



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1167 OF 2016

(FORMERLY HCC NO. 196 OF 2011)

JOY FELLOWSHIP MINISTRIES

(PENTECOSTAL CALVARY CHURCH).....1ST PLAINTIFF

PASTOR JOSEPH MOREMA.....2ND PLAINTIFF

PASTOR LAWRENCE O. NYABIAGE.....3RD PLAINTIFF

VERSUS

MR. NASHON MWEBI.....1ST DEFENDANT

MR. ABOKE J. S. KUMENDA.....2ND DEFENDANT

THE DISTRICT LAND REGISTRAR, NYAMIRA.....3RD DEFENDANT

J U D G M E N T

1. The Plaintiffs commenced the present suit vide a plaint dated 20th September 2011 which plaint was amended on 10th July 2012. The Plaintiffs vide the amended plaint filed on 2nd August 2012 prayed for the following orders:-

(a) A permanent injunction restraining the defendants, their agents, assigns or anybody authorized by them from interfering with the Plaintiff's peaceful possession and enjoyment of Plot No. East Kitutu/Mwamang'era/1145.

(b) A mandatory order be issued directing the 3rd defendant to recall title deed of Plot No. East Kitutu/Mwamang'era/1145 which is in the names of the 2nd Defendant and proceed to revoke it and a new title be issued in the 1st Plaintiff.

(c) That an order directed to the 1st and 2nd Defendants directing them to return for cancellation to the land registrar Nyamira District any vesting title deed, land certificate or other documents that were issued and/or may have been issued and/or may still be issued to any 3rd party in respect of Plot No. East Kitutu/Mang'era/1145.

(d) Alternatively the 1st and 2nd Defendants do pay the Plaintiffs a sum of kshs. 1,552,500/= together with interest at court rates from the date of filing the suit as the value of the developments on the suit property.

(e) That the Defendants be bounded to keep peace and to abstain from interfering with the Plaintiff's quiet enjoyment, possession and occupation of Plot No. East Kitutu/Mwamang'era/1145 and provide security for the same.

(f) That general damages be awarded.

(g) Costs of this suit.

2. The Plaintiffs vide the Plaint stated that in the year 2003 they purchased land parcel **East Kitutu/Mwamang'era/1145** situated in Keroka Town from the 1st Defendant who was then the registered owner for the consideration of kshs. 300,000/= and which purchase included the structures thereon. The Plaintiffs averred that they were granted exclusive possession of the suit property which they proceeded to develop by putting up structures thereon. The Plaintiffs further averred that on or about 2nd September 2011 they received a letter from the 2nd

Defendant alleging he was the registered owner of the suit property. Upon carrying out a search on the property the Plaintiffs confirmed that indeed the 2nd defendant was registered as owner on 5th February 2009.

3. The Plaintiffs averred that the transfer to the 2nd Defendant was fraudulent as they had purchased the land and were in possession of the same.

4. The 2nd Defendant filed a statement of defence dated 26th September 2011 on 28th September 2011. The 2nd Defendant denied the Plaintiffs purchased the suit land as pleaded in the plaint. He admitted he was registered as the owner of the suit land on 5th February 2009. He denied he had irregularly or fraudulently acquired the property as alleged by the Plaintiffs. The 2nd Defendant stated that he regularly purchased the suit property after exercise of due diligence. The land was in the 1st Defendant's name who sold the property to him and no encumbrances were noted on the register. The 2nd Defendant further averred that if the Plaintiffs had entered into any transaction with the 1st Defendant the same did not comply with the law and was unenforceable for being null and void.

5. The suit was heard before me on 24th July 2018 when PW1 Pastor Joseph Morema testified on behalf of the Plaintiffs. On 6th March 2019 when the suit was fixed for further hearing neither the Plaintiffs nor their advocate attended court though the 2nd Defendant had served a hearing notice on them. The court allowed the 2nd Defendant to proceed with the hearing ex parte. The suit against the 1st Defendant who had died and had not been substituted for over one year had abated.

The Evidence of the Parties:

6. PW1 stated in his evidence that their church Joy Fellowship Ministries was the one who was buying the land from the 1st Defendant. He stated there was a written agreement entered into dated 27th March 2003 exhibited in the Plaintiffs bundle of documents at page 17. As per the agreement the purchase price was kshs.300,000/= and a deposit of kshs.65,000/= was paid on execution of the agreement and the balance was to be paid in instalments. The witness stated the last instalment was paid in 2010 although he provided no evidence of how the instalments were paid. He stated that the seller who was the 1st Defendant permitted them to take possession and to use the land and develop the same as they pleased. He however stated the seller did not take them to the land control board to obtain the land board's consent as required.

7. In 2011, the witness stated they discovered the 1st Defendant had resold the same property to the 2nd defendant and had processed a title in favour of the 2nd Defendant who was registered as owner on 5th February 2009 as confirmed by the official search they carried out on the property on 25th August 2011. The witness further stated they contacted the seller (1st Defendant) who affirmed he had sold the property to the 2nd defendant. PW1 stated that the seller acknowledged they had paid him the purchase price and he offered in writing to make a refund of the money paid to them.

