



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 250 of 1989

JOSEPH IRUNGU MWIHIKA.....PLAINTIFF

VERSUS

KEZIAH NJOKI KIMANI.....1ST DEFENDANT

SAMUEL WARUGO KIMOTHO.....2ND DEFENDANT

JUDGMENT

By an amended plaint filed on the 17th of July 1997, the plaintiff Joseph Irungu Mwihika sued Keziah Njoki Kimani (*his former wife*) (*hereinafter referred to as the 1st defendant*) and Samuel Warugo Kimotho (*hereinafter referred to as the 2nd defendant*) seeking orders of this court to be declared the owner of parcel No. *Kiambogo/Miroreni Block 1/206* (*hereinafter referred to as the suit land*). The plaintiff averred that the 1st defendant had had herself registered as the owner of the suit land fraudulently and thereafter transferred the same to the 2nd defendant. The plaintiff averred that the 1st defendant took advantage of the fact that the plaintiff had registered the 1st defendant as the owner of one share at Itherero Farmers Company Limited which share later crystallised into the suit land. He averred that although the 1st defendant's name appeared in the register of the said farmers company, in actual fact he was the owner of said share and subsequently thereafter the suit land. He averred that the 1st defendant had therefore fraudulently obtained the title in respect of the suit land and thereafter transferred it to the 2nd defendant in breach of a then existing court order. The plaintiff urged this court to grant him general damages for trespass. He also prayed to be given vacant possession of the suit land. He further prayed for an order cancelling the title of the suit land issued to the 2nd defendant and further prayed for an order retransferring the said parcel of land to him.

When the defendants were served with the summons to enter appearance they filed defences. The 1st defendant denied that the suit land was fraudulently registered in her name. She averred that she was entitled to the suit land because she had purchased the said share from Itherero Farmers Company Limited. She further averred that it was the plaintiff who had attempted to defraud her of the said parcel of land. She further averred that she had lawfully transferred the suit land to the 2nd defendant because the suit land belonged to her. In the circumstances therefore she prayed that the plaintiff's suit be dismissed with costs. In his defence, the 2nd defendant averred that he purchased the suit land from the 1st defendant who was a first registered owner. The 2nd defendant averred that he paid valuable consideration and was a bona fide purchaser. He further averred that the said parcel of land had been transferred to him and he therefore held a valid title to the said parcel of land for all intents

and purposes. He urged this court to dismiss the plaintiff's suit.

This case was first heard by Visram J. He heard the plaintiff and the evidence-in-chief of the 1st defendant. On the 6th of October 2004, the parties to this suit agreed by consent for this court to take over the conduct of this case from where Visram J. had reached. In delivering this judgment therefore, I will rely on the evidence that adduced before Visram J. by the plaintiff. I however concede that I will not have had the advantage of assessing the demeanour of the plaintiff when he testified.

In his evidence before court, the plaintiff testified that he was married to the 1st defendant in 1962 but divorced her in 1978. He testified that in 1966, he bought two shares from Itherero Farmers Company Limited (*hereinafter referred to as the company*). The said two shares were valued at Kshs 2,500/=. He was issued with two share certificates which he produced in evidence as *plaintiff's exhibit No. 1(a) & (b)*. He testified that each share was equivalent to 14.5 acres with a half an acre plot. He registered one of the two shares in the name of the 1st defendant because at the time the company allowed only one individual to purchase one share. He testified that in 1982, he balloted for the plots and was issued with parcels No. 68 and 74 respectively for the two shares. He produced the ballot papers as *plaintiff's exhibits No. 2 (a) & (b)*. He took occupation of parcel No. 68 but parcel No. 74 remained vacant.

He recalled that in 1986 the 1st defendant attempted to sell the suit land to the 2nd defendant. When he learnt of the 1st defendant's intention, he filed a suit in court. He produced a copy of the plaint as *plaintiff's exhibit No. 3*. The case was referred to a panel of elders for arbitration. The panel of elders made the award in favour of the plaintiff and which award was adopted as an order of the court on the 16th of June 1989. The letter of the D.O. was produced as *plaintiff's exhibit No. 4* and the award produced as *plaintiff's exhibit No. 5*. The plaintiff was therefore shocked when he learnt that the 1st defendant had sold the land to the 2nd defendant in spite of an existing court order barring any dealing in the said parcel of land. A copy of the court order was produced as plaintiff's exhibit No. 6. He filed contempt of court proceedings against the 1st defendant. The 1st defendant was found to have been in contempt of court and was fined Kshs 500/= or in default she was to serve one month imprisonment. The proceedings were produced as plaintiff's exhibit No. 7. The 1st defendant paid the fine (*receipt produced as plaintiff's exhibit No. 8*).

