



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 568 OF 1995

JAMES NYASIMI KIANA PLAINTIFF

VERSUS

DAVID MANKONE MBOA DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendant in December 1995. The plaintiff amended the plaint on 21st July 2004. In his amended plaint, the plaintiff averred that prior to the adjudication process in North Mugirango/Bokeira section, the parcels of land now known as LR No. North Mugirango/Bokeira/627 (hereinafter referred to as “the suit property”) and LR No. North Mugirango/Bokeira I/950 (hereinafter referred to as “Plot No. 950”) were one piece of land then owned by the plaintiff. The plaintiff averred that sometimes in the year 1968 the plaintiff sold to the defendant a portion of the then said single parcel of land measuring approximately one (1) acre adjacent to a road of access. The plaintiff averred that he retained the land beyond the portion that he sold to the defendant which land extended from the said portion that he sold to the defendant to Entete Igare stream. The plaintiff averred that he provided for a road of access next to the portion of land that he sold to the defendant to his portion of land that remained beyond the plaintiff’s parcel of land next to the river. The plaintiff averred further that after selling the said portion of land to the defendant, he left for Kericho for work until the year 1995 when he came back to North Mugirango.

2. Upon his return, the plaintiff discovered that during the adjudication process in the area the defendant fraudulently caused himself to be registered as the proprietor of the parcel of land that the plaintiff had sold to him together with the portion that the plaintiff had retained for himself next to the river. The plaintiff averred that the entire parcel of land that the defendant had registered in his name measured approximately two (2) acres and was given land reference number LR No. North Mugirango/Bokeira I/627 (“the suit property”). The plaintiff sought judgment against the defendant for; a declaration that the defendant holds a portion of the suit property measuring two (2) acres in trust for the plaintiff, an order that the defendant do transfer to the plaintiff the said portion of the suit property failure to which the deputy registrar be put at liberty to do so and general damages and/or mesne profits from the year 1995 until possession is delivered to the plaintiff of the said portion of the said property. In his statement of defence, the defendant denied the plaintiff’s claim in its entirety save that the suit property is registered in the name of the defendant. The defendant contended that the plaintiff sold to him the entire parcel of land which is comprised in the suit property and that the plaintiff is not entitled to any portion of the suit property as claimed or at all.

3. When the suit came up for hearing the plaintiff and the defendant gave evidence and called one witness each. In his testimony, the plaintiff reiterated the contents of the plaint that I have highlighted above. The plaintiff testified that he sold to the plaintiff land measuring one (1) acre in 1968 on the lower side of the road at a price of kshs. 2,000/=. On that portion of land that lie on the lower side of the road,

the one (1) acre portion thereof which, he sold to the defendant was on the upper side next to the road. The portion thereof that was on the lower side next to the river the plaintiff retained for himself. The plaintiff testified that he demarcated the portion of land that he sold to the defendant and left a path through which he could access the river from the main road. After selling the said portion of land to the defendant he left for Kericho in 1970 until 1995. When he came back he found that the plaintiff had registered the entire parcel of land including the portion that he (the plaintiff) had reserved for himself near the river in his name and he had been issued with a title deed for the same under LR No. North Mugirango/Bokeire I/627 (“the suit property”). The plaintiff testified that he complained to the lands office but got no assistance and as such he had no alternative but to file this suit.

4. After this suit was filed, the same was referred to arbitration. However the arbitrator’s award was set aside by the court. The plaintiff urged the court to order that the defendant do retain one (1) acre only of the suit property and do transfer the remainder thereof to the plaintiff. The plaintiff produced as exhibits; a certificate of official search in respect of the suit property (Pexh.1) and an award that was made by the district officer Ekerenyo Division (Pexh.2). The plaintiff’s witness, Benson Mogaka Gisemba (PW2) corroborated the plaintiff’s evidence. He testified that he was a witness to the agreement that the plaintiff had entered into with the defendant for the sale of land in 1968 and that the portion that the plaintiff sold to the defendant measured one (1) acre only and that the same was clearly marked and a path left for accessing the river.

5. In his evidence, the defendant testified that the plaintiff sold to him a portion of his (the plaintiff’s) land from the road up to the river and that the purchase price was kshs.2,500/=. The agreement for sale was witnessed by eleven (11) witnesses, six (6) witnesses on the side of the plaintiff. The said agreement was in writing. It was written in an exercise book. He took possession immediately and started using the land. The sale agreement took place before land adjudication process in the area. When land adjudication was conducted in the area, the defendant and him were present and the parcel of land that lay on the upper side of the road was registered in the name of the plaintiff as plot No. 950 while the entire parcel of land that lay on the lower side of the road was registered in the name of the defendant as the suit property. The registration of both parcels of land was done on the same day namely on 16th July 1976. The defendant testified that he planted blue gum trees in 1972 on the portion of the suit property next to the river which trees are now mature. He stated that he had occupied the suit property peacefully from 1968 until 1995 when the plaintiff filed this suit against him. He reiterated that the plaintiff sold to him the land from the road to the river and that he acquired title to the suit property lawfully. The defendant testified that the agreement for sale that he entered with the plaintiff had three (3) written versions; one was in Ekigisii language, the other in Kiswahili and the last version in English.

