaintiffs that the defendants were not voluntarily discharging their contractual obligations. In advancing the absence of the consent of the Land Control Board as a valid ground, the 1st defendant is basically telling the



court to reward him for his refusal to do what he covenanted to do. This is a court of law and a court of equity at the same time. The court will not reward the 1st defendant for his breach.

22. Have the defendants satisfied the criteria for setting aside a consent order or consent judgment? Based on the above analysis of the grounds which the defendants advanced, they have clearly not satisfied the criteria. This court has no basis to warrant interference with the parties' consent recorded before Gacheru J on 5/11/2019.
23. In light of the above finding on the first issue, it logically follows that there is no proper basis for grant of an interlocutory injunctive order to the defendants at this stage. This dispute remains settled in terms of the parties' consent recorded on 5/11/2019.
24. It is also not lost to the court that the defendants did not have a counterclaim. Even if the plea for the setting aside of the consent order had succeeded, I doubt that a court of law properly directing itself would, at the interlocutory stage, issue the orders that were sought in the application in favour of a party who did not have a counterclaim on which to anchor the interlocutory orders.
25. For the above reasons, the defendants' application dated 27/9/2023 is rejected and dismissed for lack of merit. The defendants will bear costs of the application.

Application dated 5/10/2022

26. Through the application dated 5/10/2022, the plaintiffs seek an order committing the defendants to civil jail for six months or for such period of time as this court may deem fit in the circumstances of this case. The plaintiffs allege that the defendants have failed/refused to obey and/or ignored the order issued on 5/11/2019. The Court has read the response to the application.
27. Given that the deceased died before completing the conveyance of the intervivos gift, it follows that the administrators of the estate of the deceased are expected to play a facilitative role in the completion of the conveyance process. To that extent only, the said administrators are necessary parties to the application for contempt orders.
28. Consequently, I direct that the notice of motion dated 5/10/2022 be amended to join the administrators of the estate of Charles Karuga Koinange jointly as respondent number 3 in the motion for contempt orders. At this point, all parties to the motion are cautioned about the grave consequences of contempt of a court order.
29. Fresh directions will be issued on disposal of the application dated 5/10/2022 once the motion is amended.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 27TH DAY OF AUGUST 2024.

B M EBOSO

JUDGE

In the Presence of: -

Mr. Simon Wachira for the Defendants

Mr. Kipkurui for the Applicants

Court Assistant: Melita

