



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 134 OF 2014

WENIMWANA PROPERTIES HOLDINGS CO. LTDPLAINTIFF

VERSUS

JAVAN RANGOMA & 5 OTHERS..... DEFENDANTS

CONSOLIDATED WITH MOMBASA ELC NO 130 OF 2016

(FORMERLY VOI NO. 1 OF 2015)

JAVAN RANGOMA & 4 OTHERS PLAINTIFFS

VERSUS

WENIMWANA PROPERTIES HOLDINGS CO. LTD & 7 OTHERS.....DEFENDANTS

JUDGMENT

(Defendants having sold land to a partnership in the year 1985, receiving full payment and parting with possession, but declining to execute the transfer; suit by plaintiff to compel the defendants to execute the transfer; parallel suit by defendants seeking vacant possession; evidence showing that the defendants, as vendors, sold the land and received full payment; defendants thus no longer having any interest in the suit land; defendants not entitled to decline to transfer the suit land to the purchasers or the nominee of the purchaser; judgment entered for the plaintiff; defendants' counter suit dismissed)

PART I – INTRODUCTION AND PLEADINGS

1. This is a consolidated judgment over two related suits.

2. The first of the two suits is Mombasa ELC No. 134 of 2014 and was commenced through a plaint filed on 29 May 2014. The plaintiff in that case is a limited liability company and avers to have entered into an agreement with the defendants for the purchase of the land parcel LR No. 1956/329. It is pleaded that at the time of purchase, the plaintiff was a partnership known as Wenimwana Properties Partnership before incorporation into a limited liability company and that the purchase price of Kshs. 20,000/= was fully paid. It is pleaded that after the purchase, the defendants handed over vacant possession of the suit property together with the original title document and a consent to transfer dated 11 June 1993. It is pleaded that the plaintiff drafted the instrument of transfer and delivered the same to the defendants for execution but the defendants have failed to execute it. It is further pleaded that to facilitate execution of the instrument, the plaintiff offered the defendants an ex gratia payment of Kshs. 75,000/= which the defendants refused and instead demanded a sum of Kshs. 330,000/=. In the suit, the plaintiff asks for the following orders :-

(a) A declaration that the plaintiff is the bona fide owner of the parcel of land known as LR No. 1956/329.

(b) An order compelling the defendants to execute the instrument of transfer.

(c) In the alternative, an order authorising the Registrar of the High Court of Kenya, Mombasa to execute the transfer in favour of the plaintiffs.

(d) General damages.

(e) Costs and interest.

3. The defendants entered appearance and filed defence vide which they denied ever entering into any sale agreement with the plaintiff for the sale of the suit land. They also denied handing over the original title document or the letter of consent to transfer. They pleaded that if at all there was any sale agreement, the same was between them and Wenimwana Properties Partnership, which agreement was rescinded, as a result of breach on the part of the partnership. It was however admitted that the plaintiff is in possession of the property.

4. In the second suit, originally filed as Voi ELC No. 1 of 2015 and now Mombasa ELC No. 130 of 2016, the defendants in Mombasa ELC No. 134 of 2014 are the plaintiffs, and they have sued Wenimwana Properties Holding Company Limited and other individuals being Agatha Mwasi, Fulgence Mwashau, Mutemi Mwema, Jane Wanjiku, Geoffrey Mwadime, John Mwalume and Everlyne Nzale. In that case, the plaintiffs contend to be the registered owners of the suit property. They pleaded that the 1st defendant company has without justification collected the original title deed without their permission. They pleaded that the other individual defendants have invaded it and continue to occupy it without their authority. It is averred that they have been approached to formalize a tenancy agreement but they have refused to cooperate. In the suit, the plaintiffs seek orders to compel the defendants to release the title document to them, vacant possession, mesne profits at Kshs. 10,000/= per month, costs and interest.

