



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 62 OF 2013.

P M1ST PLAINTIFF

M N J.....2ND PLAINTIFF

-VERSUS-

F O G.....1ST DEFENDANT

M E N.....2ND DEFENDANT.

J U D G M E N T.

INTRODUCTION;

1. P M and M N J, hereinafter referred to as 1st and 2nd Plaintiffs respectively, sued F O G and M E N, hereinafter referred to as 1st and 2nd Defendants through the plaint dated 29th July, 2013 for the following orders;-

“ 1. Declaration that the 1st Plaintiff constitutional rights under article 27 (3) , 40 (2) (b), 44 and 45 (3) of the constitution has been violated and or threatened with violation.

2.A declaration that land Parcel No. [particulars withheld] as currently registered in the names of M N E is subject to spousal rights as it provided for under section 28 of the Land Registration Act No. 3 of 2012.

3. An order to evict the 1st defendant and or his agents, assignees from land Parcel No. [particulars withheld] .

4. A permanent injunction to restrain the 1st Defendant from returning into land Parcel No. [particulars withheld]

5. An order for Compensation for loss of user, damage caused to the suit property.

6. An order for Compensation for sentimental attachment value attached to property destroyed.

7. Costs and interest.”

2. The Plaintiffs avers that the Defendants entered into a land sale transaction involving land parcel [particulars withheld] which was Matrimonial property for the 1st Plaintiff and 2nd Defendant without

the Plaintiffs consent. They further stated that the 1st Defendant took possession of the suit land dispossessing the Plaintiffs and hence this suit.

3. The 1st Defendant filed a defence and Counterclaim dated 12th August, 2013 against Plaintiffs and 2nd Defendant for Kshs.1500,000/=, being the refund of purchase price paid of Kshs.1300,000/= and Kshs.200,000/= for fencing the suit land. He also prays for damages and costs.

4. The 2nd Defendant filed a statement of defence dated 31st July, 2013 accepting that he had entered into a land sale agreement with the 1st Defendant over the suit land but added that the 1st Defendant had breached the agreement rendering it null and void. He later filed a statement of admission dated 23rd January, 2015 to the Plaintiffs claim and 1st Defendant counterclaim of Kshs.1300,000/=

5. The Plaintiffs filed a reply to the Defence filed by both Defendants. They also filed a defence to the 1st Defendant's Counterclaim through their reply dated 26th August, 2013 stating that they were not party to the agreement and cannot be held liable to the 1st Defendants loss.

6. ISSUES FOR DETERMINATION.

- a. Whether there exist a valid land sale agreement over the suit land and if so who the parties are.
- b. Whether the said sale agreement was subject to spousal consent and if so whether the spousal consent was obtained.
- c. Whether the Land Board consent to the sale agreement was obtained and if not, which party is to blame.
- d. Whether specific performance orders should be issued and if so, in whose favour.
- e. Whether the 1st Defendant is entitled to the orders sort in the counterclaim, and if so against which party or parties.
- f. What order should be issued in favour of the Plaintiffs, if any .

7. ANALYSIS OF THE EVIDENCE.

- a. The Plaintiffs testified as PW 1 and PW 2 respectively. Their evidence is that about July, 2013, PW 2 was posted to [particulars withheld] hospital and wanted to operate from their home which is on the suit land. He however found the home had been occupied by agents of the 1st Defendant . PW 1 contacted the 1st Defendant for an explanation and it was then she learnt that her husband, who is the 2nd Defendant , had sold the suit land to the 1st Defendant. The Plaintiffs then instructed an advocate to file this suit. The Plaintiffs indicated that they had not been consulted about the suit land's sale by 2nd Defendant. The Plaintiffs further testified that the Land Control Board consent has not been obtained and the land is yet to be transferred to the 1st Defendant. They further said that the 2nd Defendant should refund the money he had received from the 1st Defendant in accordance with the admission he filed dated 23rd January, 2015 and that the 1st Defendant should vacate from the suit land.
- b. The 1st Defendant testified as DW 1 and said that his land neighbours that of the 2nd Defendant. His testimony was that the 2nd Defendant approached him with an offer to sell to him the suit land. He said he declined at first but finally agreed to buy the land after 2nd Defendant pestered him for about one year. They agreed at a purchase price of Kshs.2000,000/=. The title to the land was charged with N H C for a loan, and by then the arrears was about Kshs.700,000/=. The 1st Defendant sent the 2nd Defendant to his advocate and a sale agreement which they executed on 13th October, 2011 was made . The 1st Defendant said he paid 2nd Defendant Kshs.1300,000/= and the balance was to be paid on transfer . The 1st Defendant took possession of the land and used about Kshs.400,000/= to fence it. The 1st Defendant said the 2nd Defendant failed to obtain the Land Control Board consent and the suit land is yet to be transferred to him.

