



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL CASE 552 OF 1994

- 1. **HUSSEINBHAI K.KHANBAHI**
- 2. **MUSTANSBER K. AKBARALI**

PLAINTIFFS

- **V E R S U S** -

- 1. **DZITO MWAPANGA**
- 2. **FREDRICK M. MULINGE**

DEFENDANTS

J U D G M E N T

The Plaintiff filed this suit in 1994 in respect of plot originally registered as Kwale/Golini/619 and subsequently subdivided and registered in two parts namely Kwale/Golini 1207 and Kwale/Golini 1208. The claim as set out in the plaint is for permanent injunction restraining the defendants by themselves and or their agents, servants, employees and/or other person from trespassing interfering, entering and or doing anything on the plaintiffs piece of land. The plaintiffs also claim for general and exemplary damages for trespass together with costs and interest. The plaintiffs state that the land was registered on 7.11.1989 in the names of the plaintiffs. Land Board consent as required under Land Control Act Cap. 302 is said to have been granted on 6.6.1989. For the transaction between plaintiffs and the first defendant. The issuance of the consents vigorously disputed by first defendant. He says he never appeared at the board meeting on that date and in his favor a copy of minutes for that meeting were exhibited and nowhere is the minute regarding the transaction is recorded. Furthermore the chairman of that board meeting Mr. Christopher Wasike appeared and testified that on 6.6.89 the alleged consent was not given and that his signature on the consent form was forged. On examination of the application forms exh. No. D.3 it shows that the dates on which forms were signed is tempered with both the day and month. The plaintiffs say the forms were dated on 2.6.1989 but the dates were originally written as 12th. Both plaintiffs and the first defendant deny having attended any land board meeting. The plaintiffs say that there was a broker PW3 Mohamed Baruk who was taking care of the documentations in this transaction.

In his evidence PW 3 testified that there was another man more knowledgeable in land transactions called Duma he is the one who prepared the form. On this ground as is the law the transaction would be declared null and void if no consent was obtained or if it was obtained fraudulently and by forgery and the plaintiffs suit would fail. As stated above there was the broker PW3 in the matter. He is the one who introduced parties to the transaction. It is admitted by the plaintiffs that there was no written sale agreement but however on 30.10.1989 the broker was paid shs. 10,000/- (on behalf of Mr. Dzitso) being “**part payment for Kwale Plot**” again on 23/11/1989 shs. 40,000/- was paid to first defendant acknowledgment of receipt shows the money was actually received by Mwaga Nganzi DZITSO whose

identification number is written thereon. This document exh. 4 carries a signature which is similar to that written on exhibit 5 and on Exh D9. there is no expert evidence on this.

In his evidence the first defendant testified that in November, 1989 he agreed to sell a portion of his land Plot no. Kwale/Golini 619 to the plaintiffs. He gave out the title deed to enable subdivision. He later discovered the whole land had been taken over by the plaintiffs. He said he never signed consent forms and he later came to learn that his land had been sub divided into two titles namely Kwale /Golini/1207 and 1208 and titles issued to the plaintiffs. This was in 1994. Upon discovering this state of affairs he visited the lands office to complain. There is evidence that by 4/5/1994 he had already made a complaint to the Land registrar as seen in the letter dated 4.5.94. The Plaintiffs admit that the matter was taken to police and also that they attended a meeting at the Land Registrar where a solution was discussed and it was agreed in writing before Land Registrar that the plaintiffs would give back plot no. 1208 to the first defendant and they agreed to re-purchase that plot from him at a price of shs. 200,000/-. The first payment of shs. 170,000/- was to be paid on 15/9/1994 and the balance by instalments. This document is dated 31/8/1994. The agreement is signed by one of the plaintiffs and first defendant. This agreement was never adhered to by the plaintiffs, instead the plaintiffs filed this suit on 15/9/1994. The defendants filed defence and counter claim. Both parties filed separate issues. The issues which fall to be determined are set out of those filed by parties are as follows.

1. Was there a valid sale agreement for plot Kwale/Golini/619 by the first defendant to the plaintiffs at all.
2. Was the sale approved by land control Board sitting at Matuga.
3. Did the plaintiffs obtain the sub divisions nos. 1207 and 1208 fraudulently.
4. Have the defendants trespassed upon the plaintiffs plot 1208 & 1207 aforesaid.
5. Can an order for permanent injunction be made against the defendants.
6. What is the interest of the 2nd plaintiff in this suit.
7. Is the first defendant entitled to his counterclaim.
8. What order as to costs.

