



REPUBLIC OF KENYA



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Kamau & 2 others v Njuguna & another (Environment & Land Case E006 of 2022) [2023] KEELC 17684 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEELC 17684 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE E006 OF 2022
AK BOR, J
APRIL 20, 2023
(FORMERLY NYERI ELC CASE NO. 43 OF 2016)

BETWEEN

ANNAH NYAGUTHII KAMAU 1ST PLAINTIFF
SIMON MWANGI WERU 2ND PLAINTIFF
IDAH NYAGUTHII MUHIU 3RD PLAINTIFF

AND

ZUBERA NJUGUNA 1ST DEFENDANT
SHAFI GREWAL KAKA 2ND DEFENDANT

JUDGMENT

1. The 1st Plaintiff was allocated the parcels of land known as plot no 583 and V2 191 situated within Solio Ranch in Laikipia County by the Government of Kenya on April 22, 2010. In the Amended Plaint dated June 27, 2016 filed at the Nyeri Environment and Land Court (ELC), she claimed that she had sold two acres from plot number 583 to the 2nd Defendant vide the sale agreement executed on April 7, 2014. She averred that through the sale agreement executed on March 18, 2015 she sold another two acres from plot no 583 with plot number V2 191 to the 3rd Plaintiff. She claimed that the 1st Defendant had threatened to forcefully evict the 2nd and 3rd Plaintiffs from the two parcels of land yet they had acquired their property legally. She sought a permanent injunction to restrain the Defendants from interfering with the two parcels of land.
2. The Defendants filed an Amended Defence and Counterclaim on July 1, 2016 in which they denied the Plaintiffs' claim and averred that having previously sold the two parcels of land on December 19, 2009 to the 2nd Defendant, the 1st Plaintiff did not have any proprietary interest in the two parcels of land which she could dispose of to the 2nd and 3rd Plaintiffs on April 7, 2014 and March 18, 2015



respectively as she purported to have done. They gave particulars of fraud and illegality on the part of the 1st Plaintiff in transacting in the two parcels of land while knowing well that they were already alienated to the 2nd Defendant. The Defendants asserted that the 2nd and 3rd Plaintiffs were all aware that they were conned by the 1st Plaintiff yet they did not pursue a refund of the funds they paid to the 1st Plaintiff as the purchase price for the two parcels of land.

3. The 2nd Defendant counterclaimed for a declaration that the sale of the land transaction between him and the 1st Plaintiff vide the agreement dated December 19, 2009 was valid, subsisting, binding, enforceable and that the 1st Plaintiff was in breach of that agreement. He also sought specific performance of the contract dated December 19, 2009 by the 1st Plaintiff by completing the sale transaction failing which the Deputy Registrar of the court is to be authorised to execute the transfers, applications, deeds or other documents to vest ownership of plot number F.583 and V.2 191 Solio Ranch scheme, Laikipia in the 2nd Defendant. He also sought an order for the eviction of the Plaintiffs from the two parcels of land and a permanent injunction to restrain them from interfering with the 2nd Defendant's peaceful occupation of the suit land.
4. The suit was heard by Lady Justice Waithaka at the Nyeri ELC on October 10, 2017. The Plaintiffs were not in court and their suit was dismissed for want of prosecution and the court directed the Defendants to prosecute their counterclaim. Abdulkarim Hassan gave evidence.
5. He stated that sometime in December 2009, Zuberi Ramadhan Njuguna asked if he was interested in purchasing two parcels of land from the 1st Plaintiff, that is 4 acres known as F.583 and half an acre referred to as V2 181 within Solio Ranch Scheme in Laikipia where he also owned land. Not being in a position to purchase the land, he approached his uncle, the 2nd Defendant who expressed interest in the land. He conducted due diligence on the properties and the owner by checking the records held by the scheme in Naro Moru. He also went to the site with the scheme and Government surveyor and was shown the location of the land and its beacons. Later he caused a tractor to dig a trench around the land for ease of identification.
6. He stated that on December 11, 2009 he signed a sale agreement on behalf of the 2nd Defendant, who is his uncle, for the purchase of the two parcels of land known as V2 191 measuring half an acre and F583 measuring 4 acres both of which are situated in Solio Ranch scheme for Kshs 450,000/=, which he paid in full to the 1st Plaintiff on the same day.
7. They went to the offices of Muhoho and Company advocates who drew the sale agreement. Since the 1st Plaintiff did not have a bank account, he helped her open an account where he deposited Kshs 300,000/= and gave her the sum of Kshs 150,000/= in the presence of the advocates. The lawyer was paid legal fees of Kshs 5,000/=. The 2nd Defendant was granted vacant possession of the land under the terms of the agreement. He stated that they made the requisite payment on June 9, 2010 to facilitate the processing of the title deed.
8. He stated that the 1st Plaintiff surrendered to him all the original documents relating to the land including the ballot card that showed the parcels were V2 181 and F.583. Subsequently the 1st Plaintiff obtained the letter of allotment dated April 22, 2010 and forwarded it to the 2nd Defendant, in which the correct parcel number was given as V2 191 for the village plot and 583 for the agricultural land. The spirit and understanding was that the 1st Plaintiff would facilitate the transfer and registration of the land in the 2nd Defendant's name. The 2nd Defendant took over and paid the dues owing to the Settlement Fund Trustees (SFT).
9. He clarified that plot number V 2181 was erroneously captured in the ballot card yet it should have been V 2191. After they had paid the purchase price and obtained the transfer forms, they took



