



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 319. OF 2017

PETER MUTHIANI KAVITA.....1ST PLAINTIFF

MUSYOKA KAVITA.....2ND PLAINTIFF

MAINGI KAVITA.....3RD PLAINTIFF

VERSUS

JAMES MUVIU MWILU.....1ST DEFENDANT

WILLIAM KAVITA KIMILU.....2ND DEFENDANT

JUDGMENT

1. The suit was filed by the plaintiffs vide a plaint dated 26th July, 2017 before this honourable court on 27th July, 2017 wherein they sought the following prayers: -

- a) **That the honourable court be pleased to order the 2nd defendant to refund to the 1st defendant a sum of Kshs. 260,000/=.**
- b) **An order nullifying the contract of sale between the defendants entered into sometime in the year 2005.**
- c) **Costs of this suit.**
- d) **Any other relief the court deems fit and just to grant.**

2. In the plaint, the plaintiffs averred that sometime in the year 2005, the 1st and 2nd defendants entered into an illegal agreement for sale of thirteen acres of land located in Kanzokea location in Kathonzwani Sub- County for the sum of Kshs. 260,000/=. That immediately upon payment of the purchase price, the plaintiffs raised an objection that the suit land is an agricultural land that could not be disposed without their consent.

3. The plaintiff cited particulars of negligence as disposing the suit land without their consent, failure by the 1st defendant to exercise due diligence before purchase of land and engaging in an illegal contract.

4. The 1st defendant filed his statement of defence dated 30th August, 2017 in which he denied that the agreement for sale entered into between himself and the 2nd defendant was illegal. The 1st defendant averred that he entered into an agreement for sale of land with the 2nd defendant with full knowledge that the 2nd defendant would obtain all the requisite documents necessary to transfer the suit land but the 2nd Defendant reneged to perform his contractual obligations.

5. The 1st defendant also averred that the plaintiffs' actions to seek that the purchase price be refunded to him is premised on ill motive, bad faith, malice, fraud and ill intent to deny him his right to own property as enshrined under Article 40 of the Constitution. It is the 1st defendant's assertion that the plaintiffs and 2nd defendant are in collusion to deny him his rightful entitlement.

6. The 1st defendant filed a notice of claim against co-defendant dated 12th September, 2017 seeking the following: -

- i) **An order of specific performance directed at yourself to complete the transaction for the sale of land being 13 acres of land**

between yourself and the 1st Defendant the subject of agreement for sale attached to the defense filed in the suit by the 1st Defendant.

ii) An order compelling you to process and transfer title to the aforesaid property in favour of the 1st Defendant pursuant to the Agreement for sale of land entered between yourself and the 1st Defendant.

iii) In the alternative, and should the Plaintiff's claim succeed, an order compelling you to pay, (in addition to refunding all sums received from the 1st Defendant pursuant to the transaction for sale between yourself and the 1st Defendant from the date of receipt of the monies to the date of full payment.

iv) Further, an order compelling yourself to compensate the 1st Defendant for loss of use of the property the subject of Agreement for sale between yourself and the 1st Defendant from the date of Agreement to date of judgment of the honourable court.

7. The claim is premised on the grounds similar to those raised in the Plaintiff save that the issues for determination need not only be determined as between the plaintiffs and defendants but also between the 1st defendant and the 2nd defendant. In addition to payment of the purchase price in the sum of Kshs. 260,000/-, the 1st defendant paid Kshs. 13,500 surveyor's fees and Kshs. 500/- for booking of the land control board. The 1st defendant also claims that it was a term of the agreement that he would be entitled to possession of the suit land upon payment of the first instalment and therefore would be seeking damages for loss of use of the land.

8. The 2nd defendant filed his statement of defence dated 13th November, 2017 in which he admitted to have entered into an illegal agreement for sale for the suit land. That immediately upon payment of the purchase price the plaintiffs raised an objection. He further averred that after consultation with the plaintiffs, the 2nd defendant decided to refund the 1st defendant the purchase price together with interest thereon.

