



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 19 OF 2009

BARNABAS MUNGO LONGIT

(SUING AS THE ATTORNEY OF

PRISCILLA CHEBET) PLAINTIFF

VERSUS

PHILEMON RUTTO DEFENDANT

J U D G M E N T

This suit was filed on the 6th February, 2009, by Barnabas Mungo Longit, on behalf of Priscillah Chebet, against Philemon Rutto, for a declaration that the sale agreement dated 18th October, 2005 is null and void for reason that it related to a controlled transaction yet the relevant consent of the Land Control Board was not obtained. Therefore, the plaintiff is entitled to refund the consideration and upon such refund the defendant do grant vacant possession of Plot No. 1458 Milimani Scheme to the plaintiff. It is averred in the statement of claim (plaint) that Priscillah Chebet (herein, the donor) is the legal owner of a parcel of land known as plot No. 1458 Milimani Scheme measuring five (5) acres which was sold to Philemon Rutto (defendant) on the 18th October, 2005 at an agreed consideration of Kshs.300,000/=. At the time of the agreement, the property was free from encumbrances but upon the defendant taking possession thereof, a Mr Paul Chemuttut laid claim over it.

Consequently, the emerging dispute was referred to the settlement office in Kitale and in the meantime the defendant was offered an adjacent parcel of land being plot No. 1143 Milimani Settlement Scheme of equal measurement with the suit property Plot No. 1458. The defendant declined the offer to relocate to the alternative plot. He also refused a refund of the consideration paid to the plaintiff by himself.

Alternatively, the plaintiff avers that the material sale transaction was a controlled but the prerequisite consent of the Land Control Board was not obtained within the stipulated time herein rendering the transaction null and void. The plaintiff therefore prays for judgment against the defendant in terms of the prayers in the plaint.

The defendant filed a statement of defence on 6th April, 2009, in which he averred that the alleged dispute between the plaintiff and defendant Paul Chemuttut was solved after the property was surveyed by the District Surveyor and boundaries identified and although he (defendant) was offered alternative land being the said plot No. 1143, the offer was made after he had developed the suit plot while plot No.1143 was in the possession of a third party such that he could not occupy it. That, after the dispute between the plaintiff and Paul Chemuttut was resolved, an offer

was made by Paul Chemuttut for the purchase of the suit property from the plaintiff at a higher price. Hence, the two conspired to remove him (defendant) from the suit property.

The defendant further averred that the suit property was at a settlement scheme as such allottees were issued with allotment letters and not title deed. It was therefore, the plaintiff's obligation to make a follow up on the issue of a title deed and approach the Land Control Board for the necessary consent which obligation was not discharged after the offer to take alternative land was declined by him (defendant).

The defendant therefore prays for the dismissal of this suit with costs.

The suit was tried in the absence of the defendant who failed to appear despite being served with the necessary hearing notice . In his testimony, the plaintiff **Barnabas Mungo Longit (PW1)**, indicated that the suit property belonged to his daughter (the donor) after it was allocated to her in 1999. He produced a letter of allotment dated 29th April, 1999 (P.Ex.1) and went on to state that his daughter was at the time studying in America and that she needed funds for her education. She therefore authorized him to sell the suit property and executed a power of attorney to that effect.

The plaintiff produced the said power of attorney dated 8th June, 2005 (P. Ex 2) and a sale agreement dated 18th October, 2005 (P. Ex 2) showing that he sold the property to the defendant for the sum of Kshs.300,000/= of which Kshs.240,000/= was paid by the defendant leaving an outstanding balance of Kshs.60,000/=. He (Plaintiff) said that the defendant took possession of the property a few months after the agreement but prior to that, a dispute arose over the property when a person called Chemuttut (PW2) was found to have fenced off the plot and developed it.

The dispute was brought to his (Plaintiff's) attention by the Settlement Fund Trustees and was brought to the attention of the defendant who was offered an alternative parcel of land belonging to the plaintiff which was adjacent to the suit property.

The plaintiff contended that the defendant accepted the offer but failed to take possession of the alternative land despite several requests made to him.

A bundle of correspondence (P. Ex.4) was produced by the plaintiff with regard to the dispute over the suit property. He said that vide a letter dated 19th January, 2007 (P. Ex. 5), the defendant insisted that he was entitled to possession of the suit property and referred the matter to the area district officer (D.O) who wrote a letter dated 17th March, 2007 (P. Ex.6). Nevertheless, the matter was never settled at the D. O's office.

