



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL CASE NO. 9 OF 2011

PATRICK NYONGESA BIKETI.....APPELLANT

VERSUS

TERESINA NALISI SOSIO.....RESPONDENT

JUDGMENT

[1]. The respondent herein filed a suit in the Resident Magistrates Court and he alleged that he purchased 2.25 acres from the appellant for Kshs.24,000/=. The parties entered into an agreement for sale. The respondent paid Kshs.10,000/= and left a balance of Kshs.14,000/= the 2.25 acres was to be hived from Ndivisi/Mihuu /476. The land was not in the appellants name and he had to file Succession Proceedings as it was in his deceased's father's names. The respondent told the Magistrate that the land became Ndivisi/Mihuu/1953. She said that she was given 0.7 acres and that is why she did not pay the balance. She produced an application for Land Control Board and a Consent dated 5/2/1998. She said that the land parcel 1953 was subdivided by the appellant into parcels 2160 and 2161 and that she was to get parcel No.2161. She told the court that she had been always ready to pay the balance of Kshs.4,000/= but the appellant has refused to accept the same.

The appellant told the Resident Magistrate that he entered into an agreement to sell to the respondent 2 acres at an agreed price of 12,000/= per acre and Kshs.10,000/= was paid and that Kshs.14,000/= was not paid and that at the time the land was in his father's name. He said that the Land was Ndivisi/Mihuu/476. He said that he later filed an application for Letters of administration and the land became his. He went on to say that he made a further Subdivision of 476 and Ndivisi/Mihuu/1953 was one of the resultant parcels. 1953 was Subdivided into parcels 2160 and 2161. The appellant admitted there was a Consent to transfer parcel 2161 to the respondent. He denied however that he made the application of the Land Control Board he also denied having signed the same.

[2]. The trial Magistrate in his Judgment of 12/1/2011 found that the plaintiff sold land to the plaintiff that belonged to his father and the same had not been subdivided, possession was given and the respondent lives there todate. That at the filing of the suit in 2004 the appellant had succeeded Ndivisi/Mihuu/1953 comprising of 12 hectares. The appellant refused and declined to execute the transfer forms to give effect to the agreement for same. He stated that whereas he had no authority to enter into the agreement entered with the respondent, that the same was validated when the family took the letters of administration and the estate shared among the beneficiaries. And that the agreement was validated when the portion sold to the respondent fell on the appellant as a beneficiary. And that therefore that, the appellant cannot run away from his obligation and must give effect to his intention in full. It is against this finding that the appellant filed his Appeal.

The first ground of Appeal was that the Court erred in-law in ordering specific performance when Kshs.14,000/= was not paid. The issue of Kshs.14,000/= was not paid, the issue of Kshs.14,000/= being outstanding was admitted by the appellant and the respondent. However, the reasons for the same being outstanding differed. The appellant alleged that the respondent refused to pay the same while the respondent alleged that the appellant refused to accept the same. The learned Magistrate was well within his powers to accept one version and reject the other in view of the evidence produced to wit, the conflicting D.O's Letters.

[3]. The appellant finally was registered as owner of Ndivisi/Mihuu/476 in the place of his father on 21/12/95 pursuant to Succession Cause. That title was closed on Subdivision on 3.12.97. New titles Ndivisi/Mihuu/1953 and 1954 were created on 3.12.97. The respondents claim before the Resident Magistrate was for Specific performance directing the appellant to sign the transfer of 2.25 acres in favour of the respondent from land parcel Ndivisi/Mihuu 1953. This land was only in existence for seven (7) years to the filing of the suit. The suit was not therefore barred by Limitation.

The consent to transfer land parcel Ndivisi Mihuu/1261 (a subdivision of Ndivisi/Mihuu 19530) was granted by the Webuye Land Control Board on 19/12/02. That consent was not challenged by the appellant. He admitted to signing the application to the Land Control Board.

The letter of Consent of the Land Control Board obtained by the appellant in 1994 was long before the suit land was created. The same having been created in 1997. Whether or not the agreement was for sale of Ndivisi/Mihuu 476 and whether the same was void is neither here nor there since that was not the land subject to the suit before the lower court.

None of the grounds of Appeal set out by the appellants has merit. I dismiss all of them as against the respondent. The learned Magistrate ordered a transfer of the Sub-division of Ndivisi/Mihuu 2160 and 2161. Consent was granted for the transfer of 2161 to the respondents. That is the land the respondent shall have, after paying the Kshs.14,000/= outstanding to the appellant. The appeal is dismissed with costs.

Judgment read in Open Court in the presence of Counsels.

DATED at BUNGOMA this 23rd day of May, 2017.

S. MUKUNYA

JUDGE

In the presence of:

Joy/Gladys: Court Assistant

Okwi - holding brief for Mr. Areba for the Respondent

Mr. Situma for the Appellant - Not Present Mr. Juma holding brief.