



**Sifuna v Mulaya & another (Environment & Land Case 280 of 2015)
[2023] KEELC 17561 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17561 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 280 OF 2015
OA ANGOTE, J
MAY 18, 2023**

BETWEEN

DAVID K SIFUNA PLAINTIFF

AND

EMILY KIVALI MULAYA 1ST DEFENDANT

NELSON MUTURI DUMBEYIA 2ND DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff instituted this suit vide a Plaint dated December 8, 2014 in which he sought for the following reliefs:
 - a. Permanent injunction be issued restraining all the Defendants, their servants, agents and/or employees from disposing of, alienating, selling or in any way dealing with Subdivision No 9967, Original No 9690/7 Section 1 Mainland North and if any dealings have commenced, such dealings be declared null and void.
 - b. A declaration that the detaining of the Plaintiff's title by the Defendants being Subdivision No 9967, Original No 9690/7 Section 1 Mainland North is unlawful and the court to direct that the title be released to the Plaintiff unconditionally.
 - c. Costs of the suit herein.
 - d. Any other or further relief that the court may deem appropriate to grant.
2. Through an Amended Defence/Statement of Admission dated March 10, 2016, the 1st Defendant admitted the facts as pleaded by the Plaintiff. The 2nd Defendant opposed the Plaint vide his Defence and Counterclaim dated January 23, 2015.



3. When this matter came up for hearing on October 28, 2021, the Plaintiff failed to appear in court to give his evidence. The court dismissed the Plaintiff's suit for want of prosecution and non-attendance with costs to the Defendants. Having dismissed the Plaintiff's suit, what remains for the consideration of this court is the 2nd Defendant's Counterclaim, in which he sought for the following orders:
 - a. An order transferring Subdivision No 9967, Original No 9690/1 Section 1 Mainland North to the 2nd Defendant, Nelson Muturi Dumbeya.
 - b. The transfer to the 2nd Defendant be executed by the Deputy Registrar of this Honourable Court.
 - c. The Plaintiff to pay the costs of the counterclaim.
4. The 2nd Defendant's case is that on February 14, 2014, the Plaintiff acknowledged in writing and assumed a debt of Kshs 5.5 million owed him by the 1st Defendant and her husband and that in the acknowledgement, the Plaintiff clearly stated that he had agreed with the him that the 1st Defendant and her husband retransfer LR No Trans-Nzoia/Kapomboi/93 to the Plaintiff, which property had been transferred to him and was only awaiting registration in his favour.
5. It is the 2nd Defendant's case that the Plaintiff agreed to have parcel number Trans-Nzoia/Kapomboi/93 (the Kitale land) transferred into his name upon the agreed terms that he would provide a security to be held by him being the suit property, which would be released to the Plaintiff against the payment of Kshs 5.5 million on or before December 31, 2014.
6. The 2nd Defendant averred that the acknowledgement document had a default clause which provided that if the Plaintiff was in default of payment of Kshs 5.5 million on or before December 31, 2014, he would unconditionally execute a transfer of the suit property in favour of the 2nd Defendant on or before December 31, 2014; and that if the Plaintiff failed to execute the transfer, the 2nd Defendant would be at liberty to summarily apply for execution through the court process.
7. The 2nd Defendant further averred that the assignment of his contractual rights in Trans-Nzoia/Kapomboi/193 to the Plaintiff was complete when the Plaintiff acquired a title deed to the aforementioned land and what remains is the enforcement of his remedy against the Plaintiff.
8. According to the 2nd Defendant, since January 1, 2015, he became the equitable/beneficial owner of Sub-division No 9967 Original Number 9619/7 Section 1 Mainland North (the suit property) and that the only outstanding issue is the execution of the transfer in his favour through an order of this court.

