



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISHII

ELC NO. 157 OF 2010

TOM MOGOI OGECHHE.....PLAINTIFF

VERSUS

GEORGE NYANGENA MOGOI.....DEFENDANT

J U D G M E N T

1. The plaintiff and the defendant in the instant suit are brothers. The plaintiff by a plaint dated 8th June 2010 averred that he and the defendant jointly purchased land parcel **Central Kitutu/Daraja Mbili) 2380** measuring approximately 0.17 Hectares. The title for the property was however solely registered in the Defendant's name. The defendant, the plaintiff avers caused the land to be subdivided into portions namely Central **Kitutu/Daraja Mbili/2859** and **2860** which were yet to be registered.

2. The plaintiff further averred that the defendants had without the consent of the plaintiff threatened to sell the property to a third party without the plaintiff's involvement. The plaintiff prays for judgment against the defendant for:

*(a) A declaration that the Defendant holds the land known as **Central Kitutu/Daraja mbili/2859** and **2860** in trust of himself and the Plaintiff in equal shares which are proportionate to their respective contributions to the purchase price.*

*(b) An order that the Plaintiff be registered as proprietor of half share of all that piece of land comprised in both **Central Kitutu/Daraja Mbili/2859** and **2860**.*

(c) An order that the Defendant do execute a transfer and all acts necessary to convey the said title to the Plaintiff in default the Deputy Registrar of the High Court be authorized to sign the relevant papers on behalf of the Defendant.

(d) The Defendant do bear the costs of this suit.

(e) Any other or further relief this honorable Court may deem fit and just to grant.

3. The defendant filed a statement of defence dated 7th July 2010. The defendant denied that he purchased the suit land property jointly with the plaintiff. He admitted that the land was subdivided into land parcels **Central Kitutu/Daraja Mbili/2859** and **2860** but denied he needed the consent and/or authority of the plaintiff to effect the subdivision. He denied that he held the suit property in trust for the plaintiff as alleged in the plaint.

4. The plaintiff testified and called three witnesses in support of his case while the defendant testified and called and one witness in support

of the defendant's case.

The plaintiff's case

5. The plaintiff (PW1) testified that in 1985 he and his brother, the defendant herein were interested in buying land in Kisii their home area and as they were at the time both working away from Kisii he stated that they requested their cousin, Isaac Onyango Orutwa to identify a piece of land for them to purchase. He stated the cousin identified a parcel of land within Daraja Mbili owned by two women jointly, Agnes Kwamboka Orege and Regina Kemunto Mosirigwa who were co-wives. The plaintiff stated that Agnes Kwamboka Orege was selling a portion of her land measuring 80 ft by 200 ft approximately. He stated that they went to view the plot in the company of their cousin. They liked the plot and agreed to buy the same for the consideration of Kshs.30,000/=. He stated they entered into a sale agreement with the said Agnes Kwamboka which was witnessed by Isaac Onyango Orutwa and Francis Orenge a son to Agnes Kwamboka amongst other persons. The plaintiff stated that he paid Kshs.20,000/= while the defendant paid Kshs10,000/=. He explained that as he was working away from Kisii and his brother had been transferred to Kisii, the agreement was that the brother was to process the title. He stated that it was only in 2007 that he discovered that his brother had caused the land to be transferred to his sole name when he (the defendant) was attempting to sell the portion of the land that belonged to him (the plaintiff) to a third party.

6. The plaintiff explained that they were shown the dimensions of the portion of land they purchased on the day they made the agreement. He stated they immediately took possession of the land whereby the defendant occupied and commenced development on the upper part of the land while the plaintiff occupied the lower part. The plaintiff stated that the defendant put up a structure on his portion but explained on his (plaintiff's) portion of the land he allowed his sister Lucy Bosibori Mauti to cultivate. He stated there is a fence separating his portion of the land from his brother's portion. He stated their sister was residing in a house on the defendant's portion of the land but was cultivating on the plaintiff's portion of land.

