



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 443 OF 2010

JOAN NJOKI GITAU.....1ST PLAINTIFF

GILBERT MACHARIA GITAU.....2ND PLAINTIFF

VERSUS

LUCY WAMBUI KIBOI..... DEFENDANT

JUDGMENT

The plaintiffs brought this suit on 22nd September, 2010 by way of a plaint dated 13th September, 2010 in which the plaintiffs sought rescission of the contract of sale that the plaintiffs had entered into with the defendant in respect of a parcel of land known as Plot No. V3299 which was a subdivision of L.R No. 10904/2(hereinafter referred to as “the suit property”). The plaintiffs amended their plaint on 21st March, 2014 through which they introduced a completely new claim against the defendant. In their amended plaint dated 19th March, 2014, the plaintiffs sought the following reliefs;

1. A declaration that there existed no agreement between the plaintiffs and the defendants for the sale of the suit property.
2. A declaration that no payment was made by the defendant to the plaintiffs for the purchase of the suit property.
3. A declaration that the 2nd plaintiff was the legal owner of the suit property.
4. A mandatory injunction compelling the defendant to yield possession of the suit property to the 2nd plaintiff and to remove the structures she had erected thereon.
5. Costs of the suit and interest.

In their amended plaint, the plaintiffs averred that the suit property was at all material times owned by the 2nd plaintiff and that the 1st plaintiff was at all material times acting as an agent of the 2nd plaintiff in relation to the transactions that the plaintiffs had with the defendant in relation to the suit property. The plaintiffs averred that the 1st plaintiff as an agent of the 2nd plaintiff sold to the defendant two parcels of land known as Plot No. 1279B and 1291B. The plaintiffs averred that the defendant made full payment of the purchase price for the two parcels of land and took possession thereof. The plaintiffs averred that while the defendant was carrying out construction on the two parcels of land that she had purchased, she requested the plaintiffs to allow her to store her construction materials on the suit property that was adjacent to the same which request the plaintiffs granted. The plaintiffs averred that contrary to the agreement between the plaintiffs and the defendant, the defendant erected structures on the suit property claiming that she had also purchased the same.

The plaintiffs averred that with a view to defraud the 2nd plaintiff of the suit property, the defendant drew a false contract for sale purporting that the same had been made between the 2nd plaintiff and the defendant in respect of the suit property and that the defendant had paid to the 2nd plaintiff the full purchase price for the property. The plaintiffs averred that they did not sell the suit property to the defendant neither did the defendant make any payment to them in respect of the property on account of the purchase price.

The defendant filed amended defence and counter-claim on 28th March, 2014 in response to the amended plaint. The defendant averred that she was the owner of the suit property having purchased the same from the plaintiffs and paid the full purchase price. The defendant averred that in addition to the two plots, namely, Plot No. 1279B and 1291B that the plaintiffs sold to her, the plaintiffs also sold to her the suit property at a price of Kshs. 200,000/- which she paid in full. The defendant denied that the plaintiffs gave her possession of the suit property only for the purposes of storing construction materials. The defendant denied further that she created a false agreement for sale between her and the 2nd plaintiff in respect of the suit property.

In her counter-claim, the defendant reiterated the contents of the defence and averred that on 7th July, 2004 and 28th July, 2004, the 1st plaintiff demanded from her and was paid a total of Kshs. 20,000/- which the 1st plaintiff wanted to use in processing the transfer of Plot No. P1279B and P1291B to the defendant which payments were not part of the agreed purchase price for the said plots. The defendant averred that on 4th August, 2004, the 2nd plaintiff demanded without any legal basis payment of a total of Kshs. 26,000/- for a site visit and processing of a transfer of his Plot No. P1279 to his name.

The defendant averred further that on 3rd July, 2007, she entered into another agreement with the plaintiffs for the purchase of a fourth plot namely, Plot No. P1291 at a consideration of Kshs. 300,000/-. The defendant averred that between 3rd July, 2007 and 30th September, 2008, she paid to the plaintiffs a total of Kshs. 50,000/- on account of the purchase price for this fourth plot. The defendant averred that the plaintiffs repudiated the said agreement and refused to transfer the fourth plot to her and declined also to refund the said sum of Kshs. 50,000/-. The defendant averred that a total sum of Kshs. 96,000/- was due and payable by the plaintiffs to her comprising of a refund of the said sum of Kshs. 50,000/- paid for the fourth plot and a sum of Kshs. 46,000/- that the plaintiffs obtained from her through coercion and extortion.