5. The two matters were consolidated with the lead file being Mombasa ELC No. 134 of 2014.

PART II - PLAINTIFF'S EVIDENCE

6. PW-1 was Patrick Mwandaghoi. He had a witness statement which he fully relied on. In the same, he stated that he is a shareholder of the plaintiff company and one of the original partners of Wenimwana Properties Partnership. He stated that they had fully paid for the property before the partnership changed into a limited liability company. In the year 2007, he was among those involved in a series of meetings with the main agenda being to discuss the ex gratia payment to the defendants to facilitate signing of the transfer. He stated that in the meetings, it was agreed that they would pay the defendants Kshs. 75,000/= which they proceeded to deposit with their lawyers. He stated that this was rejected with the defendants demanding Kshs. 330,000/=.

7. Cross-examined, he stated that the plaintiff company was initially a partnership. This partnership was known as Wenimwana Partnership. He stated that they wrote a sale agreement dated 9 February 1985 to purchase the property. One of their partners Mr. Maganga was the only one who signed the sale agreement. He was Chairman of the Group at that time. The title deed was also given to Mr. Maganga and it was Mr. Maganga who paid the purchase price. He stated that the Group paid all Government dues. He stated that the defendants insisted that for them to transfer the land, the plaintiffs would need to make payment afresh, and thus the dispute. He stated that it was the Land Officer who gave Mr. Maganga the title deed after they showed him a copy of the sale agreement. Re-examined, he stated that they took possession in the year 1985 and they have never been given notice to vacate.

8. PW-2 was Victor Mzame Joseph. He also had a written statement which he adopted as his evidence. In that statement, he has stated inter alia that on 9 February 1985, the plaintiff entered into a sale agreement to purchase the suit land from the defendants. He stated that the agreement was in name of Wenimwana Properties, a partnership firm which has now been incorporated into the plaintiff. He stated that the purchase price of Kshs. 20,000/= was fully paid and vacant possession was handed over together with the original title deed and a letter of consent to transfer dated 11 June 1993. He stated that they drew the instrument of transfer but the defendants declined to sign it. They then offered an ex gratia payment of Kshs. 75,000/= which the defendants declined and demanded Kshs. 330,000/=. In his oral evidence in court, he testified that each defendant received Kshs. 3,333/=: thus Kshs. 19,999.80/= in total, which he rounded off to Kshs. 20,000/=. He stated that the plot was in Voi Town and possession was given immediately. At the moment, there are temporary kiosks on the land and they have tenants. They also pay the land rates and land rents.

9. Cross-examined, he stated that the 7 partners who bought the land were Edward Maganga, Patrick Mwandaghoi, Joyce Maghuwa, Faith Wanjala, Robinson Siku, Mariam Mgoi, and himself. He accepted that it is these who entered into a sale agreement with the defendants. He himself did not sign the sale agreement which was only signed by one of the partners. He was also not present when the agreement was signed. Neither was he present when the purchase price was paid. He was also not present when the title deed was given to them and he could not exactly tell when the same was handed over. He stated that they have four tenants on the property one being a posho miller who pays rent of Kshs. 15,000/=. Re-examined, he accepted that they filed the case after 25 years but he stated that this was because they were trying to settle the matter out of court.

10. With the above evidence, the plaintiff closed its case.

PART III - DEFENCE EVIDENCE

11. DW-1 was Walter Mcharo. He similarly had a statement which he relied on as his evidence in chief. In it, he stated inter alia that the group of seven persons, comprising of Wenimwana Properties Partnership, approached them to buy the suit property and they entered into an agreement. He stated that the parties later disagreed when the conditions for making the agreement were not followed and also by the fact that the purchasers refused to sign the agreement or pay the full purchase price. He stated that the company is a total stranger as they did not do any business with it. He stated that the company has collected the title deed without its knowledge. He stated that the agreement and voucher for payment was signed in good faith but when it came to actual payment of the agreed purchase price they only brought half the amount. He stated that they were taken aback as they had agreed that they would pay the entire amount and also come with evidence of payment of land rent from 1982 to 1985. He stated that Edward Magangha and his group took advantage of them having prior signed the sale agreement and the payment voucher to refuse to pay the entire purchase price. He stated that he is only aware of payment of Kshs. 10,000/= and that the purchaser refused to pay the balance and reneged on payment of land rent which he stated is now in excess of Kshs. 12,000/= since 1982. He stated that the purchaser fraudulently caused a change of name at the Municipal offices yet the property had not been transferred to them. He claims this was done with the help of the late Edward Magangha who was then Chairman of Voi Municipal Council. He mentioned that the property belongs to the six defendants though three have since died, being Javan Rongoma, Gladness Majala and Mr. Bigvai.

