



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL CASE NO. 47 OF 2007

DAVID NAMASAKA.....PLAINTIFF

VERSUS

GEOFFREY WAFULA SILIKHANI

ANNE SILIKHANI.....DEFENDANTS

JUDGMENT

1. The Plaintiff via his plaint dated 18th June 2007 sued the Defendants seeking the following prayers;
 - a). A declaration that the agreement of 20.12.2004 is null and void.
 - b). An order of eviction of the Defendants, their servants and/or agents from plot No. BOLOLI/KITUNI/891.
 - c). A temporary injunction restraining the Defendants from carrying out any further developments, disposing of or in any other way interfering with the Plaintiff's possession of the plot.
 - d). Costs of the suit.
 - e). Any other relief the court deems just to grant.
2. Contemporaneous with the Plaint, the Plaintiff also filed an application under Order XX XIX rules 1,2,3 & 4 of the Civil Procedure Rules seeking temporary injunction orders restraining the Defendants/Respondents, their servants or agents from continuing with any further developments, disposing or interfering with the Plaintiff's ownership/possession of TITLE NO. BOKOLI/KITUNI/891 pending hearing a and determination of the case.
3. This application was disposed of on 10th July 2007 by way of consent recorded by the parties. The consent read thus,
 - i. The status quo prevailing on the ground is preserved.
 - ii. The Respondent/Defendants to remain in possession of the suit property but not to effect any further developments pending the hearing and determination of the suit.

iii. Costs in the cause.

4. The Defendant on being served with summons to enter appearance filed a memorandum of appearance and a replying affidavit to the application for injunction. They did not file any defence on record.

5. On 16th May 2013, the hearing of the Plaintiff's case commenced. David Namasaka Khumanya the Plaintiff testified as PW1. PW1 in evidence told court that he did not have any agreement of sale of land between him and the 2nd Defendant. That the 2nd Defendant wrote to him on 7.12.2004 (ex. 1) requesting to buy land from him.

6. PW1 continued that on 20.12.2004 he received a letter from the 2nd Defendant informing him that the 2nd Defendant was paying Kshs. 100,000/= Pex. 4. He has never appeared before the Land Control Board because they have not agreed with the Defendants. According to him what was sold was the behind plot not the front part facing the main road.

7. The Plaintiff asked the Court to issue an eviction order against the Defendants. He also prayed for damages as he did not have any agreement with the Defendants so the agreement of 20.12.2004 be nullified. He also asked for costs of the suit.

8. During cross examination, PW1 said he had a home on the plot and has sold the plot to some other 4 people. That the Defendants had wanted to buy two plots but they did not agree. That his signature was missing in Pex. 4 which is an agreement written by the 2nd Defendant. That he declined to receive the balance because the defendants were building on the front against his will.

9. On 18th July 2013, PW2 WANYONYI E. WETAMBO testified as the Plaintiff's witness. He is a Land Surveyor working with Geosaf Land Surveys based in Webuye. He had drawn a sketch map for the suitland which was not registered due to a restriction registered on the title. He said he also did a survey on L.R. title no. BOKOLI/KITUNI/1405 which neighbours the suitland. For the work on title L.R. no. 1405, he obtained Land Control Board Consent to transfer and mutation forms which documents were produced as a bundle in pex. 6.

10. On cross- examination, he said he is not a registered surveyor but he works under Charles Gathoko. That he knows the boundaries of Webuye Municipality. The Plaintiff closed his case.

11. The matter was adjourned twice and when finally on 28.11.2013 when the Defendants were ready to testify, the Plaintiff's advocate objected that there was no defence on record and the statement of the defence sneaked in court that morning was improperly on record. By a ruling made by this Court on the same date, the defence was struck out as no leave of the court had been sought to file a defence out of time. In the result that the Plaintiff's evidence in uncontested.

12. The parties thereafter filed written submissions. The submissions by the Plaintiff in summary; that the court can only pronounce judgments following from pleadings and referred to case law of **Galaxy Paints Co. Ltd. vs. Falcon Guards Ltd [2000] E.A 386**. Secondly the defendants did not pay the balance of the purchase price and developed the front part instead of "the behind piece as agreed." Finally that the transaction was void for lack of Land Control Board consent. On provision for consent of L.C.B, Counsel made reference to the cases of **Kariuki v. Kariuki [1983] KLR 852 Wasike vs. Awala [1985] KLR 425**.

