



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC No. 91 OF 2015

MIKAEL SUNDULI NANDWA.....PLAINTIFF

VERSUS

DENNIS MUNYENDO.....DEFENDANT

JUDGMENT

1. By plaint dated 27th March 2015, the plaintiff averred that he is the registered owner of the parcel of land known as L.R East Wanga/Eluche/2280 measuring 0.78 hectares, hereinafter referred to as the 'suit property'. He further averred that sometimes in November 2014, he entered in to an agreement with the defendant to assist him offset a loan balance of KShs 132,500 with Agricultural Finance Corporation Kakamega Branch which the defendant paid. That later the defendant sent him KShs 43,500 via Mpesa all totalling KShs 175,000 on an undertaking that the plaintiff would sell him ½ an acre but later disagreed when the defendant demanded that the plaintiff sells him the whole 1 acre at KShs 200,000. The plaintiff averred further that on 2nd December 2014, he entered in to an agreement with the defendant in which he acknowledged owing the defendant KShs 175,000 which he undertook to pay. That on 26th February 2015 the defendant summoned the plaintiff at the office of the Mumias East Sub County Commissioner and forced him to sign an agreement to pay KShs 203,250 to the defendant by 31st March 2015 being an amount that the plaintiff never received.

2. The plaintiff averred that he had applied for another loan with Agricultural Finance Corporation, Kakamega branch which had been approved but the defendant blocked it and also lodged a caution against the suit property. That the plaintiff requested the defendant to collect a refund of the KShs 175,00 due from him but the defendant refused. The plaintiff therefore prayed for judgement against the defendant for: -

a) An order compelling the Defendant to receive a refund of KShs. 175,000 from the Plaintiff herein and an order compelling the defendant to remove the cautions lodged on the Plaintiff's loan with the Agricultural Finance Corporation, Kakamega Branch and on L.R EAST WANGA/ ELUCHE/2280 (0.78Ha).

b) Costs and interest.

3. The defendant filed a defence and counter-claim in which he denied the plaintiff's allegations and averred that the plaintiff who is his relative approached him and pleaded with him to purchase one acre of land from the suit property at a consideration of KShs 200,000 to enable the plaintiff use part of the money to offset a loan of KShs 131,000 owed to the Agricultural Finance Corporation and put the rest to his personal use. The defendant further averred that on 3rd November 2014, the plaintiff and the defendant entered in to an agreement for the sale of one acre out of the suit property at a consideration of KShs 200,000 pursuant to which the defendant paid to the plaintiff the sum of KShs 85,000 which the plaintiff paid to the Agricultural Finance Corporation (AFC) on the same date and the balance of KShs 90,000 was paid by the defendant to the plaintiff subsequently.

4. The defendant further averred that the plaintiff convinced him that he knew a surveyor Mr. Herman Mmosi whom he introduced to the defendant and both the plaintiff and defendant executed documents to facilitate the subdivision of the suit property and transfer title of one acre to the defendant. That the plaintiff made a false statement to the Assistant Commissioner, (District Officer) East Wanga Division/ Sub-county when the parties were summoned and the plaintiff rescinded the sale agreement and agreed to refund the defendant KShs 175,000 being the consideration he had received plus KShs 28,250 being the sum of money the defendant had incurred in the process of seeking to enforce their contract totalling KShs 203,250.

5. The defendant prayed that the plaintiff's suit be dismissed with costs and that judgement be entered in his favour for: -

a) Ksh. 203,250/=

b) Costs of the counter-claim

c) Interest on (a) and (b) above.

d) Any other relief deemed fit to grant.

6. At the hearing, the plaintiff testified as the sole witness in respect of the plaintiff's case. He stated that the defendant is both his neighbour and his cousin. That he had a loan of KShs 135,000 with AFC in 2014 and asked the defendant to offset the same. That the defendant agreed and paid KShs 175,000 both to offset the loan and for the plaintiff to use the balance with the result that the plaintiff got title deed released. That it was agreed that the plaintiff was to give the defendant ½ acre of the suit property and that the defendant would pay a total of KShs 200,000. He added that the defendant wanted the whole parcel which is about 2 acres while the plaintiff wanted to refund the sum. That the defendant lodged a caution against the suit property. That they appeared before the District Officer on 26th February 2015 and the defendant said he wanted KShs 203,250 inclusive of interest. He urged the court to allow him to refund KShs 175,000 without interest and to order removal of the caution. That he is still ready to give the defendant ½ acre.