Hearing and Evidence

9. The 2nd Defendant, DW1, relied on his witness statement dated January 23, 2015. DW1 testified that the original title for the parcel of land known as Trans-Nzoia/Kapomboi/193 (the Kitale land) was transferred to him by the 1st Defendant's husband, Henry Wanyama Khaemba, the registered proprietor, and that the said land was held by him as a lien over his unpaid fees as well as on account of the sum of Kshs 1.5 million which he had paid towards the fees for the 1st Defendant's daughter.
10. DW1 averred that the Plaintiff tendered his original title over Sub-division No 9967 Original No 9617/7 Section 1 Mainland North (the Mombasa land) to him who in turn released the Kitale land title deed to the Plaintiff and that this release was upon terms which were reduced into writing and duly signed by the Plaintiff and witnessed by the 1st Defendant.



11. DW1 further averred that the Plaintiff entered into a sale agreement with the 1st Defendant on December 11, 2013 in respect to the Kitale land without involving him; that the Plaintiff allegedly paid a down payment of Kshs 2 million to the 1st Defendant when he (the 2nd Defendant) was still holding the Kitale land title and that he only became aware of the said agreement in February 2014 when he travelled to Kitale to meet the Plaintiff.
12. DW1 stated that the 1st Defendant subsequently revoked the Power of Attorney in respect of the Kitale land; that the Kitale land title was not transferred to the Plaintiff on the strength of a Power of Attorney but was transferred by the registered owner and that the transfer of the Kitale land to the Plaintiff was duly executed, attested and witnessed by an Advocate.
13. DW1 averred that the Plaintiff recorded a statement with the police in which he confirmed that the 1st Defendant was selling the land to meet urgent fees requirements; that he requested his advocate to ensure that the registered owner of the Kitale land signed the transfer papers; that the registered owner personally executed the transfer of the Kitale land in the Plaintiff's favour and that the Plaintiff is in possession of the Kitale land.
14. DW1 averred that the Plaintiff has neither rescinded the contract resulting in his acquisition of the Kitale title deed nor has he offered to retransfer the land to him; that the contract was not frustrated but was completed when the Plaintiff acquired title in respect of the Kitale land and that because he lost the Kitale property to the Plaintiff, the Plaintiff should be ready to lose the suit property to him because that is what he consented to.
15. DW1 produced in evidence two bundles of documents as DEXB1 and 2, which included the sale agreement dated December 11, 2013; transfer of the Kitale land dated February 25, 2014; the Plaintiff's handwritten statement to the police dated April 24, 2014; a copy of the Plaintiff's Complaint in ELC No 120 of 2014 and RTGS transfer of Kshs 3 million dated August 24, 2012 to the 1st Defendant's daughter's account.
16. DW1 also produced in evidence the transfer document of the Kitale land in favor of the Plaintiff; the charge sheet and proceedings in Criminal case No 3836 of 2014, Kitale; the charge against him in Disciplinary Cause No 19 of 2016 and the judgement thereto and the deed of revocation of a power of attorney dated June 4, 2014, amongst other documents.

Analysis and Determination

17. Having considered the 2nd Defendant's Counterclaim, testimony and evidence, the only issue for determination is whether this court should issue an order for the transfer of the suit property to the 2nd Defendant, with the transfer documents being executed by the Deputy Registrar of this court.
18. Indeed, while this suit is undefended, the 2nd Defendant had a duty to prove his case on a balance of probability. In the case of *Karugi & Another vs Kabiya & 3 Others [1983] eKLR* the Court of Appeal held that:

' The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge.'



19. Similarly, in the case of *Gichinga Kibutha vs Caroline Nduku (2018) eKLR*, the court held that:

' It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.'

20. The facts in this case are that an advocate/client relationship subsisted between the 2nd Defendant and the 1st Defendant and her late husband. In the said capacity, a debt of Kshs 5.5 million arose in favour of the 2nd Defendant with respect to legal fees owed.
21. To offset the said debt, the 1st Defendant and her husband purportedly agreed to transfer to the 2nd Defendant parcel of land known as Trans-Nzoia/Kapomboi/193 (the Kitale land). The intention of the parties to transfer the Kitale land to the 2nd Defendant is evident in the transfer purportedly executed in his favour by Henry Wanyama Khaemba and the Affidavit of spousal consent sworn on September 16, 2013.
22. However, in 2014, the 1st Defendant and her husband sought to sell the Kitale land to the Plaintiff instead. In order to obtain the title that was held in lien by the 2nd Defendant, the Plaintiff took over the debt owed by the 1st Defendant and deposited the title in respect of the suit land in this matter, Subdivision No 9967, Original No 9690/7 Section 1 Mainland North, (the Mombasa land) with the 2nd Defendant.
23. In the acknowledgement note dated February 14, 2014, the Plaintiff undertook to pay the debt of Kshs 5.5 million to the 2nd Defendant on or before December 31, 2014, failing which he would execute a transfer of the suit land to the 2nd Defendant. A further remedy was included in the said note - that failing the execution of the transfer by the Plaintiff, the 2nd Defendant was at liberty to seek execution through the court process.
24. The 1st Defendant has admitted in her Defence this factual position. She has averred in her Defence that by an agreement dated December 11, 2013, in her capacity as a lawful holder of a power of attorney dated March 23, 2013, she caused and conveyed the Kitale land to the Plaintiff.
25. The 1st Defendant has further admitted in the Defence that she negotiated with the Plaintiff to take over the debt that she was owing the 2nd Defendant, and an agreement was signed between the Plaintiff and the 2nd Defendant to the effect and that the 2nd Defendant, who was holding the title deed for the Kitale land as a lien, releases to the Plaintiff the said title, and the debt that was due to the 2nd Defendant to be secured by the Plaintiff's title (the Mombasa land).
26. According to the 1st Defendant, the performance of the agreement between the Plaintiff and the 2nd Defendant was frustrated by the legal suit that was subsequently filed by her late husband challenging the Power of Attorney that he purportedly signed which enabled the 1st Defendant transfer the Kitale land to the Plaintiff. That suit, being Kitale ELC 120 of 2014, is still subsisting in court.
27. Indeed, the question of whether the Plaintiff would obtain a good title in respect of the Kitale land was not the subject of the agreement of November 14, 2014. The agreement of February 14, 2014 between



the Plaintiff and the 2nd Defendant was 'unconditional.' The pertinent paragraph of the agreement provided as follows:

' In default, I (the Plaintiff) shall unconditionally execute a transfer of the security on or before December 31, 2014. Failing such execution Mr Nelson Muturi Dumbeyi (the 2nd Defendant) be at liberty to summarily cause execution through a court process.'

28. It is trite that courts cannot re write contracts for parties, more so parties who are senior Advocates of this court. The Plaintiff having unconditionally agreed to pay the 2nd Defendant a sum of Kshs 5.5 Million on or before December 31, 2014, and in default to execute a transfer in respect of the suit property in favour of the 2nd Defendant, is bound by the said agreement.
29. The Plaintiff and the 1st Defendant cannot now argue that the said agreement has been frustrated by the suit filed by the 1st Defendant's husband in respect to the Kitale land. The 2nd Defendant, having handed over the title deed for the Kitale land which he was holding as lien, was entitled to either the Kshs 5.5 M as at December 31, 2014 or to file a suit for the transfer of the Mombasa property in his favour.
30. The dispute that arose after the Kitale land was transferred to the Plaintiff can only be as between the Plaintiff and the 1st Defendant. In the event the Plaintiff loses the Kitale land, he will be entitled to seek for indemnity from the 1st Defendant.
31. For those reasons, the 2nd Defendant's Counter claim is allowed as follows:
 - a. An order be and is hereby issued transferring LR N0 Subdivision No 9967, Original No 9690/1 Section 1 Mainland North to the 2nd Defendant, Nelson Muturi Dumbeyia.
 - b. The transfer documents, and all other supporting documents, in respect of LR N0 Subdivision No 9967, Original No 9690/1 Section 1 Mainland North, in favour of the 2nd Defendant to be executed by the Deputy Registrar of this Court.
 - c. The Plaintiff to pay the costs of the Counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF MAY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Sifuna for Plaintiff

Mr. Muturi for 2nd Defendant

Court Assistant - Tracy

