



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL CASE NO. 82 OF 2005.

SAMWEL WAFUNAFU WACHILONGA PLAINTIFF

VERSUS

JOHN MAKOKHA SAKWA DEFENDANT

JUDGMENT

1. The plaintiff filed this suit on 26th September 2005. He later amended his plaint and filed the amended plaint on 4th November 2011. In the amended plaint, the plaintiff has sought for prayers in terms of the following;

- i. Orders for rectification of the register of land title Kimilili/Kimilili/813 and a permanent injunction as per paragraph 7.
- ii. A declaration that the defendant is holding land title Kimilili/Kimilili/813 in trust for the plaintiff.
- iii. Compensation for malicious damage as per paragraph 8 of the plaint.
- iv. Costs of this suit.
- v. Interest on (a) at court rate.
- vi. Any other or further relief this honourable court may deem fit to grant.

2. The defendant also filed a defence and a counter-claim on 14th October 2005 which he later amended. He filed the amended defence on 3rd February 2012. In the counter-claim, the defendant is asking for an order of eviction of the plaintiff from the area he encroached in the year 2005. After the pleadings closed, the matter was set down for hearing.

3. The plaintiff's son testified as **PW1**. He had a power of attorney which was filed in court to allow him testify on behalf of his father. He knows the defendant who is his uncle and son to the late Kefa Sakwa Wafunafu. The witness stated that the late Kefa sold to the plaintiff land in 1964 measuring 3.5 acres at a price of Kshs. 350. The agreement was reduced in writing and which he produced as *pex 1*. The parcel number was not known at the time of drawing the agreement but became known later as Kimilili/Kimilili/813. The payment was made in three installments. **PW1** testified further that the plaintiff made several attempts to cause the late Kefa to transfer this land to him with no success. He therefore filed a suit before the Kibingei Land Disputes Tribunal vide case no. 20 of 1999. The tribunal awarded the suit land to the plaintiff and the proceedings of the tribunal were produced *pex 3* and the proceedings adopting it as an order of the

court as *pex. 4*. Earlier the plaintiff had registered caution on the title as shown by copy of caution form produced in evidence as *pex. 2*.

4. The witness stated that the plaintiff did not get the title in his name despite the tribunal's award. He later learnt that the tribunal's award had been set aside. The plaintiff also filed a suit against the late Kefa Sakwa commenced by way of an originating summons civil case no. 153 of 1999 – copies of the pleadings produced as *pex 5* but this suit was not concluded because of the death of Kefa. **PW1** continued that the late Kefa got a court order which removed the caution lodged by them on the suit title. The witness stated further that in spite of the defendant being aware of the existence of a suit, he went ahead and registered himself as proprietor of this land. He produced the green card of the suitland as *pex. 7* to show the transfer to the defendant's name was done on 11th February 2004. **PW1** states further that the plaintiff is in occupation of the suitland and the defendant only attempted to occupy the same in 2005 by destroying the plaintiff's crops.

5. The plaintiff reported the incident of the destruction of his crops to the police and produced as *pex.8* the valuation report of the damaged crops. He has questioned the transfer done between the late Kefa and the defendant which he avers was aimed to defeat the plaintiff's interest. He urged the court to allow this suit. In cross examination, he states that the defendant's father and the plaintiff's father were brothers and both are deceased. He did not know when the parcel number was inserted in the sale agreement. Further, that at the time when the agreement was drawn, the parcel number of the land was not known. **PW1** denied that the plaintiff owns any other land besides the suit land. The plaintiff was not registered as owner of the suitland in August 1965 during the exercise of registration because the purchase price was not yet paid in full. The witness said the defendant attempted to fence the land but the fencing posts were stolen. The witness states the defendant is holding the land in trust for them because they are in occupation from 1964 to 1999 peacefully. In re-examination, he said he was not aware of any restraining order issued in the originating summons.

6. **PW2** is **Godfrey Masibo Sakwa**. He is a teacher by profession and a brother to the defendant. He testified that he knew his late father sold to the plaintiff land. He advised his father to sell the land to enable his father secure iron sheets. He said he was a witness to the agreement and the land measured 3.5 acres comprised in Kimilili/Kimilli/813. It is his evidence that the plaintiff lives on this land. In cross-examination, he said the day the agreement was drawn, he was not present as he was in school. He was aware of the case before the tribunal and the high court case between the plaintiff and his father but he did not attend to any of them. He knows the plaintiff has 3 parcels of land comprised in Kimilili/Kimilili/517, 518 and 522 which parcels surround the suitland. Before buying this land, the plaintiff had built a house on his father's land. He said the defendant has settled elsewhere.

