



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 59 OF 2013

SOLOMON AMIANI.....PLAINTIFF

-versus-

SALOME MUTENYO OTUNGA..... DEFENDANT

JUDGEMENT

1. By a Plaint dated 26th March 2013 and filed on 11th April 2013, the Plaintiff pleaded that he was the sole registered proprietor of original title KWALE/DIANI COMPLEX/1003. That sometime in late 2010, the Plaintiff gave his original title to the Defendant as an advocate he knew and as his tenant in offices occupying part of KWALE/DIANI COMPLEX/1003 for safe keeping.

2. That in October 2010, the Defendant returned to the Plaintiff a new title KWALE/DIANI COMPLEX/1552 a subdivision curved out of the original KWALE/DIANI COMPLEX/1003 without any input or participation of the Plaintiff. The Plaintiff stated that out of the proceedings in Mombasa ELC Case No. 20 of 2012; SOLOMON AMIANI AND RENATA SERNEELS VS. SALOME MUTENYO OTUNGA, he came to learn of the existence of the following documents:

- i. An Agreement for Sale dated 24th September 2010.
- ii. An undated application for the consent of the Land Control Board.
- iii. A mutation Form dated 1st October 2010.
- iv. Land Board Consent dated 15th September 2010.

3. The Plaintiff denied that he signed the Sale Agreement, the application for the consent of the Land Control Board and the Mutation Form. He also stated that he had not visited the Msambweni Land Control Board on 15th September 2010. The Plaintiff further denied that he received the purchase price from the Defendant. The Plaintiff stated that the Defendant obtained title deed for KWALE/DIANI COMPLEX/1553 from him through fraud and deceit. The Plaintiff prays for judgment against the Defendant for:

- i. **An order that the agreement dated 14th September 2010 purportedly signed by the Plaintiff was invalid, null and void as it offends the provisions of section 3 (3) of the Law of Contract Act Cap. 23 of the Laws of Kenya.**
- ii. **An order that the Defendant's rights and interest to KWALE/DIANI COMPLEX/1553 be extinguished.**
- iii. **An order directing the Land Registrar Kwale to remove the name of the Defendant as the registered proprietor of KWALE/DIANI COMPLEX/1552 and instead issue a new title in the name of the Plaintiff.**
- iv. **An injunction restraining the Defendant, her agents and/or servants from continuing with the construction of the building on KWALE/DIANI COMPLEX/1553**

v. An order that the Defendant at her expense demolish and remove the debris thereof from the suit premises

4. The Defendant filed her statement of defence on 7th May 2013. She stated that the Plaintiff sold to her property known as KWALE/DIANI COMPLEX/1553 vide a Sale Agreement dated 14th September 2010 and signed by both the Plaintiff and herself. The Defendant stated that prior to the purchase of the subject property, she was the Plaintiff's tenant at the same premises paying a monthly rent of Kshs. 15,000/= and that she had renovated the premises at a cost of Kshs. 150,000/=.

5. The Defendant stated that before she purchased the suit property, she conducted a search which revealed that the Plaintiff's was registered as the sole proprietor of the original property being KWALE/DIANI COMPLEX/1003. That after purchasing the property, the Plaintiff, the Defendant and a surveyor demarcated the property and put beacons in the presence of both parties and the Plaintiff signed the mutation form. The Defendant pleaded that both herself and the Plaintiff attended the Land Control Board to obtain consent to subdivide and transfer the property and later appeared at the Kwale Land Registry where the transfer form was witnessed by the Land Registrar.

6. The Defendant denied that the Plaintiff had given her the original title deed for safe keeping and stated that she was never the Plaintiff's advocate. The Defendant stated that she had on various occasions offered financial assistance to the Plaintiff through *M-pesa* and was surprised to learn that the Plaintiff and his wife had filed ELC Case No. 20 of 2012 seeking to restrict the Defendant to the construction of only one storeyed building yet the Defendant had approvals for her construction. In her counterclaim, the Defendant claimed monies owed to her by the Plaintiff. The Defendant's advocate, however told court on 15th April 2015 when the matter came for hearing that the Defendant had abandoned her counterclaim.

7. Both sides called one witness each being the parties themselves. **SOLOMON AMIANI** (hereinafter referred to as "**PW 1**"), the Plaintiff, first testified on 8th December 2014 and was recalled on 15th September 2015 when he testified further because the Defendant served her witness statement after his testimony.

8. **PW 1** told the court that since he had issues with his wife, he gave the original title deed to the Defendant for safe custody. That he discovered in 2010 that the Defendant had subdivided the property into two and registered the first number KWALE/DIANI COMPLEX/1552 in the Plaintiff's name and the other KWALE/DIANI COMPLEX/1553 in the Defendant's name. The Plaintiff stated that he was not aware of the subdivision and did not participate in the entire process. The Plaintiff produced in evidence copies of the two subdivisions. The Plaintiff testified that the Defendant told him that she would pay him Kshs. 1.5 million for the parcel in the Defendant's name.

9. **PW1** further told this court that he learnt of the existence of a sale agreement dated 14th September 2010 in a suit that he and his wife had filed against the Defendant. He stated that he did not sign the sale agreement and no money was paid to him. He continued that the sale agreement indicates that the advocate for both parties was S.M Otunga who is the Defendant herein. The Plaintiff stated that he was not aware that the Defendant acted for him in the sale of the property. The Plaintiff stated that his alleged signature on the sale agreement was forged and was not witnessed. That the agreement does not indicate by whom it was drawn. The Plaintiff produced the sale agreement in evidence.

10. The witness denied that he signed the Mutation Form and stated that he did not witness the surveyor subdividing the plot. He stated that he reported the forgeries to Diani Police Station but so far nothing had been done. **PW 1** testified that he did not attend Msambweni Land Control Board and added that the Defendant did not show any minutes of the Land Control Board. He further stated that the signature on the application for the Land Control Board consent was not his. **PW1** further stated that he served the Defendant with a demand letter dated 10th May 2012 because he had not been paid his money. He prayed that the high rise building that the Defendant is developing on the plot be demolished.

11. The Plaintiff testified that he permitted the Defendant to demolish the structure that was originally on the plot because the Defendant wanted to put a slab for purposes of insurance. The witness stated that he

did not appear before the Land Registrar as alleged. That the allegation that the Land Registrar witnessed his signature is untrue because he did not appear before the Registrar on 1st October 2010 or on any other date in connection with Plot No. 1553. He stated that he did not lodge a complaint over the forged signature because the matter was in court. **PW1** stated that the Defendant has been having his original Identity Card because she had represented them in transaction before.

12. On cross-examination, **PW 1** stated that he did not file a formal complaint with the police concerning the forgeries. He also stated that he did not have any report from the DCIO or handwriting expert confirming that the signatures on the documents do not belong to him. He further stated that despite having encountered the sale agreement in court, he never presented it for investigation.

13. The Plaintiff stated that he signed the National Environment Management Authority (NEMA) forms that the Defendant had used to obtain NEMA approval for her construction because he was her landlord and he was authorising her to put up a one-storey building. He stated that the Defendant started construction of her storey building in 2011 yet the case was filed in 2013. He testified that he did not stop the Defendant from continuing with the construction because he did not have money. The Plaintiff further stated that he was agreeable to the construction when it started but started having problems with the same when the building started going up. **PW 1** stated that despite pleading in his particulars of fraud in the Plaintiff that the Land Registrar was involved in the fraud; he did not enjoin the Registrar to this suit.

14. **SALOME OTUOMA** (also referred to as “**DW 1**”) testified on 15th September 2015 and on 9th October 2015. She stated that she is an advocate of the High Court of Kenya. She knew the Plaintiff as a friend having known him through acquaintances. She became the Plaintiff's tenant from December 2009 or early 2010. That she later demolished the structure that she had rented and used as her office when she bought the property from the Plaintiff. **DW 1** testified that she had sold her plot to raise a deposit of Kshs. 380,000.00 which she paid to the Plaintiff as deposit of the purchase price of the suit property. That the Plaintiff then brought to her the original title deed in the company of his wife.

15. The Defendant stated that she then brought in a surveyor who drew the mutation forms and the suit plot was given number 1553 and was first registered in the Plaintiff's name. That the Plaintiff then attended the Kwale Land Control Board where the consent to transfer was given and the Plaintiff duly signed the transfer form. That the signatures were witnessed by the Land Registrar, Kwale. The Defendant stated that she paid the full purchase price to the Plaintiff and nothing is outstanding. She further stated that in HCC No. 20 of 2012, the Plaintiff's only claim was that he wanted construction to be restricted to one storey. That the Plaintiff did not lay claim to Parcel No. 1553 and did not claim that the building that was being constructed on his plot.

