



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 767 of 2010

ZEPHANIAH NGAIRA ANGWEYE.....PLAINTIFF

VERSUS

MOSES LUTOMIA WASHIALI.....1ST DEFENDANT

KENYA COMMERCIAL BANK LTD.....2ND DEFENDANT

JUDGEMENT

1. This suit was instituted by way of a Plaint dated 12th November 2010 and filed in Court on 15th November 2010.
2. The brief facts of the case are that sometime in the year 1995, the Plaintiff purchased L.R No. Isukha/Shirere/3643 (“the suit property”) and was issued with a Title on 22nd September 1995. Thereafter he constructed a permanent house and employed the services of a caretaker, one Laban Ngaira Mulinya, as he worked abroad. Upon his return from abroad in 2010 he noticed a stranger on his land. He conducted a search and found that Moses Washiali Lutomia, the 1st defendant, had been registered as the proprietor of the suit land. The 1st defendant had also secured a loan using the suit land as security. The search also revealed that prior to the 1st defendant’s purchase, there was a caution lodged by Chrispinus Ingoi Simwa on the suit land claiming purchaser’s interest. He was claiming Kshs. 500,000/= which he had paid to Laban Mulinya when he realized the whole transaction was fraudulent and his purchase could not proceed.
3. The Plaintiff’s claim against the Defendants is for inter alia a declaration that the Plaintiff is the lawful owner of the property known as title Number Isukha/shirere/3643 measuring approximately 0.2 ha being a sub division of plot 1597 pursuant to a transfer registered on the 22nd September 1995 and was duly issued with a Title deed on the 22nd September 1995.
4. The Plaintiff avers that he is the legal owner of the suit property which he purchased from one Manasseh Bwosi for a valuable consideration. It is further averred that a search conducted on the property has established that the 1st defendant caused the property to be registered in his name. The plaintiff further avers that the registration of the property in the name of the 1st defendant and the subsequent creation of the mortgage are null and void ab initio as the same cannot vest any interests or rights over the property in the 1st and 2nd defendant or any other person claiming an interest adverse to that of the Plaintiff as the legal owner thereof.
5. The suit was controverted vide the 1st defendant’s defence dated 6th December 2010 and filed in

Court on 16th December 2010. In the defence, the 1st defendant essentially denies the allegations in the Plaintiff and maintains that he is the legal owner of the suit property having purchased the same from its previous owner Laban Ngaira Mulinya.

6. The 2nd defendant did not defend the case despite the fact that they entered appearance.

7. The hearing of the suit commenced on 2nd April 2012 with the Plaintiff giving testimony as PW 1. He testified that he currently lives in South Africa but was born and brought up in Kenya. He testified that he had employed Mr. Laban Mulinya as a caretaker to take care of his property in his absence. It was his testimony that he never authorized him to enter into any sale agreement and he never gave him power of attorney. He testified that Mr. Mulinya had since passed on. He further relied on his pleadings and prayed for judgment in his favour.

8. On cross-examination, the Plaintiff confirmed that Mr. Laban Mulinya was only his employee and was not his agent for the sale of any of his property. He testified that he would not have made Mr. Mulinya his agent without giving him the original title which he had all along.

9. The 2nd Witness, Mr. Chrispinus Simwa, PW 2 testified on the dispute of the suit property. He testified that he once tried purchasing the suit property. The seller, that is the late Mr. Mulinya, was to give PW2 the original title deed upon payment of deposit. He testified that Mr. Mulinya was unable to deliver the title and he was arrested and charged with the offence of obtaining money by false pretense. He dropped the charges when Mr. Mulinya refunded him the money through his lawyer.

10. On cross-examination, he testified that Mr. Mulinya did not show him anything to confirm that he was the owner of the suit property when he wanted to buy the property. However, when he engaged the services of a lawyer a copy of the title was produced and it was in the name of Mr. Mulinya. His lawyer did a search which showed that there were no encumbrances and the title was in the name of Mr. Mulinya.

11. On re-examination, PW2 confirmed that he had never seen the original title and could not tell whether or not Mr. Mulinya was the owner of the Title as he alleged.

12. The third and last witness, PW3 was Naftali Mushosho, the area assistant chief of Sabana Sub-location. He testified that he knew the late Laban Mulinya who hailed from the same sub-clan as himself. He further testified that Laban was the caretaker of the Plaintiff's property and that he had no authority to sell the Plaintiff's property.