8. The witness further testified that the 2nd Defendant in 2011 attempted to take possession of the land forcibly from the Plaintiffs prompting the Plaintiffs to report the matter to Keroka Police Station. The 2nd defendant was arrested and charged together with others with the offence of malicious damage to property and was convicted.

9. On cross-examination, PW1 admitted he was not an official of Joy Fellowship Ministries. He stated that Joy Fellowship Ministries was registered on 15th August 2007 and further affirmed the agreement dated 27th March 2003 was entered into between the 1st Defendant and Pentecostal Calvary Church Keroka. He explained that initially their church was Pentecostal Calvary Church and was not registered. The witness confirmed that he signed the letter (agreement) dated 26th August 2011 where the 1st Defendant agreed to refund the purchase price paid to him. He stated he signed the document on behalf of Pentecostal Calvary Church and his explanation was that they needed to have a document to demonstrate to their members that their money was not lost.

10. The 2nd Defendant, Dr. John Aboko Kumenda by way of evidence adopted his witness statement dated 26th September 2011 and placed reliance on the 2nd Defendant's bundle of documents dated 26th September 2011 and filed in Court on 28th September 2011. The 2nd Defendant stated he purchased the property and he was issued with a title to the property in February 2009. He testified that at the time he purchased the property there was no church on the property but only a temporary structure thereon which belonged to the previous owner. He further stated that before buying the property he had carried out an official search which revealed the land was owned by the 1st Defendant, who was the one selling the property to him.

11. The 2nd Defendant further admitted that when in 2011 he attempted to take possession of his property, PW1 and others made a complaint to the police resulting in his (2nd Defendant's) and 1st Defendant's arrest. The 2nd Defendant stated the charge of malicious damage was not proved but the magistrate convicted him of desecrating a place of worship but which conviction was quashed on appeal. The 2nd Defendant further stated the 1st Defendant had agreed to refund the Plaintiffs their money and they made an agreement to that effect in writing. He maintained the property had no encumbrances when he purchased the same and insisted the Plaintiffs had no legitimate claim to the land. As sought in the counterclaim he prayed for orders that the plaintiffs vacate his land and for their eviction if they fail to do so.

Analysis and Determination:

12. Having reviewed the pleadings and having considered the evidence tendered by the parties, the following issues arise for determination:

- 1. Whether the Plaintiffs entered into any valid agreement of sale for the purchase of land parcel East Kitutu/Mwamang'era/1145 from the 1st Defendant?**

2. If there was such an agreement whether the same became null and void by operation of law for want of consent of the Land Control Board?

3. Whether the registration of the 2nd Defendant as proprietor of the suit property was fraudulent?

4. What reliefs and/or orders should the court grant, if at all?

13. The plaintiffs in their evidence placed reliance on an agreement of sale alleged to have been made on 27th March 2003 (“**PEX.1**”). The parties to that agreement were the 1st Defendant as the seller and Pentecostal Calvary Church as the purchaser. The 1st Defendant by his defence filed on 30th September 2011 under paragraph 7 denied the agreement of sale. The 1st defendant died before the suit was heard and he was not substituted. The issue whether or not there was a valid agreement between the Plaintiffs and the 1st Defendant cannot be determined. The suit against the 1st Defendant abated for failure of substitution of the 1st Defendant. The Court therefore cannot make a determination on the issue as it was not tried.

14. Even if it was found there was indeed a sale agreement between the Plaintiffs and the 1st Defendant as alleged by the Plaintiffs, this agreement would have become null and void by operation of law for lack of consent of the Land Control Board pursuant to the provisions of Section 6(1) of the Land Control Act, Cap 302 of the Laws of Kenya

Section 6(1)(a) provides:-

6(1) Each of the following transactions-

(a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b)

(c)

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

15. Under Clause 6 of the alleged agreement, the parties acknowledged the consent of the Land control board would have been required. Though the agreement provided the consent would have been availed after the full purchase price was paid, the application for consent under Section 8(1) of the Land Control Board had to be made within six months of the making of the agreement for sale.

Section 8(1) of the Act provides:-

8(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto.

16. The Plaintiffs in their evidence admit no application for the land board consent had been made up to 2011 when they said the 2nd Defendant attempted to take possession of the suit land. In consequence therefore, the agreement of sale dated 27th March 2003 became null and void upon expiry of six months from the said date and was therefore unenforceable.

17. The remedy the Plaintiffs had in terms of Section 7 of the Act was recovery of any money they may have paid pursuant to the void transaction. Section 7 of the Land Control Act provides:-

7. If any money or other valuable consideration has been paid in the course of a controlled transaction that has become void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to Section 22.