16. On cross-examination, **DW 1** stated that the purchase price of Kshs. 1.5 million was paid in cash. That there was no separate document where the Plaintiff acknowledged receipt of the money. **DW1** testified that neither her signature in the sale agreement nor that of the Plaintiff was witnessed because she did not anticipate any problem as the Plaintiff was her friend and that witnessing was not necessary. When asked why she did not avail to court the minutes of the Land Control Board, she said it was difficult to get the minutes because of the transition of the Land management boards. In re-exam, **DW 1** stated that it was the Plaintiff's obligation to bring the minutes since he had the burden to prove his case. The defence closed their case.

17. The parties' advocates then filed their written submissions. In his submissions, the Plaintiff critiqued the documents produced by the Defendant. He submitted that there was no valid sale agreement as the document produced did not meet the requirements of Section 3(3) of the Law of Contract Act because the signatures were not witnessed. In support of this, he cited the case of **SAMMY KOSGEI VS GRACE JELEL BOIT (2013)eKLR and CHARLES KEISA BUTICHI VS ALBERTS YUGI (2011)eKLR**. It is also submitted that there was no independent witness to verify that indeed the Plaintiff was paid the alleged purchase price.

18. The Plaintiff also submitted that there was a big conflict of interest because of the advocate/client relationship which existed, undue influence could not be ruled out. He has relied on **KING WOOLEN**

MILLS LTD & TWO OTHERS VS STANDARD CHARTERED FINANCIAL SERVICES & ANO CACA NO 102 OF 1994 to buttress this submission. The plaintiff also submitted on the role of a registrar as set out under section 109 and 110 of the Registered Land Act (*repealed*). Further that the name of the registrar was not disclosed and the rubber stamp used could be made anywhere citing **LLYODS BANK LTD -VS- BUNDY (1974) 3All ER 757**.

19. The Defendant on her part in response to the legality of the agreement quoted **WALSH VS LANSDALE** where the court stated that, **“equity treats as done that which ought to be done”**. In answer to the question whether the defendant’s title was lawfully issued, her answer was positive because she obtained land control board consent as per the provisions of section 6(6) of CAP 302 and had transfer documents executed plus stamp duty duly paid.

20. **The** defendant further submitted that the Plaintiff is prevented by the principle of estoppel to claim the contrary by virtue of having received his title in 2010 and doing nothing about it. The Defendant relied on the case of **CENTURY AUTOMOBILES VS HUTCHINGS BIEMER LTD (1965) EA 304** in explaining the elements required for estoppel to arise. On proof of fraud, the Defendant submitted that the Plaintiff had the documents he alleged his signatures were forged but did not subject them to an expert. He also failed to avail the minutes of the Msambweni Land control board of September 2010 to prove there was no consent issued in regard to the transfer of the suit property. In conclusion, the Defendant stated that the Plaintiff did not prove the claim and is therefore not entitled to the orders sought. She urged the court to dismiss the suit with costs to her.

21. I have evaluated the pleadings, the evidence adduced and the submissions rendered and find the following issues arising for my determination;

- a. **Whether the sale agreement dated 14th Sept 2010 is invalid, null and void.**
- b. **Whether the allegations of fraud pleaded against the Defendant have been proved and therefore the Plaintiff is entitled to the orders sought.**
- c. **If the Plaintiff is estopped from claiming the suit title.**
- d. **Who bears the cost of the suit?**

22. Section 3(3) of the Law of Contract Act provides that no suit shall be brought on a contract for a disposition in an interest in land unless the contract upon which the suit is founded is;

- **In writing**
- **Signed by all the parties thereto**
- **The signature of each party signing has been attested by a witness who was present when the contract was signed by such party.**

23. The agreement in question on the face of it has been signed by the parties to it. The signatures of the parties have however not been attested to by a witness as required under section **3(3) (b)**. The Plaintiff urged this court to declare it null and void on this account. The Plaintiff added that he never signed the agreement but I will deal with the allegation of forgery of his signature under the heading of fraud. The section is worded in mandatory terms however it does have a proviso as follows;

“Provided this subsection shall not apply to a contract made in the course of a public auction by an Auctioneer within the meaning of the Auctioneers Act nor shall anything in it affect the creation of a resulting, implied or constructive trust.”*(Underline mine for emphasis).*

24. The Plaintiff in his evidence has denied selling the suit property to the Defendant which in essence means there was never a sale and therefore needed not to question the validity of the agreement. In my view, he ought to have stuck with the issue that his signature was forged but now that he raised the issue of the validity of the agreement, I will deal with it. The Defendant on her part averred that the plaintiff signed the agreement but she did not bother having it witnessed because they were friends with the Plaintiff and she did not anticipate a problem would arise. This is a lame defense indeed for someone versed in the law and given that she paid a reasonably large amount of money as purchase price. Since it

is not denied that the signatures on the agreement were not attested, the answer to my first question is that the sale agreement is invalid for failing to fulfil all the conditions set in section 3(3)(b) of the Law of Contract Act.

