



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO. 1186 OF 2016

LUKA KIBEGWA OKARA.....PLAINTIFF

VERSUS

NYAKEYO AYEGA.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff who is the registered owner of land parcel no. WANJARE/BOKEIRE/1628 filed suit for trespass against the Defendant seeking the following orders:

- a. An order of eviction against the Defendant his agents and/or servants from the Plaintiff's Land Parcel No. WANJARE/BOKEIRE/1628 and an injunction permanently restraining him from ever re-entering the same
- b. Damages for the trees wantonly felled and the ground destroyed by construction
- c. Costs of this suit
- d. Interest on (b) and (c) above.

2. In his amended Defence and Counterclaim dated 16th April 2016 the Defendant denies that he is a trespasser and states that he is on the suit property by virtue of being a purchaser.

3. In his Counterclaim, the Defendant contends that sometime in May 1999 he entered into a sale agreement with the Plaintiff for the purchase of L.R No. WANJARE/BOKEIRE/1628 for a consideration of Kshs. 275,000/=. He therefore prays for an order of specific performance transferring the suit property to him or a refund of Kshs. 200,000 with interest from May 1999.

4. At the hearing of the suit the Plaintiff testified as the sole witness. The Defendant also testified and called one witness. The court then directed that the parties file their final submissions and Counsel for both parties filed their submissions.

PLAINTIFF'S CASE

5. The Plaintiff testified that he is the registered owner of Land Parcel No. WANJARE/BOKEIRE/1628 having purchased it from one Nyarenda Oisebe in 1982. He stated that soon after he bought the suit property, he took possession thereof and planted some eucalyptus trees. He produced a copy of his national Identity card, a certificate of official search and a copy of the survey map in respect of the suit property. He testified that the Defendant was his neighbour whose parcel of land bordered the Plaintiff's land on the upper side. He said that sometime in the year 2010 he noticed that someone had erected some structures on his land and he later established that the said structures belonged to the Defendant.

6. He denied having sold his land to the Defendant. He said he had not instructed the firm of GJM Masese & Company Advocates to sell his land nor had he signed any sale agreement. He denied having received any money from the Defendant. He disowned a demand letter written by the firm of GJM Masese in which he demanded the balance of Kshs. 75, 000 for the Defendant being the balance of the purchase price and said he did not instruct the said advocate to write the letter though he acknowledged that Mr. Masese was his family lawyer.

7. Upon cross-examination he stated that the Defendant had encroached on his land in December 2009. He stated that he was not ready to

transfer any portion of his land to the Defendant as he had not received any money from him.

DEFENDANT'S CASE

8. The Defendant's son one Patrick Lumumba Nyakeyo (DW1) who is an advocate of the High Court of Kenya testified on his behalf as the Defendant was said to be incapacitated. He stated that the Plaintiff's land was sandwiched by the Defendant's land on both sides. He testified that his father entered into an agreement for the sale of land parcel no. WANAJARE/BOKEIRE/1628 though he did not have a copy of the said agreement as it was misplaced in the office of G. J. M Masese. He produced a copy of a demand letter dated 9.12.1999, written by the said advocate demanding Kshs. 75,000 for his father being the balance of the purchase price for the suit property. He stated that his father did not pay the said amount as he was waiting for the Defendant to avail the title. He said that his father had not taken any action before this suit was filed as he had been waiting for Mr. Masese to avail the title deed. His father since filed a counterclaim seeking an order of specific performance or refund of the sum of Kshs. 200,000.

9. On cross-examination he stated that at the time of drafting the sale agreement, Mr. Masese was acting on behalf of the Plaintiff. He stated that his father had paid the sum of Kshs. 200,000 without seeing the title deed for the suit property as he knew the Plaintiff since they were schoolmates.

10. He stated that his father had signed the sale agreement in Mr. Masese's office although he had not seen it. Asked why they did not sue the Plaintiff, DW1 could not give any explanation. He also admitted that his father filed his counterclaim 5 years after this suit was filed.

11. Mr George Joseph Mogaka Masese Advocate testified as DW2. He stated that sometime in January 1999 he had received instructions from the Plaintiff to prepare a sale agreement between the Plaintiff and the Defendant for the sale of the suit property at a price of Kshs. 275,000. He said that even though he prepared the said agreement, it was not signed by the Plaintiff nor was any money paid in his office. He later wrote a demand letter dated 9.12.1999 for the Plaintiff to pay the balance of Kshs.75,000. He stated that the Plaintiff had given him the title deed but when he failed to pay the balance of Kshs. 75,000 he returned the title deed. He produced a copy of the sale agreement together with a copy of the demand letter as defence exhibits 1 and 2 respectively.