12. In his evidence in Court, he testified that the title is still in their names and they have never signed a transfer to the plaintiff. He stated that he has himself never received any money from the plaintiff.

13. Cross-examined, he conceded that 7 persons came with intention to buy the plot from them. He conceded that an agreement was put down into writing. He stated that no payment was received (though he had a statement mentioning payment of Kshs. 10,000/=). He was shown the payment voucher showing payment of Kshs. 3,333.30/= to each seller and affirmed that those were the signatures of the sellers. He conceded that they never wrote a letter cancelling the agreement and he gave reason that they were waiting for the balance of Kshs. 10,000/=. He denied that they voluntarily gave the original title deed to the plaintiff. He conceded that the plaintiff entered the land and they did not eject them. Neither did they report that they had unlawfully collected the title deed. He affirmed that they wanted to be added some more money so that they can sign the transfer.

14. Re-examined, he insisted that the agreement they had was with Wenimwana Partnership and not the plaintiff company, and that these two are different entities.

PART IV - SUBMISSIONS OF COUNSEL

15. I invited counsel to file submissions but only Mr. Oddiaga, learned counsel for the defendants, filed submissions. He inter alia submitted that no agreement was proved to demonstrate that the plaintiff purchased the suit property and that there was no proof of payment. He also submitted that the claim was time barred and cited Section 4 (1) (a) of the Limitation of Actions Act, which provides for a 6 year limitation period to enforce contracts. He submitted that the cause of action arose in the year 1985 and cited a couple of authorities on the same. He further submitted that no defence was filed in the suit Mombasa ELC No. 130 of 2016 by the individual defendants and that case was thus undefended.

PART V - ANALYSIS AND DECISION

16. I have considered the matter. In my view, the following issues are for determination :-

(i) Whether there was a sale agreement over the suit land ?

(ii) Was the agreement performed ?

(iii) Are the defendants entitled to the land ?

(iv) Is the suit time barred ?

(v) Is the plaintiff entitled to the land ?

17. The disputed land is LR No. 1956/329. The title to that land is in the name of Javan Zewa Rongoma, Bigvai Mzuga Mwazi, Francis Johnson Mwang'ombe, Walter Madedo Mcharo, Gladness Majala Mwasho, and Phoebe Kitawa, six persons in number. On whether there was a sale agreement, there is documented evidence of a sale agreement dated 9 February 1985, signed by all the above six persons as sellers with the buyer being Weni Mwana Properties Partnership. The agreement is signed by one person on behalf of the purchasers, and from the evidence, the person who signed was Edward Magangha. There is contention within this suit that there was no sale agreement but this document speaks for itself. The document is in black and white and it is an agreement for sale of the suit property vide which Javan Zewa Rongoma, Bigvai Mzuga Mwazi, Francis Johnson Mwang'ombe, Walter Madedo Mcharo, Gladness Majala Mwasho, and Phoebe Kitawa sold the property to Weni Mwana Properties Partnership. That disposes of the first issue, of whether or not there was a sale agreement.

18. The second issue is whether the agreement was performed. That agreement stipulates that the purchase price is Kshs. 20,000/= and that the buyer will also meet the land rent and rates and any other cost in connection with the transfer of the property. There is of course the argument raised that the purchase price was not paid. The plaintiff has availed a payment voucher dated 9 February 1985 that shows that it was signed by all the six sellers, each receiving a sum of Kshs 3,333.30/= thus Kshs. 19,999.80/- and 0.20 cents being assigned to miscellaneous expenses. I am aware that within this suit, the defendants claimed that only Kshs. 10,000/= was paid. There is absolutely no evidence to buttress this contention. The documented evidence shows full payment of the purchase price of Kshs. 20,000/=. The purchasers were of course to pay Government fees so that the property can be transferred to them, but that cannot be an issue for the seller to raise. My finding is that the purchasers fully performed their obligation to the sellers.