7. **PW3** was **Richard Wachilonga** who lives in Kimilili division. He knows the plaintiff bought land from the defendant's father. The defendant is his uncle. He was not a witness to the sale agreement but saw it being prepared. The land sold was measuring 3.5 acres at Kshs. 350/=. The witness testified that the plaintiff has built on the land and lives on it todate. He states that the plaintiff has stayed peacefully until 1999 when a dispute arose between the plaintiff and the defendant. He knew the land belonged to Samuel who later transferred it to his son, the defendant. In cross-examination, **PW3** said payment was made first then the agreement drawn later. He could not remember the amount paid as the 1st installment but said it was paid at the home of the plaintiff. He also stated that the suit plot is in the middle of the plaintiff's parcels of land and there is no boundary separating them. He cannot identify the boundary of 813.

8. The last witness was **PW4** who prepared the sale agreement. He is called **Paul Wasiandu**, a resident of Sikhendu. He was the secretary of Khalumati co-operative society where the plaintiff was working as a sprayer. The late Kefa was a member of the society. The witness said the deceased wanted some iron sheets but his coffee trees could not satisfy the number of iron sheet he wanted therefore he decided to sell a portion of his land near the coffee factory. He drew the sale

agreement (*pex1*) between the plaintiff and the late Kefa Sakwa. He identified the sale agreement. He said the ID card number of the late Kefa was entered later when they appeared before the tribunal court where he also signed the document. He also stated the plaintiff took possession of the land immediately. The witness testified that the payment was made in three installments.

9. On cross examination, the witness said the agreement was first handwritten before it was typed. He did not know if the late Kefa had an ID card by 1964 but himself he had. He did not enter the parcel number in the agreement because there was no number but it is the tribunal court who inserted the parcel number in the agreement. He did not know who typed the parcel number in the agreement. **PW4** said the plaintiff gave money to the society. He also knew the plaintiff had other parcels of land besides this where his home was. In re-examination, he confirmed the typed agreement was signed by all three of them. It is the tribunal who entered the parcel number into the sale agreement and the plaintiff gave money to the society. The plaintiff then closed his case.

10. **John Makokha Sakwa** the defendant testified as **DW1**, stating that he lives in Webuye and he is a farmer. He stated that his land L.R. Kimilili/Kimilili/813 which he inherited from his late father Kefa Sakwa neighbours that of the plaintiff. His father, the late Kefa Sakwa took him before the Kimilili Land Control Board and obtained consent to transfer the land to him. He produced the application for consent as *Dex. 1* and letter from the L.C.B giving consent as *Dex. 2*. He later obtained a title deed which he produced as copy as *Dex. 3*. He denied holding the land in trust for the plaintiff. **DW1** stated further that before his father died, there was a dispute over this land pending in court and proceeded to produce a copy of a replying affidavit sworn by his father in Bungoma HCC (O.S) no.153 of 1999 as *Dex. 4*. He continued that before 2005, he was the one using the suitland and had built a house on it which the plaintiff demolished. He stopped using the land after he was served with restraining orders issued in this case.

11. He denied the signature on *pex. 1* as his father's. He also stated that in 1964, there was no new generation ID card. The defendant asked the court to dismiss the plaintiff's suit and issue orders of permanent injunction to stop the plaintiff from using this land. In cross-examination he said no one is living on the land. He was given this land by his father as a gift and entry no. 6 in *pex. 7* is only showing the value of the land not what he paid for it. He admitted his father appeared before the tribunal which awarded the plaintiff the suitland. He knew his father appealed this decision but he did not have the appeal proceedings.

12. **DW2** is **JAPHETH WAFUNAFU SAKWA** who lives in Kimilili and is a brother to the defendant. He knows the plaintiff as they are from the same clan. He was given land by his father in 1951 while the defendant was given the suitland in 2004. His father used to graze cattle on this land. His evidence is that this land belongs to the defendant. In cross-examination, he said the suitland was registered in his father's name in 1965. He denied the land was registered in his father's name because the plaintiff had not finished paying the purchase price.

