



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 267 OF 2011

ISAAC MACHARIA NGARANGE.....PLAINTIFF

VERSUS

MALILI RANCH LIMITED.....1ST DEFENDANT

JOSEPH MAINGA NDETO.....2ND DEFENDANT

JUDGMENT

1. In the Plaintiff dated 21st September, 2011, the Plaintiff averred that on 15th April, 2011, he purchased a parcel of land from the 2nd Defendant for Kshs. 3,200,000; that he conducted a search at the 1st Defendant's offices and confirmed that the suit land was registered in the name of the 2nd Defendant and that on the basis of the said search, he paid the 2nd Defendant a sum of Kshs. 350,000 in cash as the first instalment.
2. The Plaintiff averred that subsequently, he entered into a Sale Agreement with the 2nd Defendant dated 29th April, 2011; that he paid to the 1st Defendant the requisite transfer fees of Kshs. 20,000 and that the Defendants have since declined to transfer the land he purchased to him.
3. In the Plaintiff, the Plaintiff has prayed for an order of specific performance; a permanent injunction restraining the Defendants from disposing him the suit land and in the alternative, for a refund of the purchase price, the Transfer fees and the expenses involved in developing the land. The Plaintiff has also sought in the Plaintiff for general damages for distress and the costs of the suit.
4. In its Defence, the 1st Defendant averred that the Plaintiff did not conduct any search at its premises as alleged and that it was a stranger to the allegations raised in the Plaintiff, including the Sale Agreement between the Plaintiff and the 2nd Defendant. The 2nd Defendant neither entered appearance nor filed a Defence.
5. The Plaintiff, PW1, informed the court that in April, 2011, he entered into negotiations with the 2nd Defendant for the purchase of his land which is within Malili Ranch; that on 15th April, 2011, he visited the 1st Defendant's office and conducted a search and that after confirming that indeed the land was registered in favour of the 2nd Defendant, he paid the 2nd Defendant cash of Kshs. 350,000.
6. It was the evidence of PW1 that he conducted another search at the 1st Defendant's premises on 29th April, 2011 and that the 1st Defendant's Secretary and Chairman confirmed to him that the 2nd Defendant was still the registered owner of the suit land. According to the Plaintiff, it was on the basis of the two searches he conducted in the 1st Defendant's offices that he entered into a written agreement with the 2nd Defendant in respect to the suit land.
7. According to the evidence of PW1, after signing the Sale Agreement of 29th April, 2011, he paid to the 2nd Defendant the full purchase price, together with the transfer fees of Kshs. 20,000, which he paid to the 1st Defendant. It was the evidence of PW1 that to date, the 1st Defendant has never transferred the land he bought from the 2nd Defendant to him. In cross-examination, PW1 stated that the Agreement of Sale refers to one John Njenga who was the first allottee and who sold the land to the 2nd Defendant.
8. It was the evidence of PW1 that he paid to the 2nd Defendant Kshs. 3,200,000 for the land and that he was not aware that the 2nd Defendant had been convicted by the court for forging a Sale Agreement. The Plaintiff produced in evidence the Agreement dated 13th September, 2010 between John Njenga and the 2nd Defendant; the Agreement dated 29th April, 2011 between himself and the 2nd Defendant; The letter of allotment to the 2nd Defendant dated 19th August, 2006; direct money transfer remittance receipts for Barclays Bank of Kenya for Kshs. 2,844,000 and payment slips.
9. PW2 informed the court that he is a land agent based in Machakos; that on 15th April, 2011, he assisted the Plaintiff in identifying the land

to buy and that he accompanied the Plaintiff to the 1st Defendant's offices. According to PW2, they did a search in the 1st Defendant's offices on 15th April, 2011 and 29th April, 2011; that the 1st Defendant's officials were present during the said searches and that the 1st Defendant's Chairman confirmed to them that the 2nd Defendant was the owner of the land that the Plaintiff intended to buy.

10. It was the evidence of PW2 that it was on the basis of the searches that they conducted at the 1st Defendant's office, in the presence of the 1st Defendant's Secretary and Chairman, that he advised the Plaintiff to buy the suit property.

