



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

HCCC NO. 49 OF 2009

1. SAADA BAKARI MOHAMED

2. REHEMA ABDUL HASSAN

3. ESTATE OF ABDUL HASSAN SHAABAN.....PLAINTIFFS

=VERSUS=

HANS GRUBER.....DEFENDANT

R U L I N G

Introduction

1. This court was moved by way of a Plaint dated 8th May 2009 and filed on the same day. The Plaintiff filed an amended Plaint on 6th December 2011.
2. In the amended Plaint, the Plaintiffs have averred that on 3rd April 2003, the Defendant entered into an agreement with Abdul Hassan Shabaan, now deceased, in which the deceased agreed to sell to the Defendant land known as portion number 10712/4 Malindi (the suit property).
3. The Plaintiffs have further averred that the Defendant agreed with the late Abdul Hassan Shabaan that the Defendant was to cause a sub-division of the suit property into two parcels of land and transfer one of the portion in the name of the deceased or his nominee which he failed to do.
4. The Plaintiffs' contention is that the Defendant has refused to complete the Agreement he entered into with the late Hassan Shabaan, which was to transfer land portion number 10712/5 (original number 10712/4/1) Malindi. The Plaintiff is praying for an order of specific performance.
5. The Defendant fled his defence and counterclaim on 27th May 2009 and averred that it is the Plaintiffs who have been the authors and architects of the events that have ensured that the subdivision do not take place; that the 3rd Plaintiff while alive breached the said agreement by not giving vacant possession; that the Plaintiff failed to disclose the presence of the squatters on the land and that the Plaintiff failed to disclose that he had surrendered a road crossing the plot as a public access.

Plaintiffs' Case

6. According to the evidence of PW, the wife of the late Abdul Hassan Shaaban, the deceased owned plot number 10712 which he purchased in 1997. PW1 produced as Plaintiff's exhibit number q the title document.
7. It was the evidence of PW2 that her late husband sold plot number 10712 to the Defendant for

- Kshs.2,700,000 vide an agreement dated 3rd April 2003 which she produced as Plaintiff exhibit number 3. The Defendant and the 1st Plaintiff's late husband agreed that upon subdivision of the plot, the Defendant was to give a portion of the land to the deceased.
8. The suit property was eventually transferred to the Defendant who proceeded to sub-divide it into seventeen (17) portions. However, the Defendant, according to PW1, never transferred one of the portions to her late husband as agreed.
 9. PW1 denied that her late husband owed the Defendant any money as claimed by the Defendant. The 1st Plaintiff produced as Plaintiff exhibit number 5 and 6 the correspondences that was exchanged between the Plaintiff and the Defendant's advocate.
 10. PW1 informed the court that although there were squatters on the suit property, she removed them by paying them off. PW1 produced as Plaintiff exhibit number 7 a-d the agreements showing the payments she made to the squatters. It was her evidence that the plot that her husband was entitled to is plot number 10712/17 which the Defendant has since sold to a third party. The agreement between the Defendant and the third party was produced as Plaintiff exhibit number 8a while the deed plan in respect to plot number 10712/17 was produced as exhibit number 8b.
 11. It was the testimony of PW1 that the agreement between the Plaintiff's late husband and the Defendant did not make any reference to the squatters and that the whole land had a road in between it which the Defendant closed. The witness produced the sub-division scheme as Plaintiff's exhibit number 9. PW1 Prayed that the Defendant should be ordered to either give him plot number 17 which is now plot number 5 or give her a sum of money equivalent to the value of the plot.
 12. In cross-examination, PW1, informed the court that her late husband had eleven wives. She denied that the grant has ever been revoked but conceded that the grant in respect to the Estate of her late husband has never been confirmed.
 13. According to PW1, the Shutu family was paid by the Plaintiff because they were taking care of the land. Mr. Shutu was to remove the squatters that he had put on the land. PW1 denied that it was the Defendant who paid for the demolition of the houses constructed by the squatters on the land.
 14. PW2, the land valuer, informed the court that he inspected the portion number 10712/5 for the purpose of valuing it on 11th December 2013 and prepared a report dated 12th December 2013. According to the witnesses, portion number 10712/5 measures 0.0988 Ha and its value is Kshs.2,400,000. The valuation report was produced as Plaintiff's exhibit number 11.

