



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT BUSIA

CASE NO. 16 OF 2015

JOSEPHAT OUNDO OMODO.....PLAINTIFF

= VERSUS =

MARTINA ANYANGO KHANYA.....DEFENDANT

JUDGMENT

1. The plaintiff, Josephat Oundo Omodo instituted this suit vide the Complaint dated 9th February 2015 and filed on 26th February 2015. It is pleaded that sometime in 1993 the Defendant sold to the plaintiff a portion of the land parcel known as LR Bukhayo/Kisoko/1013 measuring 2 acres at a consideration of Kshs 38,000. The sale agreement to that effect was executed and the Defendant acknowledged receipt of the purchase price. That the Defendant caused the mother title to be subdivided into three parcels, namely Bukhayo/Kisoko/3447, 3448 and 3449 with the suit property, parcel no. 3448 being designated for the Plaintiff. Further, the Defendant applied and obtained the Land Control Board consent to transfer the suit property to the Plaintiff but failed to complete the process from that juncture.

2. The Plaintiff pleaded further that in as much as he was given vacant possession of the suit property in 1993 of which he has since then had peaceful and quiet possession; the Defendant has to date failed to surrender the title deed and transfer document to complete the transaction and is therefore in breach of the sale agreement. The Plaintiff seeks specific performance in terms of the following reliefs:

- i. Transfer of LR Bukhayo/Kisoko/3448 to the Plaintiff**
- ii. The Deputy Registrar of the Court to sign all relevant transfer documents**
- iii. The surrender or revocation of the title deed of LR Bukhayo/Kisoko/1013 issued to the Defendant**
- iv. Costs of the suit**

3. The Defendant, Martina Anyango Khaunya filed her Defence dated 11th December 2015 on even date. She denied the Plaintiff's claim specifically that the Plaintiff paid her the purchase price of Kshs. 38,000 and that she was a party to the subdivision of the mother title Bukhayo/Kisoko/1013 giving rise to Bukhayo/Kisoko/3447, 3448 and 3449. The Defendant however admitted that she was a party to the signing of an application for the Land Control Board's Consent to the subdivision but denied participating in any proceedings before the Board on consent to transfer hence the Plaintiff's claim for specific performance has no merit.

4. Aside from blanket denials, the Defendant claimed that the Plaintiff forged the application for the Land Control Board's consent as well as the mutation form. She pleaded fraud on the part of the Plaintiff particularized thus:

- i. That the Plaintiff presented mutation forms to the Land Registrar with no title deed to create Bukhayo/Kisoko/3447,3448 and 3449
- ii. That the Plaintiff presented an application for consent to Nambale Land Control Board without the attendance of the Defendant thus he obtained a null and void Letter of Consent dated 6th February 1996
- iii. That the sale agreement dated 18th October 1993 did not obtain leave for extension of time to apply for Consent to transfer Bukhayo/Kisoko/3448 rendering the consent null and void

The Defendant concluded that the Plaintiff was not entitled to the suit property and that the claim was time barred.

5. Parties were heard on various dates from 15th January 2019, with the Plaintiff calling two witnesses and the Defendant testifying as the

sole witness in support of her case. The Plaintiff, **PW1** testified that he comes from Malanga Sub-location, Nambale sub-county and that he works with Mumias Sugar Company. That the Defendant who was his aunt sold him a piece of land being a 2 acre portion of Bukhayo/Kisoko/1013 at Kshs.38,000. He produced the first sale agreement dated 8th October 1993 as P. Ex 1. It was witnessed by one Boaz and Christopher. That on that date he paid Kshs.18,000 leaving a balance of Kshs.20,000 which was settled on 12th October 1994. The acknowledgment of receipt of the balance of the purchase price was produced as P. Ex 2.

6. **PW1** continued that they applied to the Land Control Board for consent to subdivide the mother title; Bukyahyo/Kisoko/1013. That the consent was issued for subdivision into parcel Nos Bukhayo/Kisoko/3447, 3448 and 3448 with 3448 being designated for him. He produced the application and consent as P. Ex 3 and 4; and the mutation form for the resultant subdivisions as P. ex 5. **PW1** stated further that the Defendant applied for consent to transfer parcel no. 3448 to him; the Land Control Board gave its consent but from that point forward the Defendant refused to sign the transfer form. The said application and consent were produced as P. Ex 6 and 7 respectively. **PW 1** sought redress from the area elders and relatives.

7. He continued that a meeting was held but the Defendant yet again refused to sign the transfer forms culminating in the current case. **PW1** asserted that the Defendant received the full purchase price of Kshs.38,000. That she had all along signed the requisite documents voluntarily and had given possession of the suit property which was never challenged. Currently on the land, **PW 1** has planted trees. He prayed to be granted the reliefs enumerated in the Plaintiff.

8. On cross-examination, **PW1** admitted that the signature of the magistrate was not legible on the initial sale agreement (P. Ex 1) as it had faded. Counsel for the Defendant challenged its authenticity as to the discrepancy in date as compared to **PW1's** testimony. However, on re-examination **PW1** testified that it was signed on 8th October 1993 and the magistrate appended her signature thereto. He asserted that P. Ex 2 was equally genuine and valid.

9. Boaz Owase Otisi testified as **PW2**. He stated that he hails from Malanga sub location, Nambale Sub County and adopted his statement dated 10th February 2017 as his evidence in chief. **PW 2** was categorical that the acknowledgment, **Pex 2** was signed by the Defendant when she was paid the balance of the purchase price being Kshs.20,000. He also confirmed that the Defendant refused to transfer the suit property to the Plaintiff as directed by the elders in the meeting alluded to by **PW1** that took place on 18th March 2012. On cross-examination, **PW2** stated that a further sum of Kshs.18,000 was discussed at the meeting. It was however meant for resurvey. That the Plaintiff was willing to meet the cost but the Defendant refused to cooperate.

