



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC NO. 114 OF 2005**

**SAMSON M. AGUMBA.....PLAINTIFF**

**VERSUS**

**ELLAM CHOGO LIBABU.....1<sup>ST</sup> DEFENDANT**

**PATRICK KACHWEYA.....2<sup>ND</sup> DEFENDANT**

**PATRICK SIMIYU.....3<sup>RD</sup> DEFENDANT**

**STEPHEN LUSASU.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff filed a complaint dated 30/9/2005 which he subsequently amended. On 14/5/2015 he filed a further amended complaint dated 13/5/2015. In that further amended complaint he seeks the following orders against the defendants:-

**(a) An order that the legal administrator of the estate of the deceased Abigael M. Libabu do execute necessary documents to transfer 2.5 acres on Plot No. 38 Kimila SFT to the plaintiff.**

**(b) A permanent injunction restraining all the defendants from interfering with the plaintiff's use and possession of 2.5 acres on Plot No. 38.**

**(c) Costs.**

**(d) Any other relief.**

**The Plaintiff**

2. According to the further amended complaint, the plaintiff states that he purchased 2.5 acres out of plot No. 38 - Kimila Settlement Scheme from one Abigael M. Libabu, paid the purchase price and took possession of the suit land and that he has been in possession thereof to date. He has substantially developed the land. However the seller purported to subdivide the suit land and to dispose of it to third parties who are the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants, hence the prayers in the complaint.

**Defence and Counterclaim of the 1<sup>st</sup> defendant**

3. In an amended statement of defence dated **23/10/2018**, the 1<sup>st</sup> defendant denied the alleged agreement between the plaintiff and Abigael and averred that there was therefore no contractual relationship created between the two; he claimed to be the registered owner of the entire land parcel referred to as **Trans Nzoia/Kimila/38**. He also claimed the plaint was fatally defective. In the alternative, the 1<sup>st</sup> defendant stated, the transaction was void for want of a Land Control Board Consent, and that the plaintiff was therefore in illegal occupation of the land, a trespasser. It is further averred that granting the prayers sought would be furthering a voided agreement in clear breach of the law. In his counterclaim he prays for a declaration that the alleged sale transaction is void, a declaration that the plaintiff is a trespasser, general damages and mesne profits and costs of the suit. The contents of the defence and counterclaim were denied by the plaintiff in a reply dated **29/10/2018**.

4. On **23/10/2018** Ms. Arunga Counsel for the plaintiff indicated that she wished to withdraw the suit against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant with no orders as to costs. The court ordered that the suit against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants was marked as withdrawn with no orders as to costs.

### **The Plaintiff's Evidence**

5. The hearing of this suit commenced on **27/11/2018** when **PW1, Samson Agumba**, the plaintiff testified. He reiterated the contents of his plaint, and added that the consideration agreed upon was **Kshs. 19,000/=** per point of an acre, and that the total purchase price came to **Kshs. 350,000/=**. He produced an agreement dated **22/12/2001** as **P. Exhibit 1**. He averred that he took possession of the land in **2001** and began conducting developments thereon. He has about 3 houses on the suit land. After Abigael died, the 1<sup>st</sup> defendant took out letters of administration and caused the land to be registered in his name, whereupon the plaintiff lodged a caution against the land title.

6. Upon cross examination the plaintiff admitted that Abigael never personally executed the sale agreement dated **22/12/2001**. He averred that he paid the consideration to one Gabriel who took the money to Abigael. He admitted that the parties never sought a Land Control Board Consent.

7. **PW2, Beatrice Kawage Misoga** testified on **19/9/2019**. Her evidence is that she lived with Abigael who was her elder sister in 2007, caring for her in the absence of her husband the 1<sup>st</sup> defendant, as she had suffered a stroke. In October 2007 Abigael passed on. According to PW2 the plaintiff came to Abigael in 2007 during the period of her illness and it was then that Abigael informed PW2 that she had sold 2.5 acres of land to the plaintiff, who gave Kshs. 10,000/= to PW2 in Abigael's presence. That was on 24/7/2007. On 3/9/2007 the plaintiff gave Kshs. 75,000/= as the final payment the land, which money was utilized in settling Abigael's medical expenses. By then Abigael could not sign due to illness and **PW2** signed the acknowledgment of receipt on her behalf in the presence of some other witnesses. PW2 produced the acknowledgement as **P. Exhibit 7**. According to PW2 the plaintiff took up possession in 2001 and began living in the house that Abigael had lived in while Abigael went to live in Kitale town.

### **The Defendant's Case**

8. **DW1, Ellan Chogo Libabu**, the defendant testified on **26/9/2019** and adopted his written witness statement dated **23/10/18**. His evidence is that he was not aware of any agreement between the plaintiff and his wife.

9. That marked the closure of the parties' respective cases.

10. The plaintiff filed his submissions on **15/10/2019** while the defendant filed his on **28/10/2019**.

11. I have considered the pleadings and the evidence and the submissions of the parties in this case. The issue that arises is whether there was a sale agreement between the plaintiff and the deceased and whether the plaintiff gained any proprietary rights from such agreement.

