



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
LAND AND ENVIRONMENT CASE NO. 26 OF 2013
[Formerly High Court Civil Case No. 52 Of 2012]

JOHN SIMIYU NDALILA.....PLAINTIFF

VERSUS

FRANCIS SOITA.....DEFENDANT

JUDGMENT

1. The plaintiff has sued the defendant seeking this court's order to compel the defendant to sign transfer forms to enable the plaintiff have ownership of 1¾ acres comprised in land title no. S. Malakisi/S. Namwela/635. He also prayed for costs of this suit and any other order this court deems fit to grant. He pleaded that on diverse dates from 15th October 1998, 21st February 1999 and 16th October 2001 respectively they entered into a sale agreement for sale of L.R.S. Malakisi/S. Namwela/635 for a consideration of Kshs. 91,200/=.

2. The Defendant denied this claim and filed a defence. He pleaded that the plaintiff only leased his land. In any event the plaintiff took advantage of his illiteracy and made him sign what was a sale agreement without disclosing its contents to him. He pleaded further that this matter was resolved before the chief that the plaintiff be refunded Kshs. 90,000/=. The defendant also counter-claimed for an order of permanent injunction to issue against the plaintiff stopping him from trespassing or remaining on or disposing of or attempting to cultivate the suit land upon refund.

3. The plaintiff was initially represented by an advocate but before the hearing commenced, he filed a notice to act in person. Meanwhile the defendant was represented by counsel to the end. The plaintiff called a total of two witnesses. The plaintiff testified as PW1. He testified that he is a farmer. He sued the defendant because he sold to him land but failed to transfer it to him. He produced 5 sets of written sale agreements as the portions of land were sold to him in patches at different times. He also produced a green card for L.R. no S. Namwela/S. Malakisi/635 as exhibit P3 showing the land is registered in the name of defendant.

4. PW1 continued that the land was sold together with the coffee trees on it. He had no objection to the defendant refunding him the purchase price at the current value of the land. In cross examination, he said the agreements were drawn in Kiswahili. The defendant in his opinion knows how to read because he signed the agreements. The defendant's wife was a witness in all the agreements. His son Julius Waliaula also witnessed one of the agreements. The plaintiff denied leasing the land from the defendant and said there are trees planted on the boundaries. He asked the defendant twice to take him to the Land Control Board but the defendant told him to wait. In the waiting he decided to file this suit. He paid a total

of Kshs. 91,200/= for the land.

5. The plaintiff has been utilizing the land from 1999 to date. He said he has planted coffee trees and gravillia. He harvests coffee which he sells to Sibumba factory. He is not happy with refund of Kenya shillings Ninety One thousand two hundred (Kshs 91,200/=). PW2 RICHARD WOSE gave evidence that he knew both the plaintiff and defendant. He knew the defendant sold to the plaintiff ½ acre and ¼ acre land in 1999. In the year 2000, he sold the plaintiff ¼ acre at Khs. 15,000/= and in the year 2001 ¼ acre. In all these instances PW2 was the secretary. He confirmed the plaintiff does not owe the defendant any money.

6. During cross-examination, he said he drew 3 of the agreements acting as the secretary although there were 5 agreements in all. He would draw the agreements after the parties had negotiated and agreed. He confirmed the wife of the defendant as present and signed the agreements he drew by thump printing. He was unaware of a lease entered between the defendant and plaintiff. When he drew the agreement, witnesses to the defendant were his wife, Gabriel Wamalwa and Patrick Waliaula. He never received any report after drawing the agreements. The plaintiff then closed his case.

7. The defendant testified without calling additional witnesses. He told court that he knew the plaintiff as Fred Simiyu while John Simiyu is the plaintiff's brother. He discussed with the plaintiff in 1998 about selling his land as he needed money for treatment. According to him, he leased the land to the plaintiff and each time he needed money, he would increase the portion he leased. The plaintiff harvested coffee that was on the land and also planted maize on it. He told the plaintiff in the year 2011 that the money he had paid for leasing the land was over and he took the report to the chief because he wanted the plaintiff to leave. He said the land leased was about 2 acres. His children were ready to refund the plaintiff his money.

8. The defendant said the plaintiff sued him before he could refund the money. He continued that he will give the plaintiff land only if his family agrees. He says that his right eye was operated in 1993 in Kenyatta hospital. They entered the agreement before the clan. He could go and ask his people to assist him refund the plaintiff at home. The defendant disputes the claim because the plaintiff has been using the land from 1999 to date so he has benefited from it. In cross-examination, he said he visited the plaintiff with an intention to lease not to sell the land. He knew they agreed because he was given money. He denied problems began in 2010 after the plaintiff demanded for title. He also denied running away when the surveyors came. Thereafter the defendant closed his case.

9. Both parties filed written submissions which I have taken time and read. The questions for determination by this court are the following;

1. Whether there was a sale or lease agreement between the plaintiff and the defendant.
2. If there was a sale, did the same become null and void for lack of land control board consent?
3. Is the plaintiff entitled to the orders sought?
4. Who should pay the costs of the suit?

