



REPUBLIC OF KENYA

High Court at Kitale

Civil Suit 162 of 2001

PAUL FUNDI ARAP BOSS ::: PLAINTIFF.

VERSUS

PETER OKUMU ODITO ::: DEFENDANT.

J U D G M E N T.

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By dint of the plaint filed herein on 21st November, 2001, the plaintiff, **Paul Fundi Arap Boss**, prays for orders against the defendant, **Peter Okumu Odito**, to the effect that the agreement of exchange of the suit lands entered between the plaintiff and the defendant be found to be null and void and that each party returns to their original parcels of land. Further, that the defendant be evicted from parcel No. Kakamega/Mabusi/18-104 in the event that he refuses to vacate.

The plaintiff also prays for costs and interest of this suit. It is averred by the plaintiff that on the 30th March, 1992, he exchanged his aforementioned parcel of land measuring 13.2 hectares with the defendant's parcel of land No. 307 (originally 124) at Chekata Sigaon Farm. It was in the process agreed that the plaintiff would receive sixteen (16) acres from the defendant in exchange of fifteen (15) acres due to the defendant from the plaintiff.

Consequently, the defendant took occupation of the plaintiff's land and the plaintiff took occupation of the defendant's land.

However, it emerged that the defendant's land measured only twelve (12) acres and not sixteen (16) as agreed and that the said defendant's land was a subject of numerous wrangles, disputes and conflicts thereby denying the plaintiff a clean title free from encumbrances. Therefore, the plaintiff prays for the nullification of the agreement and contends that the same had been frustrated and ought to be vitiated on grounds of misrepresentation and fraud on the part of the defendant.

The plaintiff further contends that the agreement was never sanctioned by the Land Control Board.

In his statement of defence filed herein on 10th December, 2011, the defendant avers that both parties confirmed the acreages of the respective portions of land prior to occupation and denies that his parcel of land turned out to be 12 acres as alleged by the plaintiff.

The defendant also avers that his parcel of land being plot No. 307 Chekata Farm was with the knowledge of the plaintiff surveyed and confirmed to be 16 acres and that since the plaintiff has now been registered as the absolute proprietor of parcel No.s Moi's Bridge/Ziwa/Block 17 (Chekata-Sikaoni) 307 and 356, the material agreement cannot be cancelled neither can the said title unless obtained fraudulently.

The defendant denies that the agreement was frustrated and that it was made through fraud and misrepresentation on his part.

The defendant further denies that his land was subject to many disputes and contends that if the plaintiff was dissatisfied with the agreement, then he should not have entered into occupation of the land.

The defendant further contends that the Land Control Board's consent was not necessary for the transaction. The defendant therefore prays for the dismissal of the plaintiff's case with costs.

Both the plaintiff and the defendant led evidence in support of their respective cases.

In his evidence, the plaintiff produced a title deed (P.Exh. 1) respecting parcel No. Kakamega/Matisi/18-104 (plot No. 104 Matisi) and said that it consisted of thirty (30) acres which were at the material time occupied by himself. He said that in 1992 tribal clashes erupted and these affected people in the Matisi Land Scheme. He met the defendant on 30th March, 1992 and they discussed issues pertaining to land. It was then that they agreed to exchange their respective portions of land such that the plaintiff would exchange 16 acres of his plot No. 104 Matisi for the defendant's 15 acres at Chekata Farm.

The plaintiff produced the material agreement (P.Exh. 2) dated 30th March, 1992 but said that they did not actually measure the defendant's plot at Chekata Farm. He later found out that the defendant's plot measured 12 acres and realized that he had been short changed by four (4) acres. He demanded the four acres but the defendant declined.

It was the plaintiff's contention that the material transaction did not go through the land control board and that it was the defendant who told him that the land at Chekata farm measured 16 acres. His desire is that the parties do return to their respective original portions of land.

Mark Mukhwana Konzano (PW2), was at the material time in the year 2005 based at the Uasin Gishu District Survey office as a land surveyor. He took measurements of plots described as plots No. 307 and 356 Moi's Bridge/Ziwa Block 17 and confirmed that they measured a total of 12.7 acres. He compiled two reports dated 19th December, 2005 and 3rd January, 2006 which were produced in court by himself (i.e. P.Ex. 3 (a) & (b))

On his part, the defendant testified and admitted that the plaintiff and himself indeed agreed to exchange their respective portions of land due to the tribal clashes of 1992. He said that his portion of land comprised plots No. 307 and No. 356 measuring approximately 16 acres within Uasin Gishu District at an area known as Ziwa. He said that the plaintiff's portion of land measured 15 acres and was situated at Mabusu Scheme in Lugari District. He contended that both portions were measured and their acreages confirmed. The defendant testified that since the plaintiff's portion of land had trees and coffee he agreed to provide an extra acre of his land to the plaintiff. He moved into the plaintiff's land and the plaintiff moved into his land. They both settled in the respective portions and put up residential structures. In the process, the plaintiff obtained title deeds to the portions which had previously belonged to him (defendant). The defendant denied that he misled the plaintiff into giving him less acreages and contended that this present claim by the plaintiff is not genuine and should be dismissed.

Alfred Sunga Mukangai (DW2), a farmer at Chekata and a former chairman of Chekata Sigaon Co-op Society confirmed that the defendant was a member of the said society which had purchased a large portion of land for its members. He said that the land was described as No. 841/2 and that the defendant's shares in the land comprised of 16.3 acres which he occupied in 1992 after a survey of the land was carried out. He (DW2) was not aware of the agreement between the defendant and the plaintiff but was made aware of the plaintiff's complaint that he had been given less acreage of land than agreed with the defendant. He (DW2) indicated that he was responsible for measuring the defendant's portions of land and there came to a total of approximately 16 acres. He contended that the plaintiff received from the defendant approximately 16 acres of land and not 12.2 acres as claimed. He confirmed that the plaintiff has already taken possession of the land and developed it.

It is apparent from all the foregoing evidence that there is no dispute that the plaintiff and the defendant entered into an agreement for exchange of their respective portions of land situated in different areas.

The agreement was made and reduced into writing on the 30th March, 1992. A copy of the alleged handwritten agreement was exhibited herein by both the plaintiff and the defendant (i.e. P. Ex. 2 & D.Ex.1).

However, the copy exhibited by the plaintiff and that exhibited by the defendant are not exactly the same. The plaintiff's copy is dated 30th March, 1992 and is in the Kiswahili language while the defendant's copy is dated 3rd April, 1992 and was apparently made by an Assistant Chief in English language. Nonetheless, both copies of the agreement confirm that there was to be an exchange of land between the plaintiff and the defendant. In essence, this was akin to a barter trade rather than a sale of land transaction which ordinarily would involve monetary consideration.

In the circumstances, and in terms of section 6 (1) of the Land Control Act, the consent of the Land Control Board was necessary in order to validate the transaction.

The said section 6(1) of the Land Control Act (Cap 302 LOK) provides that a transaction involving "inter-alia" exchange of agricultural land would be void for all purposes unless the Land Control Board has given its consent in respect of that transaction.

Herein, it is undisputed that the exchange transaction between the plaintiff and the defendant was undertaken without the consent of the Land Control Board. It was therefore null and void "ab initio" and cannot be given any legal effect.

Being an illegal agreement, neither the plaintiff nor the defendant should benefit from it by way of this suit. In that regard, this suit succeeds only to the extent that the material agreement is and must hereby be declared null and void.

With regard to the plaintiff's prayers for the parties to return to their original portions of land or for the defendant to be evicted from plot No. 104 Mabusi, it is the opinion of this court that this court is not the right forum for grant of such prayers and more so, considering that it was indicated herein that each party has since settled on the exchanged lands and that the plaintiff has since obtained title to plot No. 307 Chekata Farm.

In the end result, judgment is entered for the plaintiff as prayed in prayer (a) of the plaint in exclusion of the second limb of the prayer seeking a return by each party to return to their original parcels of land.

Each party shall bear own costs of the suit.

Ordered accordingly.

[Delivered and signed this 23rd day of April, 2013.]

J.R. KARANJA.

JUDGE.