13. **Patrick Nyongesa Mukhongora** testified as **DW3**. He knows the defendant as they come from the same clan. He used to be a village elder. The plaintiff is also his villager. He recently learnt the defendant owns the suitland. Previously, he knew the land belonged to the defendant's late father. He was mkasa between 1986 – 1996 and knew the suitland was only being used for grazing by the late Kefa. On cross examination he knew the case pending over this land was one of trespass. The defendant then closed his case.

14. From the evidence presented I find the following questions arising whose answers will result in reaching a just determination of this matter;

- a). Was there a valid sale agreement between the plaintiff and the late Kefa Sakwa?
- b). Did that agreement create a trust between the two capable of being enforced.

c). Is the plaintiff entitled to the orders sought?

d). Who should bear the costs of this suit?

15. The plaintiff through his witness **PW4** produced as *Pex. 1* – a sale agreement between him and the late Kefa Sakwa. The content of this agreement was brief (without the insertions by the tribunal) and as follows;

Mapatano ya kulipa deni

Bwana Kefa Sakwa M/No 292 wa Khamulati area amekubali kukopa mabati 60 x 9 x 30 G pamoja na ridgings kulipa shs. 50/00 cash.

Mr. Samwel Wafunafu nayo atalipa shs. 350/00 ambazo ni za mapatano ya kuuziana shamba. Yaani bw. Kefa amemwuzia Bw. Wafunafu shamba lake kwa bei ya shs. 350/00. Zinazo bakia bw. Kefa atakuwa akilipa kila mwezi tangu mwezi wa July 31.7.1964.

sahihi hao (names of parties handwritten)

approved by (signature of secretary).

16. It is this document (*pex1*) which the plaintiff refers to as the sale agreement between him and the late Kefa. It is admitted by **PW4** that at the time it was drawn, the parcel number was not indicated. The parcel no. Kimilili/Kimilili/813 was inserted by the tribunal court. That court also inserted the ID nos of the parties when they appeared before it. In *pex. 3* the proceedings before the tribunal took place in July 1999 while *Pex. 1* was prepared on 8th June 1964. Secondly, from the reading of *Pex. 1*, it is worded as if there was a separate agreement of sale of land that had earlier been made between the plaintiff and the late Kefa Sakwa. The document original *Pex. 1as* was drawn did not give details of the land sold e.g its number and size. The document does not indicate any acknowledgement of any of the installments by the late Kefa or any receipt issued by the co-op society. The agreement only said ***Bw. Wafunafu naye atalipa (loosely translated means Mr. Wafunafu will pay)***. The plaintiff added a document pasted on the face of *pex1* stating that payments were made to the society quoting receipt numbers given on the various dates but no actual receipts were produced.

17. **PW3** claimed that payment was done first then the agreement drawn later. He stated in cross examination that he saw the money being paid at the home of the plaintiff yet the inference drawn from the contents of this agreement and the evidence of **PW4** this money was to be paid later to the co-operative society. Secondly the first installment was paid after the date of the agreement. **PW2** other than advising his father to sell a part of his land to get iron sheets was not present when the agreement was drawn nor when payment was made. The credibility of the evidence of **PW2** and **PW3** is therefore doubted by this court as regards the authenticity of the agreement. **PW1** also denied his father had other parcels of land besides the suit land yet his witnesses stated otherwise.

18. The Law of Contract Act cap 23 came into operation on 1st January 1961 hence it is applicable to this case. Under Sec. 3 (5) thereof, **provides that the terms of a contract may be incorporated in a document by either being set out in it or by reference to some other document.** This court takes judicial notice of the fact that even areas still under adjudication and where the register for titles have not been opened, there are parcel numbers existing for each land. The plaintiff averred in his evidence that the parcel number was not indicated because it was not known. I said earlier in this judgment and in my view *Pex. 1* was a debt agreement. It was drafted as if it referred to some other document in regard to the purchase of the land and cannot be conclusively used as a sale of land agreement. This is because before the insertion of the parcel number by the tribunal court in 1999, *pex. 1* did not have details of the land sold. I am of the

opinion and so I hold that the insertion by the tribunal court was a major alteration to the initial contract. The tribunal court in effect re-wrote the contract between the parties and which is not permitted in law whose effect was to render the original agreement void. The upshot of my finding is that there was no valid sale agreement of land L.R. no. Kimilili/Kimilili/813 as alleged by the plaintiff.

