



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS
ELC. CASE NO. 11 OF 2018

ELIZABETH GATWIRI MBAYA.....1ST PLAINTIFF

SUSAN WAVINYA JULIUS.....2ND PLAINTIFF

PHOEBE NDUKU KIVUNGO.....3RD PLAINTIFF

VERSUS

JANE SYOMBUA KYALO.....1ST DEFENDANT

JOHN MUTUKU KISUVI.....2ND DEFENDANT

MICHAEL KYALO KISUVI.....3RD DEFENDANT

STEPHEN MUSAU KISUVI.....4TH DEFENDANT

BERNARD MUTINDA KISUVI.....5TH DEFENDANT

THE LAND REGISTRAR, MACHAKOS DISTRICT LAND REGISTRY.....6TH DEFENDANT

JUDGMENT

1. In the Plaintiff dated 4th December, 2017, the Plaintiffs are seeking for the following prayers:

a. A declaration that the Title Deeds issued on 23rd October, 2013 and 18th September, 2017 in respect of all that Title Number Donyo Sabuk/Komarock Block 1/526 in the names of the 4th and 5th Defendants is null and void and an order do issue revoking the same forthwith.

b. A declaration that the Plaintiffs have proprietary interest in the Land Title Number Donyo Sabuk/Komarock Block 1/526 by virtue of having purchased the suit properties measuring two (2) acres sold to the 1st and 2nd Plaintiffs jointly and two (2) acres sold to the 3rd Plaintiff by the 3rd, 4th and 5th Defendants herein.

c. An order of specific performance compelling the 3rd, 4th and 5th Defendants to transfer and/or effect registration respectively of the suit properties measuring approximately two (2) acres of land sold to the 1st and 2nd Plaintiffs jointly and two (2) acres sold to the 3rd Plaintiff to be curved out of Land Title Number Donyo Sabuk/Komarock Block 1/526.

d. An order directing the 6th Defendant to properly register forms R.L. 7 (Transfer by personal representative to person entitled under a will or on intestacy) and R.L. 19 (Application to be registered as a proprietor by transmission) emanating from Machakos High Court Succession Cause No. 659 of 2010.

e. An order directing the 6th Defendant to transfer the suit property measuring two (2) acres of land sold to the 1st and 2nd Plaintiffs jointly and two (2) acres sold to the 3rd Plaintiff by the 3rd, 4th and 5th Defendants herein and comprised in Land Title Number Donyo Sabuk/Komarock Block 1/526 to the Plaintiffs respectively.

f. Costs of the suit plus interest at 14% from the date of filing suit until payment in full.

g. Any other and/or further relief as this Honourable Court may deem fit to grant.

2. In the Plaintiff, the Plaintiffs have averred that the 1st to 5th Defendants are the beneficiaries of the Estate of the late Kisuvi Wambua (*deceased*); that the 4th and 5th Defendants are the court appointed administrators of the Estate of the deceased and that on 20th October, 2008, 23rd May, 2009 and 24th June, 2009 respectively, the 3rd, 4th and 5th Defendants represented to the Plaintiffs that they would sell and transfer two (2) acres of land to the 1st and 2nd Plaintiffs and two (2) acres of land to the 3rd Plaintiff.

3. According to the Plaintiffs, the mother title of Donyo Sabuk/Komarock Block 1/526 was at the material time beneficially owned by Kisuvi Wambua (*deceased*); that the Defendants acknowledged payment and receipt of the total purchase price during the execution of the Agreements for Sale and that they agreed with the 3rd, 4th and 5th Defendants during the execution of the Agreements that the transfer of the titles to the suit properties would be effected directly to the Plaintiffs upon the conclusion of the Succession case.

4. According to the Plaintiffs, they have since learnt that the Grant of Letters of Administration in High Court Succession Cause No. 659 of 2010 was confirmed on 11th April, 2013; that the 4th and 5th Defendants were to hold the mother title in trust for themselves and the other nineteen (19) beneficiaries and that the 4th and 5th Defendants are unlawfully appropriating the Plaintiffs' properties.

5. In the Defence, the 1st-5th Defendants denied generally the averments in the Plaintiff. In the alternative, the Defendants averred that if there was any representation made, it was upon the Plaintiffs to undertake due diligence, which they never did.

