



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 243 OF 2017

ELIJAH MAINA KIMANI (*Suing on behalf of*

LIGHT HOUSE OF GRACE MINISTRY.....1ST PLAINTIFF

GERALD WAMBUA MAKAU.....2ND PLAINTIFF

VERSUS

JACOB MUYENDI WAMBUA.....1ST DEFENDANT

SUMAC MICROFINANCE BANK.....2ND DEFENDANT

JUDGMENT

1. In the Amended Plaint dated 27th April, 2018, the Plaintiffs have averred that at all material times, the 1st Defendant was the registered absolute owner of land known as Mitaboni/Ngelani/1385; that on or about 23rd January, 2004, the 1st Plaintiff bought two portions of the suit land measuring 130 x 80 and 55 x 45 from the 1st Defendant and that on 3rd July, 2015, the 2nd Plaintiff bought another portion of the suit land measuring 40 x 40 feet.

2. The Plaintiffs have averred that after signing the Agreements of Sale, the suit land was sub-divided; that they were shocked to learn that the 1st Defendant fraudulently and unlawfully charged the suit land in favour of the 2nd Defendant and that an order declaring the charge purportedly registered against the suit property in favour of the 2nd Defendant was illegal and fraudulent should be issued. The Plaintiffs are also seeking for an order releasing the original Title Deed to the Plaintiffs to facilitate the sub-division process.

3. In its Defence, the 2nd Defendant averred that at all material times, the 1st Defendant was the registered owner of the suit land; that on 21st April, 2016, the bank extended a credit facility to Cosmus Kivuva Ndambuki for a sum of Kshs. 2,000,000 and that the 1st Defendant agreed to charge the suit land to secure the said sum.

4. The 2nd Plaintiff, PW1, informed the court that the 1st Defendant is the proprietor of a parcel of land known as Mitaboni/Ngelani/1385 (*the suit land*); that on 3rd July, 2015, he entered into an Agreement of Sale with the 1st Defendant who agreed to sell to him a piece of the suit land measuring 40 x 40 feet and that he paid the 1st Defendant Kshs. 350,000 for the said land.

5. It was the evidence of PW1 that he was shocked to discover the suit land had been charged to the 2nd Defendant and that the transaction between the 1st and 2nd Defendants is illegal and unlawful.

6. It was the evidence of PW1 that after purchasing a portion of the suit land, the land was sub-divided and a mutation form signed; that the Registered Index Map was amended to reflect the sub-divisions and that the new numbers that emerged after the sub-divisions were parcel numbers 3696, 3695, 3693 and 3694.

7. According to PW1, the Plaintiffs were to get parcel number 3696 and that the mother Title Deed is in the custody of the 2nd Defendant; that the Plaintiffs have a Church on the portion of land that they bought which they have occupied since the year 2007 and that they had used the land as a Church since 2004.

8. In cross-examination, PW1 stated that the sale of the land was between the year 2004-2011; that they never obtained the consent of the Land Control Board and that they do not have a certificate of registration for their Church. According to PW1, although the Registered Index Map shows the land was sub-divided, the official search does not show the sub-division.