By way of a counter-claim, the defendant sought judgment against the plaintiffs jointly and severally for;

1. A declaration that the defendant was the rightful owner of the suit property.
2. Kshs. 96,000/- together with interest at court rates.
3. Such other or further relief the court deemed fit to grant.

The plaintiffs filed a reply to defence and defence to counter-claim on 3rd April, 2014 in which they reiterated the contents of the amended plaint and denied the defendant's counter-claim in its entirety. The plaintiffs denied that they sold the suit property and Plot No. P1291 which the defendant referred to as the fourth plot to the defendant. The plaintiffs maintained that the defendant only purchased and paid for Plot No. 1291 B and 1279B. The plaintiffs urged the court to dismiss the defendant's counter-claim and enter judgment for the plaintiffs against the defendant as prayed in the amended plaint.

At the trial the 1st plaintiff gave evidence on her own behalf and on behalf of the 2nd plaintiff. The 1st plaintiff adopted her witness statement dated 19th March, 2014 as part of her evidence in chief. The 1st plaintiff told the court that they only sold to the defendant Plot No. 1291B and 1279B. The 1st plaintiff stated that they did not sell the suit property to the defendant and that no payment was received by them from the defendant in respect thereof. The 1st plaintiff stated that at a meeting that was chaired by DW3, the defendant agreed that she would pay a sum of Kshs. 150,000/- for the suit property which promise was not honoured since DW3 only gave her a photocopy of a banker's cheque for Kshs. 150,000/- and not the cheque itself.

On her part, the defendant gave evidence and called two witnesses. The defendant adopted her witness statements dated 28th February, 2013 and 5th June, 2015 as part of her evidence in chief. The defendant narrated to the court how the plaintiffs sold to her the initial two plots namely, Plot No. P1291B and P 1279B which she paid for in cash. The defendant told the court that after paying for the two plots, the plaintiffs sold to her the suit property which she also paid for in full by instalments with the last installment of Kshs. 90,000/- having been paid on 18th June, 2006 in the presence of witnesses. The defendant stated that she agreed to pay the plaintiffs additional sum of Kshs. 150,000/- for the suit property following the frustrations that she suffered when the plaintiffs refused to transfer the suit property to her when she wanted to develop the same. The defendant stated that a banker's cheque for Kshs. 150,000/- was presented to the 1st plaintiff by DW3 but the 1st plaintiff refused to take the same for unexplained reasons. The defendant stated that a photocopy of the said cheque was given to the 1st plaintiff at her request. The defendant stated that the 1st plaintiff had requested that she be given a copy of the cheque so that she could confirm whether the cheque was genuine before collecting the original cheque. This testimony was confirmed by DW3.

The defendant stated that after paying for the suit property in full, she entered into negotiations with the plaintiffs for the purchase of the fourth plot, namely, Plot No. P1291 whose purchase price was agreed at Kshs. 300,000/-. The defendant told the court that she paid a total of Kshs. 50,000/- to the plaintiffs for the fourth plot whose purchase was not completed. She stated that in addition to the said sum of Kshs. 50,000/- that she paid for the fourth plot, she paid to the plaintiffs a further sum of Kshs. 46,000/- which the plaintiffs demanded for various activities. The defendant produced in evidence as exhibits among others, several payment acknowledgment receipts that were signed by the 1st plaintiff when she was receiving payments for the suit property and the fourth plot from the defendant. The defendant also produced in evidence the agreement for sale dated 18th June, 2006 between the defendant and the 2nd plaintiff in respect of all the three parcels of land that the defendant purchased from the plaintiffs.

After the conclusion of evidence, the parties made closing submissions in writing. The plaintiffs filed their submissions on 1st April, 2019 while the defendant filed her submissions on 23rd July, 2019. I have considered the evidence tendered by the parties in support of their respective cases. I have also considered the submissions by the parties' respective advocates and the authorities cited in support hereof. The parties did not agree on the issues for determination by the court. In their submissions, each party framed its own issues. From the pleadings, the following in my view are the issues that arise for determination in this suit and counter-claim;

1. Whether the plaintiffs and the defendant entered into an agreement for sale in respect of Plot No. V 3299 ("Suit property").
2. Whether the defendant paid for the suit property.
3. Whether the defendant is the lawful owner of the suit property.

4. Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.
5. Whether the defendant is entitled to the reliefs sought in the counter-claim.
6. Who is liable for the costs of the suit?

Whether the plaintiffs and the defendant entered into an agreement for sale in respect of Plot No. V 3299 (“Suit property”).

I am satisfied from the evidence on record that the defendant and the plaintiffs entered into an agreement for sale in respect of suit property. The defendant led evidence that when she entered into an agreement with the plaintiffs for the purchase the suit property, the property had no allocation reference number and as such the property was described in the various acknowledgement receipts that the 1st plaintiff signed while receiving the payments made to her by the defendant for the suit property as “*plot at the end of triangle near Hurlingham Butchery next to plot No. 1291 B*”. The existence of the agreement for sale between the plaintiffs and the defendant in respect of the suit property was evidenced by the various payment acknowledgement receipts that the 1st plaintiff signed between 29th November, 2005 and 9th May, 2006 for the payments made to her by the defendant over the period for the suit property and the land sale agreement dated 18th June, 2006 signed by the 2nd plaintiff and the defendant in the presence of witnesses.

In her evidence, the 1st plaintiff did not dispute her signature in the various payment acknowledgment receipts that were produced in evidence by the defendant as part of D.Exh. 1. The 1st plaintiff contended however that the payments that she received and acknowledged through the said receipts were on account of the purchase price for the two plots namely, Plot No. P1291B and Plot No. P1279B that she sold earlier to the defendant and not for the suit property as claimed by the defendant. A perusal of the said payment acknowledgment receipts shows that they do not make reference to Plot No. P1291B and Plot No. P1279B. The receipts refer to “*plot at the end of triangle near Hurlingham Butchery next to plot No. 1291 B*”. This is how the parties had referred to the suit property according to the evidence of the defendant.

In their amended plaint, the plaintiffs claimed that the 2nd plaintiff’s signature in the agreement for sale dated 18th June, 2006 was forged. The plaintiffs denied that the 2nd plaintiff had signed the said agreement. In their submissions, the plaintiffs contended that they were victims of the defendant’s acts of forgery. The plaintiffs submitted that all the agreements for sale and the payment acknowledgment receipts that were produced in evidence by the defendant were forged with the intention of defrauding the 2nd plaintiff of the suit property.

In her testimony, the defendant gave a detailed explanation on the circumstances under which the agreement for sale dated 18th June, 2006 was signed by the parties. The 2nd plaintiff who claimed that the agreement was a forgery did not give evidence to rebut the evidence that was tendered by the defendant to the effect that the 2nd plaintiff signed the agreement. In his affidavit sworn on 13th September, 2010 filed in court on 22nd September, 2010 in support of the plaintiffs’ application for interlocutory injunction to restrain the defendant from carrying out construction on the suit property pending the hearing of the suit, the 2nd plaintiff had admitted in paragraph 4 that the 1st plaintiff acting on his behalf had entered into an agreement to sell to the defendant three parcels of land which included the suit property. This statement on oath contradicts the evidence that was given by the 1st plaintiff who maintained in her testimony that they did not sell the suit property to the defendant.

I am in agreement with the decisions in Zakayo Michubu Kibuange v Lydia Kaguna Japheth & 2 others [2014]eKLR , R.G.Patel v Lalji Makani [1957] E.A 314 and Nyangate Guto alias Watson Mogere Mogoko v Maxwell Okemwa Mogoro & another [2015] eKLR that were cited by the defendant in her submissions. As was held in the said cases, forgery and fraud are serious allegations. The same must not only be pleaded but must be strictly proved. The onus was upon the plaintiffs to place evidence before the court in proof of the alleged forgery of the 2nd plaintiff’s signature in the agreement for sale dated 18th June, 2006 and the 1st plaintiff’s signature in the payment acknowledgement receipts. I am not satisfied that the plaintiffs discharged this burden in relation to the acts of forgery and fraud alleged against the defendant.