An examination of the evidence before court indicates that the agreement between plaintiffs and first defendant was oral. Except for the exhibit HKK4 which appears to have been signed by first defendant and which is denied by first defendant there is no other writing signed by the person to be charged evidencing the transaction while that document is said to be signed by first defendant the endorsement thereon – **“money received by Mwaganganzi Dzitso”** shows that the money mentioned was not given to him. This would be strange if he was present himself at the time. The other document exhibit 3 dated 30.10.89 was not signed by him but PW3 Mbaruk. There is also the evidence of PW3 that the price was agreed at 50,000/- while the documents show that it was 40,000/-. An examination of the transfer shows that the same was attested by an advocate who was paid attestation fees by the plaintiffs. On 23/10.89 however the document is marked as **“Drawn by;_ DZITSO MWAPANGA of Box 56, Kwale”**. Here it is clear the first defendant was not involved in preparing the document which was typed. The problem and confusion appearing in these documents is resolved on an examination of plaintiffs evidence. They said that the documents were handled by the broker, PW3, it is not therefore surprising that the first defendant states in evidence that he did not know how things went until afterwards.

It is the defendants evidence that by agreement dated 25/4/94 they entered into an agreement for the sale of plot no. 1208 by the first defendant to the 2nd defendant. It was known to both that the land was registered in the names of the plaintiffs. What is strange is that it was not until 31/8/1994 four months later that the plaintiffs agreed to handover the plot or to repurchase the plot from the first defendant and the negotiations for this agreement (exh.D9) was not commenced until the month of May 1994. It is quite

clear this document was not made on the date indicated.

The reasons the plaintiffs brought this suit is that the 2nd defendant was interfering with the boundaries to the plaintiffs land. The second defendant relied on the agreement of purchase aforesaid but he admitted he never obtained Land Board consent to that agreement therefore under the provisions of the Land Control Act the agreement has become void and unenforceable. I will say no more of it.

From both documentary and oral evidence it is clear there was no valid written sale agreement for the sale of defendants plot no. Kwale/Golini/619 to the plaintiffs. The terms of sale are unclear as to the price and size. The plaintiffs say price was shs. 40,000/- as in documents while shs. 50,000/- appears to have been paid. The first defendant say they sold a portion but plaintiffs says they bought the whole. The first defendant parted with his Title Deed to facilitate subdivision of the portion to be sold. There is no agreement reached on the sale. There is totally no evidence as to how the documents were prepared and signed. The first defendant states that he never signed documents and that his signature was forged. The evidence of Mr. Wasike favours the first defendants stand. The Land Board consent produced and presented to the Land Registrar was not genuine, it was a forgery. A transaction on Land that has not approval of that Land Board is void, null and invalid for all purposes see Land Control Act Cap. 302 Sec.6. It follows that the transfer of Plot no. 619 to the plaintiffs was invalid null and void. The registration and title issued on 7.11.1898 is also invalid. The consent that was handed to Land Registrar was a forgery. The subsequent sub-division of the plots and issuance of new titles is also invalid null and void. It will be noticed that this sub division was taking place in February 1994 when complaints first hand were raised.

Mr. Mutisya learned counsel for the defendants has relied on judgment of Court of Appeal in Civil Appeal no. 133/87 where the issue of whether Land Board consent under the Land Control Act 302 had been granted. The court stated

“The transaction for which as the respondent sought specific performance required the consent of the relevant Land Control Board.

This is a legal requirement”.

Further in Mbsa HCCC. NO. 252 of 1998 Jamila Salim Awadh –vs- Salima Touban and 4 others was cited where questions of sale agreement and other statutory deals were discussed by Hon. Justice Hayanga. The learned Judge said

“In the absence of consent I think agreement to sell land subject of Land Control Act. I believe such agreement is void if there is no consent and cannot be enforceable.”

In this case the deciding factor is the want of Land Board consent. Whether there was valid agreement for sale or not the transaction is made illegal by the Land Control Act and is void for all purposes and cannot be enforced at law. I also find that the transaction was tainted by fraud. In the circumstances the plaintiffs suit against the first defendant for trespass cannot stand. No evidence has been advanced that the 2nd defendant did any act of trespass. He said he entered into an agreement to purchase plot 1208. When he approached the plaintiffs to sign retransfer forms they refused and then the matter was brought to court. Therefore plaintiffs suit against both defendants is dismissed with costs.

On the first defendants counterclaim there is sufficient evidence that he is entitled to orders necessary. The Land Registrar at Kwale shall forthwith deregister the plaintiffs from the proprietorship of the two pieces of land namely 1207 and 1208 which is null and void and Register the same in the name of first defendant. Costs of counterclaim to first defendant.

Dated this 8th day of November, 2004.

J. KHAMINWA

JUDGE

Mr. Sifuna – I apply for copies of judgment and proceedings typed.

I also apply for 14 days stay to enable me to file a formal application for stay.

Mr. Bosire – I do not object.

Court – Let the typed copies of proceedings and judgment be supplied upon payment of copying charges.

2. Temporary stay is hereby granted for a period of 14 days pending filing of a formal application.

J. KHAMINWA

JUDGE