12. It is noteworthy that this suit was lodged while the original 1<sup>st</sup> defendant was still alive, and that it

was her alleged attempt to sell the land to third parties that prompted the suit. However in the original defendants' joint defence, she denied any agreement with the plaintiff and curiously pleaded that "*she has all the rights of use and disposition of the suit land.*" She did not offer any explanation of how the plaintiff obtained possession of the suit land. Conspicuously missing from her defence which was drawn by an advocate, are claims for eviction and mesne profits, which were only raised by her husband after he was substituted as the 1<sup>st</sup> defendant in the suit. Also, in the joint defence, no lease was claimed to have been entered into between the parties.

**13.** It is also noteworthy that the statement of the deceased's husband states that he was not aware of any sale agreement. He does not aver that there was any lease agreement, not even in his amended defence and counterclaim.

**14.** Evidence of the two prosecution witnesses shows that DW1 was not resident on the suit land; neither did he live with the deceased, and he was absent for as long as the matters that led to the plaintiffs claim were happening; it is doubtful that he is able to testify with any certitude as to what the deceased did or did not do.

**15.** Much was made of the fact that the deceased had a husband and grown children, ostensibly to cast doubt on the claim by PW2's evidence that she stayed with the deceased and cared for her and was entrusted with receiving some payments on her behalf. But as a necessary sequel thereto and without needing to make any moral judgment regarding the current 1<sup>st</sup> defendant's conduct as well as that of his children, the relevant question that arises in the court's mind is if there was a husband and grown up children as at the deceased's time of illness and disposal of land for medical funds, where were they?

**16.** I find that DW1 has not explained his whereabouts and has demonstrated serious lack of knowledge of his late wife's dealings with her property to the point that he lacks a witness to corroborate his evidence.

**17.** In the circumstances, has DW1 given this court any reason to doubt that the plaintiff, who had stayed on the suit land for about four years before the suit was filed, truly entered into an agreement with the deceased? The answer is clearly "no". However that answer does not leave the plaintiff in the clear because the alleged agreement dated **22/2/2001** was not personally executed by the deceased and it does not show who signed it on her behalf. The plaintiff mentioned during his cross examination by Mr. Ingosi that one, Jescah M. Lugabo, who is named in the agreement dated **22/12/2001**, executed it on behalf of the deceased but there is no direct evidence in proof of this allegation as the said Jescah was never called to testify in the suit.

**18.** Be that as it may, in this court's view, there must be a good reason why the plaintiff took possession of a very specific area of land which he still claims to date; there must also be a good reason why Abigael's defence to the suit, rather than term the plaintiff as a trespasser outright yet it was filed while she was still alive, sought to justify her actions by stating that she had "*all the rights of use and disposition of the suit land*" and that "*there was no contractual relationship between the two capable of creating any duty or obligation for her to transfer the 2.5 acres to the plaintiff*". This must be viewed from the backdrop of the claim by the plaintiff in his original plaint that she had attempted to dispossess the plaintiff of the suit land in favour of disposal to third parties.

**19.** In my view, rather than whether she had executed or authorized to be executed any such instrument, the deceased's defence quite evasively focused on whether there was any legal force in any existing instrument to transfer any right or interest in the suit land to the plaintiff.

**20.** This court is aware that the agreement dated **22/12/2001** is not purported to have been made by a legal expert; it is also aware that the agreement dated **3/9/2007** was made by a legal expert and the latter agreement referred to and based itself on the contents of the agreement of **22/12/2001**. Both documents were made before the deceased died and while the plaintiff was still in possession of the suit land.

**21.** All the foregoing are, in this court's opinion, pointers to the fact that despite there not being a very

elaborate agreement between the plaintiff and the deceased, or an agreement which the deceased could term as *incompetent to transfer any right or interest to the plaintiff*, there was nevertheless some agreement, and that part performance of the agreement was executed in the taking up of possession and the part payment, and later, full payment of the purchase price. In my view therefore, the plaintiff can hardly be deemed a trespasser in the circumstances.

22. I find that of the two sides, the plaintiff's evidence is more plausible.

23. Consequently, I find that the plaintiff has established his claim against the defendant on a balance of probabilities, and I therefore enter judgment in his favour against the defendant and I give the following final orders:

**(a) A declaration that the plaintiff is the purchaser for value of 2.5 acres out of all that land parcel comprised in Land Reference Trans Nzoia/Kimila/38;**

**(b) A declaration that the registration of the defendant as the absolute proprietor of all the land comprised in Land Reference Trans Nzoia/Kimila/38 so as to include the portion bought by the plaintiff is invalid;**

**(c) An order that the defendant, shall execute all necessary documents to transfer 2.5 acres on Land Reference Trans Nzoia/Kimila/38 to the plaintiff;**

**(d) A permanent injunction restraining the defendant from interfering with the plaintiff's use and possession of 2.5 acres on Land Reference Trans Nzoia/Kimila/38;**

**(c) An order that each party shall bear his own costs of this suit.**

**Dated, signed and delivered at Kitale on this 21<sup>st</sup> day of January, 2020.**

**MWANGI NJOROGE**

**JUDGE**

**21/1/2020**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi for defendants

Ms. Arunga for the plaintiff

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**21/1/2020**