11. In cross-examination, PW2 stated that the suit land did not have the Title Deed and that is why they could not conduct an official search at the lands office; that the 2nd Defendant gave them all the documents relating to his membership in the 1st Defendant including the membership card and the allotment letter.

12. The 1st Defendant's Secretary stated that parcel number 1830 initially belonged to Member No. 1269, one Isaac Mutiso Ngozi, which he sold to Nthoki Enterprises Limited on 15th March, 2010. According to DW1, Nthoki Enterprises Limited sold the land to one John Njenga Ngethe on 8th April, 2011.

13. DW1 informed the court that the 2nd Defendant and other brokers used fraudulent or forged documents to facilitate the fraudulent transfer of the suit property from John Njenga Ngethe to the 2nd Defendant and that the 2nd Defendant fraudulently transferred the suit property to the Plaintiff.

14. According to DW1, receipt number 6003 dated 29th April, 2011 was not issued by the 1st Defendant; that the said receipt is a forged and fraudulent document and that the 2nd Defendant was charged for making a false document in Criminal Case No. 1761 of 2011 (*Machakos*) and was convicted; that during trial in the criminal case, the court found that the suit property belonged to Njenga Ngethe and that at no time did Njenga Ngethe sell the suit property.

15. DW1 denied that the Plaintiff conducted a search of the suit property at the 1st Defendant's offices; that the Plaintiff's representative was told that the documents that were used to sell the suit property to the Plaintiff were forgeries and that the 2nd Defendant did not pass a good title to the Plaintiff.

16. DW1 stated that the 1st Defendant never received any money from the Plaintiff. In cross-examination, DW 1 stated that they issued a receipt dated 8th April, 2011 to John Njenga Ngethe and not the receipt dated 29th April, 2011; that the Plaintiff never paid the amount of money indicated in the receipt of 29th April, 2011 and that the receipt and the letter of allotment in possession of the Plaintiff are forgeries.

17. The Plaintiff's advocate submitted that the 1st Defendant, being the only custodian of the ownership records of plot number 1830, knew the rightful owner of the said plot; that the 2nd Defendant could not have transferred the suit property to himself fraudulently without the knowledge of the 1st Defendant's officials and that it was the duty of the 1st Defendant to inform the Plaintiff about the fraudulent dealings of the 2nd Defendant in the suit property.

18. The Plaintiff's counsel submitted that a perusal of receipt numbers 765 and 767 both dated 8th April, 2011 shows that they were issued by the same person; that the suit property was transferred to the 2nd Defendant on 8th April, 2011 they after he paid fees of Kshs. 20,000 and that the only way the 2nd Defendant would have managed to transfer the suit property to his name without following the due procedure is in collusion with the 1st Defendant.

19. While relying on the case of ***Republic vs. Industrial Injuries Commissioner Ex-parte AEU (1966) 2QB 31***, counsel submitted that an action arises out and in the course of employment if it results from an act which the employee is employed to do even if the employee is adopting a wrong method of doing the act or doing the act in the wrong manner. It was submitted that the 1st Defendant's actions of confirming to the Plaintiff during the search that the 2nd Defendant was the registered owner of the suit property points out to a well hatched fraudulent scheme between the 1st and 2nd Defendants.

20. The Plaintiff's counsel submitted that whereas the 2nd Defendant was charged and found guilty of making a document without lawful authority, the criminal court did not interrogate the participation of the 1st Defendant's witness, PW2. The Plaintiff counsel submitted that a civil court is not bound by the findings of a criminal court and that the civil court is seized of the authority to re-evaluate evidence and proceedings of the criminal court before reaching its decision.

21. The 1st Defendant's counsel submitted that the 1st Defendant was the complainant in Criminal Case No. 1761 of 2011; that the 2nd Defendant informed DW1 that he had bought Plot No. 1830 from one John Njenga and presented a Sale Agreement, a ballot card and a certificate for transfer and that it later turned out that the documents which the 2nd Defendant relied on were forgeries.

22. The 1st Defendant's counsel held that the receipts in possession of the Plaintiff allegedly issued by the 1st Defendant were forgeries; that the Plaintiff did not call a document examiner to confirm the signatures on the receipts and that the 1st Defendant did not enter into any agreement with the Plaintiff.

