



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT BUSIA

CASE NO. 3 OF 2014

LUCAS BULUMA WERE.....PLAINTIFF

= VERSUS =

ODUORI MAKANGA.....1ST DEFENDANT

DANIEL OUMA KWAMBA.....2ND DEFENDANT

J U D G E M E N T

1. Vide an amended plaint dated 7th December 2016, the plaintiff brought a claim against the two defendants where he pleaded that he purchased a portion of land No. BUNYALA/BUKOMA/974 measuring 0.05ha from the late Martin Nyabola. That through fraud, the defendants have acquired title for the suit land. The plaintiff prayed for judgment against the defendants severally for;

(a) An order cancelling of the fraudulently obtained title deeds on land parcel No. BUNYALA/BUKOMA/974 measuring 0.05 ha.

(b) Costs of this suit.

(c) Any other relief this Honourable Court deems fit to grant.

2. The 2nd defendant denied the claim through a 5 paragraphed statement of defence dated 30/10/2018 and filed on 1st November 2018. Paragraph 1 & 2 of this defence admitted the description of the parties to the suit. In paragraph 3, the 2nd defendant denied that the vendor Martin Nyabola was the registered owner of the suit land and that he had capacity to sell. The 2nd defendant denied the allegations of fraud pleaded in the plaint. The 2nd defendant pleaded that before buying his parcel of land measuring 0.03ha he did due diligence which revealed no encumbrance on the title. He urged the Court to dismiss the plaintiff's claim with costs.

3. The 1st defendant filed his defence on 14th February 2019. He pleaded similar facts as set out in the 2nd defendant's defence. The 1st defendant added that he inherited the suit land from his brother Marende Makanga – deceased through succession proceedings.

4. The parties called oral evidence. The plaintiff stated that he lives in Malakisi while the suit land is situated in Port Victoria. He continued that this dispute was heard by Budalangi Land Dispute Tribunal in the year 2006 and the Land Dispute Tribunal award adopted on 28/9/2006. An appeal lodged against the said decision was also dismissed and parties ordered to share costs of subdividing the land. That while he was waiting for the defendants to pay their side of costs he visited the lands office and discovered they had registered the land between them. The plaintiff is therefore praying for cancellation of their titles which was issued in disregard to the existing court order.

5. In cross-examination, **PW1** said the case before the Land Dispute Tribunal was between him and the 1st defendant. That he bought the land from Martin Nyabola who used the money to pay dowry on behalf of the 1st defendant. That he was not aware Marende Makanga the registered owner was deceased when he purchased the land. That he purchased a plot measuring 50ft by 100ft. That the 2nd defendant owes him nothing except he blames him for getting his title contrary to a court order.

6. The 2nd defendant adopted his witness statement dated 30/10/2018. The 1st defendant also adopted his statement dated 30/10/2018. He said the land was first registered in his brother's name Marende Makanga on 20/5/1978 and he succeeded him vide Cause No. 67 of 2008. It is his evidence that the proceedings before the Budalangi Tribunal Dispute Tribunal were a nullity for want of jurisdiction of the Tribunal. Secondly that Martin Nyabola had no capacity to sell the suit land. **DW2** said he lives on the remaining portion after he sold some of it to the 2nd defendant.

7. In cross-examination, **DW2** denied knowledge of payment of any dowry on his behalf. That he was present when the elders sat on 19/10/1994 and planted boundary on plaintiff's plot. **DW2** said he did not agree with the decision of the Land Disputes Tribunal. That he removed the boundary marks because the land belonged to his brother. This marked the close of the defendants' case.

