



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL SUIT NO. 13 OF 2012.

MUSA ODONGO KWEYU.....PLAINTIFF

VERSUS.

JACKSON OBULIALIA OTWORI.....1ST DEFENDANT

MAURICE M. LISHENGA.....2ND DEFENDANT

JUDGMENT.

[1]. The plaintiff in this case filed this case and claimed that he sometime in the year 2006 he entered into an agreement with the 1st defendant for the sale of 1 acre out of N/Wanga/Kholera/1325 at a consideration of Kshs.125,000/= whereupon the defendant paid Kshs.105,000/= leaving a balance of Kshs.20,000/= which has never been paid to date. He claims that the defendant fraudulently and without any justification whatsoever, presented to him blank transfer forms and asked him to affix his photograph and other particulars for the defendant to facilitate further subdivision process. He alleged that the parties attended the land surveyors office where the plaintiff made the 2nd defendant to cause subdivision of the suit land so that the respondent could have one acre but through the fraud of the 1st and the second defendants caused a figure of 1.0 ha written instead of 1 acre and that the both defendants went ahead to process issuance of title deed for LR No. N/Wanga/Kholera/2002 in the defendants name. The plaintiff set out the particulars of fraud by the defendants. The plaintiff prayed for eviction against the first defendant and cancellation of title LR No. N/Wanga/Kholera/2001 and N/Wanga/Kholera/2002 and Prays that the original title LR No. N/Wanga/Kholera/1325 be reinstated. Plus costs and Interests.

[2]. The 1st defendant filed a defence and denied the allegations of the plaintiff. He denied the particulars of fraud as set out and stated that if there was a land buying transaction on Parcel No. N. Wanga/Kholera/1325 between himself and the plaintiff which he denied the same was done openly transparently and that the same was registered legally. He argued that the suit was incompetent, unattainable bad in law and that it discloses no reasonable cause of action against the defendant.

[3]. The issue for determination is whether the plaintiff has made a case against the defendant to warrant the granting of the orders sought.

[4]. John Mumasi Mundia gave evidence and he said he was the Land Registrar based in the land Registry at Kakamega and that he had been in that office for 5 years.

He came to court pursuant to a court summons that required him to produce the documents of North Wanga/Kholera/1325 and North Wanga/Kholera/2001 and 2002. He produced the green cards for those parcels which showed the identity cards of the people who transferred and for whom they were transferred. He explained that parcel 2001 has an area of 0.97ha in the name of Musa Odongo Kweyu and was issued on 27/9/2011. That parcel 2002 is indicated as one hectare and in the name of Jackson Obulialia and was transferred by Musa Odongo Kweyu on 7/2/2011.

[5]. The mutation of survey for parcel 1325 were produced to show how the land was subdivided. Also produced were application for Land Control Boards consent dated 5/4/2010 showing the suit land as 2.3 hectares and subdivision of the same 0.97 hectares and parcel 2002 as one hectare. The application was for subdivision. A consent was granted pursuant to that subdivision into portions of one hectare and 1.3 hectares. The application for Subdivision was thumb printed by the vendor. There was also a name of Odongo Musa Kweyu as the owner of the thumb print. The land Registrar said that the mutation were registered. The consideration was Kshs.105,000/=. The transfer was executed on 26/1/2011 and was presented in the land office on 7/2/2011. Certified copies of those documents were made available to Court.

[6]. During the hearing the Plaintiff insisted that he sold one acre and NOT one hectare. He insisted that he never signed the agreement for sale. He however admitted that he subdivided his land parcel 1325 and a consent was granted on 7/4/2006 and that he transferred N/Wanga/Kholera/200 to the defendant. He said he knew the application for consent of 4/7/2000 and the consent of 5/7/2000. He also owned the transfer of 17/2/2017.

[7]. The defendant produced in court his sale agreement dated 9/4/2000. The transfer dated 26/7/2011 and the application for consent dated

4/7/2006 and the letter of consent of 6/7/2006 and a copy of the title for Kholera/North Wanga/2002. He stated that he paid Kshs.175,000/= in total and that the land was transferred to him. He finally stated that he entered the land in 2007. He prayed that the suit to be dismissed.

[8]. Having heard the evidence of the plaintiff, the defendant and the land Registrar Kakamega, and also having perused the agreement entered into by the parties, the application for land subdivision, the resultant subdivisions, consents granted for the same, and the transfer executed by the parties, I am convinced that the size(s) of the land was in hectares and NOT in acres as alleged by the plaintiff. There is no proven misrepresentation at all. He does not deny entering into a Sale Agreement and/or transferring a portion of his land to the defendant. Equally he does not deny executing the transfer documents at all.

He thumb printed the document. Signing a document is a testament that one is aware of what one is signing or that one is privy to the contents therein. Changing ones mind after the passage of time or feigning ignorance cannot be a basis for the court to vitiate a contract entered into freely and without fraud or mistake or proven misrepresentation by two competent parties to a contract of sale. The plaintiff herein had all the time to report to the police of any fraud if he thought he was defrauded or that the agreements and transfer documents were misrepresented by the defendants. He did not do so.

I find the plaintiff case without merit. I dismiss it with costs to the defendants.

Dated at Bungoma this 28th day of March, 2018.

S. MUKUNYA

JUDGE.

In the presence of:

Joy: Court Assistant

Mr. Murunga: For Onindo for the Plaintiff

Madam Achieng for Mr. Ingotsi for defendant

Judgment read in Court in the presence of Counsels.