



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 110 OF 2017

ZEPHANIA KHISA SAUL.....PLAINTIFF

VERSUS

THE SCHOOL COMMITTEE

ST. ANNE'S SECONDARY SCHOOL.....DEFENDANT

JUDGMENT

1. By a plaint dated **21/6/2017** and filed in court on the same date the plaintiff sought the following orders against the defendant:-

(a) **An eviction order against the defendant, their agents/or servants from part of the said parcel of land known as Kakamega/Mabusi/424 measuring approximately 0.31 hectares.**

(b) **A permanent injunction restraining the defendant, their agents and/or servants from trespassing upon and/or committing any acts upon the said parcel of land known as Kakamega/Mabusi/424 measuring 0.31 hectares.**

(c) **Costs.**

(d) **Interest at court rates form 21/3/20109 till judgment and until payment in full.**

(e) **Any other relief this court may deem just to fit to grant.**

The Plaintiff's Case

2. According to the plaint the plaintiff was the owner of land known as **Kakamega/Mabusi/424** measuring **0.31 hectares**. On **21/3/2007** the plaintiff and the defendant agreed to have a water project established in the plaintiff's land and half acre portion of land was carved out of his land in favour of the school which was to pay a consideration of **Kshs.600,000/=** for the land before the commencement of the said project. The plaintiff acknowledges in his plaint that the defendant paid **Kshs.350,000/=** as a down payment. The balance however remains unpaid to date despite several demands having been served upon the defendant. By reason of the default the plaintiff seeks orders of eviction of the defendant from land parcel **Kakamega/Mabusi/424** and alternatively payment of the balance of the purchase price. I find a discrepancy in the plaint in that whereas consideration is said to be **Kshs.600,000/=** at paragraph 4 and the down payment already received by the plaintiff to be **Kshs. 350,000/=** the plaintiff seeks payment of the balance which he computes at **Kshs.300,000/=**; the same mistake is repeated in the plaintiff's statement; in my view simple arithmetic shows the balance to be **Kshs.250,000/=**.

The Defendant's Defence and the Reply to Defence

3. The defendant filed its defence on **18/3/2019** and amended it on **20/2/2020** to include further statements and a counterclaim. In that defence and counterclaim the defendant admits that the plaintiff is the registered proprietor of the suit land known as **Kakamega/Mabusi/424**. It also avers that the suit is fatally defective; that it offends the **Limitation Of Actions Act Cap 22**; that the plaintiff agreed to sell the defendant **1 /2** acre of land from **Kakamega/Mabusi/424**; that the suit property was valued at **Ksh 350,000/=** which was paid to the plaintiff in full; that the defendant rightfully took possession of the suit land in **2007** and that the plaintiff ought to be compelled to transfer the suit parcel to the defendant to be registered in its name.

Reply to defence and counterclaim.

4. On **5/3/2020**, the plaintiff filed a reply to defence and counterclaim denying the matters set out therein and sought an order compelling the plaintiff to transfer the half acre portion out of land parcel **Kakamega/Mabusi/424** to the defendant as well as costs.

The Plaintiff's Evidence

5. The suit came up for hearing on **24/2/2021**, when **Zephania Khisa Saul**, the plaintiff testified. His evidence is that the defendant school approached him for a source of water; he told it that the price would be **Ksh 600,000/=** being for the well and the developments around it; that he rejected the school's offer of **Ksh 300,000/=**. That he needed **Ksh 50,000/=** being the development costs and **Ksh 10,000/=** being the cost of the vegetables on the land; that on the day the parties disagreed on the price in the year **2007**, the defendant school moved into the suit land; that the plaintiff demanded that the school vacates the land; that the school stated that they would like a valuation of the land and the developments and they came to **Ksh 230,000/=** for the land and **Ksh 120,000/=** for the well; that the plaintiff rejected that valuation and sent a letter dated **14/5/2007** saying so; that the ministry of water officials conducted the valuation; that on **2/2/2007** the plaintiff wrote another letter objecting to the schools entry onto the suit land; that the school then offered him **Ksh 300,000/=** but he refused the offer; that subsequently it was suggested a politician be invited to conduct a *harambee* to raise the money required but the fundraiser never took place. The plaintiff testified that the parties herein never executed any agreement and that the plaintiff never took the defendant to the land control board for consent to the transaction.

The defendant's evidence.

6. The hearing of the defence case took place on the **22/04/2021**. **Pamela Everes Obuda** testified as **DW1**. She adopted her statement dated **20/02/2020** as her evidence-in-chief. Her evidence is that she is the principal of the 2nd defendant and the secretary to the defendant's board of management. She admitted to knowing the plaintiff who sold land to the Ministry of Water Kakamega in **2007**. When she took over the school in **2017**, she was informed that the plaintiff had a claim that the school did not pay for the suit land; that the land had been valued at **Ksh.250,000/=** but the plaintiff sought compensation for the developments on the land and was paid as per the letter dated **21/03/2007** which showed the value to be **Kshs. 230,000/=**; the developments were valued at **Ksh. 120,000/=** to make the value **Ksh. 350,000/=**.