10. On the evidence on record, the plaintiff has produced as exhibit 1 (a) – (e) sets of sale agreements drawn between him and the defendant. In four sets of the agreements, the defendant's wife was a witness. The defendant signed all the agreements. The total size of all the portions sold is indicated as one acre and three quarters (P1 (a)). Besides the defendant's wife, in P.1(c) Isaya Mwatikhe and Patrick Waliaula signed as witnesses to the defendant. In P1 (d), Jones Nasimiyu Soita (wife to defendant) and Gabriel Wamalwa are recorded as witnesses to the seller (defendant). There are also witnesses recorded for the plaintiff. All the documents (P 1a – e) refer to sale of land L.R. no S. Namwela/635 by the defendant to J. Simiyu. Nowhere is reference made to Fred Simiyu. It is strange for the defendant to claim that John Simiyu refers to the plaintiff's brother while at the same time admitting he leased his land to the plaintiff herein who is called John Simiyu. Further, the defendant did not produce any evidence of lease of the

land between him and the plaintiff. He also did not call any witness to verify his allegation of lease. The material presented before court point only to a sale transaction. My answer to this question one therefore is that I find the plaintiff has proved that there was a sale of land and not lease between him and the defendant.

11. Did this sale become void for lack of Land Control Board consent? Section 6 of the Land Control Act cap 302 of the laws of Kenya requires any transaction dealing on agricultural land to obtain the consent of the board within a period of 3 months from the date of such transaction. In this instant, the last agreement was drawn on 16th October 2001. Therefore consent to subdivide ought to have been obtained by 16th January 2002. None was got by 2002 or todate. For all purposes as per the Act, this agreement is deemed as null and void for lack of Land Control Board consent.

12. I would have ended my finding at this but there are several decisions reached by the court of appeal where the effect of lack of Land Control Board consent has been held not to invalidate an agreement. I am bound to consider those decisions and review their applicability to the present case and see if I can reach a different or similar view. In the case of **Wamukota vs. Donati [1998] Law Africa**, the court considered the question whether equity could allow a statute to be used as an engine of fraud. In **Mwangi & another vs. Mwangi [1986] KLR 328** the court of appeal held that ***“The rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights”***. The court of appeal in **Macharia & 87 others vs. Davidson Mwangi Kagiri [2014] e KLR** while quoting **Steadman vs. Steadman [1976] AC 536, 540** stated as follows;

“If one party to an agreement stands by and let the other incur expenses or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable.”

13. In this case, the defendant has admitted he was paid his money in full. He admitted the plaintiff has been using the land sold from 1999 todate. He says he cannot give the plaintiff land until his family has agreed. He did not lead any evidence to explain why his family has failed to agree. His counsel submitted the transaction is void for lack of land control board consent. The plaintiff said problems began when he demanded title in 2010. He had asked the defendant to take him before the Land board but the defendant kept telling him to wait. He even brought the surveyor to measure the land but the defendant ran away. From the defendant's attitude, I find that he wants to rely on the provisions of the Land Control Act to perpetuate fraud by denying the plaintiff access to the land he sold to him.

14. In light of the cases cited supra, I find the plaintiff has established his rights over the portion of land he was sold and which he is claiming under the equitable doctrines. In the case of **Chase International Investment Corporation & another vs. Laxman Keshra & others [1978] KLR 143** Madan JA (as he then was) said, ***“If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed.”*** . Further in the case of **Mwangi & 87 others** supra, the court of appeal stated in paragraph 22 that ***“the court is enjoined to dispense substantive justice. What is Justice? Justice is a conscience, not personal conscience but the conscience of the whole humanity. Would the conscience of humanity allow an individual to receive purchase price and later plead that the agreement is void? The conscience of humanity dictates thats constructive trust and proprietary estoppel shall apply in such case.”***

It is without a doubt that the defendant having received the purchase price in full is estopped from relying on the defence that their agreement is void for non-compliance with section 6 of Land Control Act. My answer to the second question is therefore in the negative.

15. Having answered the first two questions as above, I find the plaintiff is entitled to the orders sought. I do therefore order the defendant to execute all necessary documents that shall enable the plaintiff acquire title to 1¾ acres of land from L.R. S. Namwela/S. Malakisi/635 forthwith. In default, the Deputy Registrar of this court shall sign the documents on behalf of the defendant and in favour of the plaintiff. The defendant filed a counter-claim against the plaintiff seeking for permanent orders barring the plaintiff

from using the said land. However, on the basis of my finding, the defendant's counter claim fails as he is estopped from changing his mind having sold the land to the plaintiff. The counter claim is therefore dismissed.

16. Costs follow the event. The court is however given the discretion to hold otherwise. In the instant suit, the plaintiff was forced to file suit due to unincorporation of the defendant. I find he merits to be reimbursed his expenses and therefore I allow the plaintiff's suit with costs.

Dated, signed and delivered in Bungoma this 17th day of September 2014.

A. OMOLLO

JUDGE.