18. Indeed, the Plaintiffs perhaps in acknowledgment of the above provision obtained a commitment from the 1st Defendant for the refund of moneys paid to him in terms of the written agreement/ memorandum dated 26th August 2011. On the basis of the foregoing, it is my holding and determination that any agreement for the purchase of land the Plaintiffs may have entered into with the 1st Defendant became null and void for want of consent of the Land Control Board under the provisions of the Land Control Act. Any such agreement was unenforceable.

19. The Plaintiffs in their evidence though no evidence was provided stated that they paid the last instalment of the purchase price in 2010. The suit property as at that date had been transferred to the 2nd Defendant and definitely the 1st Defendant had ceased to own the property and therefore if he in fact received any money in 2010 towards purchase price as alleged then that would only have been fraudulently, as he had no property that he could sell and transfer to the Plaintiffs as at that time.

20. The 1st Defendant never denied he sold the suit property to the 2nd Defendant in his filed defence. Indeed, in paragraph 4 and 5 of the replying affidavit sworn by the 1st Defendant on 29th September 2011 in response to the Plaintiffs application for injunction the 1st Defendant stated:-

4. That in the said period the 2nd Defendant herein approached me and he appeared thereon to be a serious buyer/purchaser thereon we entered into negotiations where upon we reached an agreement by him paying the consideration price for the purchase of the said land which is the suit land herein.

5. That I know of my own knowledge that immediately the 2nd Defendant cleared his purchase price, I took him to the land board whereupon we executed the transfer forms and the said suit land was transferred to his name plainly and openly.

21. The transfer of the suit property to the 2nd defendant was regularly effected. The requisite application for the consent of the Land Control board was made on 15th December 2008 as per the copy exhibited and the board duly gave its consent on 31st December 2008. The 2nd Defendant was registered as the absolute proprietor of the suit property on 5th February 2009 and as the registered owner he was vested with ownership rights and was entitled to exclusive possession and use of the property. At the time of registration, the title had no encumbrances and on the land there were only temporary structures and the 2nd Defendant testified the structures belonged to the 1st Defendant and that the purchase was inclusive of all such structures. On the face of it, there was nothing to prevent the 2nd Defendant from proceeding with the transaction with the 1st Defendant as the records showed the 1st Defendant was the owner of the suit property.

22. I find no basis upon which I could find and hold that the transfer of the suit property to the 2nd Defendant was fraudulent and/or irregular. The Plaintiffs have alleged fraud against the 2nd defendant but they have led no evidence and neither have they proved fraud against the 2nd Defendant. The Plaintiffs have stated that they had structures on the land and that they were in possession of the land and therefore the 2nd Defendant ought to have established the interest of the Plaintiffs in the property. The 2nd Defendant had carried out due diligence by carrying out an official search which showed the 1st Defendant to be the registered owner and there were no encumbrances and had visited the land and had noted there were only some temporary structures which he stated belonged to the 1st Defendant and were included in the purchase price.

23. As indicated earlier in this judgment, the Plaintiffs alleged agreement had become null and void for all purposes for failure to comply with the provisions of the Land Control Act which meant that after the expiry of 6 months within which the Plaintiffs had to obtain the sanction of the Land Control Board, their possession of the land, became unlawful and were liable to be evicted by the lawful owner of the land. I find and hold that the 2nd Defendant was lawfully registered as owner of the suit property. The Plaintiffs have only themselves to blame for failing to ensure their transaction with the 1st Defendant complied with the law. Indeed, it is a matter of concern that the Plaintiffs could have commenced a sale transaction in 2003 as alleged and the same remained uncompleted upto 2010 when they state they paid the balance of the purchase.

24. The upshot is that, I find and hold that the Plaintiffs have failed to prove their case on a balance of probabilities and cannot therefore be entitled to the orders they seek. Respecting the counterclaim by the 2nd Defendant, I find and hold that the 2nd Defendant has proved on a balance of probabilities that he was legitimately and validly registered as owner of the suit property and is entitled to judgment.

25. In the premises, I dismiss the Plaintiffs suit against the 2nd Defendant with costs and enter judgment in favour of the 2nd Defendant on the counterclaim on the following terms:-

1. The Plaintiffs are ordered to vacate and deliver vacant possession of land parcel number East Kitutu/Mwamang'era/1145 to the 2nd defendant within 60 days from the date of this judgment.

2. In the event the Plaintiffs fail to vacate as under (1) above, the 2nd Defendant shall be entitled to obtain an order for the forcible eviction of the Plaintiffs on application.

3. The costs of the counterclaim are awarded to the 2nd Defendant.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 13TH DAY OF MAY 2019.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Nyawencha for Njagi for the 1st and 2nd Plaintiffs

N/A for the 1st Defendant

Mr. Ochwangi for O. M. Otieno for the 2nd Defendant

Ms. Chepkirui for the 3rd Defendant

Ruth Court assistant

J. M. MUTUNGI

JUDGE