23. The 1st Defendant's advocate submitted that the Plaintiff cannot have a good title over plot number 1830 since he bought the land from a fraudulent transaction and that the Plaintiff has failed to prove fraud as against the 1st Defendant.

Analysis and findings:

24. The evidence by the Plaintiff is that in the month of April, 2011, he entered into negotiations with the 2nd Defendant to buy land from him at Malili Ranch, and that after visiting the 1st Defendant's offices on 15th April, 2011 and 29th April, 2011 to confirm the ownership of the said land, he paid to the 2nd Defendant the purchase price amounting to Kshs. 3,200,000.

25. The Plaintiff produced in evidence the copy of the Agreement he entered into with the 2nd Defendant dated 29th April, 2011. According to the said Agreement, the Plaintiff bought from the 2nd Defendant land known as Plot No. 1830 (*the suit property*) situate at Malili Ranch Limited measuring 7.8 acres for Kshs. 3,200,000, which the 2nd Defendant acknowledged receipt.

26. It was the evidence of the Plaintiff that before signing the Agreement of 29th April, 2011, he visited the 1st Defendant's offices and met the 1st Defendant's Chairman and Secretary who confirmed that indeed the 2nd Defendant was the owner of the land. According to the Plaintiff, he established from the Defendants that initially the suit land belonged to one John Njenga who then transferred it to the 2nd Defendant.

27. The copy of the purported Agreement dated 13th September, 2010 between the said John Njenga Ngethe and the 2nd Defendant was produced in evidence. According to the Plaintiff, the 2nd Defendant showed how the Agreement dated 13th September, 2010 between himself and the said John Njenga Ngethe.

28. After being convinced that the suit property belongs to the 2nd Defendant, the Plaintiff proceeded to sign the Agreement dated 29th April, 2011 and paid the entire purchase price, whereafter he paid to the 1st Defendant the transfer fees of Kshs. 20,000.

29. On his part, the 1st Defendant's Secretary stated that the 1st Defendant has 2,757 members; that the 2nd Defendant used forged documents to defraud the Plaintiff and that the criminal court found the 2nd Defendant guilty. According to DW1, they never received from the Defendants the transfer fees of Kshs. 20,000 and that they have no land to transfer to the Plaintiff.

30. DW1 produced in evidence the Judgment in the Chief Magistrate's Court at Machakos Criminal Case No. 1761 of 2011 (*Criminal case*). The Judgment shows that the 2nd Defendant was charged with the offence of making a false document without authority contrary to Section 357(c) of the Penal Code.

31. The Judgment shows that the allottee of the suit land, John Njenga Ngethe, who is not a party to this suit, testified in the criminal case as PW1. The said John Njenga denied ever selling the suit property to the 2nd Defendant.

32. DW2 herein testified in the criminal case as PW2. DW2 herein informed the court in the Criminal case that on 8th April, 2011, he was in his office when three people, including the accused (*the 2nd Defendant*) entered his office. It was the evidence of DW2 that the accused person (*the 2nd Defendant*) informed him that he bought the suit property from John Njenga Ngethe. The accused (*2nd Defendant*) then handed to him a Sale Agreement, a ballot card allotment and a certificate.

33. DW2 further told the trial court in criminal case that the 2nd Defendant paid Kshs. 20,000 for the transfer of the land to his name but it later turned out that all the documents he had were forgeries. After hearing the Investigating Officer and the 2nd Defendant, the learned Magistrate in the Criminal Case found as follows:

“From the evidence on record, there is evidence that the land parcel in question belongs to PW1 (John Njenga Ngethe). That accused purported to have purchased it from his which was not true. Accused purported to have purchased it from him which was not true. Accused's (the 2nd Defendant) in a Sale Agreement produced as PEXB 2 in this regard. He even presented himself before DW2 an official of Malili Ranch Company Limited to formalize the transaction. It is evident that the whole transaction was fraudulent... Accused (2nd Defendant) was positively identified as having appeared before PW2 to do the transaction. He cannot run away from it and purport to lay blame to an Asian. They were all actors in the commission of the offence and I find for prosecution that indeed he did make a document without authority and he is guilty and is convicted as charged.”

34. Indeed, the 1st Defendant's Secretary has reiterated that the Plaintiff did visit the 1st Defendant's offices. However, he insisted that issue of the 2nd Defendant having forged the documents that he used to sell the land to the Plaintiff came out later, and that after the said discovery, they reported the issue to the police.