19. The plaintiff has asked this court to make an order of declaration that the defendant is holding the suit title in trust for him. Further he prays for order of rectification of the register of the suitland and a permanent injunction as pleaded in paragraph 7 of the plaint. It was lead in evidence that the plaintiff had sued the defendant's father in Bungoma H.C. originating summons no. 153 of 1999 for a claim of adverse possession. The copies of pleadings in that case were produced as *pex. 5*. That suit was not concluded according to the plaintiff because of the death of Kefa Sakwa in the year 2004. It follows therefore that it has abated as the respondent was not substituted within the period specified in law. In my view producing the copies of the pleadings in this suit which has abated has no evidential value save to show to this court it ever existed.

20. In that suit (originating summon 153 of 1999) it seems no orders were obtained inhibiting the suit title during its pendency otherwise the plaintiff would have referred to the orders. The plaintiff also produced copy of caution (*pex. 2*) registered on the title and *pex. 6* – a notice of motion application in Misc. 41/03 seeking to remove that caution and an order dated 20th January 2004 issued and directed at the land registrar to remove the said caution. It appears therefore that the caution lodged by the plaintiff was removed using a court order. From the record he did not challenge the order even after he learnt of its existence. Given the two scenarios obtaining i.e no inhibition order from the originating summons and an order removing the caution lodged on the title, I do not see how his evidence that the transfer from the late Kefa Sakwa to the defendant was fraudulent can hold any water.

21. Further the defendant showed in evidence as *Dex. 1* and *2* respectively application for consent and a letter of approval from the board consenting to this transaction. He obtained title (*Dex. 3*) after the consent was obtained. The Plaintiff's only complaint was that the transfer was done when there was a suit pending over the subject matter. Unless a register of title is restricted, there is no bar to transactions being undertaken even if a suit is pending in court. The issue of the consideration being given at Kshs. 280,000/= while the defendant stating it was a gift and paid no money does not in my view construe any fraud.

22. Was this registration in trust for the plaintiff? It is not in dispute the plaintiff is in possession of the suitland. The plaintiff says he has been in possession from 1964 while the defendant is claiming he encroached on a part of this land in 2005. The plaintiff is not claiming adverse possession in this case therefore when he took possession is immaterial. Trust is an equitable obligation and a mechanism for separating legal and beneficial ownership. There are several types of trusts but the type that in my view is applicable to this case is constructive trust. The court of appeal in the case of **John G. Buruno & another vs. Jackson R. Buruno 2003 eKLR held;**

“a constructive trust arises where the property the subject matter of a constructive is held and a person in circumstances where it would be inequitable to allow him ascertain full beneficial ownership of the property.”

23. The plaintiff's occupation of the suit land appears to me to be founded on a document that did not give him any right to do so. There was no valid contract between him and the late Kefa over the suitland as has been explained in the body of this judgment. It follows that there is no relationship legal or equitable that was established/created between him and the late Kefa over the suitland. In the absence of such relationship, it is difficult for the court to apply the doctrine of constructive trust in his favour as the defendant got the title of the suitland clear of any obligations equitable or otherwise. In my view, the plaintiff's claim if any would have been put forward by way of a claim for adverse possession and not trust. The claim on trust fails as it is not supported

by any facts on record.

24. The plaintiff also prayed for compensation for crop damage as contained in the crop damage assessment report dated 1st September 2005 produced as *pex. 8*. The defendant did not specifically deny the allegations in his statement of defence filed neither did he deny it in evidence that he destroyed the plaintiff's crops. I am satisfied that this claim was satisfactorily proved and grant it. The defendant shall pay the plaintiff value of his damaged crops as assessed by the agricultural officer in the sum of Kshs. 670/= plus interest at court rates from the date of this judgment.

25. In conclusion, I find the plaintiff's suit succeeds in part in terms of prayer (b) only. Prayer (a) and (aa) fails and is dismissed. Since I have found the plaintiff's claim over the land is without basis, it follows the defendant is the rightful owner entitled to enjoy its user and occupation. Consequently, the plaintiff's occupation if at all is unlawful and he should give vacant possession to the defendant. To this end, the defendant's prayer for eviction in the counter-claim is allowed. The plaintiff is granted 90 days to voluntarily hand over vacant possession in default the defendant will be at liberty to evict him. On costs, I order each party to bear their respective costs of the suit.

DATED and **DELIVERED** in Bungoma this 5th day of **November** 2014.

A. OMOLLO

JUDGE