



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 30 OF 2017

JOHN MUTAVA MASIKA.....PLAINTIFF

VERSUS

BENSON NZANGI MUTISO.....DEFENDANT

JUDGMENT

1. By his plaint dated 18th January, 2017 and filed in court on 19th January, 2017 the Plaintiff prays for judgement against the Defendant for orders that: -

a. The Defendant be compelled and ordered to receive and or accept Kshs. 230,000.

b. Permanent injunction to restrain and or ordering the Defendant to vacate land parcel number Nzai/Mumbuni/578.

c. Costs of the suit.

d. Any other relief that this court may deem fit to grant.

2. The claim is denied by the Defendant in his statement of claim dated 22nd February, 2017 and filed in court on even date.

3. On the 29th March, 2017 the Plaintiff filed a reply to the statement of defence dated 29th March, 2017.

4. The Plaintiff's case was that between the years 2000 and 2005, he borrowed a total of Kshs. 115,000 from the Defendant. The loan was in four (4) tranches. He and the Defendant drew four (4) agreements (PEX No, 1(a) to (d). The first agreement was on the 24th July, 2004. The Plaintiff invited the Defendant to live on his land being Nzai/Mumbuni/578. The second agreement was for the year 2004 to 2005. It was for Kshs. 20,000. The third agreement was for Kshs. 5,000 while the fourth agreement ended in the year 2005.

5. His evidence in cross-examination by the Defendant was that the agreements indicated that he had sold land to the Defendant. He also said that the agreements showed that the defendant had paid the purchase price in full. He pointed out that even though he was to refund the money to the Defendant, there was no definite date when he was to do so.

6. The Plaintiff called four witnesses. The four were Masila Mutava(PW1), Joseph Ngingila Masila(PW2), Regina Mutindi Mbithuka(PW3) and Waita Mutava(PW4).

7. Masila Mutava's (PW1) evidence in chief was that he was aware of the agreement between the Plaintiff and the Defendant where the latter advanced Kshs. 115,000 to the former.

8. His evidence in cross-examination by the Defendant was that he has never seen the agreements in question. He was not re-examined.

9. Joseph Ngingila Masila (PW2) in his evidence in chief told court that sometime in the year 2004, he witnessed a sale agreement between the Defendant and the Plaintiff. He revealed that the subject matter of the agreement was a portion of land parcel number Nzai/Mumbuni/578. The witness revealed that the land in question belonged to his late father, Masila Ndolo and that the Plaintiff was yet to obtain letters of administration so as to be able to inherit his deceased father's estate.

10. He reiterated in his evidence in cross-examination that the agreement showed that the Plaintiff had sold land to the Defendant.

11. Regina Mutindi Mbithuka's (PW3) evidence in chief was that she was present when the Plaintiff and the Defendant entered into sale agreement in respect of a portion of land parcel number Nzai/Mumbuni/578 in the year 2004.