7. **DW1's** further evidence was that the 2nd defendant was just a beneficiary of the agreement between the plaintiff and the Ministry Of Water; that the minutes dated **19/03/2007** showed the events that transpired and the various institutions that get water from the suit property; that the agreement dated **19/03/2007** shows that the plaintiff claimed for more money; that he was not given the **Ksh. 600,000/=** he was claiming; that by the minutes dated **21/03/2007**, the plaintiff and his son agreed to receive **Ksh. 300,000/=**; that he also asked for **Ksh. 10,000/=** for planted vegetables and the employment of his son in the school; that no receipt was given for the **Ksh. 350,000/=**; that the plaintiff never opposed the construction of the various water developments on the suit property; that he has not surrendered the title deed for the **0.5** acres. That she did not have the agreement between the plaintiff and the school and neither did she have any mutation forms, LCB consent application and letters of consent.

8. **Mary Naiya Ogina** testified on **8/06/2021** as **DW2**. She adopted her witness statement dated **20/02/2020** as her evidence-in-chief. While reiterating **DW1's** testimony, her evidence is that she is the chairlady of the board of management of the 2nd defendant since **2019**; that the plaintiff sold to the 2nd defendant half an acre of the suit property which was paid for by the government in **2007** and that the consideration was **Ksh. 350,000/=**.

Determination

9. I find that the plaintiff has established that he has title for the whole of the suit land.

10. The only issue that this court must determine is whether the orders sought by the plaintiff are deserved, that is, order of eviction and a permanent injunction restraining the defendant from trespassing upon the suit land. In doing this the place of the alleged agreement between the parties must be considered.

11. There is also an alternative prayer for payment of balance of purchase price of **Kshs. 300,000/=** but this is contained in the body of the plaint rather than in the prayers. I must concentrate on the prayers as expressly stated in the "prayers" section of the plaint.

12. I have noted that the defendant is a public institution which apparently negotiated with the plaintiff for the sale of the suit land to it. This appears to have been a direct transaction between the parties herein and not a land acquisition process by the government on behalf of the school.

13. I do not find any express agreement for sale exhibited by either the plaintiff or the defendant even in a bundle of their documents. The plaintiff's exhibits, and especially the minutes, show that there was discord between the parties as to the quantum of the purchase price for the suit land. Even though the plaintiff avers that there was an agreement and that he was paid part of the purchase price there is no evidence of such an express agreement. Without that express agreement it is not possible to grant the alternative prayer for payment of the balance of the alleged purchase price.

14. **Paragraph 8** of defence dated **15/3/2019** admitted the agreement between the parties whereby the plaintiff was to sell half an acre of land to the defendant out of the land known as **Kakamega/Mabusu/424**.

15. There is evidence that the defendant took possession of the land and developed it extensively. It appears that the Ministry of water was involved in this crucial process that was to supply the defendant school with water for use by the school community.

16. The government valuer was asked to assess the value of the land and he put it at the amount that the defendant claims to have paid to the plaintiff but the plaintiff claims to have been absent at the valuation.

17. It is stated in **DExh 4** which is the official record of the events that the plaintiff took **Ksh 350,000/=** assessed as the value of the property but still sought more money from the defendant. In the minutes dated **21/3/2007** it is indicated that after discussions the plaintiff accepted to

sell the half acre of land for **Ksh 300,000/=** but asked to be paid **Ksh 10,000/=** in respect of the vegetables on the land and that his son be considered for employment in the school.

18. Minutes dated **27/8/2008 (DExh 8)** and the photographs **DExh 10 (a) – (f)** show that developments on the half acre bought by the defendant had been effected by that year which in this court's view are quite extensive. In the said minutes it is indicated that one **Naftali Khisa** was hired to take care of the equipment at the site with a caveat that it was a temporary employment and that the community should sit and decide on whom to employ for the position. Though the plaintiff is recorded as having attended that meeting he appears not to have raised any complaint. It is therefore credible as recorded in **DExh 5** that the plaintiff accepted to sell the half acre of land for **Ksh 300,000/=** but asked to be paid **Ksh 10,000/=** in respect of the vegetables on the land and that his son be considered for employment in the school.

19. It is not disputed that the plaintiff took the money that was offered and allowed the taking up of possession by the defendant. The plaintiff can not say that he was not aware of the defendant's protest that it could not afford to pay more for the land as per the plaintiff's demands since that was the official government valuation had fixed the value of the land and the developed spring at **Ksh 350,000/=**.

20. I find that had the plaintiff been minded to reject the project and the sale he should have rejected the money offered or refunded the same and prevented the taking up of possession of the land. The agreement in respect of the land, in whatever format, was acted on by both parties and the status of the land was altered considerably by the defendant for a public purpose.

21. In this court's view the parties concluded the sale and the plaintiff has only changed his mind and decided to revive his claim for more funds which is untenable. The defendant does not owe the plaintiff any money as consideration for the sale of the land.

22. This court finds that the plaintiff's claim has no merit and that the defendant's counterclaim has merit.

23. Consequently the plaintiff's has failed to prove his claim on a balance of probabilities while the defendant has proved its counterclaim on a balance of probabilities.

24. Judgment is therefore entered for the defendant on its counterclaim and the following orders are hereby issued:

a. The plaintiff's suit is hereby dismissed.

b. The defendant's counterclaim is allowed.

c. The plaintiff shall cause subdivision of transfer half an acre of land out of Kakamega /Mabusi/424 on which the school water project is located to the Permanent Secretary to the Treasury to hold in trust for the defendant.

d. In default of the subdivision and transfer by the plaintiff mentioned in order no (c) above the Deputy Registrar of this court shall execute all necessary documents to effect the subdivision and transfer of the half acre portion as ordered.

e. The plaintiff shall bear the costs of the main suit and the counterclaim.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 30TH DAY OF SEPTEMBER, 2021.

MWANGI NJOROGE

JUDGE, ELC