



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISHI

ELC CASE NO 139 OF 2014

JOASH ONGWAE MAKORI.....PLAINTIFF

VERSUS

RONALD ISABOKE OMWENGA.....1ST DEFENDANT

JOHN NTABO NYAKWAYE.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 27th March, 2014 seeking the following reliefs:

- a) A declaration that the Plaintiff is the rightful owner of land parcel number WANJARE/BOGITAA/5724 (hereinafter referred to as the suit property).
- b) An order of reversion and cancellation of transfer and registration of the suit property in the names of the 1st Defendant and in the alternative, damages against the Defendants for the true value of the suit property.
- c) A permanent injunction restraining the Defendants either by themselves, their agents/servants from entering upon or otherwise interfering or dealing howsoever with the suit property.
- d) A declaration that the 1st Defendant is holding the suit property in his trust.
- e) Any other relief as the Honourable Court may deem fit and expedient to award.

2. In his Plaint the Plaintiff avers that on 16th September, 1998 he entered into a sale agreement with one Andrew Atandi Matundura for the sale of a portion of LR. No. WANJARE/BOGITAA/808 (hereinafter referred to as the original parcel) measuring 30m by 166m. The said parcel was registered in the name of Nyakwaye Maiyeka (deceased).

3. The Plaintiff further avers that the said Andrew Atandi Matundura had purchased the said parcel from the 2nd Defendant who is the son of the late Nyakwaye Maiyeka. He states that he entered into a second agreement with the 2nd Defendant wherein, he (the 2nd Defendant) recognized the agreement between the Plaintiff and Andrew Atandi Matundura and agreed to transfer the land to the Plaintiff upon the completion of the succession cause in respect of the estate of his late father.

4. The Plaintiff further avers that after the purchase of the suit property he has continuously and without interruption occupied the same for a period of more than 12 years. He states that on 11th July, 2013 after the sub-division of the original title, he was issued with a title deed in respect of parcel No. WANJARE/BOGITAA/5654 indicating that his property measures 0.30 Ha which is far less than the property he occupied. The remaining portion known as LR WANJARE/BOGITAA/5724 which is the suit property herein was registered in the name of the 1st Defendant.

5. The Plaintiff contends that the registration of the suit property in the name of the 1st Defendant was unlawful and fraudulent considering that it was part of the land he had purchased. He states that due to the Defendants' fraudulent acts and omissions, they have unlawfully deprived him of the suit property and he has suffered loss.

6. The 1st Defendant filed a statement of Defence dated 8th May, 2014 in which he denies the Plaintiff's claim. He states that he was not party to the two agreements the Plaintiff alleges to have entered into concerning the suit property. He denies the Plaintiff's claim that he has

been in continuous occupation of the suit property for a period of more than 12 years and states that the Plaintiff has in fact been in occupation of land parcel NO. WANJARE/BOGITAA/5654 which is registered in his name. It is 1st Defendant's contention that the suit property was registered in his name on 25th January, 2013 while parcel 5654 was registered in the Plaintiff's name on 30th July, 2013, 7 months later. He denies that the registration of the suit property was procured through fraud.

7. The 1st Defendant denies that he has trespassed into any part of the Plaintiff's property. It is his contention that if the Plaintiff had any issue with the measurement indicated in his agreement and on the ground he ought to have resolved the same with the parties to the two agreements.

8. The matter came up for hearing on diverse dates and both parties testified and called their witnesses.

PLAINTIFF'S CASE

9. The Plaintiff who testified as PW1 relied on his witness statement and urged the court to adopt same as his evidence in chief. He told the court that he purchased a parcel of land from one Andrew Matundura Atandi vide a sale agreement dated 16th December, 1998. The said Andrew Matundura Atandi informed him that he had bought the land from the 2nd Defendant. He produced the said agreement as Plaintiff's Exhibits 1 (a) and (b). He stated that Andrew Atandi later took him to the 2nd Defendant in 2002 and he entered into an agreement with the 2nd Defendant dated 12th June 2002. He produced the said agreement as Plaintiff's Exhibit 2. He stated that they measured the property and found it to be 166m by 30m. He testified that he took possession of the property until 2014 when the 2nd Defendant sold part of the land to the 1st Defendant. He testified that afterwards a title deed was issued to him for land parcel No. WANJARE/BOGITAA/5654 measuring 0.30 Ha. He stated the same was less than what he bought since the land he purchased included the suit property now registered in the name of the 1st Defendant which measures 0.36Ha that the 1st Defendant allegedly bought from the 2nd Defendant.

10. He testified that he visited the land registry where he found a mutation form dated 7th October, 2011 for land parcel number 3824 registered in the name of the 2nd Defendant which had produced parcels numbers 5723, 5724, and 5725. He established that his land was from the mutation form for parcel No. 5723 which had produced parcels numbers 5652-5655. He claimed that the mutation form for parcel no. 5723 appeared to be fraudulent as it had been written as 3824 at first and then cancelled. It was his testimony that by the time he filed this suit the 1st Defendant had forcefully entered into the suit property and planted trees thereon. He thereafter engaged a Surveyor who gave a report that his land went beyond the road and that the Defendant had occupied part of his land which was on the upper side of the road.