8. FINDINGS.

- a. That there is no doubt the 1st Plaintiff and 2nd Defendant are wife and husband respectively and the 2nd Plaintiff is their son.
- b. That Land parcel [particulars withheld] is registered in the names of M E N, who is the 2nd Defendant, since 28th October, 2005 as shown on the copy of the title and certificate of official search.
- c. That there is also no doubt the 1st Plaintiff and 2nd Defendant matrimonial home is situated on the said land.
- d. That the 2nd Defendant had charged the title to the suit land for Kshs.500,000/= with N H C and the appropriate entry made on 29th May, 2007 at part C of the register of the suit land as confirmed by the copy of certificate of official search.
- e. That the Defendants entered into a land sale agreement on 13th October, 2011 under which 2nd Defendant agreed to sell the land parcel [particulars withheld] to the 1st Defendant for Kshs.2000,000/=. It has been admitted by the 2nd Defendant in his statement of admission dated 23rd January, 2015 and filed on 26th January, 2015 that he had received a total of Kshs.1300,000/= from the 1st Defendant as part payment. It was a term of the said sale agreement at clause 3 (b) that on the completion date, the 2nd Defendant was to submit to the 1st Defendant transfer documents. The court was told by the Plaintiffs that the Land Control Board consent to transfer the suit land has not been obtained. The 1st Defendant testified on the same issue and said the 2nd Defendant declined to sign the application for Land Control Board consent. The Land sale agreement dated 13th October, 2011 between the Defendant was subject to the Land Control Board consent being obtained within six months. By the time the parties offered their testimonies before the court, there was no evidence tendered to confirm whether the consent had been applied for and or obtained and in terms of provisions of the Land Control Board Act, Chapter 302 of the Laws of Kenya. The Defendants transactions therefore become void after the lapse of six months from the date of the agreement for failure to obtain the Land Control Board consent.
- f. That though clause 5 of the sale agreement indicated that the 2nd Defendant, as the vendor, was to give the 1st Defendant, as the purchaser, vacant possession of the suit land on completion, it is apparent the 1st Defendant is already in possession while the transaction has not been completed. This is the basis on which the Plaintiffs claim damages. The 1st Defendant has testified that he was placed in possession by the 2nd Defendant who did not offer oral evidence to rebut this position. If there was any breach of the terms of the agreement, either of the parties to the agreement would be entitled to seek recourse or enforcement orders against the defaulting party in accordance with the law. The Plaintiffs herein, not being parties to the agreement, cannot sue on it breach. It follows therefore that as the 1st Defendant was placed in possession of the land by the 2nd Defendant, who has not lodged any claim or complaint on that fact, the Plaintiffs claim for loss of user, damages and compensation under prayers 5 and 6 of the plaint cannot be sustained against the 1st Defendant. The same prayers cannot stand against the 2nd Defendant also, as he is still the registered owner of the suit land.
- g. That the land sale agreement between the Defendants dated 13th October, 2011 was subject to the Land Control Board consent being obtained. Had the Defendants lodged the application for consent, the Plaintiffs, and any other person with objection to the transactions, would have had the opportunity to make their representation before the board made its decision. The Land Registration Act 2012 has a commencement date of 2nd May, 2012 which is slightly over six months after the date of the sale agreement between the Defendants. The agreement was therefore not subject to spousal rights which is now one of the statutory overriding interests under section 28 (a) of the said Act.
- h. That the suit land, [particulars withheld], registered in the names of the 2nd Defendant, being the place the matrimonial home of the 1st Plaintiff and 2nd Defendant is situated, is so registered subject to the 1st Plaintiff's spousal rights under section 28 (a) of the Land Registration Act

