



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA
CIVIL APPEAL 10B OF 2006

PASCAL OTHIENO OKOTH APPELLANT

VS.

BENSON MOGESHA RESPONDENT

JUDGMENT

This judgment arises from the decision of the Resident Magistrate at Busia dated 19th January, 2006. The Appellant herein, Pascal Othieno Okoth had sued Benson Mogesha in respect of a parcel of land known as Bukhayo/Mundika/6193 situated within Busia Municipality.

Two paragraphs of his plaint are instructive and these read as follows:

***“3. That the plaintiff is the registered owner of commercial plot No.Bukhayo/Mundika/ 6193 within Busia Municipality:- that in or about 1995, the defendant entered in the plaintiff’s aforesaid plot and constructed a makeshift filing station, erected thereof structures, and has continued to use the plot aforesaid contrary to the plaintiff’s interest, and benefit.*”**

4. That as a result of the unauthorized use aforesaid, the plaintiff has suffered loss of user and profit, and claims rent thereof payable by the defendant since 1995, till payment in full.”

The defendant/respondent herein denied the appellant’s claim and it is also important to cite the two paragraphs in his defence that have some relevance in this appeal. And these are 3 and 4 which read as follows:

***“3. THAT I know of my own knowledge that I bought a parcel of land from the Applicant measuring 0.02 Ha. Out of land Parcel No.BUKHAYO/MUNDIKA/6193 in 1994 and paid Kshs.54,000 with the approval of his late mother and in the presence of the then are chief Boniventure Makokha and others.*”**

4. THAT the land was then surveyed and sub-divided into BUKHAYO/MUNDIKA/6300 AND 6301 and the Applicant signed a mutation form to that effect (annexed hereto and marked BM1 is a copy of the same).”

From the evidence that was adduced before the learned trial magistrate, the respondent herein alleged that he purchased the said piece of land from the appellant who then executed the mutation forms that led to the subdivision of Parcel No.Bukhayo/Mundika/6193 which also created among others parcels

No.Bukhayo/Mundika/6300 and 6301. It is also his evidence that concerning the mutation and transfer forms, the original title Bukhayo/Mundika/6193 was cancelled creating the other new numbers Bukhayo/Mundika/6300 belonging to the appellant and Bukhayo/Mundika/6301 belonging to him i.e. the respondent.

That notwithstanding, it would appear that the title No.Bukhayo/Mundika/6193 was never cancelled because on 11th March 2002, the appellant herein was given a title thereof.

The learned trial magistrate believed the evidence of the respondent herein and found that the appellant had not established his claim on the basis of the pleadings before the court and dismissed his claim.

Part of the learned trial magistrate's judgment reads as follows:

“On the other hand, the defendant stated that he purchased part of that parcel from the plaintiff and his mother sometime in 1994 and paid the purchase price pursuant to which the parcel was divided and it became the registered owner of Parcel Bukhayo Mundika/6301 whereas the plaintiff became the registered owner of Parcel No.6300 Bukhayo/Mundika. This is supported by DEX.6, DEX.4 PEX 8 and PEX9. PW2 who was called by the plaintiff gave evidence and stated that by mistake there was double registration and error on their part is failing to cross title Number Bukhayo/Mundika/6193 upon presentation of the mutations by the parties. From the above evidence, it is clear that title No.Bukhayo/Mundika/6193 does not exist upon presentation of the mutation pursuant to which the registration was effected since 1994. Therefore, it follows that the defendant does not occupy the parcel referenced as Bukhayo/Mundika/6193 as none of them exists by that title.”

I note that both parties herein were represented by counsel in the lower court. However, it is regretted that none of the two counsel drew the attention of the court that this was a transaction that by law, is governed by the **Law of Contract Act Cap.23, Laws of Kenya. Section 3** of the said **Act** has been amended severally but as at 1994, the relevant section read as follows:

“3. (3) No suit shall be brought upon a contract for the disposition of an interest in land unless –

(a) the contract upon which the suit is founded –

(i) is in writing;

(ii) is signed by all the parties thereto; and

(iii) incorporates all the terms which the parties have expressly agreed in one document; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

Since the provisions of this section are mandatory, they form the foundation of any transaction relating to land. If there is no contract in terms of the said provisions of law, then no claim can be raised either by the plaintiff or the defendant. It follows therefore, that the respondent in this case could not rely on a contract that was non-existent.

Even if it is true that the appellant herein executed some mutation forms and transfer forms which were not produced because they were allegedly lost in the Registrar's office, that cannot justify a claim upon that parcel of land. And so, notwithstanding the evidence of the Land Registrar, PW2, that the title No.Bukhayo/Mundika/6193 should have been cancelled, that could not have happened without a proper agreement executed by both parties.

There is also some suspicion that these crucial documents were lost in a government office holding such responsibility, and one also assumes that on, presentation of mutation forms, the cancellation of the original title and the creation of the new titles is done simultaneously.

It is also strange that this was not done in this case and the appellant was able to obtain a title to his property many years after it was allegedly cancelled.

In my judgment, there having been no foundation in the transaction between the respondent and the appellant herein, in a form of a contract for the sale of land, no claim whatsoever based thereon can succeed. I allow the appeal with costs to the appellant. It may be argued that the appellant received money from the respondent and therefore he is liable to him. However, the respondent contradicted himself on whether he paid Kshs.54,000/= or Kshs.50,000/= for that piece of land. Whatever the case, there having been no valid contract, that payment cannot be held to be a valid consideration either. He will be at liberty, and subject to proof, to pursue a refund from the appellant. It follows that this appeal must succeed.

Orders accordingly.

A. MBOGHOLI MSAGHA

JUDGE

Countersigned, dated and delivered at Busia this 6th day of October, 2009.

F. MUCHEMI

JUDGE