6. When the matter came up for hearing, the 1st Plaintiff, PW1, averred that on 23rd May, 2009 and 24th June, 2009, the 3rd, 4th and 5th Defendants represented to her and the 2nd Plaintiff that they would sell and transfer to them two (2) acres of land which was to be curved out of parcel of land known as Donyo Sabuk/Komarock Block 1/526.

7. According to PW1, the entire suit property was beneficially owned by Kisuvi Wambua (*deceased*) from whose Estate the 1st to 5th Defendants were entitled to 1/3 while the remaining 2/3 was to be inherited by the other two households of the deceased and that the deceased had three wives.

8. According to the 1st Plaintiff, they were aware that each household was entitled to 20 acres of the suit property; that the 2nd Plaintiff agreed to buy the suit property for Kshs. 80,000 per acre making the total purchase price to be Kshs. 160,000 and that the 3rd, 4th and 5th Defendants agreed to sell the land to the 2nd Plaintiff at the said price.

9. PW1 stated that the 3rd, 4th and 5th Defendants agreed to transfer the property to the Plaintiffs directly upon the conclusion of the Succession Court proceedings and that upon execution of the Agreements for Sale, the suit properties were demarcated by erection of beacons by a Surveyor duly appointed by the 3rd, 4th and 5th Defendants.

10. PW1 stated that they have established that through a Grant of Letters of Administration Intestate dated 14th November, 2011 issued in Machakos High Court Succession Cause No. 659 of 2010 and confirmed on 11th April, 2013, the 4th and 5th Defendants were confirmed Administrators of the Estate of the deceased; that the court directed that the mother property be registered in their joint names to hold the land in trust for themselves and for the other nineteen (19) beneficiaries.

11. It was the evidence of PW1 that a transfer of land and a Title Deed dated 18th September, 2017, in respect of title number Donyo Sabuk/Komarock Block 1/55729 was processed by the 6th Defendant in September, 2017 in the names of the 4th and 5th Defendants in respect of two (2) acres out of the mother title and that an order of specific performance compelling the 3rd, 4th and 5th Defendants to transfer and/or effect registration of two (2) acres of land to the Plaintiffs should issue.

12. The 2nd Plaintiff, PW2 and the 3rd Plaintiff, PW3, adopted the same evidence that the 1st Plaintiff gave, word for word, and sought for the same prayers sought by the 1st Plaintiff. However, the Agreement that the 3rd Plaintiff entered into with the 3rd, 4th and 5th Defendants was dated 20th October, 2008 in respect of a piece of land measuring two (2) acres.

13. According to PW3, a Title Deed dated 18th September, 2017 in respect of Donyo Sabuk/Komarock Block 1/55729 was processed in the names of the 4th and 5th Defendants in respect of two (2) acres out of the mother title. The Defendants did not testify.

14. In his submissions, the Plaintiffs' advocate submitted that upon settlement of the full purchase price respectively, the 3rd, 4th and 5th Defendants prevailed upon the Plaintiffs to await the conclusion of the Succession Court proceedings relating to the Estate of their deceased father; that immediately after signing the Agreements, the Defendants put the Plaintiffs in possession of the suit property and that there is no dispute whatsoever as to the Plaintiffs' respective proprietary interest over the suit properties.

15. Counsel submitted that the Defendants' refusal and or failure to transfer the suit properties to the Plaintiffs upon conclusion of the Succession proceedings relating to their father's Estate is untenable in law and it amounts to an unlawful dispossession and illegal deprivation of the Plaintiffs' right to ownership of property.

16. The Plaintiffs' counsel submitted that an order of specific performance compelling the 3rd-5th Defendants to transfer approximately two (2) acres of land sold to the 1st and 2nd Plaintiffs jointly and two (2) acres sold to the 3rd Plaintiff out of land known as Donyo

Sabuk/Komarock Block 1/526 should issue.

17. In the Complaint dated 4th December, 2017, the Plaintiffs averred that the 1st – 5th Defendants are the beneficiaries of the Estate of the late Kisuvi Wambua (*deceased*), being a widow and the sons of the deceased respectively; that the 4th and 5th Defendants are the court appointed Administrators of the Estate of the deceased and that the deceased's Estate has since been distributed by the court.

