



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 365 OF 2017

JOSEPH MUTANGILI MUNGELA.....PLAINTIFF

-VERSUS-

NTHAKU MUUNGAMI KALILE.....1ST DEFENDANT

JAMES MAKAU NDUNGA.....2ND DEFENDANT

SAMSON KAMONYI MUUNGAMI.....3RD DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit on 5th February, 2018 vide the Amended Plaint dated 2nd February, 2018. He prays for judgment against the Defendants for:

a) A declaration that the transfer of Land Title Number Nzau/Mumbuni/135 by the 1st Defendant to the 2nd Defendant is illegal, null and void and the register be rectified.

b) A permanent injunction to restrain the 2nd Defendant, his agents, servants from entering into, constructing houses, damaging trees or in any other manner interfering with Land Title Number Nzau/Mumbuni/135.

b)(i) An order of declaration that Land Title No. Nzau/Mumbuni/135 was purchased by the Plaintiff and belongs to him.

c) Costs of this suit.

d) Interest on (c) above at court rates.

e) Any other and/or further relief this Honourable Court deems fair and just.

2. The suit against the 1st Defendant abated following her demise in or about 2014. The 2nd Defendant filed his Statement of Defence on 22nd October, 2009 while the 3rd Defendant filed his Statement of Defence on 31st May, 2018. Both Defendants pray that the suit be dismissed with costs.

3. The matter came up for prosecution hearing on 27th November, 2018. In his examination in chief, the Plaintiff adopted his statement dated 16th November, 2017. He also produced a list of documents of even date. In his sworn evidence, the Plaintiff stated that on 17th September, 1978 he bought Title No. Nzau/Mumbuni/135 (the suit property) from the family of Nthaku Kalile at a purchase price of Kshs. 1,600/= which he paid through the 1st Defendant's agent, Samson Kamonyi Muungami. That in 1978, he took possession of the suit property by clearing the bushes, erecting terraces and planting citrus trees. That in 1999, he had an assessment report done for the suit property. That on 11th July, 2009, some people entered the suit property and chased away his workers. Two of these people were brothers to the 2nd Defendant. That after he bought the land, he went to the area chief, James Mueti, who approved his agreement while also writing a letter to the Southern Division Land Control Board.

4. He further stated that he approached the said Land Control Board where he filled in some forms but could not process his title deed at the time since there weren't any. He added that the 3rd Defendant signed the consent forms on behalf of the 1st Defendant. That due to the reluctance of the 1st Defendant to process a title deed for him, he sued her at the Makueni District Land Disputes Tribunal but lost the case. Next, he appealed to the Provincial Land Disputes Tribunal but the 1st and 3rd Defendants never appeared despite being summoned. After

that, the 2nd Defendant appeared at the Makueni Police Station on 13th July, 2009 and produced the Title Deed to the suit property. That he was advised by the OCS to file a suit in the High Court which he did and the case was marked as Machakos HCCC No. 258 of 2009.

5. In cross-examination by counsel for the 2nd Defendant, the Plaintiff stated that the 3rd Defendant did not show him a power of attorney which enabled him to deal with the land on behalf of the 1st Defendant. That at the time of the agreement, the 1st Defendant was still alive yet she did not sign any of the transfer documents. That the Makueni District Land Disputes Tribunal award was adopted by the Court. That he has never been registered as the proprietor of the suit property. That currently, it is the 2nd Defendant who is occupation of the suit property.

6. While being cross-examined by Counsel for the 3rd Defendant, he stated that he was aware of Makueni PMCC 171 of 2009 where the issue of ownership of the suit property featured prominently. That in the said case, he was the Defendant, while the 2nd Defendant herein was the Plaintiff and the Court found him liable. That the 3rd Defendant was sued in the amended plaint as the agent of the 1st Defendant. That he was not aware if the 3rd Defendant had been appointed as a personal representative of the 1st Defendant. That he had never obtained a consent for the transfer of the land before it changed ownership to that of the 2nd Defendant.