The plaintiffs had also contended that the payment acknowledgement receipts that were produced by the defendant in evidence did not satisfy the provisions of section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya. I am in agreement with this submission. However, in my view, this defect was cured by the agreement for sale dated 18th June, 2006 that was duly executed by both parties and witnessed. This agreement satisfied the provisions of Section 3(3) of the Laws of Contract Act, Chapter 23 Laws of Kenya.

The plaintiffs had contended further that no payment was made by the defendant for the suit property. From what I have stated above, it is my finding that the 1st plaintiff who was at all material times acting as an agent of the 2nd plaintiff signed the acknowledgment receipts for the various payments that were made to her by the defendant. It is also my finding that the said payments were made on account of the purchase price for the suit property. It is also my finding that the 2nd plaintiff signed the agreement for sale dated 18th June, 2006 in which receipt of the payment of the entire purchase for among others, the suit property was acknowledged. I am satisfied from the evidence on record that the defendant paid the full purchase price for the suit property.

Due to the foregoing it is my finding that the plaintiffs and the defendant entered into a valid and binding agreement for sale in respect of the suit property.

Whether the defendant paid for the suit property.

This issue has been answered above in the affirmative.

Whether the defendant is the lawful owner of the suit property.

Having held that the defendant entered into a valid agreement for sale with the plaintiffs in respect of the suit property and that the defendant paid the full purchase price, it is my finding that the defendant is the lawful owner of the suit property.

Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.

The plaintiffs sought a number of reliefs in their amended plaint dated 19th March, 2014. In view of the findings that I have made above, I am not satisfied that the plaintiffs have proved their case against the defendant. The plaintiffs are therefore not entitled to any of the reliefs sought in the amended plaint. For reasons that I will give later in this judgment, I am of the view that in the wider interest of justice and for the purposes only of bringing the dispute between the parties to a close, the plaintiffs should be paid a sum of Kshs.110,000/= being the balance of the additional payment that the defendant had offered to pay to them less what they owe the defendant on the agreement for sale of the fourth plot that was not completed.

Whether the defendant is entitled to the reliefs sought in the counter-claim.

I am satisfied that the defendant has proved her claim against the plaintiffs and that she is entitled to the declaration sought in the counter-claim. With regard to the claim for Kshs. 96,000/=, I am not satisfied that the defendant is entitled to the entire amount claimed. Apart from the amount paid for Plot No. P1291, I am not convinced that the other payments that the defendant claims to have made to the plaintiffs were intended to be refunded by the plaintiffs. With regard to the payment made for plot No. P1291, the evidence adduced by the defendant shows that only a total of Kshs. 40,000/= was paid to the 1st plaintiff on 3rd November, 2007 and 15th March, 2008. The balance of the purchase price was to be paid on the transfer of the property to the defendant. In the circumstances, I will only award the defendant a sum of Kshs. 40,000/=. I will however set off this amount from the sum of Kshs. 150,000/= that the defendant had agreed to pay to the plaintiffs over and above the purchase price. I am alive to the fact that this amount was not claimed by the plaintiffs. However, I am of the view that this court has a duty under section 1A and 1B of the Civil Procedure Act and Article 159 of the Constitution to do substantive justice to the parties before it. I am of the view that in dealing with this issue of the payment of Kshs. 150,000/= the court would be giving effect to the overriding objectives of the Civil Procedure Act and Rules made thereunder.

Who is liable for the costs of the suit?

On the issue of costs, I am of the view that having regard to the nature of the dispute between the parties and its history, justice would be better served by each party bearing its own costs of the suit and the counter-claim.

Conclusion:

In conclusion I hereby enter judgment in the main suit and the counter-claim on the following terms:

1. The plaintiffs' suit is dismissed.
2. A declaration is made that the defendant is the lawful owner of Plot No. V 3299.
3. The defendant shall pay to the plaintiffs a sum of Kshs. 110,000/= being the amount of Kshs. 150,000/= that the defendant had agreed to pay to the plaintiffs on 21st March, 2009 less Kshs. 40,000/= that was paid to the plaintiffs for Plot No. P1291.
4. Each party shall bear its own costs of the suit.

Delivered and Dated at Nairobi this 12th Day of March 2020

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

N/A for the Plaintiffs

Ms. Njuguna h/b for Ms. Maina for the Defendant

Ms. C. Nyokabi-Court Assistant