



REPUBLIC OF KENYA

IN THE ENVIRONMENT & AND LAND COURT

AT MAKUENI

ELC SUIT NO.374 OF 2017

DIAMOND LAL BHANJI.....PLAINTIFF

VERSUS

MARTHA MULEE TAALI.....1ST DEFENDANT

FAIZA MBULA MULEE.....2ND DEFENDANT

ABDALLA KYALO MULEE.....3RD DEFENDANT

ZUENA MULEE.....4TH DEFENDANT

NGUI MULEE.....5TH DEFENDANT

SAVU MWANAHARUSI MULEE.....6TH DEFENDANT

J U D G E M E N T

1. On the 13th December, 2017 the Plaintiff commenced this suit by way of a plaint dated 11th December, 2017 wherein he prays for judgement against the defendants jointly and severally for: -

(a) A declaration the plot No.590 measuring 60ft x 100ft in Kibwezi town belongs to the Plaintiff.

(b) An order evicting the Defendants or their invitees and/or licensees or their family members or any other person residing on house built on plot No. 590 Kibwezi town or in the alternative an order directing the Defendants to refund the purchase price and the cost of the house commensurate to market commercial rates.

(c) Cost of this suit and interest.

(d) Any other relief that the Honourable court deems fit and just to grant.

2. The Plaintiff has averred in paragraphs 3, 4, 5 and 6 of his Plaint that at all material times to this suit he was the beneficial owner of plot No.590 measuring 60ft by 100ft located in Kibwezi market having purchased it from the 1st Defendant through the 2nd Defendant who was the caretaker, that he purchased the plot in the year 2012 to the tune of Kshs.65,000/= and started construction in the year 2013 through the 2nd Defendant who used to receive all monies for purchase of plot and construction via money gram from London which both the 1st and 2nd Defendant confirmed to have received, that while in London the 2nd Defendant used to send him photographs of how the construction was ongoing and he used to send moneys for the payment of masons and that he did spend about Kshs.1,500,000/= on construction of the house and purchase of the plot.

3. The Plaintiff's claim is denied by the Defendants' joint defence dated 27th December, 2017 and filed in court on 08th January, 2018.

4. In paragraph 4 of their defence, the 1st Defendant has averred that no purchase price was paid to her. And in paragraph 5, the 2nd Defendant admits that she received money from the Plaintiff but avers that whatever money that she received was never meant to be purchase price for her mother's plot.

5. The Defendants pray that the Plaintiff's suit be dismissed with costs.

6. The Plaintiff in his evidence in chief adopted his recorded statement dated 11th December, 2017 as his evidence. He went on to produce eight documents in his list of documents filed on the same date as P.Exhibit No.1 to 8 respectively. He further produced a list of documents dated 11th December, 2018 containing eight documents as P.Exhibit Nos 9 to 16 respectively.

7. The documents in the first list were a copy of payment of receipt of registration dated 11/05/2016, a copy of application for plot registration received on 12/05/2016, a copy of sketch map of the plot prepared by Kibwezi sub-County Surveyor dated 10/05/2016, copies of payment transactions, a copy of letter from Kenya Commercial Bank dated 18/05/2016, copies of photographs showing a house under construction, a copy of a photograph of the billboard that had been destroyed and a demand letter.

8. In his further list of documents, the documents were a replying affidavit sworn by the 1st Defendant on 10/01/2018 and filed in court on 12/01/2018, a further affidavit sworn by the same party and filed in court on 27/02/2018, an amended charge sheet dated 29/11/2018, a letter dated 10/05/2016 from the Assistant County Commissioner Kibwezi, a police statement by the 1st Defendant, photographs showing the defendants leaving the Plaintiff's house, police investigation diary extract O/B No.8 dated 04/05/2016 and a certified letter from KCB Ltd dated 18/05/2016.

9. His evidence was that the 1st Defendant faces a case of obtaining money by false pretences vide criminal case No.1094/16 at Makindu Law Courts. He went on to state that the 1st and 2nd Defendants frequently collected money from KCB Kibwezi branch and added that he was the one who used to send the money to the two.

10. It was also his evidence that after he purchased plot No.590 in Kibwezi, the 1st Defendant never transferred it to him nor did she give him a sale agreement. He pointed out that she however allowed the transfer via a consent.

11. He said that on 15th May, 2016 he paid Kshs.8,700/= to the Revenue office of Makueni County Government in Kibwezi and he was issued with receipt No.0274108 and also given an account number being 2501 and 5122. He said that even though the 1st Defendant transferred the plot to him, he is yet to be issued with an allotment letter.

12. He went on to say that in paragraph 14 of her affidavit, the 1st Defendant has deposed that the house in the suit plot belongs to him.

13. His evidence in cross-examination by Mr. Olieti for the defendants was that the 1st Defendant took him to the site where the plot is situated and pointed out the plot in question to him. He said that the 1st Defendant's daughter only introduced him to the former who said that she wanted to sell a plot.