7. The Plaintiff called two witnesses, the first being Jonathan Muia Kiala (PW1). He adopted his statement dated 16th October, 2017 as his sworn evidence. He stated that he secured the Plaintiff as purchaser to the suit property in 1978 at the request of the 3rd Defendant. That an agreement was prepared afterwards and the purchase price was paid. That six sisal plant were planted and the Plaintiff took possession of the suit property for 32 years. That he also signed the agreement as a witness.

8. In cross-examination, he stated that when the agreement was prepared on 17th September, 1978, five people were present him being one of the two witnesses for the Plaintiff. That the 1st Defendant was not present at the material time. That the agreement was in the handwriting of the Plaintiff. That Kshs. 1,350/= changed hands at the time with the 3rd Defendant receiving payment from the Plaintiff.

9. The Plaintiff called his second witness, Joseph Maithya Nguku (PW 2), who adopted his statement dated 16th October, 2017. He stated that he was hired by the Plaintiff on 1st April, 1994 to work as a farm labourer in the suit property. That on 11th July, 2009 he was working at the suit property when the Kivuva Ndunga and Matata Ndunga arrived armed with pangas and spears and ordered him to move out of the suit property. That he immediately left and went to inform the Plaintiff about the events.

10. In cross-examination, the witness stated that the Plaintiff had not issued him with an employment letter. That he was not aware how the Plaintiff had acquired the suit property. That it was him who had planted orange trees and other crops in the suit property.

11. In defence hearing, the 2nd Defendant, James Makau Ndunga was duly sworn and in his examination in chief, he adopted his statement dated 26th April, 2018. He stated that he bought the suit property from the 1st Defendant on 2nd February, 2009. That he obtained the consent of the Land Control Board before transfer of ownership. He produced a sale agreement together with a title deed in his bundle of documents. That the sale agreement was duly witnessed by the 3rd Defendant and three others. That he bought the suit property for Kshs. 187,500/= which was duly paid. That when he bought the suit property, it was virgin land and no house had been put up thereon. That at no point had the Plaintiff ever been in possession of the land.

12. In cross-examination, the 2nd Defendant stated that the 1st Defendant's sons were present when the suit property was sold and that there was no caution over the suit property at all material times. He went on further and stated that the assessment report of crops said to have been destroyed that was produced by the Plaintiff was a false document. That before he bought the suit property, the 1st Defendant and her children had taken him around. That he was not aware of a dispute that was pending before the Tribunal before he bought the suit property.

13. The 2nd Defendant called one witness, Onesmus Mutunga Muungami (DW1). He adopted his statement dated 26th April, 2018 as his sworn evidence. He stated that he was a witness to the sale of the suit property by the 1st Defendant, who is his mother, to the 2nd Defendant.

14. In cross-examination, he stated that he was aware of the dispute between his mother and the Plaintiff at the Makueni District Land Disputes Tribunal which his mother won. That the Plaintiff had never cultivated the suit property prior to sale thereof to the 2nd Defendant. That at one time, the Plaintiff had paid school fees for one of his brothers but the said money was not meant for the purchase of the suit property.

15. The 3rd Defendant, Samson Muungami Kamonyi, adopted his statement dated 30th April as his sworn evidence in his examination in chief. He stated that the suit property initially belonged to his mother, the 1st Defendant, before she sold it to the 2nd Defendant. That the Plaintiff gave him Kshs. 1,600/= as school fees. That the money was given to him and not to his mother. That his mother did not enter into a sale agreement with the Plaintiff. That he had no authority to sell his mother's land and that he also did not enter into any written agreement after receiving Kshs. 1,600/= from the Plaintiff.

16. In cross-examination, the 3rd Defendant restated that he did not enter into any written agreement with the Plaintiff after receiving Kshs. 1,600/=. That the purported signature in the said agreement produced as the Plaintiff's Exhibit 1 was not his. That he did not prepare the alleged agreement nor did he ever write a letter to the Plaintiff. He further stated that the Plaintiff had never lived on the suit property or even cultivated it and that marked the close of the Defence's case.