18. The land belonging to the deceased is known as Donyo Sabuk/Komarock Block 1/526, which, according to the Plaintiffs, was to be inherited by the deceased's three wives. It is the evidence of the Plaintiffs that the Defendants were entitled to 1/3 of the said land, which was approximately 20 acres.

19. The evidence by the 1st and 2nd Plaintiffs was that they entered into two Agreements of Sale jointly with the 3rd, 4th and 5th Defendants in which the said Defendants agreed to sell to them two (2) acres of land. The Agreements of Sale are dated 23rd May, 2009 and 24th June, 2009. On the other hand, the 3rd Plaintiff's claim is that he entered into a separate Sale Agreement dated 20th October, 2008 with the 3rd, 4th and 5th Defendants for a piece of the suit land also measuring 2 acres.

20. The Plaintiffs informed the court that even after paying the purchase price, and the Succession Court granting the Defendants their share of the Estate of the deceased, the Defendants have declined to transfer the land they sold to them.

21. I have perused the Agreement dated 23rd May, 2009 between the 1st and 2nd Plaintiffs and the 4th and 5th Defendants. The Agreement shows that the two Defendants agreed to sell a portion of parcel of land known as Donyo Sabuk/Komarock Block 1/526 at Kshs. 80,000 per acre.

22. The Agreement of 23rd May, 2009 does not state the acreage that the two Plaintiffs were buying. However, it shows that the two Plaintiffs paid Kshs. 80,000, which was the agreed amount for one (1) acre. The signing of the Agreement was witnessed by two people, Kimathi Murugu and Daniel Muli Kioko.

23. The second Agreement dated 24th June, 2009 is between the first two Plaintiffs and the 3rd and 5th Defendants. The Agreement shows that the two Plaintiffs bought one (1) acre of the suit land for Kshs. 80,000. Again, the Sale Agreement was witnessed by two people.

24. The Agreement that the 3rd Plaintiff signed together with the 3rd, 4th, and 5th Defendants is dated 20th October, 2008. The Agreement stated that the Vendors are the heirs of the late Kisuvi Wambua, who had agreed to sell two (2) acres of the suit land to the 3rd Plaintiff at a cost of Kshs. 140,000. The Agreement shows that the 3rd Plaintiff paid the full purchase price. The signing of the Agreement was witnessed by one person.

25. The copy of Abstract of Title for land known as Donyo Sabuk/Komarock Block 1/526 measuring approximately 41.98 Ha (*104 acres*) shows that the suit land was registered in favour of the late Kisuvi Wambua on 28th August, 2013 posthumously. On the same date, the 4th and 5th Defendants were registered as the owners of land by transmission on the basis of Succession Cause No. 659 of 2010 (*Machakos*). Indeed, a Title Deed of the whole land was issued to the two on the said date.

26. It would appear that the mother property was sub-divided into several portions. The Plaintiffs have exhibited only one title for land known as Donyo Sabuk/Komarock Block 1/55729 measuring 0.82Ha in the name of the 4th and 5th Defendants. The said title shows that the two Defendants were to hold the title jointly in trust for themselves and other beneficiaries.

27. Other than the Title Deed for parcel number Donyo Sabuk/Komarock Block 1/55729 dated 18th September, 2017, it is not clear what happened to the remaining parcel of land. Indeed, it is not clear if the entire suit land has been distributed by the Succession Court to the beneficiaries of the late Kisuvi and in which ratio.

28. Considering that the people who purportedly sold to the Plaintiffs portions of the suit land have not been registered as proprietors of any of the portions of the suit land, and in the absence of a Certificate of Confirmation to show how the Estate of Mr. Kisuvi has been distributed so far, I find and hold that an order of specific performance cannot issue as prayed.

29. Indeed, the Agreements which the Plaintiffs are relying on are not enforceable considering that the Plaintiffs purported to purchase the land of a deceased person and before his Estate was distributed by the court. The said Agreements, in my view, are contrary to the provision of Section 45 of the Law of Succession Act which provides as follows:

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

30. As correctly submitted by the Plaintiffs' counsel, the jurisdiction of the court to order specific performance is based on the existence of a valid and enforceable contract. Specific performance will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.

31. As I have stated above, the Sale Agreements exhibited by the Plaintiffs are illegal and unenforceable. In the circumstances, the Plaintiffs' suit is dismissed but with no order as to costs.

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

O.A. ANGOTE

JUDGE