



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 373 OF 2017

JOHN KAVILI NGUI.....PLAINTIFF

VERSUS

MUTINDA NGUI.....DEFENDANT

JUDGEMENT

1. By his plaint dated 08th December, 2017 and filed in court on 11th December, 2017 the Plaintiff prays for judgement against the Defendant jointly and severally for: -

a) An order that the Defendant hand over to the Plaintiff all the original ownership documents for parcel known as KISAU/NGONI/924 and all required completion documents to enable transfer of the property to the Plaintiff.

b) In the alternative a declaration that parcel known as KISAU/NGONI/924 belongs to the Plaintiff and an order to the relevant Land Register to register the same in the name of the Plaintiff.

c) Costs of the suit and interest.

2. The Plaintiff has averred in paragraphs 3, 4, 5, 6, 7 & 8 of his plaint that at all material times to this suit, the Defendant was the absolute and indefeasible owner of land parcel number Kisau/Ngoni/924 (hereinafter referred to as suit property). That by an agreement dated 07/04/2000 made between him and the Defendant, the latter sold the suit property to him at a purchase price of Kshs.30,000/= which he paid by installment on various dates from the year 2000 up to 2003, that following completion of the purchase price, the Defendant handed over possession of the suit property to him and he has been in occupation and/or use of it since 2003 and that on or about November, 2016 Plaintiff became desirous of selling the suit property and he found a buyer for it. That when he approached the Defendant to transfer the suit property, the latter refused and/or failed to do so.

3. The Plaintiff's claim is denied by the Defendant in his amended defence and counterclaim dated 15th February, 2019 and filed in court on even date.

4. In paragraphs 5, 6, 7, 14, 15 and 16 of his defence and counterclaim, the Defendant claims that the alleged sale (if any) by the Plaintiff offends the provisions of Section 3(3) of the Law of Contract Act, the Limitation of Actions Act, the Land Act and other various laws and is thus unenforceable and bad in law, that if any agreement was entered into the same was only for the lease of suit property, that in the alternative and without prejudice, if indeed the Plaintiff was in use of the suit property, the same was on leasehold basis with no intention of ever transferring possession or ownership rights to the Plaintiff, that the Plaintiff on his own admission has entered into the Defendant's land parcel number Kisau/Ngoni/924, that such entry is now unlawful and wrongful as the lease has since expired and amounts to an actionable trespass and the Defendant prays for orders of possession and injunction to permanently restrain the Plaintiff from continuing with the wrongful occupation of the Defendant's land and for an order of eviction of the Plaintiff from the Defendants land title number Kisau/Ngoni/924 and loss of user from the date of termination of the lease in 2003 to date at the rate of Kshs.4,000/= per year.

5. On the 28th February, 2019, the Plaintiff filed his reply to defence and defence to the counterclaim the same being dated 27th February, 2019.

6. During the hearing of the Plaintiff's case on 29th April, 2019, he adopted his statement and further statement dated 08th October, 2017 and 21st November, 2018 respectively as his evidence.

7. Briefly, his evidence was that the Defendant is his step brother. That the Defendant sold his land parcel number Kisau/Ngoni/924 to him at a price of Kshs.30,000/= which purchase price he paid in instalments until when he completed the payment in 2003. The Plaintiff

produced the sale agreement in Kamba language and the translation as P.Exhibit Nos.1 and 2 respectively. He said that since 2003, the Defendant has never denied that he did not sell the suitland to him. The Plaintiff went on to say that in 2015, he sold the land in question to a third party and that when he approached the Defendant to effect transfer, the latter declined. The Plaintiff produced as certificate of official search that shows the Defendant as the registered owner of the suitland as P.Exhibit No.3. The Plaintiff said that as a result of the Defendant's refusal to effect transfer of ownership of the suit property, he was forced to lodge a caution (P.Exhibit No.4{a}). He pointed out that before filing this suit, he issued a demand notice upon the Defendant and denied having ever leased the suitland from the Defendant from 1976 up to 2003 as he was 15 years in 1976. He said that he has been in occupation of the suitland from 2003.

8. His evidence in cross examination by Mr. Hassan for the Defendant was that the agreement does not identify the land which is the subject of the sale. He said that he and the Defendant have their separate booklets of the sale agreement. He said that none of them had witnesses to the agreement. He said that it was the Defendant who did not want him to call witnesses and denied the suggestion by the advocate that the Defendant did not know the content of the agreement. He revealed that the Defendant kept on promising that he would transfer the suitland before he switched off his phone.