17. On 9th March, 2021, the Plaintiff filed submissions in support of his case. Therein, it was submitted that the 3rd Defendant had the permission of the 1st Defendant to sell the suit property as her agent. That the said sale agreement is valid and enforceable under the Law of Contract Act. That by virtue of taking possession of the suit property immediately after execution of the sale agreement, the 1st Defendant held the suit property in constructive trust on behalf of the Plaintiff. That the 1st Defendant breached the sale agreement and therefore, the

subsequent sale of the suit property to the 2nd Defendant and his registration as proprietor was illegal, null and void and ought to be cancelled by this Court. He relied on the following authorities: -

i) Jeremiah Mucheru Ndibui v David Gichure Ngugi [2019] eKLR;

ii) Mbugua Njuguna v Elijah Mburu Wanyoike & another [2004] eKLR

18. The 3rd Defendant filed his submissions on 8th June, 2021. On his behalf, it was submitted that no orders were sought against him in the amended plaint and hence if no liability can be found against him, the amended plaint ought to be dismissed with costs. That no proof was tendered by the Plaintiff to demonstrate that the 1st Defendant had donated power of attorney to the 3rd Defendant so that the sale transaction could be concluded. One authority was relied on: -

i) Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR

19. The 2nd Defendant filed his submissions on 11th May, 2021. It was submitted that the Plaintiff did not demonstrate that the 3rd Defendant had legal capacity to purport to sell the suit property in 1978. That the alleged sale of the suit property in 1978 is null and void for want of the mandatory consent of the Land Control Board which had to be obtained within six months of the transaction. That the Plaintiff had not demonstrated any lawful cause to oust the 2nd Defendant's title to the suit property.

20. In my view, the apparent issues for determination are: -

i) *whether the Plaintiff has demonstrated a case for the enforcement of the sale agreement dated 17th September, 1978; and*

ii) *whether the Plaintiff has demonstrated any factors vitiating the sale of the suit property to the 2nd Defendant.*

21. In 1978 at the time of execution of the subject sale agreement herein, the Law of Contract (Amendment) Act, 1964 was in operation. Section 3(3) thereof provided as follows: -

“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it:

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

(i) has in part performance of the contract taken possession of the property or any part thereof; or

(ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

22. One undisputable fact from the proceedings is that the 1st Defendant was never a party to the subject agreement. It was also not established by the Plaintiff that the 3rd Defendant was authorized by the 1st Defendant to sign the sale agreement on her behalf. For any disposition of an interest in the suit property, the 1st Defendant needed to have donated a power of attorney to her son, the 3rd Defendant. To compound the matter, the application for consent of the Land Control Board produced as PEX 4 did not express any signature or mark of the 1st Defendant authorizing her intention to sell the suit property. Needless to state, the Plaintiff has not presented prima facie evidence, oral or documentary, which could persuade this Court to find that there was a binding sale agreement between him and the 1st Defendant. I also do not find the assertion of constructive trust by virtue of occupation of the suit land plausible as the weight of the evidence presented by the 2nd Defendant and the 3rd Defendant suggests that the 2nd Defendant took vacant possession of the suit property after completion of the sale transaction with the 1st Defendant in 2009.

23. In the absence of a valid agreement between the Plaintiff and the 1st Defendant, I do not find that there was any legal impediment to block the subsequent sale of the suit property to the 2nd Defendant. No evidence was presented by the Plaintiff to show that the 2nd Defendant's registration as lawful proprietor was tainted by fraud or illegality. All the proper legal channels were followed with the requisite Land Control Board consent being obtained before the transfer. I will not belabour this matter further as there exists no justification, on the preponderance of evidence, to corroborate a finding that the Plaintiff has a cause of action against the Defendants.

24. The upshot is that the amended plaint dated 2nd February, 2018 lacks merit and is hereby dismissed with costs to the 2nd and 3rd Defendants.

SIGNED, DATED AND DELIVERED VIA EMAIL ON THIS 9th DAY OF MARCH, 2022.

MBOGO C.G.

JUDGE

9/3/2022

Court Assistant: Mr. T.Chuma