

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 3283 OF 1980

NKAMALOK OLE MEIKOKI.....PLAINTIFF

VERSUS

MUTUWA OLE SIREHE.....DEFENDANT

JUDGMENT

The plaintiff in these proceedings, Nkamalok Ole Meikoki, states in the plaint that “On or about May 27, 1980 and on diverse (sic) and various days prior thereto and thereafter, the Defendant entered into an agreement with the Plaintiff to sell the Plaintiff the Defendant’s said Land Parcel No Kimana/Tokondo/521 for a total sum of Kshs 12,000” Despite the alleged multitude of agreements, the plaint goes on to state that the defendant signed an agreement for the sale of the land (but does not say when), a Transfer of Land form and an application for the Consent of the Land Control Board was duly given.

The plaint then states that on the presentation of the documents for registration it was discovered that a circular had been issued by the Chief Land Registrar, Kajiado to the effect that a special ink had to be used for the thumb prints when that method of execution of documents was used and as that type of ink had not been used registration was refused. On presentation of the transfer to the defendant for re-execution in the way required he refused to execute without further consideration and, it is alleged, threatened to sell the land to someone else.

The plaintiff claimed specific performance of the contract of sale; execution of the transfer and all other necessary documents by a person appointed by the court, damages, any other relief as the court might deem just and costs.

No appearance was entered by the defendant and the case was set down before me for formal proof. The plaintiff gave evidence in the course of which he established his claim subject to him clearing up certain confusion as to whether the defendant in the proceedings was the same person as he who signed the transfer and was named in the produced land certificate. The confusion arose, largely, because of different identity card numbers in the documents. The matter was adjourned to enable the confusion to be resolved.

The case was re-instated on the July 15, 1981 and in my absence it appeared before Masime J. It would appear that an application was made by counsel for the plaintiff to have evidence taken *de bene esse* from the defendant who was in court. The application would appear to have been granted on the ground that it was difficult to ascertain the defendant’s whereabouts.

In his evidence the defendant confirmed that he was the same person as the one named in all the documents. He also confirmed that he received the purchase price of Kshs 12,000, signed the deed of transfer and that the Land Board consented to the transfer. Having said that, however, the defendant went on to say: “I now agree to transfer three acres only of the land to the applicant. This is because I feel the price was too low.” Having heard the evidence of the defendant the learned judge directed the matter to be placed before me for judgment. I assume from that order that the plaintiff had closed his case.

I have not the slightest doubt that the plaintiff is entitled to be registered as owner of the land claimed. I did, however, and do have considerable misgiving as to whether or not these proceedings are properly conceived. The defendant did everything that was to be expected of him to fulfil his contract, and registration of the plaintiff as owner would long since have been accomplished, had not the Chief Land

Registrar issued his edict that thumb prints had to be made with special ink. By what authority he issued such an edict is unknown and I can find no authority for it. If the Chief Land Registrar has merely assumed to himself such an authority then he and the Land Registrar of Kajiado should have been the defendants in mandamus proceedings. If they had, it might well have been that registration would have been ordered without the necessity of suing the plaintiff; indeed had the advocates for the plaintiff taken the trouble to question the authority of the Chief Land Registrar it is likely that no proceedings at all would have been necessary.

I have been somewhat at a loss in deciding what I should do to bring this case to amend with justice to all parties. I have decided that the fairest solution is to declare that the plaintiff is the lawful owner of the property described in the plaint; and that a new deed of transfer be prepared to be signed by the Registrar to enable the plaintiff to be registered as owner.

No evidence was forthcoming as to damages so no damages will be awarded. Indeed, even if such evidence had been forthcoming damages would not have been awarded as any loss sustained would have been due to the failure of the plaintiff to take appropriate action.

As I said earlier, the defendant originally did everything that he was legally bound to do to fulfil his contract. When the Registrar presumed to issue the edict he did the defendant should have been more co-operative rather than seize on it as a possible opportunity to increase the purchase price, but he did nothing unlawful in refusing to re-execute the deed of transfer. The advocates of the plaintiff should have instructed proceedings against the land registrars. In those circumstances I make no order as to costs.

Dated and Delivered at Nairobi this 16th day of September 1981.

J.P.TRAINOR

JUDGE