



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1583 OF 2014 (OS)

FRANCIS KIMANI1ST
PLAINTIFF

SMITH MUTURI2ND
PLAINTIFF

PAUL MUCHIR I.....3RD
PLAINTIFF

(SUING FOR AND ON BEHALF OF SUPERMIND DEVELOPMENT SELF HELP GROUP)

VERSUS

MATUMAINI VENTURES LTD1ST
DEFENDANT

KENYA COMMERCIAL BANK LTD2ND
DEFENDANT

JUDGMENT

This suit was commenced by way of Originating Summons dated 19th December 2014 in which the Applicants sought for the determination of the following questions:

1. Whether the Transfer Documents executed by the duly Constituted Attorney of the 2nd Defendant on 16th March 2006 are effectual to transfer the suit property in favour of the Plaintiffs.
2. Whether the Defendants should execute fresh transfers in conformity with the legal requirements so as to specifically perform the agreement for sale herein.
3. Whether the Defendants should execute and take out a Deed of Indemnity to effectuate the reconstruction of the Deed File for the suit property at the Land registry at Nairobi so as to facilitate the registration and transfer in favor of the Plaintiffs.
4. Whether the Defendants should be ordered and/or directed by this honorable court to execute the said Transfer and Deed of Indemnity annexed herewith within fourteen (14) days or such other

- period as this honorable court may deem just and appropriate and in default the Deputy Registrar of this Honorable court be directed to execute the said Transfer and Deed of Indemnity.
5. Such other orders and/or directions as this honorable court may deem just and fit including but not limited to the costs of this application.

The Originating Summons is premised on the Supporting Affidavit of Francis Kimani, the Chairman of Super Mind Development Self Help Group, sworn on 19th December 2014 in which he averred that the Plaintiff entered into a Sale Agreement dated 24th May 2005 with the 1st Defendant, Matumaini Ventures Limited, who were at all material times assignees of the 2nd Defendant, Kenya Commercial Bank Limited, for the purchase of the parcel of land known as L.R. No. 12867/17 (hereinafter referred to as the "suit property") for a consideration of Kshs. 13,800,000/-. He averred further that the Plaintiff paid the full consideration but the Defendants failed, neglected and/or delayed in releasing all the completion documents hence constraining the Plaintiff to institute proceedings in **ELC Miscellaneous Application No. 20 of 2008** against Messrs. Gachiri Kariuki & Kiai, Advocates for the 1st Defendant, to enforce the Professional Undertaking issued by them to release the said completion documents. He added that subsequent to that, the said Advocates released to them the original Grant and Transfer indicating that the same had been registered in favor of the Plaintiffs without their knowledge and seeking to be discharged from the said undertaking. He further averred that upon careful scrutiny of those documents, they realized that the transfer had been made and registered in the name Super Mind Development Self Help Group instead of in the names of the registered officials in view of the fact that Super Mind Development Self Help Group has no legal capacity to hold property in its name. He stated further that in light of this anomaly, they were reluctant to have the said Advocates discharged from their Professional Undertaking until the said Transfers and the entry in the Grant has been verified at the Land Registry through an official search. He further added that upon trying to conduct the official search, their advocates informed them that the Deed File for the suit property was missing from the Registry and as such they could not secure an official search so as to verify the authenticity of the said transaction. He added further that when their efforts to trace the said Deed File yielded no fruits, they were advised to take out a Deed of Indemnity so as to facilitate the reconstruction of the Deed File for the suit property at the Land Registry. He stated further that in order to correct the apparent error in the registration in the name of Super Mind Development Self Help Group to the names of the officials thereof, they executed a Deed of Rectification to regularize the position. He further averred that despite their best efforts to have the said Deed File reconstructed and the said anomaly corrected vide the said Deed of Rectification, they were informed by the Chief Lands Registrar through his letter dated 13th March 2014 that the Grant presented by the Plaintiffs contained a forgery and in particular the entry transferring the suit property to Super Mind Development Self Help Group. He added that the Chief Lands Registrar cancelled that entry and returned the Grant to them which meant that the suit property reverted back to the Defendants hence leaving the Plaintiffs and their members' interests hanging precariously. He stated further that to that end, they have written to the Defendants explaining their predicament on this matter and asking them to execute property transfer documents and Deed of Indemnity but the Defendants have failed, neglected and/or delayed to do so. He further stated that they have also pursued Messrs. Gachiri Kariuki & Kiai, Advocates for the 1st Defendant, to release to them a clean title and all completion documents as required by law and practice. He stated that the Plaintiffs are in possession of the suit property as well as the original Grant thereto and the Defendants have no claim herein and as such no prejudice would be occasioned upon them if they are ordered to execute the Transfer Documents and the Deed of Indemnity in furtherance of the Sale Agreement herein.