- possession of the land, marked the boundaries and cultivated it for three seasons until 2010 when they went back to Mombasa.
10. Zuberi Ramadhan Njuguna gave evidence. He knew the 1st Plaintiff and was present on December 19, 2009 when the sale agreement was drawn in Mr Muhoho advocate's office and the full purchase price paid to the 1st Plaintiff. He witnessed the sale agreement. The 1st Plaintiff handed over the original ballot card and a copy of her identity card to the purchaser and paid his agency or commission fee. He registered a copy of the agreement and supporting documents with the scheme office in Naromoru. The 2nd Defendant instructed him to fence the agricultural land in March 2016. He was aware that the 2nd Defendant had obtained the title to one of the plots. He stated that the seller refused to cooperate when they were to collect the title and discharge for the two parcels of land.
 11. He added that they were informed in 2010 that the allotment letters for their respective plots were out and they went to collect their allotment letters. He accompanied the 1st Plaintiff to obtain the letter of allotment and they paid the requisite fees. As the chairman of village 3, he was aware that the title deeds for their respective parcels of land had been issued and he was tasked to pass this information to the members.
 12. He stated that after the titles came out they discovered that the 1st Plaintiff had entered into other sale agreements with different people. He fenced the 2nd Defendant's land in 2016 and later found the fence had been tampered with. He reported the matter to the police station. When the police summoned the 1st Plaintiff to the Police Station it emerged that she had obtained a police abstract alleging that she had lost her documents. He clarified that the original ballot cards and letter of allotment were returned to the lands offices for purposes of processing title deeds. He maintained that the suit land belonged to the 2nd Defendant.
 13. The suit was transferred from the Nyeri ELC to the Nanyuki in February 2022. Shafi Grawal Kaka gave evidence on February 8, 2022. He stated that on December 19, 2009, he entered into an agreement with the 1st Plaintiff for the purchase of F.583 measuring 4 acres and plot number V2 191 measuring half an acre for Kshs 450,000 he paid to the 1st Plaintiff in full on the same date. The sale agreement, which granted him exclusive vacant possession of the land was prepared and witnessed by Muhoho Gichimu and Company Advocates. He added that the 1st Plaintiff surrendered to him all the original documents for the land including the green ballot card. Subsequently the 1st Plaintiff handed over the letter of allotment in her name to the 1st Defendant, as his agent. He asked the 1st Defendant to oversee the fencing of the land in March 2016. He stated that the understanding with the 1st Plaintiff was that she would cooperate and facilitate the transfer of the two parcels of land to his name including securing all the relevant consents and approvals.
 14. He maintained that he was the bona fide purchaser of the two properties in Solio Ranch scheme and added that the 1st Plaintiff did not have any legal capacity to sell the suit land to third parties including the 2nd and 3rd Plaintiffs. He maintained that the entry by the 1st Plaintiff into contracts with the 2nd and 3rd Plaintiffs over the same land in 2014 and 2015 without his consent or knowledge was fraudulent and illegal.
 15. The 2nd Defendant produced the sale agreement dated December 19, 2009 over the suit land as well as copies of the receipt issued by Muhoho Gichimo and Company, Advocates, the 1st Plaintiffs title, the ballot and the letter dated April 22, 2010 inviting the 1st Plaintiff to report to the District Land Adjudication and Settlement Officer to be shown the plot boundaries. He also produced copies of the receipts issued on June 9, 2010 and June 11, 2010 on account of the loan repayment.