19. Can the defendants now claim the land? Now, if there is evidence of a documented sale agreement, and evidence of full payment of the purchase price, I wonder what issue the defendants have with the plaintiff. They sold their land and they got full compensation/payment for the sale. There is consensus that they also parted with possession of the suit property immediately the sale agreement was entered into. I really do not see the basis of their claim that there are trespassers on the suit land for it is no longer their land. The only thing that has not been formalised is the transfer, but once they sold the property, received payment, and handed over possession, their rights to the land got extinguished. I do not see how the defendants can now claim the land as they no longer have rights over it. I see no basis for the suit where they are plaintiffs and their claim must be dismissed. I am aware that Mr. Oddiaga argued that there is no defence filed to that suit. It really doesn't matter because the plaintiff has filed suit seeking title to the same land and by that fact the issues in the two suits are joined so that one suit can very well be considered a defence to the other. I reiterate that having sold the land and having received the full purchase price, the defendants cannot be said to still retain an interest in the land.

20. Is the case of the plaintiff time barred? The way I see it is that it is in fact the defendants who are barred by limitation from bringing a suit. If at all they wished to have set aside the sale agreement of 1985, they needed to come to court at the latest within 12 years, which is the limitation period for a claim of land pursuant to Section 7 of the Limitation of Actions Act, CAP 22, Laws of Kenya which provides as follows :-

7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

21. If at all the defendants had any right to recover the land, that right accrued immediately they entered into the sale agreement and parted with possession of the land. If they wanted to claim back the land, then they needed to have filed suit within 12 years of that time. Their suit was filed on 27 January 2015 about 30 years since the sale agreement and the time they parted with possession, which was the year 1985. It is not the plaintiff who is time barred but the defendants.

22. The last issue is whether the plaintiff is entitled to the land. As I have elaborated earlier, the defendants sold the suit land and now they no longer have any rights to it. The persons they sold the land to (a partnership) approached the defendants so that the defendants can transfer the land to the company that they have now incorporated. That company is the plaintiff company. Having found that the defendants have no right to the suit land, the defendants have no basis upon which to decline to transfer the land to the plaintiff. It appears to me that the defendants are a greedy lot. Despite selling the land to the plaintiffs, they want to use the fact that the transfer is yet to be effected so as to squeeze out more money from the purchasers. I am afraid that they cannot succeed. Once a party has entered into a sale agreement to sell property, and the purchaser has fully paid, then the seller can no longer have an interest in the property and cannot assert that he/she deserves to be paid more money to effect transfer. The defendants have absolutely no reason to refuse transferring the suit property to the plaintiff. Having found that the defendants no longer have an interest in the land, why shouldn't the defendants be compelled to transfer the suit property to the plaintiff? The plaintiff is the successor of the partnership that purchased the suit property. I am aware that the defendants raise heavy weather of saying that they never sold the suit property to the plaintiff, but this to me, in the circumstance of this case is neither here nor there and is clearly a red herring. The defendants are not refusing to transfer the property to the plaintiff, for reason that they did not have a sale agreement with the plaintiff, and indeed, the defendants are not saying that they are willing only to transfer the property to the partnership and not to the company. The defendants do not want to transfer the property at all. They do not want to transfer the property to the persons that they sold the land to or to their nominee but what they want is to renege from the sale transaction absolutely. I have already held that this cannot be allowed. One can opt to go technical in stating that the plaintiff cannot sustain such suit because she was not privy to the sale agreement but it will serve absolutely no purpose. It would only have served purpose if there were grounds to hold that the defendants are not bound by the sale agreement and still have a residual interest in the land. I have already found that the defendants are bound by the sale agreement and have no residual interest in the suit land. The partnership that bought the land has morphed into the plaintiff company. I have no reason to refuse a transfer to the plaintiff company.

23. Given the above, I find that the plaintiff is entitled to have the suit property transferred to it. There is no need to engage the defendants any more on the transfer since they have been obstinate about it. In any event many of the original sellers are since deceased. The best order to make in the circumstances herein is to order the Deputy Registrar to execute the transfer instrument transferring the suit property to the plaintiff. I hereby make that order. The plaintiff will also have the costs of the two suits.

24. Judgment accordingly.

DATED AND DELIVERED THIS 20TH DAY OF MAY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA