



Mumali v Ogoha (Civil Case 147 of 2016) [2020] KEELC 2082 (KLR) (18 June 2020) (Judgment)

David Alfred Asakania Mumali v Francis Wandera Ogoha [2020] eKLR

Neutral citation: [2020] KEELC 2082 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
CIVIL CASE 147 OF 2016**

AA OMOLLO, J

JUNE 18, 2020

BETWEEN

DAVID ALFRED ASAKANIA MUMALI PLAINTIFF

AND

FRANCIS WANDERA OGOHA DEFENDANT

JUDGMENT

1. The plaintiff David Alfred Asakania brought this claim against Francis Wandera Ogoha vide his plaint dated 7th November 2016. He pleaded that on 4/6/2014, the defendant sold to him a portion of land measuring 0.24ha for a sum of Kshs.44,500. That the sold land was to be curved out of Land Reference No. Samia/Butabona/1156. He also pleaded that he immediately took possession of the sold land has developed it and currently resides therein.
2. The plaintiff pleaded further that the defendant was to allow for survey and sign relevant forms of transfer of the suit property to the plaintiff. That on 14/6/2016, the District Surveyor, Busia through the area chief informed both the parties herein that he would visit the land on 24/10/2016 to carry out the survey but the defendant refused to let the surveyor do the work thus breaching the terms of the sale agreement.
3. The plaintiff pleaded the particulars of breach to include;
 - i. Failing to ensure peace prevails during the survey process.
 - ii. Failing to allow the surveyor time to conduct the subdivision process.Consequently, the plaintiff prays for judgment to be entered against the defendant for;



- a. An order of specific performance for survey of the land sold as well as an order authorising the Deputy Registrar of this Court to execute all relevant statutory forms on behalf of the defendant.
 - b. Costs of the suit.
 - c. Any other or further relief deemed fit by this Court.
4. The defendant filed his statement of defence on 3rd November 2017 to oppose the suit. The defendant pleaded that the plaintiff brought the misfortune upon himself when he failed to give the defendant a copy of the sale agreement and proceeded to erect semi-permanent structures on the suit land without the consent of the defendant. The defendant pleaded that he did not refuse to allow the surveyor to conduct the sub-division. That on 24/10/2016, it was concluded that the plaintiff is not a person who could be trusted thus should be refunded the money. He further denied being in breach of the sale agreement adding that the claim is time barred. The defendant urged the court to dismiss the plaintiff's suit with costs.
5. Each party gave their sole witness evidence. The plaintiff on 11th November 2019 told the court that on 4/6/2016 he was sold ½ an acre of land for Kshs.44,500. That the sold portion was to be curved out of L.R. No. Samia/Butabona/1156. He produced the sale agreement as Pex 1 and the certificate of official search as Pex 2. The plaintiff continued that he was aware the defendant obtained the Land Control Board consent to sub-divide the land on 22/10/2014 and he produced a copy thereof as Pex 3.
6. The plaintiff stated that he was unable to have the land transferred to him because the defendant refused to incorporate. He produced the surveyor's letter dated 16/10/2014 as Pex 4. That he has built his home on the sold portion and urged the Court to assist him get title for his portion. In cross-examination, the plaintiff said he knew the defendant from the time he sold him the land. That he was not aware of the chief's letter dated 24/10/2016. That the surveyor has not worked because the defendant refused. This marked the close of the plaintiff's case.
7. The defendant also gave his evidence on the same date. He stated that he comes from Khakati sub-location and the plaintiff became known to him when he came to look for land. That he sold him a portion of land from L.R. No. 1156. The defendant further stated that the plaintiff became difficult after he built on the land. He confirmed the plaintiff's evidence that the sale price was Kshs.44,500 which amount was paid in full.
8. The defendant continued that all the copies of the agreement was given to David who was the clerk of area chief. That he was not given his copy until after 3 years. That when he received his copy, the purchase price had been altered from Kshs.44,500 to 54,500. He produced this copy as Dex 1. That he visited the chief's office to get the reason for this alteration and it is during this visit he received the letter from the survey office. That the surveyor refused to work unless the dispute was resolved. The defendant produced the chief's letter dated 24/10/2016 as Dex 2. The defendant concluded that he had not executed the transfer because he had not consulted his wife and children before selling the land and now they have objected to the sale.
9. In cross-examination, the witness reiterated that the copies of the sale agreement were taken by the clerk of the chief. That the alteration was done using a pen. According to him, the alteration was done by the plaintiff. That the plaintiff's name was not amongst the names included in the chief's letter. He confirmed that the plaintiff is living on the land with his family and is farming it. This marked the close of the defendant's case.



