



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 43 OF 2012

SAID SALIM OMAR.....PLAINTIFF

=VERSUS=

1. JAPHET ENOCK MRABU

2. GLADYS DAMA BILAHU.....DEFENDANTS

J U D G M E N T

Introduction:

1. In the Plaint dated 6th November, 2012, the Plaintiff averred that at all material times, the Defendant's father, Enock Japhet Mrabu (deceased) was the proprietor of plot numbers 374 and 375.
2. The Plaintiff stated in the Plaint that on 23rd February, 2007 the Defendant's father and himself entered into a sale agreement in respect of plot no.374 at a consideration of Kshs.90,000, which amount he paid in full; that on 10th November, 2009, the two entered into another agreement for the purchase of two plots measuring 50 X 100 feet at Kshs.1,000,000 and that he paid the entire purchase price.
3. It is the averment of the Plaintiff that he made a further payment to the Defendants' father of Kshs.100,000 and also made a payment of Kshs.11,000 being the transfer fees to Kalolo Kibaoni Beyamogaruji upgrading project.
4. The Plaintiff is seeking for a declaration that plot numbers 374 and 375 belongs to him and for the Defendant to be ordered to demolish any other developments on the suit property.
5. In his amended Defence, the Defendant averred that his late father held plot numbers 374 and 375, Kilifi, in trust for the family of the late Japhet Bilahi; that if any agreement was entered into between the Plaintiff and the his father for the sale of plot 375, the same was entered into with full knowledge of defect in title and that the late Enock Japhet Mrabu had no authority to sell the suit premises.
6. According to the Defence, the sale of the suit properties was riddled with fraud and omission and is therefore null and void.
7. This court allowed the joinder of Gladys Dama Bilahi as the 2nd Defendant.

The Plaintiff's case:

8. The Plaintiff, PW1, informed the court that he is a businessman in Kilifi.
9. The Plaintiff relied on his written statement in which he stated that he entered into a sale agreement with the 1st Defendant's father in the year 2007 to purchase plot number 374 for Kshs.90,000.
10. According to PW1, he entered into another agreement for sale with the 1st Defendant's father in 2009 to purchase plot number 375 for Kshs.1,000,000 out of which he paid to the Defendants' father Kshs.300,000.
11. It was the evidence of PW1 that although the 1st Defendant's father was ailing at the time the two agreements were signed, his entire family was involved in the transaction.
12. According to PW1, the 1st Defendant's uncles, Allan and Donald did a letter indicating that they had no objection with the sale of the land.
13. The evidence of PW1 was that on 30th November, 2009, the area Chief informed him in writing that the family of Mrabu had problems with the sale of the property and he requested him not to settle the balance of Kshs.700,000 until the dispute is resolved; that the area Chief withdrew his letter of 30th November 2009 and that that is when a meeting was held and the family members of Mr. Mrabu objected to the sale of the suit property.
14. It was the evidence of PW1 that he is willing to complete the transaction by paying the balance of the purchase price of Kshs.700,000 to the family members.
15. PW1 produced in evidence the two sale agreements and a receipt that was issued to him by Kalolo Kibaoni Bayamagoruzi Upgrading Project (KKB), which was the organisation that was in charge of the suit premises.
16. PW1 informed the court that he paid to the 1st Defendant's father a total of Kshs.300,000 in cash. PW1 produced in evidence the petty cash vouchers for Kshs.56,000, which, according to PW1, was after the deceased received Kshs.200,000 upon signing the agreement.
17. PW1 also produced in evidence several letters that were authored by the Chief, the 1st Defendant's father and his advocate which I shall refer to in a short while.
18. According to PW1, he did not pay the balance of the purchase price because the 1st Defendant refused to give him vacant possession.
19. The evidence of PW1 was that the plots in question do not have title documents and that they are managed by KKB. It was for that reason that he had to pay to KKB Kshs.11,000 to have the suit properties transferred to him.
20. In cross examination, PW1 stated that the deceased used to stay in the house that he sold to him with a helper; that the first plot had a foundation of a house and that it is the deceased who prepared the first agreement which was signed and witnessed.
21. PW1 informed the court that according to the agreement, he purchased plot number 375 together with the house that was standing on the land for Kshs.1,000,000 and that part of the house had tenants.
22. PW2 informed the court that he was approached by the deceased's sister, (mama Shanti), who informed him that the deceased was looking for a buyer for his plot which was next to Kobil Petrol Station.
23. According to PW2, he was by that time working for PW1 and he told him about the information he had received from Mama Shanti.

PW2 informed the court that in the presence of Mama Shanti and the deceased's uncle, he witnessed PW1 pay to the deceased Kshs.90,000 whereafter the deceased allowed PW1 to fence the plot.

25. The evidence of PW3, the Chairman of Kololo Kibaoni Bayamegoruzi Upgrading Project (KKB) was that he was the Chairman of the organisation.

26. According to PW3, the house that the deceased was staying in was his and that he had also allowed his father to stay in the house.

27. PW3 informed the court that during the identification of the squatters who were living in that area, the 1st Defendant's father was registered as the proprietor of the land although his brothers and mother were all staying on the land.

