



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CIVIL SUIT NO.721 OF 2015

PATRICK KURIA THIGA.....PLAINTIFF

VERSUS

SAMUEL MAINA.....1ST DEFENDANT

JOHN MAINA2ND DEFENDANT

UMAGARA WINYONERE.....3RD DEFENDANT

DAVID KENGERE KIMAIGA.....4TH DEFENDANT

JUDGEMENT

Introduction.

1. The Plaintiff is a male adult who brought a suit against four Defendants in which he claims the following reliefs: -

a. Permanent injunction restraining the Defendants by themselves, their servants, agents and/as employees from entering into sub-dividing, trespassing or from carrying out any construction, building or erecting any structures, selling and or disposing off or carry out any operations and or activities whatsoever or dealing in any way with all the parcel of and known as Plot No.754/1211.

b. An order of eviction and demolition of the building erected in plot No.754/1211 by the 4th Defendant.

c. Any other relief of the court may find appropriate.

d. Costs of the suit.

2. The 1st Defendant who has since died was a director of the 3rd Defendant. The 2nd Defendant is a male adult who was a broker and used to assist the 1st Defendant in running the 3rd Defendant's errands from an office at Kasarani area in Nairobi. The 3rd Defendant is a land buying company which owned land in Mwiki area of Kasarani which it subdivided and sold to its members. The 4th Defendant is a male adult who purchased a plot from the 3rd Defendant which plot is being claimed by the Plaintiff.

Plaintiff's case.

3. The Plaintiff testified that he became a member of the 3rd Defendant in 1988. He was shown plot No.754 for which he paid 13,000/=. He had paid membership fee of Kshs.120/=. He was issued with a plot certificate on 26th May 1988 after being shown the plot on the ground. In or around May 2013, he went to check on his plot only to find that someone had put up a house on it.

4. The Plaintiff went to the 3rd Defendant's office where he was shown some two maps, one showing his plot as No.754 and the other showing the same plot as No.1211. The Plaintiff went and reported the incident to the Directorate of criminal investigations offices at Kasarani . The Plaintiff and the 2nd Defendant were referred to the 3rd Defendant's offices to go and sort out the issue of the disputed plot.

5. The Plaintiff was late taken to the offices of the 1st Defendant along Jeevanjee Gardens in town center where an agreement was reached

that the 3rd Defendant was to give the Plaintiff an alternative plot or compensate him in cash. The agreement was reduced into writing and the 1st Defendant sought for two months to do that. The Plaintiff was later shown a plot which he did like as it was next to a river. He was later taken to another plot which was smaller than the one he had purchased and the person who occupied it refused to move out.

Second Defendant's Case.

6. The 2nd Defendant testified that he is a land broker at Kasarani area. He stated that he sometimes works for the 3rd Defendant on commission basis. He stated that he was wrongly sued in this case as he is neither a director of the 3rd Defendant nor did he deal with the Plaintiff during the purchase of the disputed property or even between 3rd Defendant and the 4th Defendant.

Fourth Defendant's case

7. The 4th Defendant who was said to be out of the country stated his case through his wife to whom he donated a power of attorney. The 4th Defendant stated that he became a member of the 3rd Defendant company in 1987. He purchased the disputed plot and was given a plot certificate on 5th January 2001. He was allocated plot No.1211. In 1990, he started assembling build materials on the plot. In 1991, he constructed a permanent house which is now occupied by his family.

8. In 2013, the Plaintiff came up to claim that the plot was his. The 3rd Defendant admitted that a mistake occurred when the process of subdivision occurred and that the 3rd Defendant entered into an agreement to compensate the Plaintiff. The Plaintiff was shown alternative plots which he never took up. The 4th Defendant stated that he was wrongly sued in this suit.

Analysis of Evidence and issues for Determination.

9. I have gone through the evidence of the Plaintiff and that of the 2nd and 4th Defendants. As I said hereinabove, the 1st Defendant died. A copy of certificate of death shows that he died on 30th July 2016. The 3rd Defendant company did not adduce any evidence. I have also considered the submissions filed by the Plaintiff and the 4th Defendant. The parties did not file submissions within the timelines given on 4th March 2020. On 2nd June 2020, the parties were directed to file their submissions within 7 days. The Plaintiff filed his submissions on 2nd July 2020. The 4th Defendant filed his submissions on 27th July 2020. The 2nd Defendant did not file any submissions.

