



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 165 OF 2006

ALFRED JUMA MAKANDA.....PLAINTIFF

VERSUS

ALFRED OCHOROKOD OMUSOLO.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiff in this matter filed this suit on **9/10/2006** seeking the following orders against the defendant:-

(a) Eviction of defendant from land parcel number Trans Nzoia/Botwo/384 measuring 0.5 Ha.

(b) Costs of this suit.

(c) Any other relief this court may deem fit to grant.

2. The plaintiff avers that he is the legal owner of **Trans Nzoia/Botwo/384** measuring **0.5 Ha** and he was issued with the title deed on **2/3/1999** by the Kitale District Land Registry. It is pleaded by the plaintiff that despite demand and notice of intention to sue having issued to the defendant, he has neglected or refused to remove himself from the said land.

3. The defendant filed defence in this matter on **19/3/2007**. In that defence he denies the contents of the plaint and avers that the plaintiff is not a member of Botwo Farm Company Ltd; that the plaintiff's title to the suit land, which he claims to have owned and occupied since **1980**, was fraudulently obtained while a civil suit, being **Kitale HCCC NO 66 of 1997** was pending.

4. The suit herein proceeded to hearing on **4/12/2019** and **5/12/2019** where the plaintiff's closed his case. The defendant's case was heard on **5/12/2019** where the defendant and his witness testified and the defendant's case closed.

5. After the close of the defence case the court then ordered parties to file submissions in the matter. I have perused the court record and found no submissions filed by the parties.

EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

6. The plaintiff testified that he became a member of the Botwo Farm Company Ltd in **1982**; that he purchased **1.5** acres of land; that he paid some fees at the Land Registry in **1999** and title to the suit land was processed; that he has never taken possession of the land since the defendant physically prevented him from doing so and retained possession of the land without giving any reason; that the defendant was arraigned in court and prosecuted and convicted of the offence of trespass contrary to **Section 5(1) (a) of the Trespass Act on 20/12/2001**; that the plaintiff was not a party in the case filed by the defendant that is **Kitale HCMISC APPL 322 of 1996** in which the award of the Kaplamai Land Disputes Tribunal was impugned; that the file for **Kitale HCCC 165 of 2006** (being this case) disappeared; that he filed two other cases, to wit **Kitale HCCC 120 of 2009** and **Kitale CMCC 27 of 2018** against the defendant; that those cases were dismissed on the account that this suit was still pending even though by the time of dismissal the file record for this suit had not been traced; that finally the file record for this case was discovered in the archives and that the defendant should now be ordered to vacate the suit land in favour of the plaintiff.

7. Upon cross-examination by Mr Ngeywa, the plaintiff admitted that by the time he appeared the defendant was in occupation of the land;

that the defendant was the chairman of the Farm; that the defendant took money from the plaintiff in exchange for the land and issued a receipt for the monies paid and that the letter of allotment issued in respect of the land had several names including his. In re-examination by Mr Wanyama, he denied obtaining the title fraudulently as alleged by the defendant.

8. When the plaintiff was recalled on 5/12/2019, he produced an original receipt issued by Botwo Farm Co Ltd dated 10/7/1982 acknowledging Ksh 3000/= in respect of LR 6109 apparently signed by one "Alfred" who is described as "Chairman" and another official described as "V. Chairman"; he further produced a receipt dated 16/1/1996 for Ksh 1000 endorsed with the words "deposit, survey, c/fees and rates" and also produced an original receipt dated 27/2/1996 issued by the Lands Office signifying payment of Ksh 6,615/= to the District Land Adjudication and Settlement Office Kitale, which amount is indicated on the face of the receipt to be in respect of "payment of shares on Botwo Farm LR NO 6109 plot No 207 "e" of 1.5 ac."; Upon further cross-examination by Mr Ngeywa, he admitted that his father was an original member of the Company and he held 3 acres; that he claimed land from the defendant at the Cherangany District Land Disputes Tribunal in 1995; that he was also to get 1.5 acres from another person to make his land's acreage to be 3 acres and that his name featured in the Eldoret Land Case No 322 of 1996 and he swore an affidavit in those proceedings. The plaintiff then closed his case.

The Defendant's Evidence

9. The defendant testified that he is a member of Botwo Farm; that the plaintiff is son to one Simon Makanda and lived on Simon Makanda's 5 acres; the plaintiff and the defendant had no agreement between them over land; that the plaintiff took the defendant to the tribunal claiming land and he was awarded 1.5 acres; that the tribunal decision was adopted by the court in Kitale Land Case No 104 of 1995 and a decree issued; that thereafter he sued the plaintiff in Eldoret Misc 322 of 96 and the elder's award was nullified; that the plaintiff participated in the Eldoret case; that SFT took up the Company land and subdivided it according to each member's funds paid; that he was issued 7.3 acres and a letter of allotment; that the plaintiff obtained title in 1999 vide the tribunal award but the tribunal decision had been nullified by the Eldoret court.