11. The Plaintiff called Mr. Benard N. Ogari as PW2. Mr. Ogari was the Advocate who drew the agreement dated 12th June, 2002 between the Plaintiff and the 2nd Defendant for the original parcel No. WANJARE/BOGITAA/808. He confirmed that the sale was for a portion measuring 30m by 166m at a consideration of 65,000 which portion had already been sold to Andrew Matundura Atandi. He confirmed that the parties signed the agreement and he attested their signatures.

12. Upon cross-examination, he confirmed that he explained to the parties the terms of the agreement. He also confirmed that he was aware that there was an alteration on the agreement with regards to the measurements. He explained that the alteration had been done before the agreement was executed but he did not countersign the same.

13. He also confirmed that at the time the parties entered into the sale agreement the suit property was registered in the name of the 2nd Defendant's father and the 2nd Defendant had in the said agreement undertaken to pursue succession upon completion of the sale.

14. He conceded that legally, the property of a deceased person cannot be sold before a Grant of Letters of Administration is issued in respect of the estate of the deceased. He told the court that despite having stated that the property had been sold to Andrew Matundura Atandi, he did not get to see the agreement between Andrew and the 2nd defendant. He stated that he did not know whether the parties had attended the Land Control Board for purposes of obtaining consent.

DEFENDANT'S CASE

15. Ronald Isaboke Omwenga, the 1st Defendant testified as DW1. He relied on his witness statement as his evidence in chief. In his testimony he stated that he was the registered owner of land parcel number WANAJARE/BOGITAA/5724 and that the same did not form part of the Plaintiff's land. He testified that he bought the suit property from John Ntabo Nyakwaye, (2nd Defendant) in 2011 at consideration KShs. 120, 000 pursuant to a sale agreement dated 9th December, 2011 drafted by Mr. Ombati, Advocate. He stated that the suit property was a sub-division of parcel number 3824 which was registered in the name of the 2nd Defendant. He said that he had established this after conducting an official search.

16. He confirmed that the suit property was later transferred to him and he was issued with a title deed. He produced the said title deed together with a current official search certificate and a mutation form for parcel 3824 as his exhibits. He also produced minutes of the surveyors visit to the suit property dated 23rd January, 2013.

17. He testified that after he completed the transaction and the property was transferred to him, he took possession of the suit property and planted trees thereon. He stated that after he took possession of the suit property, he received a call from the area Chief who informed him that he had received a report that Joash Ongwae Makori (the Plaintiff) had complained that he had taken his land. He told the court that the Chief advised both of them to engage the District Surveyor to determine the boundaries of their respective land parcels. Thereafter that District Surveyor visited the land in question in the presence of all parties on 23rd January, 2013 and established that the suit property belonged to him.

18. Upon cross examination, he stated that the 2nd Defendant had informed him that he had sold lower side to the Plaintiff. He also confirmed that through the advice of the chief the parties engaged a surveyor who in turn confirmed that he had not encroached on the Plaintiff's land.

19. John Ntabo Nyakwaye (the 2nd Defendant) testified as DW2. He urged the court to adopt his witness statement as his evidence in chief. He testified that he knew the Plaintiff through Andrew Matundura Atandi . He testified that his parcel was number 3824 and he had sold part of it to Andrew Matundura Atandi and the other part to Ronald Isaboke Omwega (1st Defendant). He stated that he later transferred the suit property (5724) to the 1st Defendant.

20. It was his testimony that the two properties were divided by a road. Andrew bought the lower part of the road while the 1st Defendant bought the upper side of the road. It was his testimony that Andrew later sold his portion to the Plaintiff but while doing so, they did not engage the Surveyor. Further it was his testimony that the Plaintiff later brought a Surveyor who identified his portion and issued him with title (5724). He confirmed that that each party had a title deed and the 1st Defendant had not encroached into the Plaintiff's land.

21. During cross examination the 2nd Defendant stated that he was a witness to the sale agreement between Andrew and the Plaintiff since Andrew had informed him that he intended to sell his portion of land to the Plaintiff.

22. He told the court that he had stated in his witness statement that he was duped into witnessing the sale agreement and the transfer form transferring the suit property to the Plaintiff. He confirmed that Andrew paid him the balance of the purchase price from the proceeds he obtained from the Plaintiff and that by the time the transfer was taking place Andrew did not owe him any money.

23. In re-examination, he stated that he did not confirm the measurements of the portion sold to the Plaintiff and all he knew was that his portion was on the lower side of the road.

24. After the close of the Defendants' case and the court directed the parties to file their respective submissions. The Plaintiff filed his submissions on 25th March, 2021 while the 1st Defendant filed his submissions on 24th May, 2021.