12. She said that the Defendant was informed that the land belonged to her late father in law, Masika Ndolo. She pointed out that the agreement provided for a refund of 230,000 to the Defendant either by the Plaintiff, herself or their children.
13. Waita Mutava's (PW4) evidence in chief was similar to that of Masila Mutava (PW1) in that he told the court that he was aware of the sale agreement between the Plaintiff and the Defendant. He said that the Defendant advanced Kshs. 115,000 to the Plaintiff.
14. His evidence in cross-examination was that he did not sign the agreement in question.
15. The Defendant's case was that he bought two (2) acres of land from the Plaintiff at a price of Kshs. 70,000 on the 24th July, 2004. He said that the sale agreement was signed by himself and the Plaintiff with Regina Mutindi Mutava (PW3), Benedetta Mumbua Nzangi (DW1), Dominic Kikuvi Mbithuka and Joseph Ngingila Masila (PW2) witnessing it.
16. The Defendant produced the 4 sale agreements and their translations as Dex No. 1 to 4 respectively.
17. The defendant called two witnesses. They were Benedetta Mumbua Nzangi (DW1) and Dominic Kikuvi Mbithuka (DW2).
18. His evidence in cross-examination was that the first agreement indicated that the refund of the purchase price would also include interest of shilling for a shilling every month. He added that he did not decline to take the money that the Plaintiff offered him.
19. Benedetta Mumbua Nzangi's (DW1) evidence in chief was that she witnessed the sale agreement between the Plaintiff and the Defendant in respect of two (2) acres of land at a price of Kshs. 70,000 on the 24th July, 2004. She went on to say that on the 2nd August, 2005, the Defendant bought half (1/2) an acre of land from the Defendant at a price of Kshs. 20,000. She disclosed that the Defendant paid the Plaintiff Kshs. 15,000 and the balance of Kshs. 5,000 was to be paid on or before 30th October, 2005. She went on to say that the Defendant bought another half (1/2) acre of land from the Plaintiff on 21st April, 2006 at a price of Kshs. 25,000 which amount the Defendant paid in full.
20. Dominic Kikuvi Mbithuka's (DW2) evidence in chief was that he is a village elder who on the 24th July, 2004 witnessed a land sale agreement between the Plaintiff and the Defendant. He said that the two showed him the land that was the subject of the agreement.
21. The Plaintiff and the Defendant filed their submission on the 13th March, 2018 and 6th March, 2018 respectively. The Plaintiff reviewed the evidence on record and urged the court to find that he had on a balance of probabilities proved his case against the Defendant. On the other hand, the Defendant urged the court to dismiss the Plaintiff's case with costs.
22. The issues for determination are in my view the following;
- Whether or not the sale agreements between the Plaintiff and the Defendant are valid.
 - Whether the selling of a deceased's property prior to the filing of succession cause offends the provisions of section 45(1) of the Law of Succession Act.
23. From the evidence on record it is clear that the Plaintiff and the Defendant did not apply to the Land Control Board of the land control area where the land is situated within six months of the making of the agreements as is provided for under section 8(1) of the Land Control Act Chapter 302 of the Laws of Kenya. There is no evidence of either party having approached the High Court for the extension of the period to seek consent from the Land Control Board.
24. As such, the agreement by the two parties are void and in any case, I doubt whether or not any Land Control Board would have given consent to such a transaction in the absence of letters of administration. Section 45 of the Law of Succession Act chapter 160 bars intermeddling with the property of a deceased person. In the case of ***RE ESTATE OF M'NGARITHI M'MIRITI [2017] ECLR*** the court as guided by the observations of the Court of Appeal in the case of ***BENSON MUTUNGI MURIUNGI VS CEO OF KENYA POLICE SACCO & ANOTHER [2016] eCLR*** defined what would constitute intermeddling as,
- “Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law of grant of representation to do so.**
- The category of offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of exchanging or receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens for charge or mortgage of the free property of the deceased are also acts of intermeddling in law.**
- I reckon that intermeddling with free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or a fine or both under section 45 of the law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) or protection of the estate of any persons”***
25. Section 45(1) of the Law of Succession Act provides as follows;

“No intermeddling with property of deceased person

Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

26. It is therefore clear that the Plaintiff was not a personal representative of the estate of his late father. He could not purport to sell a portion of Nzaui/Mumbuni/578 that belonged to his late father to the Defendant. His act together with the Defendant’s act of taking up possession of the portion of land that he allegedly bought from the Plaintiff amounted to intermeddling with the property of deceased person. In the circumstances, the defendant is entitled to get a refund of Kshs. 230,000 as prayed in paragraph 12(a) of the plaint.

27. The Defendant has admitted in paragraph 3 of his defence the averments in paragraph 6 of the plaint regarding the issue of refund. Even though he has alluded to fraud, no particulars of the said fraud were particularised in the defence.

28. Arising from the above, I am satisfied that the Plaintiff has a cause of action against the Defendant. However, neither he nor the Defendant are entitled to costs of the suit as the two willingly intermeddled with the suit property. I, therefore, proceed to enter judgment for the Plaintiff and against the Defendant in terms of prayers (a) and (b) of the plaint. Each party to bear his own cost.

Signed, dated and delivered at Makueni at this 3rd Day of May, 2018

MBOGO C.G

JUDGE

In the presence of:

1. Plaintiff
2. Defendant
3. Mr. Kwemboi

MBOGO C.G, JUDGE

3/5/2018