



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA.
CIVIL SUIT NO. 2 OF 2006.

SOLOMON FRANCIS NANGENDO WANYONYI.....PLAINTIFF

VERSUS.

PHILIP MASANGA WANJALA.....DEFENDANT

JUDGMENT.

[1] The plaintiff who is the administrator of the estate of Joash Waswa Machimbo Biketi filed this suit against the defendant claiming that the defendant herein fraudulently transferred the land of the said Biketi in 1995 into his name by purporting to having purchased the same from the said Waswa Machimbo Biketi.

[2] The defendant claims to have discovered this on 8th June 2001, while in the ceremony known as “lufu” where debts and liabilities of a deceased person are declared 3 days after his death according to the traditional rights of the Bukusu Sub tribe of the Luhya people.

On the aforesaid date, the defendant alleged that he had leased the land of the said deceased Biketi. He was unable to produce an agreement but promised to produce it at a later stage. The said “lufu” Minutes were recorded on 8/6/2001 and were produced in Court.

[3] The plaintiff was mandated by the clan to take letters of administration of the said Biketi and he duly took the said letters. While preparing to take the letters he visited the land office Bungoma and found out that the defendant had transferred the land of the deceased into his name in 1995. The plaintiff stated that when he visited the land office there were no Land Control Consent and Transfer Forms. The witness said that he reported his findings to clan elders who summoned the defendant. The defendant showed the elders two leasing agreements of 30/6/96 and 26/11/96. The defendant was unable to show any other documents. He later tried to enter the land by force and destroyed the house that was on the land. He was charged in Court for malicious damage to property vide Kimilili SRM CR. Case No. 808 of 2003 a copy which was produced in court as evidence.

The plaintiff called Jacton Siakeni Kusimbo as his witness who gave evidence that he knew Joash Waswa Machimbo Biketi deceased who owned Parcel No. Bokoli/Mukuyuni/1194. That he attended his “lufu” and was made Chairman. He stated that the defendant also attended the gathering and he claimed to have leased the defendants land for 6 years. But had no documents of leasing the land he stated that later he was told by the plaintiff that the defendant was claiming the land. He said that the claim is false since those claim of ownership and sale should have been made at the “Lufu” gathering.

[4] The defendant adopted his statement made on 16/12/2017. He produced a statement 2/8/195 a copy of the green card, a title deed, certificate of official search, Map of Bokoli/Mukuyuni/1194 and a decision of LDT. No. 3 of 2002.

In his statement the defendant said that on 2/8/95 he entered into an agreement for sale of land of Bokoli/Mukuyuni/1194 with Joash Waswa Biketi. The sale was for Kshs.120,000/=. Further that in September 1995 he went to the Land Registry at Bungoma with the deceased Biketi where he conducted a search and confirmed the land was in Joash Biketi's name and thereafter he was issued with a Land Boards Consent and a title deed was issued in his name in October 1995. He says that he has been in occupation and possession of the land since 1996 uninterrupted until now.

[5] The question for determination is was this land legally transferred to the defendant as he alleges?

[6] On 26/11/1996 there was an agreement for leasing land from Joash Waswa Biketi to the defendant for 3 years 2004 2005 and 2006. The agreement is witnessed by several persons. The same was not disowned by the defendant. The question begging an answer is, why was he leasing a land for the years when the land became his in 1995 when he was issued with a title deed? Previously there was a leasing agreement by the same parties for the years 2001, 2002 and 2003 the same was witnessed by many other people, why was the defendant entering into a leasing agreement on his own land with the deceased? Joash Waswa Biketi died in the year 2001, why was he buried on the suit land Seven years after he 'sold' it to the defendant and the defendant did not resist such burial? During the "lufu" as per the Minutes produced in court the defendant attended, and lay a claim of leasing the land for three years. Why did he not claim the same as owner through purchase?

After the "lufu" ceremony he entered the land, destroyed a house therein was charged and convicted with malicious damage to property contrary to Section 339(1) of the Penal Code vide Kimilili Resident Magistrates court in Criminal Case No. 808 of 2003 and he was fined Kshs.1,000/=. If the land was his why could he not raise such defence?

[7] The plaintiff alleges that when he was made an administrator of the estate of Joash Waswa Biketi he diligently perused the records in the land office and that there was no Land Control Consent and transfer documents from the deceased Biketi to the defendant why was the defendant unable to produce those documents if he indeed obtained them? Land Control Consent can easily be obtained from the lands office or from the former D.O's office now called Assistant Area Commissioner's officer and/or Minutes of the meetings.

[8] I am not prepared to believe that such Consent existed. The transfer was not given either and therefore none of these documents could be obtained from the offices aforesaid as none was granted in the first place. The evidence of the plaintiff is that the deceased Joash Waswa Biketi was illiterate and was a herdsboy of the defendant. It is quite possible that they established a relationship that lead to the granting of land leasing rights as evidenced by the lease agreements produced in Court. I am convinced on a balance of probability that, that is why the deceased may have been taken to an advocate to write the agreement for sale produced in court.

[9] The transfer of the deceased's land to the defendant was therefore fraudulent. There was no Land Control Consent as is required by Law on all Agricultural lands. The alleged sale was therefore void. There was no prove that the defendant ever paid any consideration to the deceased Joash Waswa Biketi. So none is refundable.

The Land Registrar Bungoma is therefore ordered to cancel the registration of the land parcel Bokoli/Mukuyuni/1194 to Phillip Masanga Wanjala and/or any other to any other person from Phillips Masanga Wanjala forthwith.

He shall reinstate the name of the registered owner as Waswa Biketi as registered on 31/12/64. The plaintiff shall have the costs of this suit.

It is so ordered.

Judgment read in Open Court.

Dated at Bungoma this 18th day of December, 2017.

S. MUKUNYA

JUDGE

In the presence of:

Hon. S. Mukunya (Judge)

Joy: Court Assistant

Mr. Okwi: For Mr. Khakula for the Defendant

Defendant In Person