6. The defendant termed the plaintiff’s claim as baseless and urged the court to dismiss the same. The defendant produced in evidence as exhibits; a copy of official search in respect of the suit property (Dexh.1), a copy of certificate of official search in respect of Plot No. 950 (Dexh.2), a copy of the title deed for the suit property (Dexh.3), a copy of the register for the suit property (Dexh.4), a copy of the registry index map for North Mugirango/Bokeira I, registration section (Dexh.5) and an exercise book containing the agreement for sale that the plaintiff had entered into with the defendant (Dexh.6). The defendant’s witness, Nathan Ondicho Ondicho (DW2) corroborated fully the defendant’s testimony. DW2 told the court that he was a witness to the agreement for the sale of land between the plaintiff and the defendant in 1968 and that the portion of the plaintiff’s parcel of land that he sold to the defendant extended from the road up to the river and that the defendant took possession of the said portion of land soon after purchase. DW2 testified that the plaintiff did not remain with any land on the lower side of the road.

7. Upon the close of the defendant’s case, the advocates for the parties agreed to make closing submissions in writing. The plaintiff filed his submissions on 21st January 2014 while the defendant filed his submissions on 4th June 2014. I have considered the pleadings filed by the parties, the evidence tendered and the parties respective closing submissions. The parties did not agree on issues for determination by the court. In their submissions, the plaintiff’s advocates framed three (3) issues while the defendant’s advocates did not come up with any. Having considered the pleadings and the evidence on record the following in my view are the issues that arise for determination in this case;

- (i) Whether the plaintiff sold to the defendant one (1) acre of land?
- (ii) Whether the defendant holds a portion of the suit property measuring two (2) acres in trust for the plaintiff?
- (iii) Whether the plaintiff is entitled to the reliefs sought in his amended
plaint.

8. Issue No. I;

It is common ground that the plaintiff sold to the defendant a portion of land in the year 1968. The plaintiff had a large parcel of land measuring approximately 2 hectares which land was traversed by a road measuring 20metres. The said parcel of land slopes towards a river. The portion that was sold to the defendant was on the lower side of the road towards the river. The plaintiff retained the portion that was on the upper side of the road. The plaintiff's contention in this suit is that he only sold to the defendant one (1) acre of his parcel of land that lay on the lower side of the road. He contended that on that side of the road he reserved the portion of land near the river for himself because that portion was swampy and the defendant declined to pay for the same. The plaintiff called one witness who corroborated his evidence.

9. On his part, the defendant maintained that the plaintiff sold to him the whole parcel of land that lay on the lower side of the road. He was categorical that the land sold to him extended from the road up to the river. He denied that the plaintiff had reserved land next to the river for himself. The defendant called one (1) witness who corroborated his evidence. The agreement between the plaintiff and the defendant was in writing and was witnessed by a number of witnesses. PW2 and DW2 are two of the persons who witnessed the said agreement. The plaintiff did not produce the agreement that they entered into with the defendant. He stated that the agreement was written in an exercise book belonging to the defendant and that he carried it away after the parties had entered into the agreement.

10. The defendant produced in evidence as Dexh.6 an exercise book which, he claimed to contain three (3) versions of the agreement that he entered into with the plaintiff over the disputed land. The book contained the agreement in Ekigusii language, Kiswahili language and English language. The Kiswahili and English versions seem not to be a translation of the Ekigusii version of the agreement but were the same agreement expressed in different words. The exercise book (Dexh.6) was put to the plaintiff in cross examination for him to confirm whether it is the same exercise book on which the agreement between him and the defendant was written. The plaintiff denied the same. The plaintiff stated that the exercise book on which the agreement was written did not look like the one that was produced by the defendant as Dexh.6. The plaintiff and the defendant agreed however that the agreement that agreement for sale between them did not contain the measurement of the land that the plaintiff had sold to the defendant. The witnesses who gave evidence on behalf of the plaintiff and the defendant also confirmed this fact. Although the plaintiff has contended that he sold to the defendant only the portion of his land on the lower side of the road measuring one (1) acre, there is no evidence of this fact apart from the testimony of the plaintiff and his witness which testimony was controverted by the testimony of the defendant and his witness who maintained that the plaintiff sold to the defendant the entire parcel of land that lay on the lower side of the road and, which is now comprised in the suit property.