13. The Defendants submission was on point that this transaction did not require Land Control Board consent. He referred to Sec. 2 of cap 302 on definition of Agricultural land. That the Plaintiff failed to show that the land is within a controlled area and that the agreement did not refer to Agricultural land. He summed up that the Plaintiff is out to defraud the Defendant having received the purchase price.

Determination

14. I will analyze the evidence on record and submissions offered to determine whether the Plaintiff has proved his case within the standards provided in law. The Plaintiff's suit as it stands is unopposed. He has submitted that there was no agreement reached between him and the 2nd Defendant. Alternatively if there was any sale, the same was for a plot behind not on the front piece which the defendants were jointly developing.

15. From the sale agreement produced as Pex. 4, it is true the Plaintiff did not sign it. In the case of **Machakos District Co-operative Union vs. Philip Nzuki Kiilu Civ. Appeal No. 112 of 1997**, the Court of Appeal held that no suit can be brought upon a contract for disposition of interest in land unless the contract upon which it is founded is

“1. In writing

2. Is signed by parties thereto

3. Incorporates the terms which the parties have expressly agreed in the document.”

See also **Simiyu Vs. Watambamala [1985] KLR 852 and Sec. (3) – Law of Contract.**

It follows therefore that there is no valid agreement abinitio between the parties herein.

16. Given the above finding that there is no valid agreement, the proposition that this was a controlled transaction under Sec. 6 of the Land Control Act cap 302 and that lack of the Land Control Board letter of consent made it null and void is of no relevance. However, I will investigate to find whether it was a controlled transaction or not as this is the limb the Defendants hang on in their submissions and their only defence to the case. The Plaintiff has also relied on it as the reason their agreement is void.

16. The suit property is L.R. BOKOLI/KITUNI/891. The Plaintiff aver the parcel of land neighbours BOKOLI/KITUNI/1405. He produced a copy of a letter of consent dated 9.11.2006 in which Webuye Land Control Board granted permission of transfer from one “Jacob George Makokha” to “Bungoma Women Alliance.” This was effort made by the Plaintiff to show the suit property fell within an area governed by the provisions of the Land Control Act. The Defendants' advocate submitted that the Plaintiff admitted during cross-examination that the plot falls within Webuye Municipality. I do find that statement only cannot change the provisions of the law. I therefore find that the suit property fell within the ambit of the Land Control Act. The absence of letter of consent being obtained within the time frame provided made the sale if there was any, a nullity.

17. The Defendants possession and use of the portion of suit property without the consent of the Plaintiff amounts to trespass. The plaintiff moved the Court immediately they began developing it stopping them. When the application for contempt filed within the suit came up, the Defendants were apologetic for continuing with development. In their view, they continued building because their materials would go to waste. They were very well aware of the injunctive orders. I do therefore allow the Plaintiff's suit with costs . I will not end this matter here.

18. In exercising my discretion Under section 3A of the Civil Procedure Act, Order 1A, 1B & 1C of the Civil Procedure Rules and Article 159 of the Constitution to avoid multiplicity of suits I direct the Plaintiff to refund the Defendants the sum of Kshs. 100,000/=. Under section 7 of land Control Act provides thus, **“If any money or other valuable consideration has been paid in the cause of a controlled transaction that becomes valid under This Act, that money or consideration shall be recoverable as a debt.”**

The Plaintiff admitted having received Kshs. 100,000/= for the behind plot from the Defendants leaving a balance of Kshs.100,000/=. It is this money he received I have ordered him to refund before evicting the Defendants. This is to avoid unnecessary multiplicity of suits over the same subject matter.

19. Also in line with the provisions of Article 43 of the Constitution, this court grants the Defendants 60

days within which to demolish their structures in the suit parcel and surrender vacant possession to the plaintiff. In default, the Plaintiff is at liberty to carry out lawful eviction as against the Defendants, their agents and/or servants from L.R. BOKOLI/KITUNI/891. Those are the orders of the court.

DATED, SIGNED and DELIVERED this 25th day of March 2014

A. OMOLLO

JUDGE.