9. On the other hand, the Defendant's evidence was that he did not sell land to the Plaintiff. Like the Plaintiff, the Defendant adopted his statement dated 28th September, 2018 as his evidence. According to him, he had leased the land to the Plaintiff from 1976 to 2000. He urged the court to declare the land as belonging to him and he claims arrears of lease money at the rate of Kshs.4,000/= per year. He denied having ever switched off his phone as alleged. He said that it was in the year 2018 that he learnt that he had sold his land, an issue he denies.

10. His evidence in cross-examination by Mr. Omondi for the Plaintiff was that even though he leased the land to the Plaintiff from 1976 up to 2000, he did not produce any lease documents. He said that there was no one else when he and the Plaintiff entered into the lease agreement. According to him, Kshs.30,000/= was for the period between 1976 up to 2000. He said that he trusted the Plaintiff who is his brother and that from 2003 up to 2018 he kept on asking the Plaintiff to pay him Kshs.4,000/= per year and disagreed with the advocate that he in fact sold the land to the Plaintiff.

11. The Defendant called Daniel Nguku Mutinda (DW1) who is his son as a witness. According to Mutinda (DW1) the suitland is ancestral which he expects to inherit from the Defendant. Mutinda (DW1) however agreed in his evidence in cross-examination that he did not witness the agreement being entered into in 1976 as he had not yet been born.

12. The Plaintiff's Counsel in his written submissions analysed the evidence adduced by the parties herein and urged the court to issue orders in favour of the Plaintiff.

13. In his written submissions, the Defendant's Counsel urged the court to enter judgment for the Plaintiff as prayed in the plaint. On the other hand, the Defendant's Counsel submitted that the purported sale offends the provisions of Section 6 of the Land Control Act Chapter 302 for failure to obtain the necessary consent from the relevant Control Board to transfer the suitland. The Counsel further submitted that the sale agreement offends **Section 3(3) of the Law of Contract Act chapter 23 of the Laws of Kenya.**

14. Section 3(3) of the aforementioned Act provides as follows: -

"No suit shall be brought upon a contract for the disposition of an interest in land unless: -

(a) the contract upon which the suit is founded

(i) is in writing

(ii) is signed by all the parties thereto, and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

15. I have looked at the agreement marked as P.Exhibit No.1 together with the English translation marked as P.Exhibit No.2. It shows that the Defendant sold his land to the Plaintiff vide the agreement dated 07th April, 2000. The Plaintiff finished paying the purchase price on 02nd July, 2003 and took possession of the suitland. The original agreement (P.Exhibit No.1) shows that the Defendant signed whenever he received the installments of the purchase price. The Plaintiff has also signed it. The agreement is in writing even though it is not attested by witnesses whenever the parties herein signed but of importance to note is that the Plaintiff took possession of the suitland in the year 2003 upon finishing paying for its purchase. Even though the agreement does not identify the land which was the subject of sale, there is nothing to show that the Defendant ever objected to the occupation and possession thereof by the Plaintiff.

16. The Plaintiff has clearly stated that he could not have leased the suitland in 1976 as he was only 15 and this has not been rebutted by the Defendant. The agreement (P.Exhibit No.1) which the Defendant does not deny having entered into does not show that the same was prepared in 1976. Even if one were to believe the Defendant that he and the Plaintiff had entered into a lease between 1976 up to 2000, there is nothing to show that the Defendant ever demanded for his land to revert to him once the lease was over. He only waited until when the Plaintiff sued him.

17. From the evidence and the facts of this case, my finding is that it is safe to conclude that the Defendant intended to sell and actually sold the land to the Plaintiff and he has no reason not to transfer it to the latter. In the circumstances, my finding is that the counterclaim by the Defendant against the Plaintiff must fail. I hereby proceed to dismiss it with costs to the Plaintiff.

18. Being satisfied that the Plaintiff has a cause of action against the Defendant, I hereby proceed to enter judgment for him and against the Defendant in terms of prayers (a) and (c) of the plaint. In case the Defendant fails to sign the necessary transfer forms, the Deputy Registrar

of this court is directed to sign the same.

Signed, dated and delivered at Makueni this 28th day of January, 2020.

MBOGO C.G.,

JUDGE.

In the presence of: -

Mr. Hassan for the Defendant

Mr. Nzavi for the Plaintiff

Ms. C. Nzioka – Court Assistant

MBOGO C.G, JUDGE,

28/01/2020.