7. The plaintiff stated the portion they purchased on subdivision became land parcel **Central Kitutu/Daraja Mbili/2380** and that the defendant got the same to be registered in his name alone instead of both of them. He stated this land has been subdivided into two parcels 2859 and 2860. The plaintiff stated he had no knowledge of any purchase of land by his brother in 1984 maintaining that the land they purchased together was the only land he was aware about.

8. Pw2 Isaac Onyango Orutwa a cousin of both the plaintiff and defendant explained how in 1985 both the plaintiff and the defendant requested him to identify land for them to purchase . He stated he identified the land for them which they jointly purchased. He affirmed there was a sale agreement that was prepared and was given to the defendant. He stated the full purchase price was paid when the agreement was made. He denied the defendant had bought any land in 1984.

9. The witness further stated that the defendant built a house on the upper part and reiterated that the lower part belonged to the plaintiff and that there was a fence that separated the two portions.

10. PW2 stated that he was present when the agreement was made. He was emphatic that the agreement was prepared at Mocha bookshop in Kisii town owned by his uncle and maintained that the full purchase price was paid to the sellers.

11. PW3 Francis Mose Orenge was the son of Agnes Kwamboka one of the sellers of the land and he stated in his evidence that his mother sold a portion of her land to both the plaintiff and the defendant. He stated that he was present when the sale transaction was effected. He stated his mother the step mother, the plaintiff and the defendant as well as PW2 were present when the sale was discussed at the site and the parties later went to Mocha Bookshop at Kisii where the sale agreement was entered into. The witness stated that it was both the plaintiff and defendant who took them to Mocha Bookshop after viewing the property for the agreement to be made. He said the full purchase price of Kshs30,000/= was paid out of which the plaintiff paid Ksh20,000/= and the defendant paid Ksh10,000. He was emphatic that both the plaintiff and the defendant were buying the land jointly.

12. In cross examination the witness stated the original parcel of land that was in the joint name of his mother and step mother was **Central Kitutu/Daraja Mbili/1530**. He stated it was his mother who effected the transfer for the defendant after succession was carried down in 1998. He denied knowledge of any other agreement other than the one his mother entered into with the plaintiff and the

defendant . He denied that he in 1984 witnessed any sale of land. He denied selling any land to anybody in 1990.

13. PW4 Lucy Bosibori, Mauti was the plaintiff's and the defendant's sister. She testified that she resided on the suit land. She affirmed the land belongs to her two brothers. She explained that the land was delineated into 2 portion of approximately equal size and her brothers each owned a piece . She stated the defendant got to be registered as sole owner because the plaintiff was working away from Kisii and was not easily available and on the other hand the defendant was available and he pursued the processing of the title.

14. She stated the defendant constructed a house on his portion and he allowed her to occupy the house. She stated the two portions are separated by a fence in the middle. She stated that while she resides on the defendant's portion she cultivated on the plaintiff's portion of the land.

15. The defendant (DW1) relied on the witness statement that he had filed and on the bundle of documents he had filed in support of his case. The defendant in his evidence denied that he purchased the suit land together with his brother. He stated he alone had purchased the portion of land from Agness Kwamboka and Regina Kerubo. The defendant additionally stated he purchased additional portions of land as evidenced by the copies of sale agreements he had exhibited. The defendant stated that land parcels 2859 and 2860 alluded to by the plaintiff did not exist and he had no knowledge of the same.

16. In cross examination the defendant stated that his sister (PW4) was residing in the suit land as a tenant. He said he bought the land in 1984 for the consideration of Kshs25,000/=. He stated that he bought several portions of land from the sons of the vendors. In particular he said he had bought several portions from Francis Orege Mose (PW3) and referred to the exhibited land written agreements. He stated the witnesses availed by the plaintiff were not truthful and insisted that he never purchased the land together with his brother. He affirmed that he obtained title to the land following succession and that he processed title for the land in 2007. He stated that when he wanted to subdivide his land, his brother registered a caution which prevented him from completing the subdivision through registration.

17. DW2 Benson Bakora testified that he was a witness when the defendant bought a parcel of land from Francis Mose in 1990 which was an addition of 35 ft to the land that the defendant had already bought. It was his evidence that he signed the agreement by thumb printing but could not recall the other witnesses who were present or what the consideration was.