The plaintiff testified that on the 10th of May 1988, the 2nd defendant entered into an agreement with the 1st defendant to purchase the suit land knowing very well that there existed a pending suit between the plaintiff and the 1st defendant. The agreement was produced as plaintiff's exhibit No. 9. He testified that the Land Control Board granted its consent to the transaction on the 28th of December 1988 while there existed a court order barring the said transaction (*a copy of the consent produced as plaintiff's exhibit No. 10*). The plaintiff testified that the purported share certificates which the 1st defendant used to secure the documents from Itherero Farmers Company Limited was a forgery as he was the only one who was possessed of the original genuine share certificates (*a copy of the forged certificate was produced as plaintiff's exhibit No. 11*).

The plaintiff therefore prayed for this court to order the title issued to the 2nd defendant be cancelled and a further order that the said title be issued to him. This is because the said sale and transfer was done in open defiance of a court order. He conceded that there was nothing indicated on the share certificate that the 1st defendant had held it in trust for the plaintiff. He conceded that the company did not prohibit members of a family from owning shares in the said company. He testified that he had occupied parcel No. 68 first but intended to develop parcel No. 74 later. He reiterated that he purchased the said shares using his own money. He admitted that after he divorced the 1st defendant, he did not provide for their six children.

The plaintiff conceded that there was a possibility that the said shares could have been purchased by the 1st defendant because there was no indication as to who paid the money for the purchase of the said shares. He testified that he had not filed any caution at the land registry to stop any transaction in respect of the said parcel of land. He conceded that when he filed the initial suit against the 1st defendant in 1986, he had not enjoined the 2nd defendant as a party of the suit. He further conceded that he had bought the share in the name of the 1st defendant from the company to circumvent the requirement that each member was only entitled to one share. He testified that although the share certificate had been issued by the company in the name of the 1st defendant, when it came to the time the titles to the land were issued, he was entitled to be issued with a title of the suit land because the 2nd defendant held the said share certificate in trust for him.

He conceded that the award of the panel of elders which was made in his favour, was arrived at in the absence of the 1st defendant. He further conceded that at the time the suit land was sold to the 2nd defendant, the 1st defendant was residing on the said parcel of land. He further conceded that he had not reported the alleged forgery of the share certificate by the 1st defendant to the police. He reiterated that the share certificate which the 1st defendant used to obtain the title of the suit land was forged because he was the only one who was possessed of the original share certificates. He denied that he had filed the suit to frustrate the 1st defendant and his children. He reiterated that the 1st defendant had not attended the balloting exercise and could not therefore have been allocated the suit land. The plaintiff then closed his case.

The 1st defendant then took the witness stand. She testified that she was married to the plaintiff in February 1963. They were blessed with six children; four sons and two daughters. Their marriage was however dissolved in 1975. She testified that she was a member of Itherero Farmers Company Limited and had bought the two shares from the company from the proceeds of her farm. She testified that the share certificate which was issued in her name therefore belonged to her. She recalled that she had participated in the balloting exercise and was allocated parcel number 74. She testified that the disagreement with the plaintiff over the parcel of land arose when the two were divorced. The plaintiff insisted that the 1st defendant transfers the suit land to him.

The 1st defendant was unwilling to transfer the said parcel of land because the plaintiff had abandoned her and the children of the marriage. She testified that the plaintiff refused to provide for them but insisted on getting back the land. She denied that she had forged the share certificate of the company that was issued in her name. She insisted that the share certificate was genuine that is the reason why the company recognised her and issued her with documents which enabled her to be issued with a title in respect of the suit land. She produced a copy of the title which was issued to her as 1st defendant's exhibit No. 1.

She reiterated that she was not making any claim on the plaintiff's parcel No. 68. She recalled that she was divorced from the plaintiff under the Kikuyu Customary Law in proceedings which were conducted before a chief sometime between 1975 and 1976. She insisted that she had purchased the share that crystallised in the suit land in 1966 and was issued with a share certificate. She conceded that she had been charged with contempt of court and duly convicted but denied that the said contempt of court proceedings had anything to do with the farm. She conceded that when she sold the land to the 2nd defendant she did not tell him that there existed a dispute between him and the plaintiff over the suit land. She testified that the title in respect of the suit land was issued to her on the 2nd of November 1988. She testified that she was not aware that the plaintiff had made a complaint to the panel of elders over the ownership of the suit land.

The 1st defendant admitted that when she sold the suit land to the defendant, she was paid in full the

purchase consideration of Kshs 150,000/=. She signed an agreement which was produced as plaintiff's exhibit No. 9. She transferred the suit land to the 2nd defendant. She recalled that the transfer was signed on the 5th of July 1989. She reiterated that she was a member of Itherero Farmers Company and the suit land belonged to her. She testified that she was the first registered owner of the suit land and insisted that she had sold the land to the 2nd defendant to enable her educate the children because the plaintiff had completely failed to provide for them. The 1st defendant closed her case.