11. I have carefully considered the evidence of the plaintiff and the defendant and their witnesses. The plaintiff and the defendant were the principal parties to the agreement for sale of the land in dispute while their witnesses in this case PW1 and DW2 were present when the agreement was made and stood as witnesses to the agreement on behalf of the plaintiff and the defendant respectively. The plaintiff and his witnesses and the defendant and his witness have given completely opposing evidence as to the portion of land that was sold by the plaintiff to the defendant and the measurement of that land. I am inclined to prefer the evidence of the defendant and his witness over that of the plaintiff and his witness. The plaintiff's contention that he had retained for himself some land next to the river from the portion of land that he had on the lower side of the road that he sold to the defendant is not supported by any other evidence apart from the plaintiff's testimony and the testimony of PW2 that I have mentioned above.

12. On the other hand, the defendant's contention that the plaintiff sold to him the entire parcel of land that the plaintiff owned on the lower side of the road finds support in other evidence before the court apart from the testimony of the defendant and his witness (DW2). As I have stated at the beginning of this judgment, the plaintiff owned a large parcel of land measuring approximately 2 hectares which land was divided into two by a road. The plaintiff sold to the defendant a portion of the parcel of land that lay on the lower side of the said road towards the river that marked the boundary of the plaintiff's said parcel of land at that end. The plaintiff however retained the portion of the initial larger parcel of land which lay on the upper side of the road. When this sale transaction took place the land adjudication had not taken place in the area. Although the plaintiff has claimed that he did not sell the portion of land next to the river to the defendant, evidence adduced before me which was not controverted shows that the defendant planted gum trees on the portion of land near the river which is claimed by the plaintiff in 1972 and that the said trees are now mature.

13. The defendant stated that he occupied the whole parcel of land that is now comprised in the suit property peacefully from 1968 until 1995. This fact was not controverted by the plaintiff. When adjudication took place in the area, the defendant was registered as the proprietor of the entire parcel of land on the lower side of the road that he had occupied since 1968. The plaintiff on the other hand was registered as the proprietor of the land that was on the upper side of the road (Plot No. 950). The registration was done on the same day. I am of the view that if the plaintiff's claim that he owned the portion of land across the portion that he had sold to the defendant next to the river, the said portion of land could have been registered in the name of the plaintiff during the land adjudication. Even if the plaintiff was not present during land adjudication as he has claimed, whoever caused Plot No. 950 to be registered in his name could have also caused the disputed portion to be registered in the name of the plaintiff if at all the same belonged to the plaintiff. There is no evidence that there was an objection to the registration of the disputed portion of land in the name of the defendant during the adjudication at the instance of the plaintiff or his relatives.

14. It appears to me therefore that the entire parcel of land that was registered in the name of the defendant as LR No. North Mugirango/ Bokeira I/627 ("the suit property") was recognized as belonging to the defendant. The registration of the disputed portion of land in the name of the defendant during adjudication without any objection coupled by the fact that the defendant had occupied the same for over 27 years before the plaintiff lodged his claim to the land reinforces the testimony of the defendant and his witness (DW2) that the plaintiff sold to the defendant the entire parcel of land now comprised in the suit property which measures 1 hectare. From the foregoing reasons, it is my finding that the plaintiff sold to the defendant the entire parcel of land now comprised in the suit property and not one (1) acre only as claimed by the plaintiff.

15. **Issue No. II;**

As I have held above, the defendant acquired the suit property lawfully from the plaintiff. No portion of the suit property can therefore be held in trust by the defendant for the plaintiff as claimed by the plaintiff or at all. In any event, the suit property measures 1 hectare which is equivalent to about 2.43 acres. The plaintiff has admitted that he sold to the defendant only 1 acre of the land comprised in the suit property. It follows therefore that if the defendant was to hold any land in trust for the plaintiff then it would be only 1.43 acres and not 2 acres as claimed in the amended plaint. Still on the same point, I am in agreement with the defendant that the plaintiff did not prove the elements of trust which would have entitled him to the order. It is this court's finding therefore that defendant does not hold any portion of the suit property in trust for the plaintiff.

16. **Conclusion;**

On the evidence on record, I am not satisfied that the plaintiff has proved his claim against the defendant on a balance of probability. The plaintiff has failed to prove that he only sold to the defendant a portion of land measuring 1 acre and that the defendant holds a portion of the suit property measuring 2 acres in trust for him. In the circumstances, the plaintiff's claim against the defendant fails wholly and the same is accordingly dismissed with costs to the defendant.

Delivered, signed and dated at KISII this 31st of October, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Bosire for the plaintiff

Mr. Sagwe h/b for Koina Onyancha for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE