



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA OF KISII
CIVIL CASE 297 OF 2002

PETERSON MOKAYA ABUTA PLAINTIFF

VERSUS

PERIS MORAA NYAATA DEFENDANT

JUDGMENT

By a plaint dated 26th November 2002 and amended on 30th June, 2003, the plaintiff averred that at all material time he was the registered proprietor of a parcel of land known as **East Kitutu/Mwamang'era/1928**, situate within Keroka area and measuring 0.092 hectares, hereinafter referred as "**the suit land.**" He further stated that he had been in possession of the suit land until August 1997 when he entered into a verbal lease agreement over the same with the defendant for a term of five years. The defendant was to pay a rental of Kshs. 6,000/= per year and she paid a sum of Kshs. 30,000/= for the entire lease period.

Earlier, the plaintiff had sold two parcels of land to the defendant namely, **East Kitutu/Mwamang'era/2407** measuring **0.31** hectares at a consideration of Kshs. 200,000/= and **East Kitutu/Mwamang'era/2408** measuring **0.05** hectares at a consideration of Kshs. 100,000/=. In respect of sale of the latter, the plaintiff paid the purchase price to a corporation known as **I.C.D.C.** to which the plaintiff was indebted.

On 27th October, 2002 the plaintiff discovered that the defendant had fraudulently procured registration of the suit land into her name by falsely pretending that he had sold the suit land to her.

The plaintiff further averred that the suit land is an agricultural land within the meaning of the Land Control Act and the registration of the defendant as the proprietor thereof was null and void as no consent of the area Land Control Board had been obtained.

The plaintiff sought judgment as hereunder:

“(a) A declaration that the piece of land known as East Kitutu/Mwamangera/1928 belongs to the plaintiff herein Peterson Mokaya Abuta and rectification of the register by cancelling the name of the defendant as the proprietor of the said suit land and reinstating the plaintiff’s name in the register and eviction order to issue against the defendant.

(b) A declaration that the defendant holds the suit land in trust for the plaintiff and a permanent injunction against the defendant, her agents, servants and those claiming under

her from entering, alienating, using the suit land or dealing with the suit land in any way which will interfere with the proprietary rights and freedom of the plaintiff over the aforesaid suit land and general damages for fraud and use of the same since November 1998.

(c) Costs of this suit and interest on (b) at court rates.

(d) Any other further relief as this honourable court may deem fit and just.”

In her defence, the defendant stated that the plaintiff had been the registered proprietor of the suit land upto and including the 7th day of September, 1998 when he sold the same to her. The defendant was issued with a title deed in respect of the suit land on 29th October 1998. The defendant denied that she had fraudulently acquired the suit land.

The appropriate Land Control Board consent was duly issued in the presence of the plaintiff, the defendant contended. She urged the court to dismiss the suit with costs.

During the trial the plaintiff testified that he knew the defendant as he had sold to her two other parcels of land as hereinabove stated. But with respect to the suit land, he stated that he had merely leased it to her for a period of five years.

In cross examination, the plaintiff denied having gone to the office of Omari Nyabera Advocate for purpose of executing a sale agreement in respect of the suit land.

When he was shown the signature on the sale agreement, he contented that the same was a forgery.

The plaintiff further denied having signed any transfer instrument in favour of the defendant and further denied that he had attended the Rigoma Land Control Board on 30th September, 1998 for purposes of obtaining a Land Control Board Consent. When he was shown the minutes of the board which showed that he had indeed attended the said board and consented to the sale of the suit land to the defendant, the plaintiff disowned the said minutes.

Regarding the sale agreement, the plaintiff stated that the identity card number **159921** that was appearing on the same as well as on the document of transfer was not the correct one. His national identity card number is **1594921**. Although the plaintiff initially contended that he never owned any postal address at Keroka, when he was shown the address on the face of the title deed in respect of East Kitutu/Mwamang'era/1928, he conceded that he had such a postal address, to wit, P.O. Box 484, Keroka.

The defendant testified that she had known the plaintiff as a business person at Keroka. The defendant stated that the plaintiff sent a former Assistant chief to her to find out whether she was interested in purchasing the suit land. She responded in the affirmative and thereafter she met with the plaintiff and he agreed to sell his various parcels of land to her. The plaintiff first sold parcel No. 2407 followed by parcel No. 2408 and lastly the suit land.

The sale agreement indicated that the purchase price was Kshs. 200,000/= and upon signing the agreement the vendor was paid Kshs. 82,000/=. The balance of Kshs. 118,000/= was to be paid as follows:

Kshs. 40,000/= by way of cheques payable to I.C.D.C. and Kshs. 78,000/= to the vendor.