14. On being referred to the bank documents, the Plaintiff told the court that the documents in question show that the 1st and the 2nd Defendant collected money from the bank. He added that the documents however do not show the purpose for which they collected the money. He denied having ever dated the 2nd Defendant whom he described as a friend. He said that he did not send the money to her as a friend and pointed out that whatever money he sent to her was for salary. He said that he bought the plot in 2012 and that there was no sale agreement. It was also his evidence that the 1st Defendant asked him to pay the entire purchase price upon which she would give him a receipt.

15. He reiterated that there were transfer forms which the 1st Defendant gave him. He however agreed that what he had was an application for plot registration and added that it is the document that the 1st Defendant gave him. He agreed that the form does not have a plot number. He said that although he had produced a survey map, plot number 590 is not indicated in it. He said that he had no documents from the Ministry of Lands to show that the plot had been sub-divided.

16. On the other hand, the 1st Defendant in her evidence in chief adopted her recorded statement dated 29th November, 2018.

17. Her evidence was that her daughter asked her to show her a plot where the latter would build a house. The 1st Defendant went on to say that she gave the daughter plot number 590 Kibwezi. The witness produced a bundle of receipts for payment of land rates as D.Exhibit No.1. She went on to produce a demand notice to pay rates dated 31st December, 2013 as D.Exhibit No.3. She also produced a letter from Makueni County Government dated 30th March, 2017 showing her as a registered owner of plot number 590 as D.Exhibit No.4. She also produced her application to be so registered as D.Exhibit No.5. According to her, she could not understand why the Plaintiff claims to be the owner of the plot.

18. In her evidence in cross-examination, the 1st Defendant agreed that she knows the Plaintiff but denied the suggestion that he bought a plot from her. She said that the house on her plot was built by the 2nd Defendant. She said that while the house was being built, the 2nd Defendant had been hired by the Plaintiff to work as a casual. She denied having deposed in paragraph 14 of her affidavit that the Plaintiff and the 2nd Defendant were supposed to comply with her conditions that she had set or else they would be required to remove their house from her plot. According to her, plot No.590 is not yet sub divided and denied having ever offered it for sale to the Plaintiff. She also denied having ever received any money from the Plaintiff. She also denied having ever gone to KCB to collect money allegedly sent by the Plaintiff from London.

19. In his written submissions the Plaintiff's Counsel framed five (5) issues for determination. These were: -

1) Whether there existed an Agreement for sale of a plot between the Plaintiff and the 1st Defendant?

2) *Whether the Plaintiff parted with consideration for the purchase of the plot?*

3) *Whether the Defendants have a claim over the Plaintiff's house built on PLOT NO.590 KIBWEZI TOWN?*

4) *What remedies are available to the Plaintiff?*

5) *What orders are as to cost?*

20. On the other hand, the Defendants' Counsel framed four (4) issues namely: -

a) *Whether there was an agreement of sale between the Plaintiff and the 1st Defendant for plot No.590 Kibwezi town.*

b) *Who is the owner of Plot No.590 Kibwezi town?*

c) *Whether the Plaintiff is entitled to the reliefs sought in the plaint.*

d) *What orders to cost.*

21. The issues as framed by the Counsel for the parties on record are more or less the same and I will address them together. Of importance to note is that the Plaintiff's Counsel only dwelt on the first issue.

22. While addressing the first issue, the Plaintiff's Counsel submitted that the fact that the 1st Defendant allowed the Plaintiff to construct a house without taking any legal action leads to the existence of the doctrine of constructive trust or proprietary estoppel. The Counsel further submitted that the 1st Defendant had in her sworn affidavits admitted that the house belongs to the Plaintiff. In support of his submissions, the Counsel relied on the case of **William Kipsoi Sigei vs. Kipkoeh Arusei & another [2019] eKLR** amongst other cases.

23. The Counsel went on to submit that even though there does not exist a written agreement, the evidence on record shows that the 1st Defendant together with her co-defendants sold the plot to the Plaintiff.

24. The Counsel further submitted that Section 38 of the Land Registration Act as amended by Section 55 of the Land Laws (Amendment) Act No.28 of 2016 deals with the validity of contracts to the sale of land.

25. However, it should be noted that Section 38 of the Land Registration Act No.3 of 2012 deals with certificates as to payment of rent and I will assume that the mix up was due to inadvertent mistake by Counsel in view of the fact that he correctly quoted section 38(2) of the Land Act No.6 of 2012 which is the relevant section herein. Section 38 of the Land Act deals with validity of contracts in sale of land.

Section 38(2) of the Land Act No.6 of 2012 provides as follows: -

“subsection (1) shall not apply to –

(a) A contract made in the course of a public auction;

(b) The creation of a resulting, implied or constructive trust

(c) _____”

26. Arising from the above, the Counsel cited the cases of **Willy Kimutai Kitilit vs. Michael Kibet (2018) eKLR** and **Peter Mbiri Muchuki vs. Samuel Mugo Michuki [2014] eKLR** which considered the issue of constructive trust.