When the 2nd defendant took the witness stand, he testified that he was interested in purchasing a parcel of land in the area where the suit land is situate. He was informed by an agent of the availability of the suit land for sale. He met with the 1st defendant, negotiated with her and reached an agreement to purchase the suit land. He testified that the agreed purchase consideration of Kshs 150,000/= was paid in full to the 1st defendant. The agreement was entered into on the 10th of May 1998. He testified that he saw the copy of the title issued to the 1st defendant before he agreed to purchase the said parcel of land. He produced the title in respect of his suit land as 2nd defendant's exhibit No. 1. He recalled that he had obtained the consent of the Land Control Board before the suit land was transferred to him.

The 2nd defendant testified that before he entered into the said agreement he conducted a search at the land registry and established that the 1st defendant was in deed the registered owner of the said parcel of land. He testified that when he conducted a search on the said property there was no caution or restriction filed in the register. He later mortgaged the said parcel of land to the National Bank of Kenya Limited. He produced a copy of the green card as 2nd defendant's exhibit No. 2. He testified that since taking possession of the suit land, he had developed it and was currently undertaking chicken and pig farming on it. He had also built permanent houses where his parents are currently residing.

The 2nd defendant reiterated that he saw the copy of the title in the name of the 1st defendant and also conducted a search at the lands office before he agreed to purchase the said parcel of land. He testified that he saw the title of the suit land on the 2nd of November 1988 and was satisfied that the suit land belonged to the 1st defendant. He conceded that the agreement which he entered into with the 1st defendant in respect of the suit land referred to the parcel of land as plot No. 74. He admitted that there was a possibility he could not have seen the share certificate in respect of plot No. 74. He testified that the consent of the Land Control Board was issued on 2nd of November 1988. He further testified that a restriction had been placed on the title of the suit land on the 17th of May 1987 but was removed on the 30th of May 1989.

He reiterated that he was not aware that there existed a court case between the plaintiff and the 1st defendant. He testified that he only came to know of the plaintiff when the plaintiff filed the current suit against him. He reiterated that he was registered as the owner of the suit land on the 6th of July 1989 when there was no encumbrance on the suit land. He testified that the restriction which had been placed on the title was removed by the 1st defendant. He recalled that when he met the plaintiff, the plaintiff did not show him any documents to prove that the suit land belonged to him. The 2nd defendant then closed his case.

I have read the pleadings filed by the parties in this case. I have carefully considered the evidence that was adduced by the parties to this case. I have also considered the submissions which were filed by the defendants. The issue for determination by this court is whether the plaintiff purchased the share which was registered in the name of the 1st defendant at Itherero Farmers Company. The other issue for determination is whether the plaintiff has established on a balance of probabilities that the 1st defendant fraudulently obtained the title in respect of the suit land and transferred the same to the 2nd defendant during the pendency of a suit between the plaintiff and the 1st defendant. The final issue for determination is whether the 2nd defendant purchased the suit land from the 1st defendant as a

purchaser for value without notice.

The evidence that was adduced by both the plaintiff and the 1st defendant in regard to who paid for the share that later crystallised to the suit land is conflicting. On his part, the plaintiff testified that he purchased the two shares from Itherero Farmers Company Limited, registered one in his name and the other in the name of the 1st defendant, who was then his wife. The plaintiff testified that he had registered the name of the 1st defendant because of the restriction placed by the company at the time that a member could only purchase one share. It was his testimony that he registered the name of the 1st defendant as the owner of the said share to circumvent the said restriction placed by the company. He testified that although he registered the said share in the name of the 1st defendant, it was not his intention that the said share was to be owned by the 1st defendant. He testified that the 1st defendant held the said share in trust for him. He produced the share certificates as exhibits in this case. He further produced the original two ballots that were issued to him by the company when the parcels of land equivalent to the shares purchased were distributed to the members of the company.

On the other hand, the 1st defendant has testified that she purchased the share in question using her own resources. She also produced a copy of a share certificate which she said was issued to her by the company in 1975. The plaintiff insists that the share certificate which was produced in evidence by the plaintiff as *plaintiff's exhibit No. 11* and which was purportedly issued to the 1st defendant in respect of the suit land, was a forgery. The plaintiff however conceded in his testimony that he had no document to prove that he had paid the purchase consideration for the said share. Similarly the 1st defendant did not have any document to establish that she had purchased the said share at Itherero Farmers Limited. What is however clear, and both the plaintiff and the defendant are in agreement, is that the said share was registered in the name of the 1st defendant. At the time the said share was registered in the name of the 1st defendant, the 1st defendant was the wife of the plaintiff.