9. The 2nd defendant admits his willingness to refund the 1st defendant the purchase price with interest, the monies which is in the custody of Munyasya & Company Advocates since the year 2015 and can be paid forthwith to the 1st defendant.

10. On 2nd October, 2019, parties agreed that since the facts of the suit were uncontested, by consent they were to file written submissions on the following issues namely:-

1. Whether failure by the 2nd Defendant to consult the 1st, 2nd and 3rd Defendant Plaintiffs in the sale of plot 748 sheet Number 21 to the 1st Defendant renders the sale null and void.

2. What remedies are available to the Plaintiffs and the 1st Defendant.

3. Who bears the cost of the suit.

11. The plaintiff filed written submissions dated 25th October, 2019 on 29th October, 2019. On the first issue, the plaintiffs submit that the suit land involved an agricultural land which required consent from the spouse and grown-up children of the seller. In any case, the 2nd defendant admitted that he never sought consent from the plaintiffs and this is the reason why the Land Control Board declined to sanction the sale. The plaintiffs submit that the agreement for sale entered into by the defendants does not stipulate the cause of action to be taken by a party in case one party breaches the contract. The plaintiffs cited Section 6 (1)(a) of the Land control act which provides that **'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 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.'**

12. The plaintiffs further submitted that the 1st defendant failed to make an application for consent with the six months' period provided under section 8 of the Land Control Act and, therefore cannot claim to have entered into a valid contract. The plaintiffs rely on the case of **David Sironga Ole Tukai vs Francis arap Muge & 2 others [2014]**.

13. On the 2nd issue, it is the plaintiffs' submissions were that the remedy available to the plaintiffs is that for a declaration that the agreement for sale was null and void and stands revoked. They submit that they are also entitled to mesne profits since the land has not been available for their use for a period of fourteen years. That a sum of Kshs. 500,000/= though not equivalent to the loss would be enough to cushion them. On the third issue, it is their submission that the defendants should be condemned to bear all the costs.

14. The 1st defendant filed written submissions dated 6th December, 2019. It is the 1st defendant's submission that failure by the 2nd defendant to consult the plaintiffs does not render the sale null and void as claimed by the plaintiffs and 2nd defendant. That a number of facts are not in dispute between the parties namely:-

(i) That the 2nd defendant is the registered absolute owner/proprietor of the suit land.

(ii) That the plaintiffs are sons of the defendant.

(iii) That the 2nd defendant sold to the 1st defendant a portion of the land measuring 13 acres sometime in the year 2005.

(iv) That the 2nd defendant received the full purchase price.

(v) That the land in question is an agricultural land.

(vi) That the land in question is not held by the 2nd defendant in trust for the family.

15. It is the 1st defendant's submission that ownership of land by the registered proprietor is absolute and only subject to the restrictions and encumbrances as provided under section 25 of the Land Registration Act. It is also the 1st defendant's submission that the plaintiffs have not told this court what rights they hold in respect to the suit land.

16. It is the 1st defendant's submission that the plaintiff cannot challenge the transaction between the defendants on grounds that they did not procure their consent since the suit land is an agricultural land. That the doctrine of privity of contract forbids the plaintiffs from enforcing or repudiating a contract they were not a party to. The 1st defendant relied on the case of **Dunlop Pneumatic Company Limited versus Selfridge & Company Limited [1915] Ac 847** where it was held:-

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party to, even if the contract is made for his benefit and purports to give him the right to sue or make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such a near relationship to a party to the consideration does not entitle him to sue upon the contract”.

17. It is the 1st defendant's submission that the plaintiffs contention is misplaced and the only avenue available to them to challenge is whether there exists in their favour any restrictions or encumbrances provided in section 24 and 25 of the Land Registration Act.