9. In his Defence, the 1st Defendant averred that the suit property belongs to the Plaintiffs in their respective shares and ought to be sub-divided and transferred to the Plaintiffs; that he never authorized the charging of the suit land by the 2nd Defendant and that the fraud enumerated in the Plaint was perpetrated by the 2nd Defendant and the borrower, Cosmus Kivuva Ndambuki.
10. In his evidence, DW1 stated that he sold a portion of the suit land to the Plaintiffs; that before he could process the title document in favour of the Plaintiffs, he met one Cosmus Kivuva in Machakos town and that the said Cosmus Kivuva requested for the mother Title Deed for “five months” and promised to give him Kshs. 60,000.
11. According to DW1, the said Cosmus Kivuva took him to the 2nd Defendant’s offices; that he informed the bank that he had agreed “to lend” the borrower the Title Deed for five (5) months and that before the lapse of the five months, the 2nd Defendant told him that Cosmus had used the Title Deed to borrow Kshs. 2,000,000.
12. The 2nd Defendant’s Collection and Recoveries Manager, DW2, informed the court that Cosmus Kivuva sought for a loan facility from the 2nd Defendant; that while accompanied with the 1st Defendant, he gave to the 2nd Defendant the Title Deed for the suit land as security and that the 1st Defendant signed a personal guarantee on 15th March, 2016. According to DW2, the 1st Defendant swore an Affidavit to the effect that he was not married and that the 1st Defendant signed the charge document together with the consent to charge the suit land.
13. The Plaintiffs’ advocate submitted that the Plaintiffs purchased the suit land on 23rd January, 2004; that the suit property was charged on 21st April, 2016 way after the sale of the suit property and that the purported charge was irregular, unlawful and fraudulent. Counsel submitted that after selling the suit property to the Plaintiffs, the 1st Defendant did not have valid title to charge.
14. The Plaintiffs’ counsel submitted that the 2nd Defendant did not conduct a historical search on the property; that the personal guarantee by the 1st Defendant was never witnessed as required in law and that the 1st Defendant deliberately planned to defraud the Plaintiffs of their property.
15. The 2nd Defendant’s advocate submitted that the burden of proof of the alleged fraud and negligence lies with the Plaintiffs; that under Section 71(1) of the Land Act, the Plaintiffs had a duty to register their interest on the suit land and that the Plaintiffs failed to prove that the 2nd Defendant had knowledge of the Plaintiffs’ alleged interest on the suit land.
16. The 2nd Defendant’s counsel finally submitted that the suit property belongs to the 1st Defendant with the 2nd Defendant’s interest endorsed thereon; that there was no consent by the Land Control Board to sub-divide the suit land and sell it to the Plaintiffs and that the chargees’ interests supersedes any other person’s right over the charged property.
17. It is not in dispute that the 1st Defendant is the registered proprietor of land known as Mitaboni/Ngelani/1385 (*the suit land*). According to the certificate of official search, the suit land was registered in favour of the 1st Defendant on 13th October, 2008. The 1st Defendant was then issued with a Title Deed on 8th October, 2015.
18. The evidence by the Plaintiffs is that on 23rd January, 2004, the 1st Plaintiff entered into an Agreement with the 1st Defendant on behalf of Light House of Grace Ministry; that the 1st Defendant agreed to sell to them a portion of the said land and that the land the Plaintiffs bought was sub-divided but was never transferred to the Plaintiffs.
19. The Plaintiffs produced in evidence the Sale Agreement dated 23rd January, 2004. The said Agreement shows that the Plaintiffs purchased two portions of land one measuring 130 x 80 feet and another one measuring 55 x 45 feet.
20. The 1st Defendant has admitted that he indeed sold the said two plots to the Plaintiffs. However, he never transferred the same. It would appear that on 18th April, 2011, the Plaintiffs purchased a third plot measuring 168 feet by 95 feet for Kshs. 300,000. Again this plot was never transferred to the Plaintiffs.
21. Although the Plaintiffs informed the court that they sub-divided the suit land and had the Registered Index Map amended, they did not produce any evidence to show that the consent of the Land Control Board was ever obtained before the suit land was sub-divided. Section 6 of the Land Control Act provides as follows:

“(1) Each of the following transactions that is to say-

(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) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of 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.”

22. Section 8(1) of the Act provides that an Application for consent in respect of a controlled transaction shall be made in the prescribed form with the appropriate Land Control Board within six (6) months of making the Agreement.

23. In the absence of the consent of the Land Control Board allowing the sub-division of the suit land, the contention by the Plaintiffs that they sub-divided the suit land and had the Registered Index Map amended is an illegality.

24. Although the Plaintiffs purportedly purchased portions of the suit land in the year 2004 and 2011, the evidence before me shows that the suit land was charged by the 1st Defendant to the 2nd Defendant. Indeed, the said charge was registered in favour of the 2nd Defendant on 21st April, 2016, one year after the 1st Defendant was issued with a Title Deed for the suit land. The official search shows that the charge was to secure a sum of Kshs. 2,000,000.

25. The 2nd Defendant produced in evidence the copy of the consent of the Land Control Board dated 1st April, 2016 to charge the suit property in favour of the 2nd Defendant. The 2nd Defendant also produced the Personal Loan Guarantee which was signed by the 1st Defendant. The 1st Defendant also signed the charge document on 15th April, 2016.

26. In addition to the executed charge and Personal Loan Guarantee documents, the 1st Defendant also executed an Affidavit. In the said Affidavit, the 1st Defendant deponed that he had agreed to provide the suit land as security for a facility obtained by Cosmus Kivuva Ndambuki and that he was not married.

27. The 1st Defendant has not denied that he signed the above document. The assertion by the 1st Defendant that he was tricked by Cosmus Kivuva and the 2nd Defendant to sign the documents was not proved. Indeed, it is my finding that the signing of the Personal Loan Guarantee, the charge document and the Affidavit by the 1st Defendant was voluntary.

28. Other than the Sale Agreement between the Plaintiffs and the 1st Defendant being void for want of the consent of the Land Control Board, Section 26 of the Land Registration Act provides that a Certificate of Title is absolute and indefeasible subject to encumbrances.

29. The 1st Defendant's title has been encumbered by the and 2nd Defendant's charge. Consequently, the said title can only be released to the 1st Defendant pursuant to the provisions of Section 88 (1) (a) and (b) of the Land Act, 2012 which provides as follows:

“(1) There shall be implied in every charge covenants by the chargor with the chargee binding the charger-

a) to pay the principal money on the day appointed in the charge agreement, and, so long as any of the principal money or any part thereof remains unpaid, to pay interest on the money thereon or on so much of the money that for the time being remains unpaid at the rate and on the days and in the manner specified in charge agreement;

b) to pay all rates, charges, rent, taxes and other outgoings that are at all times payable in respect of the charged land”

30. Until the charged land is redeemed according to the terms of the charge instrument, the said title cannot be released to the 1st Defendant, neither can the Plaintiffs' claim succeed.

31. For those reasons, I dismiss the Plaintiffs' Amended Plaint dated 27th April, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF APRIL, 2020.

O.A. ANGOTE

JUDGE