10. The issues which emerge for determination are as follows: -

i. Is plot No.754 the same as plot No.1211 on the ground.

ii. Is the 2nd Defendant a director of the 3rd Defendant and if so, did he play any role in the purchase of the disputed plot by either the Plaintiff or the 4th Defendant.

iii. Was the disputed property sold fraudulently to the 4th Defendant and if so, was the 4th Defendant privy to the fraud if any

iv. Is the Plaintiff's suit statute barred?

v. Is the Plaintiff entitled to the prayers in the Plaintiff?

vi. Which order should be made on costs

Is plot No.754 the same as Plot No.1211 on the ground.

11. The Plaintiff's evidence is that he was allocated a plot which was Plot No.754. On the other hand, the 4th Defendants testified that he was allocated plot No.1211. Whereas the Plaintiff states that Plot No.754 is what later on changed to Plot No.1211, the 4th Defendant submits that the two are distinct plots and that the Plaintiff has not adduced evidence to show that the two plots are one and the same on the ground. The 4th Defendant relied on **Kitale ELC No.64 of 2015 (David Were Wafula Vs Titus Kipkosgei)** where justice M Njoroge found that two plots which were being disputed were distinct plots which were not the same on the ground.

12. I have looked at the documents which were filed by the parties herein. There are two maps which were produced. The first map shows that plot as plot No.754 whereas the second map shows that the plot is plot No.1211. However, it is clear from the two maps that the location of the two plots refer to one plot. It is apparent that in the second map, there was re-planning which resulted in facilities such as nursery school being introduced. In the initial map, there was no provision for a nursery school. The new map necessitated change of numbers. It is therefore clear that plot No.754 is what later changed to plot No.1211 and that the two numbers refer to one and the same plot on the ground.

13. In the **David Were Wafula** case (supra) the Judge stated that there were no maps produced and that the survey plans which were in the file had not been approved by the Commissioner of lands and the Director of Physical Planning hence his finding that the two disputed plots were distinct and that the county council of Nzoia treated them as such. This is unlike in the present case where it is clear from the maps that the disputed plot is one but bearing two different numbers. Its location is even identifiable from the neighboring plots which did not change numbers even after re-planning.

Is the 2nd Defendant a director of the 3rd Defendant and if so, did he play any role in the purchase of the disputed plot by either

the Plaintiff or the 4th Defendant?

14. There is no evidence from the Plaintiff to show that the 2nd Defendant is a Director of the 3rd Defendant. The 2nd Defendant stated in his evidence that he is a land broker who only assists the 3rd Defendant on Commission basis. If the plaintiff wanted the court to find that the 2nd Defendant is a Director of the 3rd Defendant, he should have produced form CR 12 from the Companies Registry. In re-examination, the Plaintiff stated that he first met the 2nd Defendant in 2013. This therefore means that he never dealt with the 2nd Defendant during the process of purchase of the plot. The Plaintiff only stated that he had no reason to doubt that the 2nd Defendant was a Director of the 3rd Defendant.

15. DW2 did not mention the 2nd Defendant as Director of the 3rd Defendant. The Plaintiff in re-examination stated that the Court has power to pierce the corporate veil and know who the directors are. The process of piercing the corporate veil is provided for in the law. It is not the business of the court to go to the company's registry to know directors of a company. This was the work of the Plaintiff. It was incumbent upon the Plaintiff to adduce evidence in support of his case.

16. In the letter which committed the directors of the 3rd Defendant to compensate the Plaintiff, the recorded statement of Pw2 is clear that he is the one who wrote the commitment letters. He is the one who assigned the 2nd Defendant a role of assistant director. This witness even confirmed during cross-examination that it is the 2nd Defendant who referred him to the Director of the 3rd Defendant company whom he never got to meet. I therefore find that the 2nd Defendant was neither a director of the 3rd Defendant nor did he deal with either the Plaintiff or the 4th Defendant when they purchased the disputed property.