12. Upon cross-examination he stated that the purchase price was not paid through his office. He admitted that the sale agreement was neither signed by the Plaintiff nor by him though it was signed by the Defendant.

PLAINTIFF'S SUBMISSIONS

13. In his submissions learned counsel for the Plaintiff argued that that the Plaintiff had proved his case against the Defendant as he had demonstrated that he was the registered proprietor of the suit property having been issued with a certificate of title and according to the provisions of sections 24, 25 and 26 of the Land Registration Act his rights were unassailable. The said sections provide as follows:

14. Section 24 of the Land Registration Act No 3 of 2012 provides as follows:

The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

15. Section 25 (1) of the said Act further provides that:

the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.

16. Section 26 of the same Act provides that:

the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except

a. on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or

b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

17. He submitted that the Defendant had failed to prove his counter-claim as the sale agreement upon which he relied did not meet the requirements of section 3 (3) of the law of Contract Act. The said section provides as follows:

Section 3(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 has been attested by a witness who is present when the contract was signed by such party; provided that this section shall not apply to a contract made in the casus of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap526) of the Laws of Kenya, nor shall anything in it affect the creation of a resulting t, implied or constructive trust”

18. He submitted that the transaction between the Plaintiff and the Defendant did not meet the basic ingredients of a contract for the sale of land as the following ingredients were missing:

- i. There was no sale agreement signed by the parties
- ii. There was no consent of the Land Control Board
- iii. There was no evidence of payment or consideration

19. He relied on the case of **Leo Investment Ltd v Estuarine Estate Ltd (2017 eKLR** for the proposition that a suit seeking to enforce an unsigned contract for the disposition of an interest in land is a nullity ab initio.

20. Counsel further submitted that the Defendant’s counterclaim was statute barred as it was filed after a period of six years contrary to the provisions of section 4(1) of the Limitation of Actions Act.

With regard to the claim for specific performance by the Defendant, counsel cited the Court of Appeal decision of **Kadzo Charo v Alex Nzai Dzombo (2019) eKLR** where the court relied on the case of **Bernard Nganga v Samuel Wainaina Tiras (2019) eKLR** where the court stated that:

“the jurisdiction to grant specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers some defect or illegality”

DEFENDANT’S SUBMISSIONS

21. In his submissions learned counsel for the Defendant submitted that there was a meeting of minds by the Plaintiff and Defendant for the sale of the suit property. He relied on the case of **Peter Mbiru Michuki v Samuel Mugo Michuki (2014) eKLR** where the Court of Appeal held that a letter from the Appellant’s advocates stating that the Appellant had deposited Kshs. 300 for transmission to the Plaintiff, because he had changed his mind to sell the land was corroborative evidence illustrating that a sale agreement had been entered into between the parties and the purchase price had been paid.

22. On the issue of the validity of the sale agreement counsel submitted that the law does not act retrospectively as section 3(3) of the Law of Contract Act came into effect in 2003 while the agreement between the parties was done in 1999. He relied on the case of **Peter Mbiru Michuki (supra)** where the court held as follows:

“It is our view that section 3(7) of the Law of Contract Act makes exception to oral contracts for the sale of land coupled with part performance. We find that section 3(3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contracts for the sale of land concluded before section 3(3) of the Act came into force. The proviso to section 3 (3) of the Law of Contract Act applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate the Law of Contract Act”

23. It was further submitted that since the Defendant had been in possession of the suit property since 1999 and paid a substantial amount of the purchase price, an oral sale agreement could be deduced.

24. In response to the Plaintiff’s submission that the Defendant’s counterclaim was statute barred, it was submitted that the court could not rely on the written agreement since it was not signed by the Plaintiff. Counsel contended that time for the Defendant to institute legal proceedings against the Plaintiff started running when the Plaintiff acted in a manner that was inconsistent with the rights of the Defendant by filing suit against the Defendant on 26th July 2010. He cited the case of **Sachania and Another v Hirji Pitamber Zanzibar HCCC No. 34 of 1958**.

25. Finally, it was counsel’s submission that the Plaintiff was attempting to unjustly enrich himself by claiming the suit land and retaining the money he received from the Defendant for the sale of the same land. He argued that the Plaintiff received the sum of Kshs. 200,000 in the year 1999 and that the Defendant who has been in possession of the suit land has developed it by building a school on it. The Plaintiff would therefore be unjustly enriched if his claim was allowed.