7. The Plaintiff's case was closed.

8. The defendant testified next as the sole defence witness. He stated that the plaintiff who is his relative approached him and requested him to buy one acre of the suit property at a consideration of KShs 200,000 so as to enable the plaintiff use part of the purchase price to offset a loan owed to AFC and the balance to sort out his other personal financial commitments. That on 3rd November 2014, he and the plaintiff entered into an agreement for sale to him of one acre of the suit property at a consideration of KShs 200,000 pursuant to which he paid to the plaintiff KShs 85,000 at the offices of AFC at Kakamega which the plaintiff handed over to AFC to offset his loan. That he subsequently paid to the plaintiff a further KShs 90,000 and the plaintiff then took to him a private surveyor by name Herman Mmosi and convinced him that the said surveyor would work well for them. That they both executed documents to facilitate the subdivision and transfer to him of title in respect of the one acre.

9. The defendant further stated that he paid the said surveyor for his work and was surprised to be summoned by the Assistant Commissioner East Wanga Division to attend her office on 26th February 2015 in regard to a complaint lodged by the plaintiff. That he attended the meeting together with the plaintiff, the Assistant Commissioner and one Hamisi Waziri Ali alone without the presence of any police officer. That at the meeting, the plaintiff rescinded the agreement and voluntarily offered to refund to him the sum of KShs 175,000 being the consideration he had received together with KShs 28,250 being the expenses which the defendant had incurred in enforcing the agreement, thus making a total of KShs 203,250. The sum was to be paid before 31st March 2015. The terms were reduced into a written agreement which was signed without any threat, coercion or inducement. The defendant further denied lodging any caution against the suit property or refusing to accept a refund KShs 175,000 from the plaintiff. He urged the court to dismiss the case with costs.

10. The defence case was closed. It was ordered that parties file and exchange written submissions. The plaintiff did not file any submissions.

11. The defendant submitted that the parties entered an agreement which the plaintiff agreed to sell to the defendant a portion of land out of the suit property pursuant which the defendant paid to the plaintiff a sum of KShs 175,000 being part payment of the consideration and that the defendant further incurred KShs 28,250 on survey in a bid to enforce the contract totalling KShs 203,250. That in breach of their agreement, the plaintiff refused to transfer title to the portion of land sold in to the defendant's name or give him possession. The defendant further submitted that following the parties being summoned at the offices of the East Wanga Sub-County Assistant Commissioner, an agreement was made vide which the plaintiff voluntarily and without any coercion, force or inducement agreed to pay to the defendant a sum of KShs 203,250 being a refund of the KShs 175,000 that the plaintiff had received from the defendant for the failed transaction together with KShs 28,250 being further sum the defendant incurred which sum the plaintiff undertook to pay to the defendant by 31st March, 2015. The defendant therefore urged the court to dismiss the plaintiff's suit with costs and enter judgement in favour of the defendant as sought in his Counter-Claim for KShs 203,250 plus costs and interest.

12. I have considered the parties' pleadings, evidence and submissions. There is no dispute that the plaintiff received from the defendant KShs 175,000 and that the consideration for the amount was sale of a portion of the suit property to the defendant. There is a dispute as to the size of the property that was to be sold. The dispute on the size is no longer material since based on the parties' pleadings and evidence, they are no longer interested in pursuing completion of the agreement. They are now focused on a refund.

13. Both parties produced a copy of the handwritten agreement dated 26th February 2015 wherein the plaintiff undertook to pay to the defendant the sum of KShs 203,250 by 31st March, 2015. The plaintiff claims that he was coerced into signing the agreement is not backed by any evidence. On the contrary, the defendant's explanation that the sum of KShs 203,250 is arrived at by taking into account a sum of KShs 28,250 which he incurred among others through survey costs in a bid to complete the transaction is quite understandable. I accept the defendant's explanation in that regard.

14. The plaintiff claimed that the defendant lodged a caution against the suit property. He did not however produce any certificate of search to demonstrate the existence on the register of such a caution. On the other hand, the defendant produced a copy of a certificate of search dated 8th January 2015 which shows no caution as at that date. I will therefore not grant any order for removal of caution.

15. In view of the foregoing, the parties partially succeed in their respective claims. I therefore make the following orders:

a) Judgment is hereby entered against the plaintiff and in favour of the defendant for KShs 203,250 (two hundred and three thousand, two hundred fifty) together with interest thereon.

b) Considering the relationship between the parties, I make no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 1ST DAY OF MARCH 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff

Ms Aligula for the defendant

Court Assistant: E. Juma