13. The defence case commenced with the Defendant giving testimony as DW 1. He testified that in 2006 he sought to buy a house in Kakamega when he got information that Laban was selling a house. He met with Laban who gave him a copy of his ID card and he proceeded with the same to the Lands Registrar to do a search. He confirmed that the names were the same and also established that there was an encumbrance on the property placed by one Mr. Simwa claiming Kshs. 500,000/=. He testified that the caution was later removed by Mr. Simwa. Mr. Laban signed a transfer which together with the Title deed, DW 1 took to the Bank to effect transfer. The property was eventually transferred to the defendant and charged to the Bank. He testified that they paid the price which was Kshs. 2.2 million through a Banker's cheque in favour of Laban. After payment Laban gave the defendant possession of the house which he moved in with his family and lives there up to date.

14. The Defendant testified that he received a call from one Velma who told him that the property he had purchased belonged to her. He then withheld the payment of the purchase price for about three days after which his bank released the money to Laban. He also testified that when he purchased the property it was in the name of Laban. He carried out a search and it was in the name of Laban, he therefore had no doubt that Laban was the owner. It was his testimony that a new title was issued to him which he charged to the 2nd Defendant bank and that he had never defrauded anybody.

15. On cross-examination, the defendant testified that he retired after the filing of the present suit. He clarified that the said suit did not contribute to his early retirement. The defendant testified that he did not pay stamp duty on the sale agreement dated 2nd December 2006 but that he believed his lawyer had paid stamp duty on the transfer. He also testified that when he was told that a previous intending seller had backed out, he did not have any reason to establish why the sale stopped. This was because he had been told earlier that the said seller had under quoted the price. He further testified that he was not obligated to find out who owned the property before Laban Mulinya because he knew properties changed hands. It was also his testimony that the sale agreement between himself and Laban was not witnessed before a lawyer but before a lawyer's clerk.

16. The 2nd defence witness, DW 2, was Machora Mogare who described himself as the Land Registrar in Kakamega. He testified that he had been in Kakamega for the last ten months but had worked as a Registrar for the last thirteen years. He also indicated that the records kept at the Lands registry reflected the true position of land transactions.

17. As per the records, he testified that the Title of the suit property was issued to Laban Mulinya for a sum of Kshs. 40,000/- on 23rd September 2002. The signature on the document was not his but that of an officer called Maina who was the registrar in Kakamega at that time. It was his testimony that a member of the public could not tell whether the Title was genuine or not unless they did a search which would give the details of ownership and appropriation. It was also his testimony that an official search was the conclusive evidence of ownership.

18. On cross-examination he testified that there had been complaints about Kakamega registry involving forged Land leases and problems of double allocation of Land. He further testified that double allocation of Titles was still rampant and that these were some of the problems he was trying to resolve. He also indicated that he had a rough idea of how much land would cost in Kakamega. It was his testimony that a plot on which there was a permanent house could not be sold for Kshs. 40,000/=.

19. DW 2 also explained to the Court that after the sale of a property it is a requirement that the Old title be surrendered and a new one issued to the Purchaser. He further stated that if a Title deed is lost, there ought to be a gazette notice to the effect that a new title deed be issued. It was his testimony that if Laban Mulinya had purchased the suit property, then the Plaintiff ought to have surrendered his title. However, DW 2 could not tell whether or not the title of Laban Mulinya was fake. Unfortunately, he did not also carry the documents concerning the suit property from the registry in Kakamega for reference.

20. The Plaintiff and the 1st Defendant filed their submissions on 21st September 2012 and 2nd October 2012 respectively.

ANALYSIS

21. I have considered the pleadings herein as well as the rival submissions by both counsel and the authorities cited. The main issue in dispute is who between the Plaintiff and the 1st Defendant is the legal and rightful proprietor of property Title Number Isukha/Shirere/3643.

22. What is apparent in this matter is that the suit property is registered in favour of two persons, the plaintiff and the 1st defendant. This is not possible legally hence the current suit.

23. The register indicates that Laban purchased the suit property from the Plaintiff at a consideration of Kshs. 40,000/= in the year 2002. According to DW 2 a plot on which there is a permanent house could not be sold for Kshs. 40,000/-. It is clear to me that the price of Kshs. 40,000/= for the suit property is an undervalue. There was no sale agreement to this effect and the Plaintiff maintains that he did not receive any money from Laban.

24. It has also been established that the sale agreement between Laban and the 1st defendant was not valid. This is because no stamp duty was paid and the document was not properly attested to. It was the

1st defendant's testimony that the agreement was attested to by a clerk in the office of his lawyers.

25. It is also not clear how a new title deed was issued at the Land Registry to Laban where there was an existing title deed. It was DW 2's testimony that the normal procedure is that the vendor has to surrender his title deed so that a new one is issued to the purchaser.