28. PW3 stated that indeed, the deceased sold to the Plaintiff the suit premises and KKB prepared a transfer for plot number 375.

29. According to PW3, plot number 375 was subdivided to create plot number 374.

30. PW3 stated that by the time the Plaintiff paid Kshs.11,000 to KKB, he had paid to the deceased Kshs.90,000.

31. The evidence of PW3 was that in the year 2009 when the deceased went to his office with a letter signed by Donald and Allan Mrabu dated 30th October 2009, he had received a sketch from the project's surveyor which revealed two separate plots both belonging to the deceased but with the same number, that is plot No. 375.

32. It was the evidence of PW3 that one plot had a house and the other one was empty. He used his discretion to allocate the other plot a number which was plot number 374 because, according to PW1, two plots could not have the same number.

33. PW3 informed the court that the receipt he issued on 27th January, 2009 was for plot number 374 and that according to their records, plot number 374 belonged to the deceased which he sold to the Plaintiff.

34. The then Chief of Kilifi Town, PW4, stated that the late Enock Mrabu went to his office and informed him that he had entered into an agreement with the Plaintiff and had been paid Kshs.200,000.

35. According to the Chief, he was aware of the dispute that was there between the late Mr. Mrabu and the family members concerning the sale.

36. In cross-examination, PW4 stated that the house standing on the suit property used to be occupied by the deceased's father.

37. According to PW4, when the deceased went to see him in his office, he wanted the Plaintiff to pay him an additional amount of Kshs.100,000 to enable him get treatment.

The Defendants' case:

38. The 1st Defendant informed the court that plot number 374 and 375 belong to his late grandfather, Japhet Bilahi Ndaa.

39. It was the evidence of DW1 that his late grandfather moved from his ancestral home at Garashi village and went to live in Kilifi town. Later on, he purchased a parcel of land at Kibaoni area from the late Mzee Sadikini and proceeded to develop his home, which is the suit property.

40. It was the evidence of DW1 that when his uncle Timothy Charo bilahi died in 1969, he was buried at

Kibaoni area.

41. According to DW1, when his late father retired from the civil service, he settled in a rental house at Mnarani until 2006 when the family persuaded him to return to his parents home at Kibaoni. By then, according to DW1, the deceased was old and ailing.

42. The evidence of DW1 was that in the year 2003, KKB commenced the process of surveying the area and that his grandparent's parcel of land was subdivided into several portions which were registered in the name of his father in trust for the family of the late Mzee Japhet Bilahi Ndea.

43. It was the evidence of DW1 that his late father did not own the suit property as evidenced by his Will dated 20th April, 1984; that the deceased did not involve the family when he sold the suit premises and that when the family discovered about the sale, they stopped him.

44. DW1 informed the court that his aunties instituted a civil case in the lower court in Kilifi to stop the sell of the land and that when the family had its meeting, they resolved that the Plaintiff should be refunded his money.

45. DW1 produced the correspondences and the proceedings of the lower court in evidence.

46. The deceased's sister, DW2, informed the court that she was born in 1964 at her late father's home at Kibaoni, which is the suit property.

47. It was after the said sell, according to DW2, that she sued the deceased in the lower court.

48. DW2 stated that her late brother could not sale the suit property to the Plaintiff because the land was not his.

49. DW3 informed the court that he was a neighbour of the 1st Defendant's grandfather for a very long time.

50. It was the evidence of DW3 that the deceased's father (1st Defendant's grandfather) lived on the suit property with his wives and children and even buried one of his sons on the land.

51. DW3 stated that the deceased initially had his land at Kikambala before he relocated to the suit land.

52. The current Chairman of KKB, DW4, informed the court that it is the late mzee Japhet Bilahi who owned the house standing on the suit property.

53. According to DW4, the suit property was registered in favour of the 1st Defendant's father in trust for the family.

Submissions:

54. The Plaintiff's advocate submitted that there is no evidence by the Defendants to show that the 1st Defendant's father was registered as the owner of the the suit properties in favour of the family of Japhet Bilahi Ndaa or that the Plaintiff knew that the deceased was holding the suit plots in trust and that the Defendants have not proved fraud or mistake on the part of the Plaintiff.

55. The Plaintiff's counsel submitted that the Defendants do not have the letters of administration to have the locus standi to deal with the property of the deceased and that the agreements between the Plaintiff and the 1st Defendant's late father are valid.

56. The Defendants' advocate submitted that the suit property has always been in possession of the family since the year 1959 and that the deceased's Will showed that he did not own the suit property.

Analysis and findings:

57. The Plaintiff is seeking for a declaration that the suit property being plot numbers 374 and 375 belongs to him and for a permanent injunction to issue restraining the Defendants from interfering with his peaceful occupation, possession and enjoyment of the suit property.

58. On the other hand, the Defendants' claim is that the late Enock Japhet Mrabu (deceased), who was the 1st Defendant's father and the brother to the 2nd Defendant could not have legally sold the suit property because he was holding it in trust on behalf of the family of the patriarch, the late Bilahi Ndaa.

59. The issues for determination in this matter are whether Enock Japhet Mrabu (the deceased) had the legal or beneficial capacity to sale the suit property and secondly whether the Plaintiff is entitled to the land.

60. The Plaintiff produced in evidence an agreement dated 23rd February, 2007 in which the deceased agreed to sell to him part of plot number 375 for Kshs.90,000.

61. According to the agreement, the approximate size of the plot to be sold was supposed to be around 0.25 acres.

62. The agreement was duly signed and attested. A sketch plan showing how plot number 375 was subdivided into two portions was also produced in evidence.

63. According to the evidence of the then Chairman of the organisation that had been mandated to survey the land in the Kibaoni area, PW3, he allocated one of the plots of the sub-division a number, being plot 374 while the other portion remained with the initial number of plot 375.

64. The second agreement that was entered into between the deceased and the Plaintiff is dated 10th November 2009 for plot number 375 measuring 50 X 100 feet.

65. The consideration for the second plot, which also has a house with tenants, was Kshs.1,000,000.

66. The deceased acknowledged receipt of Kshs.200,000 as at the time of signing the agreement. The balance of Kshs.800,000 was to be paid by monthly installments of between Kshs.50,000 and Kshs.100,000 until payment in full.

67. PW1 produced in evidence petty cash vouchers showing that he paid the deceased Kshs.28,000 twice on 27th May 2010 and 3rd June 2010 respectively.

68. It was the evidence of PW1 that he stopped making any further installments when the family protested about the sale of the land.

69. A receipt from KKB dated 27th January 2009 shows that the Plaintiff paid to KKB Kshs.11,000 for the purpose of having plot number 374 transferred to him.

70. From the chronology of the above events, it is obvious that the Plaintiff paid Kshs.11,000 to KKB for the transfer of the initial plot where he had paid Kshs.90,000 to the deceased and not in respect to the second agreement.

71. I say so because the Kshs.11,000 was paid to KKB before the second agreement of 10th November, 2009 was signed.

72. After the signing of the second agreement, the deceased was in a hurry to complete the transaction, probably due to his state of health.

73. On 15th November 2009 and 11th March, 2010, the deceased did two letters: one addressed to the tenants who were occupying the suit property advising them to vacate the house and the other one was asking the Plaintiff to fence the suit property.
74. According to the letter dated 17th December 2009 by the Chief, there was already a dispute between the deceased and his family members who were opposed to the sell of the land. In that letter, the Chief sympathised with the health condition of the the deceased and advised the deceased's family members to file a case in court to determine the issue of ownership of the sold land.
75. The Defendants produced in evidence a letter which was authored by the Chief who appeared in this court as PW4, in which he agreed that the land in question did not belong to the deceased.
76. The Chief, PW4, informed the court during cross-examination that he knew the deceased and the deceased's father.
77. According to the evidence of the Chief, the deceased used to live in Kikambala while his father (the Plaintiff's grandfather) lived in the house that is on the suit property.
78. The evidence by the Chief corroborates the evidence of DW1 and DW2 who informed the court that it is Mr. Bilali Ndaa who occupied the house on the suit property since the 1960's.
79. According to DW1 and DW2, it was not until the year 2002 after Mr. Mrabu retired that he settled in Kilifi before he moved into the house that had been put up by his father in the year 2006.
80. DW1, DW2 and DW3 informed the court that the 1st Defendant's grandfather settled on the suit land and even buried his first born son on the land.
81. The depositions of DW1, DW2 and DW3 were in consonant with the evidence of the then Chairman of KKB, PW3, who stated that “we registered Enock Mrabu (deceased) because the family including the mother and brothers were staying on the plot.”
82. The totality of the evidence before me shows that plot number 375, which was sub-divided to create plot numbers 374 and 375 belonged to the late Bidali Ndaa, the deceased's father.
83. Indeed, the late Bilahi Ndaa buried his first born son on the plot way before the 1st Defendant's father occupied it.
84. The Defendants' evidence that the late Mr. Mrabu was only invited on the suit land in the year 2006 is believable considering that the Chief, who grew up in the area, conceded that he advised the Plaintiff that the family members could contest the issue of ownership of the land in court.
85. The 1st Defendant's father only resorted to sell the land belonging to his late father and other family members when he could no longer afford treatment. That position is captured in the letters that were produced in this court.
86. In view of the fact that the suit property was not registered, it was incumbent on the Plaintiff to find out the competing interests in respect to the suit property before entering into the two agreements.
87. If he had done so, he would have realised that the plot and the house that he was buying did not belong to the late Mr. Mrabu as an individual, but to the entire family of the late Bilahi Ndaa.
88. In any event, the order for specific performance cannot issue considering that the Plaintiff did not complete the payment of the purchase price.
89. However, even if he had completed the payment of the entire purchase price, he could not have

succeeded in his claim because the suit property did not belong to the deceased, but to the family of the late Bilahi Ndaa.

90. The deceased could not have entered into a valid agreement with the Plaintiff in the circumstances of this case.

91. For those reasons, I dismiss the Plaintiff's Plaint dated 6th November 2012 with costs.

Dated signed and delivered in Malindi this 15th day of **April**, 2016.

O. A. Angote

Judge