2012. The Plaintiffs therefore succeeds on prayer 2 of the plaint.
- i. That Article 27 (3) of the Constitution provides for equal treatment between both gender including the right to equal opportunities in political, economic, Cultural and Social spheres. Article 40 (2) (b) of the Constitution prevents Parliament from enacting any law that permits the state or any person to limit or restrict the enjoyment of rights on any of the ground set out under article 27 (4) of the Constitution. The provisions of article 44 of the Constitution deals with language and culture, while article 45 (3) of the Constitution provides for equal rights to parties to a marriage. Though the Plaintiffs alleges the 1st Plaintiff's constitutional rights under the foregoing articles had been or are threatened to be violated, there was no evidence tendered to prove the violation or threat thereof and prayer (1) of the plaint has no merit.
 - j. That though the 1st Defendant was placed in occupation of the suit land, he is not entitled to specific performance orders against the 2nd Defendant as he has not paid fully the purchase price under the agreement of 13th December, 2011. The 1st Defendant is however entitled to a refund of Kshs.1300,000/=, which is the amount he had paid the 2nd Defendant, now that the transaction between them has become void in accordance with section 7 of the Land Control Act, Chapter 302 of Laws of Kenya. The Plaintiffs were not parties to the sale agreement and cannot be compelled to refund to the 1st Defendant the money paid to 2nd Defendant. The claim of Kshs.200,000/= for fencing the suit land has no merit as it is outside the terms of the sale agreement and cannot be taken to be part of the payment received by 2nd Defendant. The 1st Defendant has no reason to continue occupying the suit land as he took possession prematurely. The court finds prayer 4 of the plaint would remain superfluous once prayer 3 is granted.
 - k. That from the foregoing, the Plaintiffs and the 1st Defendant have partly succeeded in their respective claims and it is only fair that each party bears their own costs as between themselves. The Plaintiffs are wife and son respectively to the 2nd Defendant and so as to promote unity among them, each of them will bear their own costs. However the 1st Defendant has shown his preparedness to perform his part of the bargain, and noting that the 2nd Defendant was the one who frustrated the agreement by failing to obtain the concurrence of his family members to the transaction so as to obtain the Land Control Board consent, he should bear the 1st Defendants costs to the Counterclaim.
9. That having found as above, the court enters judgment for the Plaintiffs and the 1st Defendant in their respective claims as follows;
0. That land parcel [particulars withheld], registered in the names of M E N, is subject to the spousal rights under section 28 (a) of the Land Registration Act 2012.
 0. That the Land sale agreement dated 13th October, 2011 pursuant to which the 1st Defendant took possession of Land parcel [particulars withheld] is void and the 1st Defendant should vacate and give vacant possession of the suit land to the registered owner within the next 30 days and in default eviction orders to issue.
 0. That the 2nd Defendant to refund Kshs.1300,000/= to the 1st Defendant being the amount paid and received under the voided sale agreement dated 13th October, 2011.
 0. That the 2nd Defendant to pay the 1st Defendant's costs of the counterclaim.
 0. That save as to the costs allowed in (iv) above, each party to bear his/her own costs in both the Plaintiffs' and 1st Defendant's claim.

It is so ordered.

S. M. KIBUNJA.

JUDGE.

DATED AND DELIVERED ON 7TH .DAY OF MAY, 2015

IN THE PRESENCE OF;

1ST PLAINTIFF.....PRESENT.....

2ND PLAINTIFF..... PRESENT.....

1ST DEFENDANT ...ABSENT.....

2ND DEFENDANT...ABSENT.....

COUNSEL...MR. JUMBA FOR 1ST DEFENDANT.