The defendant said that she drew 4 cheques amounting to Kshs. 40,000/= payable to I.C.D.C. and gave them to the plaintiff. They are cheques No. 000158 dated 9/9/98, cheque No.000159 dated 9/10/98, cheque No. 000160 dated 9/11/98 and cheque No.000161 dated 9/12/98. Each was for Kshs. 10,000/=. The cheque counter foils were produced as **D. Exhibit 6**. Thereafter she paid him Kshs. 30,000/= and they proceeded to Rigoma Land Control Board and the appropriate consent was granted. Thereafter the balance of the purchase price was paid. A title deed in the defendant's name, **D. Exhibit 7**, was issued to

her on 29th October, 1998. She is now living on the suit land.

The sale agreement in respect of the suit land was prepared by Omari Nyabera Advocate and both the plaintiff and herself signed the sale agreement in the advocate's office. The sale agreement was produced as **D. exhibit 4**. At the time of drawing the sale agreement, the plaintiff had carried his national identity card which he handed over to the said advocate.

That was confirmed by **Mr. Omari Nyabera, DW4**, who stated that he inadvertently omitted one digit of the plaintiff's identity card serial number when he was drafting the sale agreement. He wrote number **159921** instead of **1594921**. The acreage of the land is stated as 0.1 hectares.

The defendant also called **Charles Getumwa, DW1**, the District Officer, Rigoma Division. The witness produced minutes of the Land Control Board meeting held on 30th September, 1998 which showed that on the aforesaid date the Board considered and granted the plaintiff's application to sell and transfer the suit land to the defendant. However, in the said minutes the plaintiff's identity card number is shown as **159921** and the size of the land as 0.092 hectares. The consent letter and the transfer do not disclose what the consideration was.

JOSHUA JAMES OWUOR, DW2, was the District Land Registrar, Nyamira, sometimes in 2003. He testified that the original transfer document and the letter of consent in respect of the suit land were at the said lands registry.

At the request of the defendant, he gave her certified copies of the documents. The transfer dated 7th September, 1998 was presented for registration on 29th October, 1998. DW2 left all the documents at the Archives but later on they were reported to have gone missing. PW2 said that he could not trace the parcel file.

From the pleadings and the evidence on record, the main issues for determination can be stated as follows:

- 1. Whether the plaintiff sold and transferred the suit land to the defendant.**
- 2. Whether the plaintiff attended Rigoma Land Control Board on 30th September 1998.**
- 3. Whether the sale and transfer of the suit land to the defendant was fraudulent.**
- 4. Whether the defendant holds the suit land on trust for the plaintiff.**

From the evidence on record, the plaintiff and the defendant visited the office of Omari Nyabera Advocate who drew a sale agreement in respect of the suit land. The parties signed the sale agreement and same was attested to by the said advocate. The plaintiff and the defendant were not strangers to Mr. Nyabera because he had previously acted for them in other transactions. The plaintiff produced his national identity card to Mr. Nyabera but the advocate made a mistake in recording the serial number of the identity card.

Although the plaintiff alleged that his signature on the sale agreement had been forged, he did not refer the document to an expert Document Examiner to verify the said allegation. The signatures on the sale agreement and on the transfer document appear the same as that of the plaintiff in his national identity card. In the absence of any evidence to the contrary, I hold and find that the plaintiff did not, on a balance of probabilities, prove that he did not willingly sell and transfer the suit land to the defendant. There was no documentary evidence to prove that the plaintiff only leased the suit land to the defendant as alleged in the plaint.

As regards the second issue, the plaintiff denied having made an application to Rigoma Land Control Board. He also denied having attended the said board meeting on 30th September 1998 when consent to

sell and transfer the suit land was given. However, DW1 produced copies of the minutes of the Land Control Board meeting of 30th September 1998 which showed that the plaintiff was in attendance. Although the consent letter and the transfer did not indicate what the consideration was, that omission does not negate the fact that the plaintiff attended the said Land Control Board meeting on 30th September 1998.

As regards the third issue, the plaintiff did not prove that the sale and transfer of a suit land to the defendant was fraudulent. This is in view of the fact that there is ample evidence that the plaintiff and defendant appeared before an advocate who drew a sale agreement in respect of the suit land and thereafter the parties went before Rigoma Land Control Board and obtained the appropriate consent that validated the transaction. There is also evidence that the defendant paid the purchase price.

In **KOINANGE & 13 OTHERS –VS- KOINANGE** [1986] KLR 23 , it was held that allegations of fraud must be strictly proved. The standard of proof is not beyond reasonable doubt but ought to be more than on a balance of probabilities. The plaintiff's evidence fell too far short of the required standard of proof.

Is the defendant holding the suit land in trust for the plaintiff?

My simple answer to this issue is in the negative. There is no evidence to support the plaintiff's contention to that effect. The plaintiff's suit was premised on the allegation that the defendant acquired the suit land fraudulently. No particulars of breach of trust were pleaded as required under **order VI rule 8** of the **Civil Procedure Rules**.

Having considered all the evidence on record, the plaintiff's suit must fail. I am satisfied that the defendant was lawfully registered as the absolute proprietor of the suit land. I therefore dismiss the plaintiff's suit with costs to the defendant.

DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF FEBRUARY, 2010.

D. MUSINGA

JUDGE.