18. At the close of the trial the plaintiff and the defendant filed their final written submissions. Having duly reviewed the pleadings, the evidence adduced and having carefully considered the submissions of the parties the following issues arise for determination:

(i) Whether the plaintiff and defendant jointly purchased land parcel Central Kitutu/Daraja Mbili/2380?

(ii) Whether land parcel Central Kitutu/Daraja Mbili/2380 was subdivided to create land parcels Central Kitutu/Daraja Mbili/2859 and 2860?

(iii) Whether the defendant upon registration as owner of land parcel Central Kitutu/Daraja Mbili/2380 held the land in trust for himself and the plaintiff?

(iv) What reliefs/orders should the Court grant?

19. In this matter the positions taken by the plaintiff and the defendant are diametrically opposite. The plaintiff insists he and the defendant purchased the suit land together while the defendant insists he solely purchased the suit property. On the evidence adduced by the parties I have formed the view that the plaintiff's assertion that he purchased the suit property together with his brother, the defendant herein is more probable. The plaintiff's evidence was buttressed by the evidence of PW2, Isaac Onyango Orutwa who was their cousin. It was Pw2 who identified the land for them to purchase and he was present during the negotiations and when the agreement was struck and payment made.

The evidence relating to the sale was supported by PW3 Francis Mose Orange, a son of the vendor. The step sister to the plaintiff and the defendant, Lucy Bosibori Mauti (PW4) in her evidence affirmed that each of her brother's was occupying their distinct portions of land which were separated by a fence. The evidence irresistibly pointed to there having been a joint purchase.

20. In an earlier suit Kisii ELC No.109 of 2008. **Hosbon Nyangau Onchuru -vs- Tom O Mogoi & George N Mogoi(2016) eKLR** where a third party buyer had sued the plaintiff and defendant jointly in regard to an alleged purchase of a portion of the suit land and whose proceedings and judgment were produced in evidence, the issue whether the plaintiff and the defendant had purchased the suit property jointly arose. The witnesses who testified before this Court in support of the plaintiff's case testified in the earlier suit. The Court in its judgment at paragraphs 29 and 30 stated as follows:-

29: Having considered the evidence of the 2nd defendant and that of DW3, DW4 and DW5, I am persuaded that the 1st defendant bought the suit property jointly with the 2nd defendant. I find particularly the evidence of DW3 who is a cousin of the 1st and 2nd defendants credible as relates to the sale transaction involving the 1st and 2nd defendants on the one hand and the mother and step mother of DW4 on the other hand. DW3 connected the defendants to the vendors and was present when the negotiations were carried out and when the payment was made. DW4 and DW5 confirmed that both defendants occupied the suit property and each of them had a distinct portion of the same which was well delineated. This is consistent with the defendants having jointly purchased the land. The 1st defendant took advantage of the absence of the 2nd defendant who was working away to have himself registered the sole owner of the land. In doing that the 1st defendant acted fraudulently and he knew what he was doing was not right and it was no wonder when he got the title in November 2007 he swiftly wanted to dispose of the portion which he knew belonged to the 2nd defendant. Thank God the 2nd defendant got wind of it and he equally swiftly moved to register a caution to safeguard his interest

30. Having held that both the 1st and 2nd defendants were joint purchasers of the suit property it follows that when the 1st defendant was registered as owner of the suit property on 4th June 2002 he was so registered to hold the land in trust for himself and the 2nd defendant. Thus the 2nd defendant had overriding interest of a trust in the suit property which in terms of section 28 (b) of the Land Registration Act, 2012 does not require registration and in the premises the 1st defendant could not lawfully and validly deal with the suit property without the involvement of the 2nd defendant. I have said enough to dispose of issued Nos (i) and (ii) which I answer affirmatively that the 1st defendant was not validly registered as the sole owner of land parcel Central Kitutu/Daraja Mbili/2380 and that the 1st defendant had in fact purchased the said property jointly with the 2nd defendant.