27. On the other hand, the Defendants' Counsel also cited section 38(2) of the Land Act which reiterates the contents of **Section 3 of the Law of Contract Chapter 23 of the laws of Kenya** as follows: -

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) The contract on which the suit is founded-

(i) is in writing.

(ii) is signed by all 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...”

28. The Counsel went on to submit that the existence of a sale agreement is denied by the defendants and it is therefore incumbent upon the Plaintiff to produce documentary evidence of it.

29. It was further submitted that even though the Plaintiff has stated that he purchased the suit land in the year 2012 there is no information as to offer or even acceptance being made. The Counsel relied on the case of **Silverbird Kenya Ltd vs. The Junction Ltd & 3 others [2013] eKLR** where it was stated inter alia: -

“... In my view it matters not that the Plaintiff had been let into possession of the premises if the contract pursuant to which the Plaintiff was granted possession was not validated in accordance with the law... In the circumstances and by reason of the Law of Contract Act, the Plaintiff’s suit must fail for being in contravention of Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya.”

30. The Counsel further submitted that even though the Plaintiff produced documents to show that the 1st and 2nd Defendants collected money from the bank, the transactions do not prove that the money was meant for the payment of the plot. The Counsel was of the view therefore that the Plaintiff has no proof of ownership of plot number 590 Kibwezi Township.

31. As for the reliefs sought in the plaint and more so the orders of eviction, the Counsel submitted that the Plaintiff has to prove that the suit property is his. The Counsel relied on the case of **Evans Otieno Nyakwana vs. Cleophas Bwana Ongaro [2015] eKLR** where Majanja J stated thus;

*“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of **Section 107 (1) of the Evidence Act (chapter 80 of the Laws of Kenya)**, which provides: -*

‘107. (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

32. Arising from the above, the Counsel cited Section 27 of the Civil Procedure Act which provides that costs are awarded at the discretion of the court and in most cases to the successful litigant thus the Plaintiff’s suit should be dismissed with costs to the defendants.

33. Having evaluated the evidence on record and considered the submissions filed, it is not in dispute that there was no sale agreement between the Plaintiffs and the 1st and 2nd defendants over plot number 590 Kibwezi Township. Apart from the two photographs that the Plaintiff claims that he was being shown a beacon by one of the defendants, there is no evidence to show the plot in question is surveyed and this may explain why the Plaintiff was making a request for him to be registered as its owner since he did not get any documents from the 1st Defendant.

34. There is no doubt that the 1st and the 2nd Defendants did collect money from Kenya Commercial Bank, Kibwezi which money had been sent to them by the Plaintiff from London but there is no evidence to show the purpose of which the money was sent to the two.

35. Although the Plaintiff claims that the 2nd Defendant was the one who was building the house on his behalf, there is no evidence to show that he gave the building plans specifying the type of house that he required to built for him. Further there is no evidence of payment of Kshs.65,000/= by the Plaintiff to the 1st Defendant towards the purchase of the said plot number 590. It seems to me that the Plaintiff gifted the defendants and more so the 1st and the 2nd Defendants with the house which they took it upon themselves to construct. Given those circumstances, the doctrine of constructive trust or proprietary estoppel cannot apply in the instant case. Besides, the instant case is distinguishable from **William Kipsoi Sigei’s** case relied upon by the Plaintiff as there is no evidence to show that the Plaintiff ever took possession of the said plot 590. Secondly, unlike Sigei’s case where there was no dispute that the 1st Respondent and the Appellant had a sale agreement leading to taking of possession and later on sale by the 1st Respondent to the 2nd Respondent, there is no such evidence of either sale or gifting of plotNo.590 by the 1st Defendant to the 2nd Defendant. The evidence on record is that the 1st Defendant only showed the 2nd Defendant the site where to put up her house and there is no evidence to show that she intended to sell it to her.

36. It is clear that the sale agreement that the Plaintiffs relies upon offends the provisions of **Section 3(3) (a)(i)(ii) and (b) of the Law of Contract Act No.23 of the Laws of Kenya** and **Section 38 (1)(a) and(b) of the Land Act No.6 of 2012**. If there was any agreement, the same is not in writing nor is there evidence to show that it was ever signed by the Plaintiff and the 1st Defendant. Needless to say, there is no evidence of attesting of the agreement.

37. It follows therefore that the Plaintiff is not entitled to the prayers sought in his plaint and his claim must therefore fail. Being not satisfied that the Plaintiff has on a balance of probabilities a cause of action against the defendants, I hereby proceed to dismiss his suit with costs to the latter. It is so ordered.

Signed, Dated and Delivered at Makueni via email this 22nd day of May, 2020.

MBOGO C. G.,

JUDGE.

Mr. G. Kwemboi – Court Assistant