35. The 2nd Defendant did not file any pleading in this matter. Indeed, the failure by the 2nd Defendant to enter appearance and file a Defence confirms that he forged the Sale Agreement of the initial allottee to the suit property and sold the same to the Plaintiff.

36. The Plaintiff has admitted that the suit property belonged to John Njenga Ngethe. According to the Plaintiff, the said land was transferred to the 2nd Defendant who sold the land to him. Indeed, the issue of whether or not the 2nd Defendant was in possession of documents showing that he had bought the land from the said John Njenga Ngethe, which he handed over to the Plaintiff, is not in contention.

37. What is in contention is whether by the time the Plaintiff signed the Agreement of 29th April, 2011, and paid to the 2nd Defendant the full purchase price, the 1st Defendant had effected the changes in its register showing the 2nd Defendant as the registered proprietor.

38. Although the Plaintiff's evidence was that the searches he carried out at the 1st Defendant's offices showed that the land was registered in favour of the 2nd Defendant, and not John Njenga Ngethe, he did not produce in evidence a document showing that position. Indeed, the Plaintiff did not obtain any confirmation in writing from the 1st Defendant's offices showing that the suit land was in the name of the 2nd Defendant.

39. Even if the 1st Defendant did confirm in writing that on 29th April, 2011, the suit land was in the name of the 2nd Defendant, and it turned out that the initial allottee never transferred the suit land to the 2nd defendant, then the whole transaction becomes a nullity.

40. The Criminal court found that the documents that the 2nd Defendant used to show that he was the owner of the suit land were all forged. Indeed, the 2nd Defendant has not presented any evidence before this court to convince me that firstly, he bought the suit property from the initial allottee John Njenga and secondly, that the criminal court was wrong in finding that he had forged the documents that he used to sell the suit property.

41. It is trite that one can only pass a good title. There is no evidence before me to show that the initial allottee, John Njenga, sold the suit property to the 2nd Defendant. Indeed, the trial court found that all the documents the 2nd Defendant had, purportedly signed by John Njenga were forgeries. That being the case, and in the absence of evidence from the 2nd Defendant to the contrary, I find that the 2nd Defendant had no title to land to pass to the Plaintiff, or at all.

42. In any event, the criminal court found that the suit land belongs to John Njenga. Indeed, the purported transfer of the suit land from John Njenga to the 2nd Defendant has been disowned by the 1st Defendant. Considering that the said John Njenga Ngethe still has an interest in the suit property, he was a necessary party in this matter.

43. Considering that the Plaintiff's claim is to have the suit property registered in his favour, the joinder of John Njenga Ngethe in this suit was paramount. It is only with his joinder that the court would have had an opportunity to hear his side of the story, and especially on whether he ever sold the suit property to the 2nd Defendant or not. Having not joined him in the suit, it will be unjust for the court to grant the Plaintiff the order for specific performance.

44. The evidence before the court shows that it is the 2nd Defendant who was paid the purchase price of Kshs. 3,200,000 which he acknowledged. Indeed, this amount is refundable by the 2nd Defendant.

45. The 1st Defendant's Director admitted in evidence that the 1st Defendant's Treasurer issued to the Plaintiff with a receipt of Kshs. 20,000. The amount of Kshs. 20,000 that was paid to the 1st Defendant, whether by the Plaintiff, or the 2nd Defendant, is refundable by the 1st Defendant.

46. In the circumstances, and for the reasons I have given above, I partially allow the Plaintiff's Plaint in the following terms:

a. The 2nd Defendant to refund to the Plaintiff Kshs. 3,200,000 being the money that the 2nd Defendant was paid for Plot No. 1830 situate at Malili Ranch Limited.

b. The 1st Defendant to refund to the Plaintiff Kshs. 20,000 being the amount that was paid to the 1st Defendant for the transfer of Plot Number 1830 situate in Malili Ranch Limited.

c. Interest on the above amount at court rates from the date of filing of this suit until payment in full.

d. The Defendants to pay the costs of this suit jointly and severally.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 6TH DAY OF MARCH, 2020.

O.A. ANGOTE

JUDGE