



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL SUIT NO. 235 OF 1989

NYAGUTA TRADING COMPANY PLAINTIFF

VERSUS

DANIEL ROGITO DEFENDANT

JUDGMENT

The plaintiff is a partnership registered under the Registration of Business Names Act. It has instituted this suit against the defendant (who himself is a partner in the partnership) for the following orders:-

(a) A declaration that the plaintiff is the owner of that parcel of land known as plot No. D3 Gekomu Market; and

(b) A permanent injunction to restrain the defendant, his servants and or agents from trespassing on the parcel of land.

The basis of the plaintiff's claim is that on 31.8.1960, it purchased the plot from one Ragogi Magana at a price of Shh.1000/=. The plaintiff's further claim is that it later put up a temporary structure upon the property which it leased to tenants and from which it earned rental income. In his written statement of defence filed in court on 27.9.1089, the defendant however denies the plaintiff's claim and avers that the plaintiff has never purchased the plot in question. He further avers that, contrary to what the plaintiff claims, the plot in dispute was purchased by him with two of the plaintiff's partners including its principle witness and vice chairman Nathan Mogire Nyangera (PW1) acting as his witnesses to the agreement of sale. In the premises the defendant contends that the plaintiff is not entitled to the orders it seeks.

It is common ground that the disputed plot was purchased from the previous owner on 31.8.1960 and that the homemade sale agreement entered into between the parties and tendered in evidence as Defence Exh. 1 (the original is in Kisii language but there is an agreed English transaction) is a true agreement for sale between the vendor and the purchaser. The only point of disagreement is who, between the plaintiff partnership and the defendant, the actual purchaser was. That in my view is the only issue I have to determine in this matter.

It would appear from the evidence available that the plot in question has not been brought under the Registered Land Act (as one would expect to be the case) or for that matter any other written law relating to land. I infer this from the fact that no evidence was tendered or referred to by either party to indicate the existence of title to the property and also the fact that the plot bears the unusual reference number D3, Gekome Market which I am unable to associate with any known land registration system. It would also appear that the plot is not even surveyed. Indeed the Gusii Municipal Council Committee clerk, Mr. Francis Momanyi Okongo (PW2) who testified in this matter conceded that the Municipal Council of Kisii did not even have any records of its size.

It is of course true that PW2 stated that the disputed plot is the property of the plaintiff and that the

plaintiff had started paying rent to the Municipal Council in 1974 but that evidence alone does not carry much weight bearing in mind the fact that in cross examination, the witness was forced to admit that the rent for the years 1974 to 1988 was paid on 11.10.88. That witness did not however know and did not tender any evidence to indicate under what circumstances the plot became the property of the plaintiff. However, since both parties acknowledged that the property was originally acquired from one Ragogi Magana in 1960 long before any records of it were kept by the Municipal Council, I do not consider what the council employees say as to who owns the property or paid the rent for the plot in those years can be treated as conclusive proof of ownership. In my view the crucial question is who between the plaintiff and the defendant actually purchased the plot from Ragogi Magana on that fateful day of 31.8.1960.

Before I proceed to evaluate the evidence tendered herein on behalf of the two parties I think it is appropriate to make some observations at this stage. Firstly, I believe that this is not a case where any party or witness is mistaken as to what happened on 31.8.1960 and quite obviously one of the parties herein is attempting through elaborate falsehood to take away the other party's property. The problem is that I have not found it easy to tell who between them is the liar. That notwithstanding, I must one way or the other attempt as best as I can to resolve the dispute through this judgment. The other observation is that while I agree with Mr. Orora's submissions that ***"there is nothing wrong in several persons purchasing property in the name of one"***. I must point out the fact that the issue I have to decide in this matter is not one of law but purely of fact namely who as between the two contestants purchased the disputed property. The third observation I wish to make is that none of the parties herein claims to have been in possession of the plot immediately before the filing of this suit.

I turn now to consider the evidence tendered by the parties.

In all five witnesses were called to give evidence for the plaintiff. Apart from PW2 whose evidence has been referred to above, they were Nathan Mogire Nyangera (PW1) who styled himself as the vice chairman of the partnership, Anunda Anunda (PW3), Judson Onsare Onsarigo (PW4) (the secretary of the partnership) and Samson Marindi Changoi (PW5). The evidence of PW1, PW2 and PW3 all of whom are partners in the plaintiff was that the partnership was registered on 20.10.1960 and that the first property it purchased was one at Nyaguta Market. Their further evidence is that on 5.8.1960, eight of the ten partners who included the defendant met at the home of PW1 to discuss the purchase of the disputed plot. Others present were PW1, PW3 and PW4.