8. The issue for determination is whether or not it has been proved that the 1st defendant acquired title for the suit property by fraud. The plaintiff listed the following as the particulars of fraud;

- (i) That with first-hand information at hand selling the same portion of land to two different persons myself and Elly Ouma Egesa.*
- (ii) Evading to indicate myself as a liability in the succession process.*
- (iii) Failing to abide by the agreement done by their late father in the contracted agreement.*
- (iv) Maliciously evading to honour the court orders of adoption done by the honourable court on 5/6/2012.*
- (v) Fraudulently acquiring consent orders from the Land Control Board without notifying third parties.*
- (vi) Failing to appear in court to the citation which undertook to do on behalf of them file administration letters in court vide Succession Cause No. 96 of 2013.*
- (vii) Mutation land parcel No. BUNYALA/BUKOMA/974 in two portions measuring 0.05ha and 0.03ha respectively without consulting the plaintiff.*
- (viii) Undermining the initial and first agreement done between the plaintiff and the defendant's father one MARENDE MAKANGA deceased.*

9. The 1st defendant stated that he acquired the title pursuant to an order made in Succession Cause No. 67 of 2008. The plaintiff seemed to have become aware of the succession proceedings no wonder he pleaded that the 1st defendant evaded to indicate him as a liability in the Succession Cause. The plaintiff admitted in his evidence that at the time the land was sold to him, the registered owner Marende Makanga was dead and the seller Martin Nyabola had not taken out letters of administration.

10. The entry No. 2 in the green card does show that the 1st defendant became registered owner of a portion measuring 0.05ha of the suit land through the order issued in HC Succ. Cause No. 67 of 2008. It is this same portion the plaintiff is claiming. The plaintiff did not however tell this court whether he had taken steps to have the grant issued to the 1st defendant revoked. The issues he took up against the 1st defendant in this case i.e. not including him as a liability in the succession proceedings and or evading to honour the court orders adopted in court on 5th June 2012 ought to have been taken up before the high court to challenge the grant taken by the 1st defendant.

11. Once the grant was confirmed and the High Court gave the suit portion the issue of fraud does not arise because the registration of the 1st defendant has been made in execution of a court order. Until that order is set aside and or reviewed, this court cannot question the process through which it was obtained. This court and the High Court share concurrent jurisdiction so this court lacks powers to sit on appeal from orders arising from the High Court. The allegations of fraud on this limb thus fails.

The plaintiff also alleged that the 1st defendant sold the suit portion to a Mr. Elly Ouma Egesa. The green card produced in evidence did not bear any name other than that of the defendants sued herein. No sale agreement was produced. Proof of fraud is on a strict liability and the burden was upon the plaintiff. He failed to discharge this burden regarding the sale to Mr. Egesa. The plaintiff pleaded that the 1st defendant failed to abide by agreement done by their late father. Failure to honour an agreement is a breach of contract. The plaintiff did not elaborate how breach of contract can be equated to fraud.

12. It was pleaded that the 1st defendant fraudulently acquired the consent of the Land Control Board without notifying third parties. The third parties that were to be notified were not disclosed or the reason why they needed to be notified. Neither was there any details of the consent that was acquired. There was no need to inform the plaintiff of mutating the suit land Bunyala/Bukoma/974 into two as the same was done pursuant to an order in Cause No. 67 of 2008. All the particulars of fraud pleaded were not proved and they did not measure up to the threshold of fraud.

13. The plaintiff's suit fails because it was hinged only on fraud. Parties are bound by their pleadings so the Court is unable to go beyond the parameters of what was pleaded and evidence adduced. The same scenario applies to the defence of the 1st defendant. In his defence, he denied the fraud levelled against him stating that he acquired the property through Succession Cause. However in his witness statement he introduced an issue of law that the Land Disputes Tribunal lacked jurisdiction to entertain the claim that was before it. Since the issue of jurisdiction of the Land Disputes Tribunal was not raised in both defences, I will say no more about it.

14. In conclusion, in light of the reasons given herein above, I find that the plaintiff's Case has not been proved. It is dismissed. However on account that the plaintiff has lost the land through the inadequacy of his pleadings, I order that each party shall meet their respective costs of the suit.

Dated, signed & Delivered at BUSIA this 12th day of March 2020.

A.OMOLLO

JUDGE