Having carefully evaluated the evidence adduced, it is clear that the dispute over the ownership of the said share arose after the plaintiff and the 1st defendant had been 'divorced' under the Kikuyu customary law sometime in 1975. The plaintiff concedes that after he 'divorced' the 1st defendant, he did not provide for the 1st defendant neither did he provide for the up keep of their six children. The issue for determination by this court is therefore whether in registering the name of the 1st defendant as the owner of the said share, the plaintiff had advanced the said share to the 1st defendant who was then his wife. In my considered opinion, it is immaterial who paid for the said share. What is material is that the said share was registered in the name of the 1st defendant who was then the wife of the plaintiff.

The Court of Appeal quoted with approval the decision of Lord Denning MR in the case of **David Mereka –vs- Margaret Njeri Mereka CA Civil Appeal No. 236 of 2001 (Nairobi) (unreported)** at page 9 when it held that:

“In Falconer –vs- Falconer ([1970]3 All ER 449) (supra) Lord Denning MR in expounding the principles of law enunciated in Gissing –vs- Gissing ([1970]2 All ER 780) (supra) said in part at page 452 e:

“The law imputes to the husband and wife an intention to create a trust, the one for the other. It does so by way of inference from their conduct and surrounding circumstances, even though the parties themselves made no agreement on it. This inference of trust the one for the other, is readily drawn when each has made a financial contribution to the purchase price or to the mortgage instalments. The financial contributions may be direct, as where it is actually stated to be a contribution towards the price of instalments. It may be indirect, as where both go out to work, and one pays the house keeping and the other the mortgage instalment. It does not matter

which way round it is. It does not matter who pays what. So long as there is a substantial financial contribution to the family expenses, it raises the inference of trust. But where it is insubstantial no such inference can be drawn.”

It should also be remembered that realistically spouses do not keep accounts of their day to day expenditure or adjust their affairs in binding legal arrangements.”

The above decision of the Court of Appeal clearly applies in this case. From the evidence adduced by both the plaintiff and the 1st defendant, it is clear that the plaintiff never provided for the upkeep of their six children once he ‘divorced’ the 1st defendant. He admitted in his evidence that he left the 1st defendant to look after the said children without any material support from him. In effect therefore, the plaintiff had left the 1st defendant to take care of the children of the marriage by herself.

According to the 1st defendant, she understood the conduct of the plaintiff to mean that she could use the suit land to take care of the said children of the marriage. It is clear that the plaintiff had this in mind as he did not interfere with the 1st defendant’s occupation of the suit land from 1975 when they were ‘divorced’ up to 1986 when the 1st defendant attempted to sell the suit land to a third party. It is then that the plaintiff started resurrecting his claim by raising the issue of who purchased the share in a bid to defeat the 1st defendant’s ownership of the suit land.

In my considered opinion, even if the plaintiff purchased the said share, the fact that the said share was registered in the name of the 1st defendant meant that the plaintiff intended the said share to belong to the 1st defendant. Further, even if the plaintiff were to change his mind, the fact that he left the 1st defendant to fend for the children of the marriage by herself meant that the 1st defendant had thereby acquired title to the said parcel of land by her contribution in the upkeep of the children of the said marriage. I therefore hold that the 1st defendant was the owner of the suit land and was properly registered as the owner thereof. I therefore hold that the plaintiff has failed to establish on a balance of probabilities that he is entitled to the said share which later crystallised in the suit land.

Having found that the 1st defendant is the owner of the suit land, the second issue for determination is whether the 1st defendant was within her legal rights to sell the said parcel of land to the 2nd defendant. Evidence was adduced by both defendants on how the two of them followed the established procedure in law in the said sale transaction and the subsequent transfer of the suit land to the 2nd defendant. The 1st defendant and 2nd defendant entered into a sale agreement. The 2nd defendant paid the 1st defendant the agreed purchase consideration of Kshs 150,000/=. The two of them sought the consent of the requisite land control board. Thereafter the 1st defendant executed a transfer in favour of the 2nd defendant. The 2nd defendant took the transfer to the lands office where he was issued with a title in respect of the suit land. At the time the said transfer was effected, there was no restriction placed on the said title to prohibit any transaction in respect of the said parcel of land.

Although there is evidence that there was a pending suit between the plaintiff and the 1st defendant over the suit land, in view of the finding of this court that the said parcel of land was owned by the 1st defendant at the material time, the pendency of such suit therefore could not prevent the 1st defendant from selling the said parcel of land to the 2nd defendant. In the circumstances of this case therefore, I hold that the 2nd defendant was a purchaser for value of the suit land without notice of any defect that could have been in existence in respect of the title of the suit land.

The upshot of the above reasons, is that I hold that the plaintiff has failed to establish that he is entitled to the suit land on a balance of probabilities. His suit therefore is hereby dismissed with costs to the defendants.

DATED at NAKURU this 16th day of June 2006.

L. KIMARU

JUDGE



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