Was the disputed property sold fraudulently to the 4th Defendant and if so, was the 4th Defendant privy to the fraud if any.

17. The Plaintiff enumerated the particulars of illegality and fraud as follows: -

a) The Plot No.754 which was later changed to plot 1211 was not available for sale.

b) The Defendant was aware of the order of status quo against the said plot but ignored the same.

c) The Defendant colluded to fraudulently sell the Plaintiff's plot without his authority.

d) The said sale is null and void.

18. It is not clear from the above stated particulars to whom the said particulars are targeted. It is however important to note from the prayers in the Plaint that the particulars may be targeted at the 4th Defendant. There is evidence that the 4th Defendant constructed on the disputed property in 1991. He has since been living in the said house. The Plaintiff now wants the 4th Defendant to demolish the house and move out. There was absolutely no evidence at all to suggest that the 4th Defendant was aware that the disputed property had been sold to the Plaintiff earlier on.

19. There is evidence to show that the property numbers changed following a re-survey. The 4th Defendant purchased his plot which was known as plot No.1211. There is no evidence to suggest that the 4th Defendant was made aware that plot No.754 which had been purchased by the Plaintiff was the same plot which was being sold to him. When the issue of double sale was brought to the attention of the directors of the 3rd Defendant, the 3rd Defendant readily agreed to give the Plaintiff an alternative plot failing which they were to compensate him the value of the plot.

20. The Plaintiff was shown two plots which he did not like. There was also an option of being compensated in cash to which he agreed to. This agreement was reduced into writing but for reasons only known to the Plaintiff, he opted to pursue the plot which had been sold to the 4th Defendant. It will be unconscionable for the Plaintiff to seek to have a house of the 4th Defendant demolished when he had already agreed to being compensated. Even if the directors of the 3rd Defendant made a mistake to sell the disputed plot to the 4th Defendant, there is no evidence that the 4th Defendant was privy to this. The 4th Defendant is prima facie an innocent purchaser for value who should be protected particularly given the fact that the Plaintiff had agreed to be compensated by either being given an alternative plot or being given monetary equivalent of the plot at the market rates. I therefore find that the disputed plot was not fraudulently sold to the 4th Defendant and that the Defendant was not privy to the alleged fraud or mistake if any.

Is the Plaintiff's suit statute barred?

21. The evidence on record is that the Plaintiff bought the plot in 1988. The 4th Defendant purchased the same plot in 2001. Though the 4th Defendant claimed that he became a member of the 3rd Defendant in 1987 and that he paid for the plot in instalments, there was no evidence to support the allegations. I therefore take it that he purchased the plot in 2001 when he was given certificate of plot ownership. The Plaintiff did not file a claim to recover his land until after fourteen (14) years later. I have already found that the purchase by the 4th Defendant was not fraudulent. The limitation period could not therefore be run from May 2015 when the Plaintiff says he discovered that his plot had been taken. In any case, the suit against the 4th Defendant could not be sustained in the face of the proviso to section 26 of the Limitation of Actions Act. This being the case, the Plaintiff's claim to recover his land was extinguished after 5th January 2013. I therefore find that the Plaintiff's suit is statute barred.

Is the Plaintiff entitled to the prayers in the Plaint.

22. I have already shown in the analysis hereinabove that the Plaintiff's suit is not only statute barred but is also not maintainable against the 1st Defendant who is deceased as well as the 2nd Defendant who is not a director of the 3rd Defendant. Equally the suit is not maintainable against the 4th Defendant for the reasons given hereinabove. The Plaintiff should direct his claim for monetary compensation against the 3rd Defendant.

Conclusion

23. I therefore proceed to dismiss the Plaintiff's suit with costs to the 2nd and 4th Defendants.

Dated, Signed and delivered at Nairobi on this 24th day of September 2020.

E.O.OBAGA

JUDGE

In the virtual presence of :

M/s Mwai for Plaintiff

Court Assistant: Hilda

E.O.OBAGA

JUDGE