



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 271 of 2003

HON. HENRY RUNGUNO CHEBOIWO.....PLAINTIFF

VERSUS

WILFRED CHEMOBO CHEPKURGAT.....1ST DEFENDANT

CO-OPERATIVE BANK OF KENYA LIMITED.....2ND DEFENDANT

MOROP FARM COMPANY LIMITED.....3RD DEFENDANT

J U D G M E N T

The Plaintiff in this matter filed this suit against the Defendant. He is seeking six prayers. The Plaintiff has abandoned two of the prayers and sought only prayers (a), (b), (d) and (f) which prays for judgment against the 1st Defendant as follows:

- (a) A declaration that the purported sale transfer and registration in favour of the 1st Defendant was fraudulent illegal and wrongful.**
- (b) An order canceling the title deed and issuance of a new title in favour of the plaintiff**
- (d) An injunction restraining the 1st Defendant whether by himself or his agents and/or servants or otherwise from further transferring disposing or interfering with the plaintiff's enjoyment and/or quiet possession of the suit property.**
- (f) Cost of this suit with interest on (d) and costs at court rate.**

It is the Plaintiff's case that he was the owner of the land L.R. No. Morop Kambi ya Moto/196, hereinafter referred to as the suit property. The Plaintiff contends that he leased the suit property in the 1980's to the 1st Defendant who is his son in law by virtue of being married to the Plaintiff's niece. The Plaintiff testified that their initial agreement was that the 1st Defendant would pay Kshs.30,000 every year during the time of the said lease. It was the Plaintiff's evidence that the 1st Defendant was not consistent with the payment and that eventually he stopped paying for the lease of the land. The Plaintiff testified that at the time he leased the suit land to the 1st Defendant he was himself living in Kitale which is far from where the suit property is located. He said that in 2001 he decided to go back to the suit property. He testified that he found some people working in the farm who informed him that the suit land did not belong to him but to the 1st Defendant. Within the same time, he came to learn that the 2nd Defendant bank was advertising the suit land for sale.

The Plaintiff testified that he made enquiries from the 2nd Defendant bank and that he was informed that the 1st Defendant had charged the suit property to secure a loan with the 2nd Defendant and that he had defaulted in repayment. The Plaintiff testified that he settled the outstanding debt owed to the Co-operative bank and he brought proof of the payment. The Plaintiff testified that it was at the time he paid the debt owed to the bank that he saw that the title to the

suit land had been changed into the 1st Defendant's name and that the 1st Defendant had charged the suit land to the bank to secure a loan. The Plaintiff produced a certificate of search of title deed as Plaintiff's exhibit 1. He also produced correspondences from the lawyers of the 2nd Defendant confirming that the debt owed by the 1st Defendant to the bank was fully paid by the Plaintiff. The correspondences were exhibit 2. The Plaintiff in his evidence testified that at no time did he sell the suit property to the 1st Defendant. The Plaintiff also stated that at no time did the issue of the sale of the suit land to the 1st Defendant ever arise between them. He testified that the 1st Defendant transferred the suit land to himself through fraud as he never signed the transfer to him neither was he involved in the transfer transaction.

After giving his evidence the Plaintiff withdrew the suit as against the 2nd Defendant stating that he had no claim against the bank. The Plaintiff also stated that he had no claim against the 3rd Defendant and waived the prayers in the plaint touching on the 3rd Defendant. The Plaintiff also abandoned all other prayers against the 1st Defendant except prayers (a), (b) and (d) which are set out at the beginning of this judgment.

The 2nd Defendant was represented by counsel, Mr. Kimondo. However, when the Plaintiff withdrew the suit against his client, his presence was unnecessary. On the other hand, the 1st Defendant did not file any defence in this matter and neither did he participate in the trial proceedings.

Order VI rule 9 of the Civil Procedure Rules stipulates as follows:

“9. (1) Subject to subrule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it.”