ISSUES FOR DETERMINATION

25. Having considered the pleadings, oral testimonies and documentary evidence as well as the written submissions filed by counsel for both parties, the issues that emerge for determination are;

- a) Whether land parcel number WANJARE/BOGITAA/5724 forms part of the Plaintiff's land.
- b) Whether the 1st Defendant acquired the suit property through fraud.
- c) Whether the Plaintiff is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

26. It is common ground that the Plaintiff and the 1st Defendant bought portions of land that initially belonged to the 2nd Defendant. However, the Plaintiff alleges that land parcel number **Wanjare/ Bogitaa/5724** which is registered in the 1st Defendant's name forms part of the property that the Plaintiff had bought from one Andrew Matundura Atandi who in turn bought the same from the 2nd Defendant. The Plaintiff therefore alleges that the 1st Defendant acquired his title by way of fraud.

27. Learned counsel for the Plaintiff submitted that there was a valid written agreement executed on 16th September, 1998 between the Plaintiff and one Andrew Matundura and later acknowledged by the 2nd Defendant vide another agreement executed by both the Plaintiff and the 2nd Defendant and witnessed by Andrew on 12th June, 2002. He submitted that the said agreement clearly indicated that Plaintiff bought a parcel of land measuring 30m by 166m. He argued that parties are bound by the contract they entered into. It was his contention that even though the 2nd Defendant denied that the property measured 30m by 166m; he was bound by the contract he had executed. He submitted that since the agreement was executed by both parties the same was valid and should be enforced in favor of the Plaintiff.

28. It is the Plaintiff's evidence that he bought land from Andrew Matundura and the only reason the 2nd Defendant signed the agreement dated 12th June 2002 was because the land was still registered in the name of the 2nd Defendant's late father. The Plaintiff by his own admission has conceded that he entered into an agreement with the 2nd defendant who did not have capacity to enter into the said agreement before obtaining a Grant of Letters of Administration in respect of his late father's estate. Section 45 of the Law of Succession Act prohibits dealing with the property of deceased person before obtaining a Grant of Letters of Administration as this amounts to intermeddling with the estate of a deceased person. The said contract is therefore not legally enforceable.

29. Apart from the sale agreement produced by the plaintiff which indicates that he bought a parcel measuring 30m by 166m there is no evidence to show that the plaintiff confirmed the area of the land he was buying from the said Andrew Matundura. It was not until 2013 that he claims to have realized that he was shortchanged. His claim that he had been in occupation of a parcel measuring 30m by 166m for a period of 12 years is not corroborated by any witness. He did not call Andrew Matundura or the area Chief one Bernard Maiko to confirm that he had indeed been occupying the portion he claims. The fact that the 1st Defendant obtained his title before the Plaintiff does not help his case. According to section 25 of the Land Registration Act, 2012 the registration of the 1st Defendant as the owner of land parcel no. Wanjare/Bogitaa/5724 conferred on him absolute and indefeasible ownership of the said title subject to the encumbrances, easements and

restrictions contained in the certificate. It is therefore my finding that land parcel no. Wanjare/Bogitaa/5724 is separate and distinct and does not form part of the Plaintiff's land.

30. With regard to the question of fraud, it is trite law that fraud must not only be pleaded and particularized but it must be strictly proved.

In the case of *Urmila W/o Mahendra Shah –Vs- Barclays Bank International Ltd & Another (1979) KLR 76*, the Court held that: -

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required.”

31. Further in the case of *Davy -Vs- Garrette (1878) 7 ch.473 at Pg 489*, the Court held that: -

“In the common law courts, no rule was more clearly settled than that fraud must be distinctly proved and that it was not allowable to leave fraud to be inferred from the facts...”

32. The legal basis for the burden of proof is found in section 107 of the Evidence Act which provides that any person who desires any court to give judgment as to any legal right or liability dependent on the existence facts which he asserts must prove that such facts exist. Additionally, section 109 of the Evidence Act provides that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person

33. Though the Plaintiff alleged fraud on the part of both the defendants herein, he failed to discharge the burden of proof through cogent evidence. There was no evidence led by the Plaintiff herein to prove the allegations of fraud especially on the part of the 1st defendant who is the registered owner of the suit property.

34. The Plaintiff did not adduce any evidence to show that the 1st Defendant obtained his title unlawfully or unprocedurally and he is therefore deemed to be a bona fide purchaser for value. The Plaintiff did not lead sufficient evidence to prove the particulars of fraud against the 2nd Defendant. While he stated in his plaint that the 2nd Defendant received money from the Plaintiff, it is clear that the purchase price was paid to Andrew Matundura.

35. Having considered the pleadings, oral and documentary evidence, submissions and the law as well as authorities cited to me, it is my finding that the Plaintiff has failed to prove his case on a balance or probabilities and the same is hereby dismissed. As submitted by counsel for the Plaintiff the parties herein are neighbours and will continue living side by side. In the circumstances, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF NOVEMBER, 2021.

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J.M ONYANGO

JUDGE