18. It is the 1st defendant's submission that it is incumbent upon a party who intends to rely on the doctrine of trust to claim interest in land to prove the same and relied on the case of **Njenga Muthuita versus Muthuita [1982-88]1KLR 42** and the case of **Isack M'inanga Kiebia versus Isaaya Theuri M'Lintari & Another [2018] eKLR**.

19. It is also the 1st defendant's submission that the suit land was not rooted in the 2nd defendant's lineage and the 2nd defendant could not argue that he intended to hold the same in trust for the family. The 1st defendant referred this court to the case of **Juletabi African Adventure Limited & Another versus Christopher Michael Lockley [2017] eKLR**.

20. It is his submission that the suit as brought does not avail any remedy to the plaintiffs as against the 1st defendant as there was no privity of contract. He submits that costs follow event and since costs are at the discretion of the court, the same should be awarded to the 1st defendant.

21. I have read and analysed the pleadings and submissions filed by the parties with the exception of the 2nd defendant who opted not to file written submissions.

22. What constitutes privity of contract has been described by *Chitty on Contracts, 2004 Edition* as follows:

“The common law doctrine of privity of contract means that a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it.”

23. This basically means that a contract cannot confer rights or impose obligations on any person other than the contracting parties; that a contract cannot be enforced by or against a 3rd party. The effect of this legal principle is that only parties who are privy to a contract can sue to enforce its terms.

24. I associate myself with the decision of the court in **Macharia Mwangi Maina & 87 others v. Davidson Mwangi Kagiri [2014] eKLR** in which the court held that the respondent had established his rights over the portion of land that he was claiming under the equitable doctrines and stated:-

“It is without doubt that the defendant having received the purchase price in full is estopped from relying on the defence that their agreement is void for non-compliance with Section 6 of the Land Control Act.”

25. In **Willy Kimutai Kitilit v. Michael Kibet – Eldoret Civil Appeal No. 51 of 2015** the court made the following observation:

“Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to promote and protect that principle amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede Land Control Act where a transaction relating to an interest in land is void and unenforceable for lack of consent of the Land Control Board.”

26. Having looked at the pleadings and submissions of the plaintiff, I note specifically that they have not proved any existence of a trust to grant them any authority as to the manner of disposition or otherwise. Also, the plaintiffs were not parties to the contract and at this point I would not wish to attempt to rewrite or vary a contract in which the court is not a party to.

27. Having found that the plaintiffs have not established any form or interest on the suit land and having found that they are not parties to the contract, I find that there isn't any remedy available to them. In fact, I find this suit as a classic example of that which has been made in bad faith and with ill motive.

28. In the case of **John Kimani Njenga v Margaret Wanjiru Kanyiri & 2 others** [2015] eKLR, the court held that: -

“It was argued by counsel for the 1st defendant that this claim cannot stand. Frankly, I do not understand the basis of that argument, for the 2nd defendant is co-defendant of the 1st defendant and Order 1 rule 24, does allow for a claim against a co-defendant. In fact, there is no other way that the 2nd defendant can seek remedy from the 1st defendant, other than filing a claim against co-defendant, which is precisely what was done in this case. The claim that the 2nd defendant has against the 1st defendant is squarely related to the claim of the plaintiff (emphasis mine). If the plaintiff succeeds, then the 2nd defendant loses the property, and the 2nd defendant is therefore perfectly entitled to seek indemnity from the 1st defendant. I have no doubt in my mind that the claim by the 2nd defendant against the 1st defendant is properly pleaded and properly on record.”

29. The notice of claim against co-defendant dated 12th September, 2017 and filed by the 1st defendant is properly on record.

30. The upshot of the foregoing is that the plaint dated 26th July, 2017 lacks merit and is hereby dismissed. The plaintiffs and the 2nd defendant shall bear the costs of this suit. It is so ordered.

DATED, SIGNED and DELIVERED VIA EMAIL on this 8th February, 2022.

Mbogo C.G

Judge

8/2/2022

In the presence of: -

CA: Chuma