Defendants' Evidence

15. The Defendant, DW1 informed the court before he purchased the suit property from the Plaintiff's late husband, he was shown a deed plan which showed the existence of a road crossing the parcel of land. However, in the ground, there was no road and on inquiry, the Plaintiff informed him that road that was indicated in the deed plan was a private road.
16. It was the evidence of DW1 that he also saw squatters on the plot with two houses. He was informed by the vendor that the squatters were there with his permission.
17. It was with those assurances in mind that DW1 entered an agreement with the Plaintiff's late husband in respect to the land. It was the evidence of DW1 that according to the Sale Agreement, the vendor was to give vacant possession upon full payment of the purchase price which he paid. However, the Plaintiff's late husband refused to remove the squatters who were on the land and to close road that was passing through the plot. On further inquiry from the Municipal Council, he was informed that the road in question was a public road which could not be closed.
18. When DW1 realised that the road that was passing through the plot was a public road, he asked the Plaintiff's late husband to refund him his money which he wouldnt because he had used to money to offset a debt.
19. It was the evidence of DW1, that he had agreed to re-transfer to the Plaintiff's late husband any land which was in excess of 2 acres. According to DW1, he discovered that the Plaintiff's late husband had transferred the suit property to a third party even after selling the whole land to him. The Defendant produced correspondences that was exchanged between the two of them as Defendant exhibit number 1 and 2. However, the vender died in the year 2004 before the issues that were pending could be sorted out.
20. DW1 stated that he negotiated with the squatters who have since left the land. However, he was

- forced to fence the property under the supervision of the police because of the threats that he received from the members of the Shutu family. It was the evidence of DW1 that the perimeter wall that he put was brought down by the Shutu family and who went ahead and assaulted him. He produced the P3 form and treatment notes as Defence exhibit number 3 and 4 respectively.
21. It was the evidence of DW1 that he has since sold the suit property to one Osso Cosimo. The Defendant produced as exhibit number 6 the agreement between him and the said Cosimo as Defence exhibit number 6. It was the testimony of DW1 that he had incurred expenses in respect to the suit property which he informed the plaintiff's late husband. The Defendant produced the breakdown of the expenses that he incurred as Defence exhibit number 7a and 7b.
 22. In cross-examination, DW1 stated that before he bought the land, he engaged a surveyor who confirmed that the squatters were outside the 2 acres that he was purchasing from the Plaintiff's late husband. It was after DW1 took possession of the land that he was informed by the Municipal Council of Malindi that the road cutting across the land that he had purchased could not be closed.
 23. It was the evidence of DW1 that although the Shutu family was not occupying the land, they harassed him pretending to be the owners.
 24. In re-examination, DW1 stated that the part marked as "B" is what was supposed to be re-transferred to the Plaintiff's husband. Portion A together with the road measured 2 acres. Consequently the squatters were moved to portion A because the 2 acres were to be exclusive of the road that was passing through the road.
 25. The parties filed their respective submissions which was a reinstatement of the facts that I have produced above.

Analysis and Findings

26. The issues that arise from the pleadings and the evidence are as follows:

- (a) Did the Defendant agree to re-transfer to the Plaintiff or his nominees portion number 10712/5 measuring 0.8999;**
- (b) Did the Defendant breach the Agreement between the Plaintiff's husband and himself;**
- (c) Did the Plaintiff's late husband or his agent frustrate the agreement of 3rd April 2003;**
- (d) Who is to pay damages if at all.**

27. It is not in issue that the Plaintiffs obtained the grant of letters of Administration Intestate in respect to the Estate of Abdul Hassan Shaaban who died on 7th May 2004.
28. It is also not in dispute that on 3rd April 2003, the Plaintiff's husband entered into an agreement with the Defendant in which he agreed to sell his land being portion number 10712/4 Malindi for Kshs.2,700,000/=. According to the agreement, the vendor was to sell to the Defendant 2.0 acres shown as portion "A" on the sketch which was attached on the agreement of sale. Vacant possession of the property was to be given to the Defendant upon full payment of the purchase price.
29. According to clause 13 of the Sale Agreement, the Defendant was supposed, upon registration of the transfer of the property to his favour commission a sub-division of portion number 10712/14 and cause to be excised the portion of land in excess of 2.0 acres execute a transfer of the same in the favour of the Plaintiff's husband or his nominee. That clause is the borne of contention in this matter.
30. The Defendant was subsequently registered as the proprietor of portion number 10712/4 which is represented in deed plan number 234667 annexed on the sale agreement. The annexed deed was subdivided into two portions marked as "A" and "B" for the purpose of the agreement that I have alluded to above.
31. Pursuant to the agreement of 3rd April 2003, the indenture dated 11th April 2003 was prepared and