26. Furthermore, soon after the 1st defendant successfully purchased the suit property he received a call from one Velma, the Plaintiff's wife who informed him that the transaction was fraudulent and that the suit property belonged to her. The 1st defendant called his bank to withhold the purchase price money from Laban. However, this was done for only three days and thereafter the money was released to Laban. I am of the view that for prudence sake, the 1st defendant should have 'dug deep' into the said allegations of ownership by the plaintiff's wife. It is trite law that due diligence is required in land transactions. In relation to this, it is clear from the evidence on record that the 1st defendant was not keen on investigating the circumstances under which the caution on the said property was lodged. It was PW 2's testimony that he tried to purchase the suit land at a consideration of Kshs. 1,000,000/= when he realized that the whole transaction was a sham and that Laban was engaged in fraud. As a result he lodged an encumbrance on the title of the land. The 1st defendant disregarded the old doctrine of "Buyer beware" and entered into a sale of land saddled with fraud. He can only blame himself.

27. To say the least, the title deed given to the 1st defendant raises more question than answers. It is not clear how the land was transferred from the plaintiff to Laban. It is not in doubt that Laban's name is in the register as one of the owners of the suit property. It is also unfortunate that he has since passed on as he would have clarified some disputes surrounding the transfer of the suit property. That being the case, there is no account whatsoever of how the said property was transferred to Laban either by way of documentary or oral evidence. The Defence did not call Mr. Maina as one of its witnesses considering that he was the officer at Kakamega registry at the time of the purported transfer.

28. The circumstances involving the transfer of the said Land from the Plaintiff to Laban are shrouded in fraud. The officer from the land registry could not comprehend how a new title deed was issued either to Laban or the 1st defendant while the Plaintiff still held an original title deed for the said piece of land. He could not also reconcile how the suit property was allegedly sold to Laban for a consideration of Kshs. 40,000/=. In the circumstances, it can be concluded that Laban held no legal ownership over the suit property. It is trite law that a person without good title cannot pass title to a purchaser for value without notice. At all times Laban held no title to the suit property. He had nothing to legally pass to the 1st Defendant.

29. There is no proof that the 1st defendant intended to fraudulently obtain the title to the suit property. However, it has been established that there was no due diligence on his part before purchasing the suit property. In addition, the sale agreement for the purchase of the suit property was not valid as no stamp duty was paid and it was attested to by unauthorized persons. In that case, the 1st defendant cannot be considered as a bona fide purchaser for value without notice.

30. There is evidence that the Plaintiff owns and retains title to the suit land. There is also no substantive evidence that the Plaintiff in any way surrendered the said title to Laban or another party. It is also obvious that the Plaintiff's title came earlier in time, being that it was issued on September 1995. It is trite law in equity that the first in time shall prevail.

31. In view of the foregoing and in line with the evidence on record I do find and hold that on a balance of probability the Plaintiff is the legal owner of property Title No. Isukha/Shirere/3643. I therefore enter judgment in favour of the Plaintiff as follows:-

a) A declaration that the Plaintiff is the Legal owner of the property referred to as Title Number Isukha/Shirere/3643.

- b) A declaration that the conveyance in favour of the 1st Defendant registered on the 26th February 2007 is null and void ab initio.
- c) A declaration that the mortgage created in favour of the 2nd Defendant registered on the 28th February 2007 was created through fraud and misrepresentation on the part of the 1st Defendant and is null and void ab initio.
- d) An order directing the 1st Defendant to deliver to the Registrar of Lands Kakamega Lands Registry for cancellation of the 1st Defendant's Original Title deed dated and issued on the 28th February 2007.
- e) A permanent injunction restraining the 1st Defendant whether by themselves, agents, servants or otherwise howsoever from trespassing upon, advertising, offering for sale leasing mortgaging, charging, transferring or assigning and/or otherwise dealing with the property Isukha/Shirere/3643.
- f) *Not granted*
- g) An order directed upon the 1st Defendant to remove all the structures erected by the 1st Defendant on the property referred to as Title Number Ishuka/Shirere/3643.
- h) Costs and interests.

32. I, however decline to grant prayer (f) of the Plaintiff for damages for fraudulent misrepresentation as there was no evidence to show that the 1st defendant intentionally set out to commit fraud against the Plaintiff.

This is the judgment of the Court.

DATED, READ AND DELIVERED AT NAIROBI

THIS 6TH DAY OF FEBRUARY 2013

E.K.O OGOLA
JUDGE

Present

Mutuhi for 1st Defendant
Kinga H/B Khaminwa for Plaintiff
Teresia – court clerk