10. When cross-examined by Mr Wanyama the defendant admitted having been the chairman of the Botwo Farm Company Ltd and that he has known the plaintiff since 1982; that the land was surveyed in 1981; that when the dispute went to the Chief's office he denied having made the signature on PExh 4 (receipt); that however he never preferred any report of forgery to the police over it; that he opposed the tribunal decision solely on the basis that the gazettement of the members was wrongful; that the court at Eldoret found that the plaintiff had been left out of the proceedings and was later included; that no case save the instant case has proceeded in respect of the dispute at hand; that SFT took over the Company land in 1997 and issued allotment letters and titles were issued and the defendant was to get 7.3 acres; that he was robbed of 7 acres by the SFT while some of the land was taken up for public utilities, and the SFT's subdivision of the land was challenged at the Eldoret High Court.

11. Upon re-examination by his counsel Mr. Ngeywa he stated that he did not know who issued the plaintiff with the receipt PExh 4.

12. DW2, Isaac Marasi, an Archivist at Kitale Law Courts, custodian of all concluded case files produced the original file record [D. Exhibit 8(a)] in respect of Kitale High Court Misc. Civil Appl. No. 14 of 1997 between Alfred Ochorokod and Julius Rotich -vs- Kaplamai Land Disputes Tribunal - Zablon Akolo, James Choge, James Mokaya, Richard Leitich and Philip Kogo, Interested Party - Alfred Juma Makanda. The same was formerly Eldoret High Court Misc. No. 322 of 1996, which was later transferred to Kitale Station.

13. Both parties never filed any submissions after the hearing.

Determination

14. Upon considering the pleadings on record and the evidence adduced in court by the parties, this court finds that the issues that arise for determination in this suit are as follows: -

(a) Whether the plaintiff is the registered proprietor of Trans Nzoia /Botwo 384.

(b) Whether the plaintiff fraudulently obtained title to the suit land.

(c) What orders should issue?

15. The issues are discussed as hereunder.

(a) Whether the plaintiff is the registered proprietor of Land Reference No Trans Nzoia /Botwo/ 384.

16. The defendant has by denial invited the plaintiff to prove that the suit land comprised in Land Reference No Trans Nzoia /Botwo/ 384 is registered in his name. The plaintiff produced a copy of title to the land bearing the above title number without any demur from the defendant. Having regard to the evidence produced this court is of the view that the plaintiff has established on a balance of probabilities that the suit land is registered in the plaintiff's name.

(b) Whether the plaintiff fraudulently obtained the title to the suit land.

17. Going by their evidence, the plaintiff and the defendant are long time acquaintances. Other than the suit land, the defendant does not appear to have an explanation for whatever else may have brought the two together. However the facts presented by both parties show that the two shared some interest in the suit land, though for a long time the land reference number now given to the suit land did not exist.

