



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO 62 OF 2010

ANDREW MOITA SIMIYUPLAINTIFF

VERSUS

SHEM NALIANYA SHIBITALIDEFENDANT

JUDGEMENT

[1] The plaintiff's claim in this case is for declaration that the registration of the defendants as the registered owners over land parcel numbers Kimilili/Kimilili/1579 and 1580 effected on 30/7/2000 and 20/6/2010 respectively be declared null and void and that both registrations be cancelled. They also pray for costs and interests.

[2] The plaintiff pleads in his plaint that on 3/12/2003 and on 28/7/2003 he got registered as the owner of land parcel Kimilili/Kimilili /1580 and 1579 respectively. He states that he was issued with a title deed of Kimilili/Kimilili/1579 on 30/7/2003 and was also issued with the title for Kimilili/Kimilili 1580 on 8/9/2004. The plaintiff states that on 25/6/2009 he applied for a certificate of official search and found out that on 30/7/2000 and on 20/6/2000 his said parcels were transferred to the defendant's name. He states that he did not transfer the said parcels to the defendant at all. He avers that the defendant's actions are a forgery and meant to dispossess the plaintiff of his lands. He set out the particulars of fraud forgery and deceit in his plaint dated 3rd March 2010.

[3] An appearance was entered for the defendant on 10/2/2011 by Kassim Sifuna & Associates. On the same day one Patrick Wafula Kaburu applied to be made a guardian ad litem for the defendant on the claim that the defendant had been adjudged to be a person of unsound mind since the year 2000. The application was heard by the court (Onyancha J) on 23/2/2011 where orders stopping the entry of judgement and the hearing of the application of the appointment of the guardian ad litem were issued. A ruling of the application for the appointment of guardian ad litem was delivered on 13/6/2012 by Muchelule J, whereby, he ordered that the said application be adjourned to allow the defendant to be re-examined by the Provincial Psychiatrist and a current report be availed to court. Nothing else was done on that score.

[4] This matter came for mention on 5/10/12 and 29/10/12 when the matter was said to be an ELC matter and the file was placed before the ELC court for disposal by Gikonyo J. On 30/2/13 this matter came before Omollo J and it was by consent of the parties fixed for hearing on 13/2/2013. It would appear therefore that the application for the appointment of the guardian ad litem was abandoned. The matter has subsequently come before the court on 15/5/2013, 17/7/13 and 5/11/13 when counsel for the defendant made an application for adjournment and to cease acting for lack of instructions. The application was opposed and finally granted and costs were agreed at Kshs.4,000/= plus Court Adjournment Fees Kshs 1,000/= The hearing date was fixed for 5/11/2013. The application to cease acting was never filed. The case was fixed finally for hearing on 7/3/2016 ex parte. The defendant's

advocate was served with the hearing notice and the applicant Patrick Wafula Kaburu was also served and a return of service was filed in court on 7/3/2016.

[5] Having been satisfied that the counsel for the defendant was served and the applicant in the ad litem application was served, I allowed the case to proceed.

[6] The plaintiff gave his evidence that he was at Kimilili and he knew the applicant who he alleged was an uncle to the defendant who had the power of attorney for the suit lands from the defendant. He explained how he bought land parcels Kimilili/Kimilili 1580 for Kshs.90,000/= from one Allan Wekesa. He stated that he paid the purchase price in instalments. He went to the Kimilili land control board and was given the necessary consent and he got his title deed in 2004. He produced the agreement for sale dated 27/11/2002 as P exh. 1. The title deed for Kimilili/Kimilili/1580 dated 18/9/2004 as P exhibit 2. He further explained how he bought Kimilili/Kimilili/1579 for Kshs.105,000/= by instalments of Kshs.65000 and 40,000/=. He said that he went to the land control board and was given the necessary consent. He produced the original title as P exhibit 3, the sale agreement dated 25/6/2003 as plaintiff exh. 4. He said that he then entered this land and still lives on the land parcel.

[7] He told the court that he later heard from the neighbours that there was a person taking lands illegally and exchanging titles in the land's office and selling the same to other people. He went to the land's office Bungoma and searched his two titles on 20/2/2009. He found out that his land had been changed from his name to the name of the defendant herein. The documents in the land's office showed that it was the plaintiff who had transferred the land to the defendant. The plaintiff denied ever having done so. He produced the green cards dated 20/2/2009 for the two parcels. He put a caution on his said lands on the same day. He produced a copy of the caution as P exh. 6(a) and (b).

[8] The plaintiff stated that he went to Bungoma Police Station and reported the matter. The defendant and the applicant herein were charged in Bungoma CM Criminal Case No. 1772 of 2010, which was later transferred to Kimilili court and the case became Kimilili SRM's Criminal Case No. 1548 of 2014. The case is still pending before the court. The defendant told the court that the accused Patrick Wafula Kaburu the applicant herein, jumped bail and ran away and a warrant of arrest was now out for him. The plaintiff produced a charge sheet showing the defendants having been charged with forgery of title deeds and obtaining money by false pretences among several other charges all totaling fourteen(14) counts.

[9] The plaintiff denied ever having sold the land to anyone. He stated that he lives on the land and no one has ever asked him to move from the said lands. He said that he had come to court to have his names reinstated in the land's registry at Bungoma as proprietor of land parcel Kimilili/Kimilili 1579 and Kimilili/Kimilili/1580 respectively. He also prayed for costs of the suit.

[10] The defence in this case was never filed. There was an allegation that the defendant was a person of unsound mind. The applicant herein filed an application to be a guardian ad litem. This issue was dealt with by Muchelule J on 13/6/2004 and the judge, having not been satisfied by the report, ordered a further examination. The same was never done and no report was ever filed. No guardian ad litem was therefore ever appointed. The defendant who was represented by an advocate proceeded to fix the case for hearing by consent. His advocate later applied for leave to withdraw from the suit citing lack of instructions. A consent order was recorded allowing him to withdraw. He never filed any application to withdraw as per request and consent. The case came up for hearing. The defendant's advocate was served. The applicant who wanted to be made a guardian ad litem was served too, presumably, as an act of caution. A return of service was filed in court on the date the case was fixed for hearing. None of them attended the court. The plaintiff then proceeded with the case and gave the evidence as earlier stated.

[11] There is therefore no evidence before the court to show that the defendant is a person of unsound mind. His advocate consented to this case being fixed for hearing. He later tried to withdraw from the suit. He was given a chance to do so and never did so. He remained on the record. Mr. Patrick Wafula Kaburu was never made a guardian ad litem at all. The defendant having been served through his advocate on record did not file any defence. He did not attend the court for hearing despite having been

served. I fully believe the evidence of the plaintiff. I find that his evidence was not challenged at all.

I grant him the order he seeks in paragraph 11 of the plaint.

It is so ordered.

Dated at Bungoma this 11th day of May 2016

S.MUKUNYA - JUDGE

Judgement read in open court in presence of

Mr. Watanga for Onchiri for plaintiff

Defendant in person

S.MUKUNYA - JUDGE

11/5/2016