- registered on the same day. The said indenture referred to the deed plan that had initially been annexed on the sale agreement.
32. Upon registration of the indenture in favour of the Defendant, the Defendant wrote to the Plaintiff on 23rd July 2003 complaining that the Plaintiff had omitted to disclose the fact that he had a long standing dispute with the Shutu family over the suit property and that he had misrepresented to him that the road going through the plot was a private one which was not the case. The penultimate paragraph of the letter was that the Defendant was to re-transfer the portion of land to the Plaintiff's husband as per the agreement only after reimbursement of the cost and expenses that he had incurred.
33. The Plaintiff's late husband was not amused at the turn of events. On 1st August 2003, he wrote to the Defendant and reminded him that he (the Defendant) had engaged the services of Mr. Mtengo of Arch Survey who went on site and carried out survey works and excised out the 2.0 acres portion and permanently marked the beacons, which was agreed upon. According to the letter, the squatters were left in the portion that was to be re-transferred to the Plaintiff's late husband and he (the Plaintiff) was to deal with the squatters separately. The Plaintiff's late husband insisted on his share.
34. The Defendant admitted the version of the Plaintiff's late husband's while testifying. However, the Defendant's evidence was that although the squatters were initially fell with portion "B" the situation changed when he executed the acreage that was to be used as a road thus incorporation portion "B" to the 2.0 acres that he bought. According to him, the initial survey did not have the road which passes through the two portion of land. The Defendant explained to the Plaintiff's husband the position vide his letter dated 1st August 2003 as follows:

"I realised unfortunately that the road is already registered as a public road reserve(10712/1)....it means, that the sold two property is divided in two portions of one acre each....."

35. From the evidence adduced, the Defendant managed to remove the squatters who were in portion "B" which portion he was to re-transfer to the Plaintiff's husband and has since sold it to a third party. However according to Plaintiff's exhibit number 7a, the Plaintiff's late husband paid off Charo Shutu Kshs.40,000 being the balance of compensation of his cash crops on plot no.10712, Malindi. The Plaintiff also produced as exhibit number 7b, 7c and 7d the agreements that he entered into with the other squatters to vacate the land.
36. I have perused the Deed plan dated 17th March 2006 showing the sub-division of plot number 10712/4 which created portion number 10712/5 measuring 0.08988Ha; the suit property. The suit property was later on transferred to Dell Osso Cosimo on 4th March 2009 way after the demise of the Plaintiff's late husband. The Defendant admitted that he sold all the other sub-divisions.
37. The Agreement of sale dated 3rd April 2003 is clear at clause 11 that the Defendant had had an opportunity of examining it and had knowledge of conditions and state of the same.
38. The Defendant had notice of the road that was passing in the middle of the property. Indeed, the said road was surveyed and was clearly marked in the deed plan which was annexed on the sale agreement. Having had knowledge from the deed plan of the existence of the road, the Defendant cannot purport that he believed the road was "private" and not public and that is why he bought the portion of land.
39. The Defendant did not tell this court why he did not find out from the surveyor or the Municipal Council of Malindi whether the road that was already surveyed and shown in the deed plan was indeed a private road or a public road. In view of the fact that the Defendant had notice before he signed the agreement of the existence of the road on portion number 10712/4 Malindi, he can not turn around and say that the size of the land he was purchasing should be increased because of the presence of the road.
40. Indeed, the Defendant admitted that the squatters were initially in the portion of land that he was to re-transfer to the Plaintiff upon subdivision. The Plaintiff produced evidence to show the compensation he made to the people who were squatting on the said portion of land. The Defendant was engulfed in the issue of squatters when he decided to take possession of both plots because of the plots, although he did not produce and evidence to show the squatters that he paid off.

41. The evidence before me clearly shows that the Defendant was under an obligation to re-transfer to the Plaintiff's late husband or his nominee portion number 10712/5 despite the problems he says he encountered during the putting up of the perimeter fence. It was not right for the Defendant to have sold all the sub-divisions without having regard to the terms of the agreement between himself and the Plaintiff's late husband. The Defendant had the opportunity to examine the said property as provided in clause 11 of the Agreement and is deemed to have had knowledge of its condition. He is bound by the terms of the agreement. In any event, no evidence was adduced by the Defendant of the expenses that he incurred to enable him defect or set off the Plaintiff's claim.

Dated and Delivered in Malindi this **14th** Day of **March 2014**

O. A. Angote

Judge