18. The appearance of the plaintiff's name and the acreage of 1.5 acres endorsed alongside it on the letter of allotment produced by the defendant as **DExh 4** and which was in the defendant's custody suggests that the plaintiff had a share in the land represented by the said letter of allotment. The defendant has not explained the presence of the plaintiff's name and identity card number on the defendant's letter of allotment in any manner. The plaintiff has explained this by indicating that he had purchased land from the defendant.
19. Although the defendant denied that he issued the plaintiff with the receipt dated **10/7/82**, it appears to this court to be a genuine document and to the naked eye many of its features resemble those in the receipt issued to the defendant earlier on **6/7/1973** by the same company. It is noteworthy that the defendant has not demonstrated that after he learnt of the existence of **PExh 4** (the receipt) he lodged any complaint with any authorities that the plaintiff was attempting to obtain a portion of his land falsely and using a forged document. This omission is surprising given that the defendant admitted to being a chairman and a director in the Botwo Farm Company Ltd, a responsible office that ought to have known the import of a false document relating to land.
20. This court is gripped by a conviction that on a balance of probabilities the defendant issued the plaintiff with **PExh 4** (the receipt) and that the plaintiff paid the defendant consideration for the suit land.
21. It is clear from the land disputes tribunal proceedings produced by the defendant that the plaintiff's complaint, against the defendant and another person, which arose as far back as **1996**, was that he gave them consideration for some land yet they failed to list him among the members in the company who were entitled to land. Directors of land buying companies were normally liable to cause allocation of land to persons who paid them consideration for the purpose. There is no evidence of a refund of the monies the plaintiff paid to the defendant and the third party. Nothing else other than the tabling before the SFT officials of concrete evidence of sale of land to the plaintiff by the defendant can explain away the fact that when the Settlement Fund Trustees took over the Farm they accepted payments for various outgoings such as rates and survey fees from the plaintiff in respect of the suit land, receipted the payments and allowed title to be processed in his name over the suit land.
22. Though the defendant rejoices in the fact that the land disputes tribunal decision was ultimately quashed by the High Court, it is this court's observation that the overriding basis of the order of *certiorari* issued in **Kitale High Court Misc. Civil Appl. No. 14 of 1997** was more of a technicality, to wit, that the panel's composition was irregular in that only two of the members who deliberated on the dispute had been properly gazetted, and that they did not meet the required quorum.
23. Other peripheral grounds for the grant of the order of *certiorari* in **Kitale High Court Misc. Civil Appl. No. 14 of 1997** were that no evidence of the filing of a statement of claim or defence or evidence of service upon the *ex parte* applicants was provided. I refer to the grounds as "*peripheral*" because the land disputes tribunal era was notorious not only for excess of jurisdiction by the panelists but also lack of a regimented protocol and a serious lack of detailed or trained record keeping that could have addressed the issue of service of summons upon respondents; many respondents may simply have gotten orders of *certiorari* in the subsequent judicial review proceedings for nullification of tribunal awards because no proper record of service was retained at the tribunal, and it was their word against the respondents that service was not effected.
24. While still on the order of *certiorari*, with regard to failure to serve statements of claim or require defences to be lodged it need not be gainsaid that the elements of total or semi-illiteracy and lack of formal training in land matters beleaguered the land disputes tribunals of yore; the legion of grave miscarriages of justice arising from such glaring gaps in the cloudy land disputes resolution system were occasionally mitigated by some silver linings: at times, perchance the tribunal award either by accident or design happened to escape the snares and strictures of the High Court's judicial review powers, a perusal of the record would reveal that the parties had without any demur engaged in a death duel before the tribunal without having filed any documents whatsoever, and the panel had made determinations based on nothing else save the parties' evidence; in addition, some such awards subsequently held fast against judicial review proceedings by hanging on the precarious thread that the rudimentaries of natural justice practicable in an environment otherwise extremely distressful to a fastidious legal practitioner, were shown to have been observed.
25. In the circumstances adumbrated above, it does not appeal to this court to invest any much stock in the contribution of those peripheral grounds of "*lack of statement or defence or service of summons*" in the granting of *certiorari* to quash the tribunal award subject matter herein which would grant benefit of doubt to the defendant's version of events in the instant case.
26. Be that as it may, it is evident from the sworn affidavit of the plaintiff dated **26/11/1996** and filed in the judicial review case on **28/11/96** that he exhibited therein three (3) summons with the official stamp of the Tribunal affixed thereon, two of which were addressed to the defendant, and that what the court was concerned with while making the order of *certiorari* was the omission to file a *return of service*, and it is not clear from the record upon whose shoulders such blame befell.
27. Given the foregoing observations, for the defendant to simply rely on the *certiorari* order to defeat the plaintiff's claim will not avail him of any relief in this case. In any event our very progressive Constitution emphasizes at **Article 159(2) (d)** that courts shall not sacrifice substantive justice at the altar of technicalities. It is therefore in the instant suit that this court is expected to deliver its pronouncement on substance, now that parties have finally appeared before it for a resolution on the merits in contrast to the decision in the judicial review case that merely dealt with the propriety of procedure.
28. It was incumbent on the defendant to discharge the burden of proof that the plaintiff is culpable for fraud. **Section 107 (1) of the Evidence Act Cap 80** in effect provides that whoever desires any court to give judgement as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist, and the burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
29. It is the SFT's inclusion of the plaintiff's name in the Farm records and their acceptance of, *inter alia*, survey fees that enabled the plaintiff to finally pay for and process his title document. This court would hardly think it possible that the defendant would have, even if he had attempted a mite harder than he did, convinced it of the plaintiff's culpability for fraudulent acquisition of title without joinder of the Settlement Fund Trustees to this suit in a counterclaim.

30. Having examined the evidence of the defendant as analysed hereinbefore, this court finds it wanting in respect of material particulars that would effectively prove fraud against the plaintiff. I therefore find that the defendant has not established his claim of fraud against the plaintiff on a balance of probabilities.

(c) What orders should issue?

31. In the light of the foregoing, I find that the plaintiff has established his claim on a balance of probabilities against the defendant. Consequently, I hereby enter judgment in the plaintiff's favour against the defendant and I order as follows:

a. The plaintiff's claim succeeds;

b. The defendant shall remove himself from the suit land that is LR Number Trans Nzoia/Botwo/384 within 90 days of this order and in default he shall be forcibly evicted therefrom and the plaintiff shall assume possession.

c. Each party shall bear their own costs of this suit.

It is so ordered.

Dated, Signed and Delivered via electronic mail at Nairobi on this 21st day of May, 2020.

MWANGI NJOROGI

JUDGE, ELC, KITALE.