The provisions of this rule are very clear that where allegations of fact made by a party in the pleadings are not traversed by the opposite party, they are deemed to be admitted by that opposite party. The allegations of fact made by the Plaintiff in his plaint were not traversed by the 1st Defendant. The legal position is therefore that it must be deemed that the 1st Defendant admits all the allegations of fact made by the Plaintiff in his plaint.

In regard to evidence, the 1st Defendant did not participate in the trial. He has not adduced any evidence to controvert or challenge the Plaintiff's case. The evidence adduced by the Plaintiff in this case is unchallenged and therefore not denied.

I have considered the evidence adduced by the Plaintiff, together with the averments in the amended plaint filed on the 24th June, 2002. Under paragraph 13, the Plaintiff avers that the transfer and the registration of the suit property in favour of the 1st Defendant was wrongful, illegal and fraudulent. The particulars of fraud are provided for in the plaint. In brief the Plaintiff avers that the 1st Defendant fraudulently purported to have bought the suit property from the Plaintiff and that the eventual transfer of the suit property to his name was without the Plaintiff's knowledge, and that it was made without a sale agreement and in contravention of Section 6 of the **Land Control Act Cap 302** in that the consent required by the Land Control Board for the transfer of suit property being agricultural land, was never obtained. The section provides as follows:

“6. (1) Each of the following transactions –

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b)...

(c)...

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

In regard to the transfer of the suit property to the 1st Defendant, the 1st Defendant has not controverted or challenged the Plaintiff's evidence to that effect, neither was there presented before this court any sale agreement for the sale of the suit property by the Plaintiff to the 1st Defendant.

Under the Law of Contract Act, section 3 thereof, it is mandatory that the sale of land should be reduced in writing and that in the absence of any written agreement such a transaction is invalid, null and void *ab initio*. The purported sale and

eventual transfer of the suit land to the 1st Defendant was therefore invalid.

Section 6 of the Land Control Act Cap 302 Laws of Kenya, requires that any sale transaction of an agricultural land must be presented to the Land Control Board within the area where the land is located for the consent of Land Board before the sale can be concluded. There is no evidence before this court to show that any such consent was obtained from the Land Control Board allowing the sale and transfer of the suit property from the Plaintiff to the 1st Defendant. The provisions of the Act are mandatory and any sale transacted in the absence of compliance with this law renders the transaction invalid, null and void. For this reason also, the transfer of the suit property from the Plaintiff to the 1st Defendant was invalid. Whether or not the Plaintiff was aware of the transfer, lack of the consent of the Land Control Board rendered the entire transaction void *ab initio* and the same should not stand.

Having come to the conclusion that I have of this matter, I am satisfied that the Plaintiff has adduced sufficient evidence to justify the court to find in his favour and declare the transfer of the suit land in the name of the 1st Defendant illegal, null and void. The transfer should be reversed. On a balance of probabilities, I do find that the Plaintiff did not sell his suit land to the 1st Defendant and therefore the transfer of the suit land to the 1st Defendant's name was fraudulent and so was the 1st Defendant's dealing with the suit land as the sole owner. Having come to this conclusion, I find in the Plaintiff's favour and grant prayers (a), (b), (d) and (f) in the following terms:

- (a) A declaration be and is hereby issued to the effect that the purported sale, transfer and registration of the suit property in favour of the 1st Defendant was fraudulent, illegal, null and void.
- (b) An order be and is hereby issued canceling the title deed in the 1st Defendant's name and directing the Registrar of lands to issue a new title in favour of the Plaintiff.
- (c)
- (d) An injunction be and is hereby issued restraining the 1st Defendant, whether by himself, or his servants or agents from interfering with the Plaintiff's enjoyment and/or quiet possession of the suit property.
- (e)
- (f) The Plaintiff will get the costs of the suit with interest at court rates from the date of judgment until payment in full.

Dated at Nairobi this 19th day of September, 2008.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Ndole holding brief Ngoge for the Plaintiff

N/A for the Defendant

LESIIT, J.

JUDGE