25. This court does not however make any conclusion that no money exchanged hands. The attestation only deals with disposition of the interest but does not excuse a party who by his signature it is confirms receipts of payments made.

26. The second question this court wishes to consider is whether having found that the agreement is invalid, the entire transaction became null and void. I am doing so because of the **proviso** to the section and the Defendant's submission on the doctrine of estoppel. While determining this, I will evaluate the sequence of events between the Plaintiff and the Defendant before and after the date of the agreement. In the evidence adduced, it is not in dispute that initially the Defendant was the Plaintiff's tenant at the suit premises at a monthly rent of Kenya Shillings Fifteen thousand (Kshs 15000/=). They had become acquaintances because the Plaintiff said he even surrendered the original title deed for Kwale /Diani/1003 to the Defendant for safe keeping without anything in writing. It is also in the course of the tenancy relationship that the parties reached an agreement that the makuti house that was rented be demolished and a permanent built. The details on the kind of building that was to be put up is sketchy.

27. The Plaintiff's version on the reason for the demolition was to enable the Defendant put up a slab for her insurance. The Defendant on her part alleged that she was already the property owner hence she demolished the old structure to put up her high-rise development. Consequently after the makuti house was brought down, construction on the suit property commenced and by the time this suit was filed it was at the fourth floor. Apparently before the filing of this suit, the Plaintiff and his wife had sued the Defendant in **ELC NO. 20 OF 2012** over a claim that the building was going beyond one storey as was agreed. We are not told on what basis the Plaintiff would allow the construction of the one-storeyed building.

28. The Defendant also produced documents of title to the suit plot which included copies of executed land control board consent, transfer appended with passport size photo of the Plaintiff. Some of these documents are dated October 2010. These documents were in the knowledge of the Plaintiff by December of 2011 as indicated by the contents of the letter drawn by the Plaintiff's advocate on record. The first paragraph on page 2 it is written thus

“A new construction then commenced. It is then she confronted her husband and also checked at the lands registry when she learnt to her shock that this particular portion had been sold to you.”

The letter further stated that ***“Our client has noticed that you intend to build more than one storey. This is illegal as to build otherwise would block the frontal view of the restaurant, apartments and matrimonial home.”***

29. The complainant in the said letter was the Plaintiff's wife. By December of 2011 she knew the plot had been sold to the Defendant albeit without her consent. She demanded that the defendant do give provision for sewer lines as the development covered the whole plot and should not exceed one storey so that the frontal view of the apartments, restaurant and the home is not blocked. When the construction was not stopped, suit ELC No 20 of 2012 was filed but was later withdrawn. As at 2011, it is open and clear that the Plaintiff and his wife were aware of;

- i. ***the construction that was on going***
- ii. ***the defendant held title to the suit property and was in possession***
- iii. ***The Defendant had transfer documents “duly executed” by the Plaintiff***

30. I form the opinion and so hold that the circumstance presents the Plaintiff as knew that he passed his interest on the property to the Defendant but for selfish reasons now he wishes to use the failure of attestation to have the agreement to unduly benefit himself. In **Ayoub vs Standard Ban of S.A (1963)**

E.A 619, the Privy Council said at page 623 par A,

“The Courts will not imply a trust save in order to give effect to the intention of parties. The intention of the parties must be clearly determined before a trust will be implied”

In the case of **Twalib Hatayan & Ano vs Said saggar Ahmed & 5 others (2015) eKLR**, the Court Of Appeal after explaining what a constructive trustis went further and stated **that imposition of a constructive trust is thus to guard against unjust enrichment He is indeed estopped from doing so as a constructive trust was created between them.**

31. In the case of before me I am satisfied that some money exchanged hands between the Plaintiff and the defendant with an intention that the Plaintiff passed part of his interest in the original title Kwale /Diani Block/1003. As a result of that intention, the Plaintiff executed subdivision and transfer documents which enabled the defendant to acquire title in her name in regard to the suit property. The Plaintiff failed to discharge the burden of proving there was fraud or undue influence on the part of the Defendant. This court from the actions/inactions of the Plaintiff infers there was an implied trust that the Plaintiff intended to pass and did indeed pass his interest in the suit property for the consideration paid. I find no merit in his suit and dismiss it with costs.

DATED & DELIVERED AT MOMBASA THIS DAY OF 11TH MARCH 2016

A. OMOLLO

JUDGE