21. The defendant though he stated he bought several portions of land and produced copies of agreements, the agreements were not proved. Specifically PW3 Francis Mose Orange who was indicated as having executed all the agreements denied that he signed the agreements or that he was aware of them insisting he was only aware of the agreement between his mother and the plaintiff and defendant where they were jointly purchasing a portion of the land. In the face of the denial the defendant required to specifically prove the agreements which were never done.

22. In his submissions the defendant contended that the plaintiff could not prove there was a joint sale agreement when he did not demonstrate there was a written agreement as required under section 3 of the Law of Contract Act, Cap 23 of the Laws which provides thus:-

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the

meaning of the Auctioneers Act ([Cap. 526](#)), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

24. The plaintiff (as the 1st defendant) in the earlier suit referred to herein above took the same point in that suit and the Court in its judgment at paragraph 27 stated as follows:-

27. The 1st defendant further submits that since the alleged agreement that the 2nd defendant relies on to back his claim for joint purchase has not been shown to have been in writing as required by the Law of Contract Act, Cap 23 Laws of Kenya, Section 3 (2) the transaction was null and void. According to the 2nd defendant following the purchase he was granted possession of the lower portion of the parcel of land in part performance of the contract. The transaction was entered into before the repeal of section 3(3) of the Law of Contract Act by Act No.21 of 1991 which had validated transactions where a purchaser had in part performance of the contract taken possession of the property or part thereof. In the case of the 2nd defendant the lack of evidence in writing of the contract of sale would therefore not vitiate the contract of sale as there is evidence he had taken possession of his portion of the land .

25. I have no reason to depart from that reasoning and I hold that Section 3(3) has no application in the circumstances of the present matter . The agreement of sale took place in 1985 and pursuant to the agreement the plaintiff and the defendant took possession of their respective portions of land. This constituted part performance of the agreement and lack of a written contract did not render the transaction a nullity.

26. On the evidence presented before the Court I am satisfied the plaintiff and the defendant purchased the land the subject of the suit jointly and I so hold.

27. The registration of the defendant as the proprietor constituted him a trustee for the plaintiff and he therefore holds title to the land subject to the plaintiff's overriding interests within the meaning of section 28 (b) of the Land Registration Act, 2012. The defendant holds the land in trust for the plaintiff and the plaintiff is entitled to an equal share of the land.

28. The defendant in his submissions has raised issue with the plaintiff's claim that he was entitled to an equal share of land parcels **Central Kitutu/Daraj Mbili/2859** and **2860** arguing that such land did not exist. The plaintiff under paragraph 4 of the plaint was categorical that the land he and the defendant contributed and bought jointly was land parcel **Central Kitutu/Daraja Mbili/2380** measuring approximately 0.17 Hectares. This is the land that was registered in the defendant's name and which the defendant sought to subdivide and mutations were duly prepared creating land parcels **Central Kitutu/Daraja Mbili/2859** and **2860**. The defendant admitted he caused a subdivision to be carried out but before the mutation was registered the plaintiff registered a caution. There is therefore no doubt as to what parcel of land the plaintiff is making a claim to. It is land parcel **Central Kitutu/Daraja Mbili/2380** which on subdivision was to bear parcels 2859 and 2860. The Court is not aware what became of the mutation forms and in the premises will ignore the same and concern itself with the mother title.

29. Having carefully evaluated and analyzed the evidence I am satisfied that the plaintiff has proven his case on a balance of probabilities and is entitled to judgment. I accordingly enter judgment in favour of the plaintiff and make the following final orders:-

- 1. That the defendant holds land parcel Central Kitutu/Daraja Mbili/2380 in trust for himself and the plaintiff in equal shares.**
- 2. That it is ordered that land parcel Central Kitutu/Daraja Mbili/2380 be subdivided into two (2) equal portions and that one portion be transferred to Tom Mogoi Ogeche the plaintiff herein.**
- 3. The defendant to execute the transfer and all other necessary documents to facilitate compliance with (2) above failing which the Deputy Registrar of the Court to execute the necessary documents.**
- 4. Parties being family members each party to bear their own costs.**

Judgment dated and signed at Nakuru this 21st day of February 2020.

J M MUTUNGI

JUDGE

Judgment delivered at Kisii this 5th day of MARCH 2020

J ONYANGO

JUDGE