16. The Plaintiffs did not participate in the hearing of suit despite being served. The Defendants filed submissions in which they stated that it was not in dispute that the 1st Plaintiff owned the suit land and that she sold her entire interest in the two parcels of land to the 2nd Defendant at the agreed consideration of Kshs 450,000/=. They submitted that the contract gave the 2nd Defendant immediate possession of the land which he took by marking the boundaries and engaging in farming on the land before fencing it in March 2016. He submitted that the 1st Plaintiff frustrated any progress towards completion of the sale and transfer of the plot to the 2nd Defendant in breach of the contract dated December 19, 2019.
17. He maintained that the purported sale of the two plots by the 1st Plaintiff to the 2nd and 3rd Plaintiffs came to light in 2016 when the 1st Defendant as caretaker for the 2nd Defendant reported to the police the discovery of temporary structures on the site. That was when they discovered that the 1st Plaintiff had dishonestly obtained copies of documents on the strength of a police abstract claiming that she had lost the ownership documents over the land. The Defendants pointed out that none of the Plaintiffs attended court to justify their positions and that they were not keen on pursuing their interest in the suit land despite initiating the suit.
18. The 2nd Defendant submitted that he had proved his claim for breach of contract and deserved the orders sought in the counterclaim while pointing out that the 1st Plaintiff knowingly allowed him as purchaser to expend money in the discharge of the charge in favour of the SFT.
19. The Defendants relied on *Macharia Mwangi Maina and 87 others v Davidson Mwangi Kagiri* (2014) eKLR where the court stated that if a party to an agreement stood by and let another party incur expenses on the faith of an agreement being valid he would not be allowed to run around and assert that the agreement was unenforceable. The court observed that the conscience of humanity would not allow an individual to receive purchase money and later plead that the agreement was void, and that in such circumstances, constructive trust and proprietary estoppel would apply whenever justice and good conscience required it.
20. The 2nd Defendant concluded that as a purchaser he had fully performed his part of the bargain and was willing to move the process to the next stage were it not for the Plaintiffs' interference. He urged the court to allow the counterclaim and have the Deputy Registrar of the court execute the completion and transfer documents on behalf of the 1st Plaintiff.
21. The issue for determination is whether the court should grant the orders sought in the counterclaim. The evidence led by the Defendants was not controverted by the Plaintiffs. After the Plaintiffs' suit was dismissed on June 20, 2016, they neither made any efforts to have it reinstated nor did they defend the 2nd Defendant's counterclaim. Based on the evidence adduced, the court is satisfied that the 2nd Defendant has proved his counterclaim on a balance of probabilities.
22. The court allows prayers (a), (b), (c) and (d) of the 2nd Defendant's counterclaim dated June 30, 2016. The Defendants are awarded the costs of the suit and the counterclaim.

DELIVERED VIRTUALLY AT NANYUKI THIS 20TH DAY OF APRIL 2023.

K. BOR

JUDGE

In the presence of: -

Mr. Michael Maweu for the Defendant



No appearance for the Plaintiffs