The Originating Summons is contested. The 2nd Defendant filed its Grounds of Opposition dated 26th February 2015 stating that the entire Application is unmerited and untenable for the following reasons:

- a. The 1st Defendant was never seized of any registered proprietary right and or interest over the suit property herein and it was therefore incapable of passing any good title to the Plaintiffs.
- b. That the Plaintiffs therefore lack the requisite *locus standi* to maintain this suit.
- c. The 2nd Defendant was never privy to the agreement for sale between the Plaintiffs and the 1st Defendant.
- d. The Plaintiff's Application is an abuse of court process and it ought to be dismissed.

The 1st Defendant did not file any response to this Application.

Both the Plaintiffs and the 2nd Defendant filed their written submissions.

Determination

I will focus my attention on the very initial stages of the transaction relating to the suit property in which the suit property is said to have changed hands from the Defendants to the Plaintiffs herein. It is conceded by the parties herein that the suit property is registered in the name of the 2nd Defendant, Kenya Commercial Bank Ltd. According to the Sale Agreement dated 24th May 2005 under which the 1st Defendant, Matumaini Ventures Limited purported to sell the suit property to the Plaintiffs, it was not the registered owner thereof. In fact, in the said Sale Agreement, it is clearly stated that Kenya Commercial Bank Ltd is the registered owner of the suit property. Further, it was stated that by an Agreement made on 31st May 2004 between Kenya Commercial Bank Ltd and Matumaini Ventures Ltd, Kenya Commercial Bank Ltd agreed to sell the suit property to Matumaini Ventures Ltd. This initial sale of the suit property from Kenya Commercial Bank Ltd to Matumaini Ventures Limited appears not to have gone through because even as I write this judgment, it is conceded that the suit property is still in the name of Kenya Commercial Bank Ltd. Accordingly, the Sale Agreement dated 24th May 2005 between the 1st Defendant and the Plaintiffs was of no legal effect because the 1st Defendant was not in a position to transfer to the Plaintiffs the suit property because it did not own the suit property at that stage or at all. Can the 2nd Defendant be compelled to transfer the suit property to the Plaintiffs? That question can best be answered after reviewing what the law says on the issue of disposition of land. The **Law of Contract Act at section 3(3)** clearly indicates as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

- a. The contract upon which the suit is founded
 - a. Is in writing
 - b. Is signed by all the parties thereto: and
- b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party...”

Going by these legal provisions, a party cannot be compelled to transfer an interest in land unless the contract under which the suit is founded is in writing and signed as well as witnessed as stated above. In this case, there was no written agreement between the 2nd Defendant and the Plaintiffs for the disposition of the suit property to them and therefore the Plaintiffs cannot compel the 2nd Defendant to sign a transfer of the suit property in their favour. As submitted by the 2nd Defendant, they were not privy to the Sale Agreement dated 24th May 2005 between the Plaintiffs and the 1st Defendant for the sale of the suit property. They cannot therefore be compelled to transfer the suit property to the Plaintiffs. Accordingly, I find that the Plaintiffs have failed to prove their case against the Defendants and their suit is hereby dismissed with costs to the 2nd Defendant.

DELIVERED AND SIGNED IN NAIROBI THIS 19TH DAY OF FEBRUARY 2016.

MARY M. GITUMBI

JUDGE