10. The parties were given time to file their respective submissions. By 9/3/2020, only the plaintiff's submissions was on record. I have considered the said submissions together with the evidence adduced. I frame the following three questions for determination of the suit;
 - a. Whether or not the sale agreement between parties was breached by the plaintiff.
 - b. Whether or not the suit is time barred.
 - c. Whether or not the plaintiff is entitled to orders of specific performance as prayed.
 - d. Who meets the costs of this suit?
11. It is not in dispute that the defendant sold a portion of land measuring 0.24ha to the plaintiff. Both parties produced the sale agreement they executed between them on 4th June 2014. The defendant accused the plaintiff of breaching the sale agreement by altering the amount of the purchase price to read Kshs.54,500 instead of Kshs.44,500. Yet the defendant in his evidence in chief stated that after they signed the sale agreements, all the copies were taken by David who is a clerk of the chief. The defendant did not tell the Court who gave him the copy with the altered figures yet his evidence was that he believed that the alteration was done by the plaintiff.
12. The defendant relied on a letter said to have been drawn by the area chief dated 24/10/2016 where it was stated that "tuligunduwa kuwa bwana David Sakania Mnunuzi wa shamba la bwana Francis Wandera alibadilisha maandishi walioandika wakati wa kununua shamba." The defendant confirmed that the plaintiff did not attend this meeting and the letter also did not include the plaintiff as one of the attendees. The defendant did not call the chief or the maker of that letter/document to explain how they discovered it was the plaintiff who had done the alteration. The letter of 24/10/2016 was also not signed by the maker or the persons who attended the meeting. Thus the letter gives no value addition to the defendant's case in the absence of corroboration.
13. Forgery falls under the category of offences of fraud which the law requires that must be proved on strict liability. In the Case of Ratilal Patel Vs Lalji Makaiyi (1957) E.A. 314 – 317 the Court held that allegations of fraud must be strictly proved. In this case, an unsigned letter/minutes undertaken in the absence of the plaintiff cannot amount to strict proof in the instance where the plaintiff on his part produced a sale agreement giving the sum of Kshs.44,500 as the price and which agreement bore no alterations on the face of it. Further, the defendant did not plead or lead evidence to prove the particulars of the alleged breach on the part of the plaintiff. Consequently, it is my finding that the allegations of breach against the plaintiff are unfounded.
14. The second issue is whether the plaintiff's suit is time barred. Under Section 3(3) of the Law of Contract, claim for disposition on land can only be brought within 6 years from the time the right accrued. In this Case, the sale agreement was executed on 4/6/2014 and this suit was filed on 2016 thus it was filed before the expiry of the six (6) years. On the provisions of Section 6 of the [Land Control Act](#) which requires consent to be obtained before the expiry of the 6 months, the plaintiff produced a letter of consent to subdivide L.R. No. Samia/Butabona/1156 issued on 16/10/2014. The consent to subdivide was therefore obtained within six months from the time of execution of the agreement.
15. It is evidence of the plaintiff that the defendant refused to allow the surveyor to carry out the survey. The defendant admitted that he could not allow the survey to be done because the plaintiff could not be trusted and he had not consulted his wife and children. It is therefore the defendant who was putting hurdles in the completion of the contract and he cannot then turn around to plead time bar occasioned by default on his part. Further the defendant did not lead any evidence that this was matrimonial



property which required spousal consent. Neither did his wife or children testify to corroborate the defence case that they were objecting to the sale.

16. Is the plaintiff entitled to be granted orders of specific performance? Definitely yes because he has performed his obligations by paying the agreed purchase price and engaging the surveyor to curve out the portion he bought from L.R No. Samia/Butabona/1156. Accordingly, judgment is entered for the plaintiff in the following terms;
- a. An order be and is hereby issued directing the defendant to allow the district surveyor to demarcate the boundaries of the portion measuring 0.24ha sold to the plaintiff from L.R No. Samia/Butabona/1156.
 - b. The nearby police station to provide security to the surveyor during the exercise.
 - c. An order be and is hereby issued directing the defendant to execute forthwith all requisite forms to enable the plaintiff acquire title for his portion. In default, the Deputy Registrar of this Court shall sign the relevant forms in place of the defendant.
 - d. The plaintiff shall meet the cost of survey, transfer and registration of the sold portion to his name.
 - e. Costs of the suit is awarded to the plaintiff.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 18TH DAY OF JUNE, 2020.

A. OMOLLO

JUDGE