The plaintiff prays for the invalidation of the transaction between him and the defendant for lack of consent of the Land Control Board. He also prays for an order that he refunds the money paid to the defendant for the property and states that the defendant has since erected a semi-permanent structure on the land.

Paul Chebon Chemuttut (PW2) testified that in the year 2006, the defendant entered his portion of land Plot No. 80 and 81 each measuring five (5) acres alleging that he had purchased the same from the plaintiff who had his own portion of land bordering the aforementioned plots.

That the defendant insisted that the land purchased by him was that occupied by him (PW2) while the plaintiff identified the suit property No. 1458 as the one allocated to him and said that the portion sold to the defendant was part of the suit property.

Chemuttut (PW2) went on to testify that he raised objection to the attempts made by the defendant to occupy his land and wrote a letter to the Director of Settlement and another to the plaintiff.

The letter to the plaintiff was raising concern as to why he (Plaintiff) was interfering with the land yet he (PW2) had occupied and developed it for about ten (10) years. Both letters were produced

(P.ex. 7) by Chemuttut (PW2) who continued to state that he later discovered that the plaintiff's daughter had been allocated part of his land. He contended that the allocation was done after he had already possessed his land. He said that due to the serious dispute that developed between him and the defendant he has had to testify in court as a complainant in several criminal cases. He said that the dispute still existed and that he is yet to resolve the dispute between himself and the plaintiff.

Although the defendant did not testify and lead any evidence in support of his defence, the burden to establish that the plaintiff is entitled to the orders sought in the plaint lay with the plaintiff.

In that regard, the element of ownership vis-a-viz the suit property was crucial in determining whether or not the plaintiff is entitled to the orders. It is undisputed that the suit property is an unregistered parcel of land which assumed various description at different times as may be seen from the plaintiff's evidence as well as that of Chemuttut (PW2). Due to lack of registration, the property was not clearly described and/or defined during the material transaction between the plaintiff and the defendant although it was referred to as plot No. 1458.

Notwithstanding the said description or any other, the obligation to establish ownership thereof lay with the plaintiff since he alleged that the property belonged to his daughter (the Donor) on whose behalf he sold it to the defendant before the third party Chemuttut (PW2) emerged into the scene and claimed ownership while referring to the property by a different description i.e Plot No 80/81.

From his evidence, it was quite clear that the plaintiff was unsure of the actual property he was selling to the defendant. He neither knew its exact description nor its boundary and that is why Chemuttut alleged that he (Plaintiff) had sold to the defendant his (Chemuttut's) land. Indeed, the plaintiff confirmed to Chemuttut that part of the land claimed by him was sold to the defendant.

It is without doubt that the defendant found himself in the middle of the dispute between the plaintiff and Chemuttut over the suit property whose description was never accurately or at all defined by the relevant authority i.e the Ministry of Lands and Settlement.

Therefore, no matter the description of the suit property, its ownership as between the plaintiff and Chemuttut and as between the plaintiff and the defendant could only be resolved by the said Ministry of Lands and Settlement. Since there was no evidence adduced by any officer from the said Ministry and no valid registration instrument was produced herein, it may safely be stated that the ownership of the suit property in relation to the plaintiff and Chemuttut (PW2) and by extension the defendant is doubtful and is yet to be settled by the Ministry of Lands and Settlement. Without proof of ownership, it would follow that the plaintiff had no legal capacity or was not in a position to sell to the defendant what did not belong to his daughter.

The allotment letter (P.Ex.1) is in fact not an allotment letter but a letter of offer. It does not amount to proof of ownership. Besides, there was no evidence that the plaintiff had ever been in possession of the suit property so as to confer him proprietary rights over the same.

Consequently, the sale agreement (P.Ex.3) entered between him and the defendant was null and void ab-intio and incapable of enforcement. If anything, the parties to this dispute including Chemuttut (PW2) should merely agree on how to resolve the issue of ownership in the manner established by law without haggling over it and each claiming ownership to what does not legally belong to them. So, any occupation of the land by any of them amounts to nothing but trespass.

For all the foregoing reasons, the plaintiff would not be entitled to the orders sought herein. This suit is thus dismissed. Parties to bear own costs

J. R. KARANJA,

JUDGE

11/02/2014

(Delivered, signed this 11th day of February, 2014).