The initial information about the plot is said to have been given to the partnership by the defendant after which deliberations amongst the partners were held. Minutes of the proceedings of the meeting at which agreement was reached to purchase the property at Shs.1,000/= were tendered in evidence. For that purpose the defendant, PW1 and PW3 were chosen to go to the defendant's place for the purpose of finalising the deal. And at another meeting held with the seller on 31.8.1960 an agreement in writing was entered into whereby the property was sold, not to the partnership as one would have expected, but to the defendant. That agreement was drawn by PW1 and he himself admitted as much. The English translation of the agreement is fairly brief and I think I should quote it in full. It is as follows:-

"THIS IS A TRUE AND FAIR TRANSLATIONS OF THE ORIGINAL

SIGNED

SIGNED

FRED N. ORORA

G. J.

MAINYE

**ADVOCATES FOR THE PLAINTIFF
THE DEFENDANT**

ADVOCATES FOR

31.8.1960

LAND SALE AGREEMENT

I, RAGOGI MAGANA has agreed to sell my land to Daniel Rogito at Gekomu. The land sold is from the main road to the toilet. The land also runs from a tree stamp to the toilet.

We have agreed that the purchase price be Ksh.1,000/=. But for today he has agreed to pay Ksh.500/= and the remaining amount to be paid when the Tribunal has given an okey. (Ksh.five hundred only).

Seller - Ragogi Magana - Signed

Buyr - Daniel Rogito - Signed

Witnesses - Andrea Omuya - Signed

“ - Nathan Mogire - Signed

“ - Thomas Omuya - Signed

“ - Ambrose Okemwa - Signed

“ - Anunda Bonuke - Signed

THIS IS A TRUE AND FAIR TRANSLATION OF THE ORIGINAL.

Signed:

FRED ORORA

Signed:

G. J.MAINYE

ADVOCATE FOR THE PLAINTIFF ADVOCATE FOR THE DEFENDANT”

The agreement indicates that the seller was Ragogi Magana (who signed the agreement as such) and Daniel Regito as buyer or purchaser (he also signed as such). The other person whom PW1 says was sent as a representative of the plaintiff, namely Anunda Anunda signed as a witness. In the agreement (and this is the most significant aspect of it) the defendant is described as the purchaser.

Throughout his evidence PW1 did not give any plausible explanation as to why the sale agreement relating to a property intended to be purchased by the plaintiff would describe the defendant as the purchaser. The nearest he came to by way of an explanation was when in reply to a question by Mr. Mainye (advocate for the defendant) he stated that when he, the defendant and Anunda Anunda went to Ragogi’s house, they already knew (that) they were going to purchase the plot on behalf of the partnership and that the defendant was representing the partnership (because) he had negotiated the deal. PW1 did not however explain why if that was the case, he personally wrote the agreement in the name of the defendant as a purchaser.

And that was despite his concession that all the partners of the defendant were informed members of the community. He described himself as having had training in teaching and to have been a teacher for a long time. To show how experienced he was, he stated that upon retiring from the teaching profession, he had been appointed General Manager of Kisii Farmers Union a position he held for about 16 years. He also stated that by the time he wrote the agreement involving the disputed plot, he was a fairly knowledgeable person, was literate as well as a leader in the society.

In their evidence both PW3 and PW4 attempted to explain the reason why the plot was bought in the name of the defendant but in the process they contradicted each other. Indeed my impression of PW4 as a witness was that he was an untruthful witness. I say so because in the course of his evidence he denied an alteration in a document which said alteration was obvious.

With regard to the issue of the purchase of the plot in the name of the defendant, PW3 stated that the partnership used to buy land in the name of an individual who have negotiated the deal on behalf of the

partnership. With regard to the specific deal the subject matter of this suit, PW3 stated that the plaintiff sent the 3 persons (mentioned above) to purchase the plot in the name of the partnership. Further, he was categorical in his evidence that the partnership did not tell the three persons to purchase the plot in the name of the defendant. And from that evidence, there was also as mentioned above produced as evidence purported minutes of the society which point to the purchase of the property by the plaintiff but in view of the fact that such evidence can easily be fabricated and further the fact that I do not really consider one of the plaintiff's witnesses truthful, I would not rely on such evidence.

As for the defendant, apart from himself, he called Henry Regito (DW 3) (a partner of the defendant) and Andrea Omuya (DW2) who said that he was a grandson of the original seller Ragogi Magana. The evidence of all those witnesses supports the defendant's position.

As observed above, there is direct conflict in the evidence of the plaintiff and that of the defendant. Most of the evidence is oral. However in favour of the defendant is the documentary evidence by way of the sale agreement which both sides admit was made. It shows that the defendant was the purchaser of the disputed property. Give that evidence, I resolve the conflict in the evidence in favour of the defendant. As to the defendant's failure to lodge a counter claim to the action, I do not think that anything turns on that. After all, the plaintiff has at the end of the day to prove its case (see Section 107 of the Evidence Act). My view of the matter is that it has not done so and consequently the suit must fail.

For the above reasons, the plaintiff's suit is dismissed with costs. Dated at Nairobi this 7th day of November, 2001.

T. MBALUTO

JUDGE