ISSUES FOR DETERMINATION:

26. Having considered the pleadings, evidence on record and rival submissions, the following issues fall for determination:

- i. Whether the Plaintiff is the registered proprietor of Land Parcel No. WANJARE/BOKEIRE/1628

- ii. Whether the Plaintiff and the Defendant entered into a valid agreement for the sale of the suit property
- iii. Whether the Defendant has trespassed onto the suit property
- iv. Whether the Plaintiff is entitled to the reliefs sought in the plaint
- v. Whether the defendant is entitled to the reliefs sought in the counterclaim.

ANALYSIS AND DETERMINATION

27. With regard to the first issue, it is not in dispute that the Plaintiff is the registered proprietor of land parcel number WANJARE/BOKEIRE/1628. He produced a certificate of official search dated 2.10.2015 indicating that the suit property was registered in his name. He told the court that he was issued with a land certificate in 1982 which he later surrendered to the Lands Officer after which he was issued with a title deed dated 26.10.2010.

28. In terms of section 26 of the Land Registration Act, the certificate of title shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. Based on the foregoing, it is my finding that the Plaintiff is the absolute proprietor of the suit property.

The second issue is whether the parties entered into a sale agreement.

29. The Plaintiff vehemently denied that he entered into an agreement with the Defendant for the sale of the suit property. He told the court that the Defendant owns an adjacent parcel of land known as WANJARE/BOKEIRE/1801 which borders the Plaintiff's land. He stated that sometime in the year 2009, he noticed that the Defendant had encroached on his land and constructed some structures after which he filed this suit. He categorically denied having offered to sell his land to the Defendant. He said he had not signed any sale agreement between him and the Defendant nor had he received any money from the Defendant under the purported agreement. He also denied that he had instructed the firm of GJM Masese Advocate to demand a sum of Kshs. 75,000 for the Defendant in 1999. When he was shown the demand letter written by Mr. Masese, he looked shocked and said he doubted the signature on the letter and wanted Mr. Masese to come and shed light on the contents of the said letter.

30. On the other hand, DW1 insisted that his father entered into a sale agreement with the Plaintiff for the sale of the suit property. The Defendant called Mr. George Masese Advocate from the firm of GJM Masese Advocate as DW 2. Mr. Masese produced the sale agreement prepared in 1999 although the specific date is not indicated. The agreement states in part that the vendor (plaintiff) is willing to sell the whole of the parcel of land known as WANAJARE/BOKEIRE/1628 measuring 0.6 Ha to the Defendant at a purchase price of Kshs. 2750,00, of which the purchaser has made a down payment of Kshs. 200,000/= on the execution of the agreement which the vendor acknowledges receipt. The said agreement is signed by the Defendant but not the Plaintiff. Mr. Masese testified that no money was paid through his office and he was not sure whether the Defendant had paid the sum of Kshs. 200,000 to the Plaintiff.

31. The question that the court must grapple with is if the said agreement meets the legal requirements. Section 3(3) of the Law of Contract Act. The said section provides as follows:

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

c. the contract upon which the suit is founded:

j. is in writing

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

d. The signature of each party has been attested by a witness who is present when the contract was signed by such party; provided that this section 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) of the Laws of Kenya, nor shall anything in it affect the creation of a resulting, implied or constructive trust"

32. It is however not lost to me that the sale agreement upon which the Defendant relies was prepared in 1999 while section 3(3) of the Law of Contract Act came into force in June 2003. Section 3(7) of the Law of Contract Act excludes the application of section 3(3) of the said Act to contracts made before the commencement of the said section. In the premises, it is clear that section 3(3) of the Law of Contract Act does not apply to this sale agreement. It would therefore be necessary to consider what section 3 of the Law of Contract Act provided before the amendment.

33. In the case of Peter Mbiri Michuki(supra) the court observed that:

“Prior to the amendment of section 3(3) of the Law of Contract Act in 2003, the subsection read as follows:

(3) No contract shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it.

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract.

1. Has in part performance of the contract taken possession of the property of any part thereof or

(11) Being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract”.

34. Counsel for the Defendant submitted that since the Defendant has been in possession of the property since 1999 and paid a substantial amount of the purchase price and he was willing to complete the balance if the Plaintiff does his part, it should be deemed that there was an oral agreement between the parties.

35. From the evidence on record, the Plaintiff’s position is that there was no sale agreement whether oral or written between him and the Defendant as he maintains that at no time did he offer to sell his land to the Defendant. He further denies having received any money from the Defendant. Indeed, the Defendant did not produce any evidence of payment. Whereas DW1 stated that his father had paid the deposit of Kshs. 200,000/= through the firm of GJM Masese Advocate, Mr. Masese told the court that no money was paid through his office. The demand letter produced by DW1 demanding a balance of Kshs. 75,000/= from the Defendant makes reference to the impugned sale agreement, which was not executed by both parties and can therefore not constitute evidence of payment. The case of Peter Mbiru Michuki is therefore distinguishable from the instant case as the demand letter in the instant case cannot be deemed to corroborate the existence of a contract.

36. It is trite law that a contract consists of three basic elements; offer, acceptance and consideration. In the instant suit the agreement was not signed by the Plaintiff which means there was no acceptance. There was no cogent evidence of payment of the purchase price and therefore consideration did not pass. That being the position, the key elements of a contract are lacking. In the premises it is my finding that there was no valid sale agreement between the Plaintiff and Defendant.

37. Turning to the issue of trespass, the Plaintiff maintains that the Defendant encroached on his land, cut down some trees and put up structures. Even though the Defendant alleges that he entered the land in 1999 after he bought it from the Plaintiff, the Plaintiff’s evidence is that the Defendant encroached on his land in 2009. Soon after he discovered that the Defendant had illegally occupied his land, the Plaintiff filed suit in July 2010 and obtained a temporary injunction to restrain the Defendant from interfering with the suit property pending the hearing and determination of this case.

38. In the case of **Ochako Obinchi v Zachary Oyoti Nyamongo (2018) eKLR** the court cited Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 which defines trespass as follows:

“Any unjustifiable intrusion by one person upon land in possession of another.”....Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”

39. From the evidence on record, it is my finding that the Defendant is unlawfully occupying the suit property and he is therefore a trespasser. The Plaintiff is therefore entitled to protection of the law.

40. I will now consider the reliefs sought by the parties. In his Amended Defence and Counterclaim the Defendant seeks an order of specific performance directing the Plaintiff to transfer the suit property to him. In the alternative he prays that the Defendant be ordered to refund a sum of Kshs. 200,000 with interest either at court rates or at the commercial rate prevailing at the time the suit is heard.

41. Counsel for the Plaintiff submitted that the claim for Specific performance being a suit based on contract ought to have been filed within a period of six years from the date when the cause of action arose. It was his submission that the counterclaim which was filed in 2016 is out of time as it contravenes the Limitation of Actions Act.

42. On the other hand, it was the submission of Counsel for the Defendant that if it was to be assumed that there was an oral contract, time started running when the Plaintiff conducted himself in a manner that was inconsistent with the rights of the Defendant. He was of the view that this was when the Plaintiff filed the instant suit on 26th July 2010 seeking orders of eviction. According to him, the counterclaim which was filed on 6th April 2016 was not out of time. It was further submitted that the Plaintiff was attempting to unjustly enrich himself by claiming the suit property and the money he received from the Defendant.

43. I agree with counsel for the Plaintiff that the claim for specific performance ought to have been filed within 6 years from the date of the alleged sale agreement. It is not lost to me that the Defendant only filed his counterclaim or specific performance almost 6 years after the case was filed. However, even without going into the issue of limitation it is important to remember that the court’s jurisdiction to grant an order of Specific performance is governed by common law principles.

44. In the case of **Thrifty Homes Ltd V. Kenya Investment Ltd (2015) eKLR**, the court stated as follows:

"specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction".

45. The same reasoning was applied in the case of **Kadzo Charo v Alex Nzai Dzombo (2019) Eklr**, the Court of Appeal relied on the case of **Bernard Nganga v Samuel Wainaina Tiras (2019) eKLR** where the court stated that:

“the jurisdiction to grant specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers some defect or illegality”

46. In the instant case, I have already made a finding that there was no valid contract between the parties and there would be no basis for granting an order of specific performance. Since the Defendant did not furnish any proof of payment of the sum of Kshs. 200,00 I find that the issue of unjust enrichment does not arise. Similarly, the alternative prayer for a refund of the said amount cannot succeed.

47. In the final analysis, I find that Defendant has not demonstrated any legal right that would entitle him to remain on the suit property. Conversely, the Plaintiff has proved his case on a balance of probabilities and I make the following final orders in respect of the suit and counterclaim:

- a. The Defendant shall vacate Land Parcel No. WANJARE/BOKEIRE/1628 within 60 days failing which and eviction order shall issue upon application.
- b. Upon vacating, the defendant by himself, his agents, servant or anyone claiming through him is permanently restrained from re-entering, remaining on or in any manner interfering with Land Parcel No. WANJARE/BOKEIRE/1628.
- c. I make no award of special damages
- d. The counterclaim is hereby dismissed.
- e. The Defendant shall bear the costs of this suit and the counterclaim

Dated, signed and delivered at Kisii electronically via Zoom this 28th day of May, 2020.

J.M ONYANGO

JUDGE