10. The Defendant gave evidence as **DW1**. She stated that she comes from Malanga sub location in Bukhayo central and adopted her statement filed on 12th February 2016. **DW1** testified that she was the owner of Bukhayo/Kisoko/1013. That the Plaintiff has planted trees on a portion of the same measuring approximately a quarter acre. She admitted that the Plaintiff started using the property in 1993 and was in the process of buying it from her. That **Pex 1** was the agreement signed by herself and the Plaintiff upon which she was paid Kshs.18,000. The balance of Kshs.20,000 was to be paid later. That on the date of the execution of the agreement, a surveyor measured the sold portion designated for the Plaintiff namely Bukhayo/Kisoko/3448. She signed a document stating that she would give it to the Plaintiff.

11. **DW1** was adamant that they never went to the Land Control Board. She denied signing the application for consent of subdivision. The Plaintiff then asked for the title but she refused to give it to him as she had not been paid the balance. **DW1** stated that she would not surrender the title even if the balance is settled nor if the Plaintiff adds money exceeding the balance because of the delay on his part. She continued that **PW2** was not present when she made the agreement with the Plaintiff and the other alleged witness, Christopher Edodo was in Uganda at the time.

12. On cross-examination, **DW2** admitted that she did not challenge the signatures on the mutation form and on the applications for Land Control Board consent as she first saw the documents when she was served with the pleadings in this suit. That she had been previously summoned by the area District Officer at the Plaintiff's behest regarding the current dispute but they had been directed to settle it at home. **DW2** also admitted that she has not refunded the part-payment of Kshs.18,000 she admitted receiving from the Plaintiff.

13. **DW2** on re-examination observed that the signatures on the sale agreement did not resemble those on the mutation form and application for Land Control Board consent. That the sale agreement was made in 1993 yet this case was instituted twenty years from that date which constituted inordinate delay.

14. The parties filed their final submissions which I have read and considered. From the evidence adduced, the questions I frame for my determination are;

- i. Whether the Plaintiff's case is time barred within the meaning of section 7 of the Limitation of Actions Act thereby divesting this Court of jurisdiction to determine this case.
- ii. Whether the Plaintiff paid the Defendant the full purchase price
- iii. Whether the Plaintiff acquired Land Control Board consents and the Mutation form through fraud.
- iv. What orders this Court ought to grant.

15. The fact that the Defendant sold the suit property to the Plaintiff is not in dispute. In her testimony as well as her pleadings, the Defendant admitted entering into a sale agreement with the Plaintiff. What she disputes is settlement of the purchase price in full which caused her to stop discharging her obligation of facilitating the transfer of the property sold to the Plaintiff. However, there are glaring inconsistencies in the Defendant's version of events. Firstly, she states in her defence that she signed the application for Land Control Board consent to subdivide the mother title but did not sign the application for consent to transfer. In her witness statement filed on 12th February

2016, she states that the sale agreement was entered into unwillingly and that she was “persuaded” to sign the consent application for subdivision imputing coercion and undue influence. In her oral testimony before court, she admitted to signing the sale agreement with no indication that it was involuntary.

16. It is trite law that he who alleges must prove. The Plaintiff on his part produced a sale agreement and an acknowledgment of receipt of the purchase price; complete with a witness to corroborate the same. The Defendant not only failed to produce documentation challenging the Plaintiff’s evidence but also made unsubstantiated denials and callous remarks during her testimony which did not aid her case. She said that she **“will not give title even if the Plaintiff adds money on top of the balance she claimed was outstanding.”**

17. The particulars of fraud enumerated in the statement of defence and the oral testimony were not proved as the defendant admits to participating in the sale of the suit property. She also admitted signing the application for LCB consents to subdivide the land. In spite of these the defendant refused to execute a transfer in favour of the plaintiff without any justification. The defendant did not call the evidence of a handwriting expert to prove that her signature was forged. Neither was there records produced minutes from the respective Land Control Board to corroborate her non-attendance of such a meeting. Her observation that the signatures in the Sale agreement and applications for consent were not similar did not suffice proof of forgery alleged

18. In cases where fraud is alleged, it must be distinctly proved and it is not enough to simply infer fraud from the facts which is what the Defendant wants the Court to do. See the holding in the case of ***Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000)***. Where the Court of Appeal held thus, ***“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that those acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”***

19. The Court is cognizant of the corroboration in the testimony of PW1, PW2 and DW1, that the Plaintiff was given vacant possession of the suit land and has been in peaceful occupation thereof from 1993. That the Plaintiff has planted trees thereon. It is unclear why the Defendant is putting up a fight on the issue of transfer yet she has not taken action to evict the Plaintiff from the property. Moreover, DW1’s testimony that she was summoned by the D.O who directed them to solve the dispute amicably and that of PW1 and PW2 of the meeting before the elders demonstrates that the Plaintiff attempted to settle this matter by other means before filing this suit.

20. After analysis of the evidence presented by both parties I am persuaded to hold that the plaintiff has proved his case on a balance of probabilities. Accordingly, I enter judgment for him as prayed in the Plaint as follows;

v. The defendant shall execute a transfer of LR Bukhayo/Kisoko/3448 to the Plaintiff forthwith and not later than 45 days from the date of service of the decree upon her.

vi. In default of the defendant complying with (i) above, the Deputy Registrar of the Court shall sign all relevant transfer documents in favour of the plaintiff in respect of L.R 3448

vii. The defendant shall surrender the title deed of LR Bukhayo/Kisoko/1013 for revocation.

viii. Costs of the suit is awarded to the plaintiff

Dated and signed at BUSIA this 29th day of April, 2020.

A. OMOLLO

JUDGE