



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 124 OF 2013

MERIMUK WILLIAM NGURIATUKEI.....PLAINTIFF

VERSUS

EMMANUEL LOMAN.....1ST DEFENDANT

THE COUNTY GOVERNMENT OF

WEST POKOT.....2ND DEFENDANT

JUDGMENT

1. In the amended plaint dated **11/3/2014** and filed on **13/3/2014** the plaintiff Merimuk William Nguriatukei seeks orders against the defendants Emmanuel Loman and the County Government of West Pokot as follows:

- (a) **An order declaring that the Plaintiff is the lawful registered owner of Plot no. C/3 Ortum Market and that the County Government of West Pokot be ordered to rectify the record/ register of the then County Council of Pokot to have the name of the Defendant cancelled from the said records;**
- (b) **The 1st Defendant be ordered to give vacant possession of Plot No. C/3 Ortum Market or be forcefully evicted by the Plaintiff's agents/ O.C.S Kapenguria Police Station;**
- (c) **Costs of this suit;**
- (d) **Any other relief that this Court may deem fit to grant for the best interest of justice.**

The Plaintiff's Claim

2. The plaintiff's claim is that the plaintiff bought **Plot No. C/3** situated at Ortum Market from one **Felix Ruto Limarusi**, the initial allottee from the County Council of West Pokot on 29/7/2009 and the same was recorded as transferred into the plaintiff's name in the council records after which an agreement was made between the transacting parties. Later the plaintiff desirous of developing the land secures approval of a development plan. The council also approved that plan. However the defendant began to develop the suit land before the plaintiff and upon enquiry at the council offices it was found that the defendant's name had been entered into the records without the plaintiff's or Limarusi's knowledge; it is alleged there was fraud on the part of the then council leading to double registration, and the plaintiff claims the aforestated orders.

3. The 1st defendant filed a defence on 5/11/2013 and denied the claim. He stated that he is the one who purchased the plot from Limarusi on 26/8/2008 after which the transfer at the council offices was done and that he is in lawful possession of the suit land. He denies that the plaintiff was ever registered as owner of the suit land in the records of the county council of west Pokot, hence no question of removal of the plaintiff's name from those records arose.

4. The 2nd defendant filed his defence on the 17th April 2014, also denying the claim. It stated that the 1st defendant was regularly and procedurally registered as owner of the suit land as per its records. It denies the particulars of fraud and avers that the plaintiff's name was ever removed from its records in respect of the said plot and replaced with the 1st defendant's name as the plaintiff's name was not in those records in the first place. It avers that the plaintiff should have sued the seller for a refund or raised a criminal complaint of obtaining by false pretence against him.

Evidence of the parties

5. The plaintiff testified on 9/9/2015. His evidence matched the contents of the plaint. He produced two original receipts no. 356558 and 356559 dated 29/7/2009 issued by the County Council of Pokot for plot transfer fees and plot rents from 2005-2009 and the agreement for sale as **PEXh 3**. He also produced the plans as **PEXh 4**.

6. **PW2** testified on 9/9/2015. His evidence is that he started working with the County Council of West Pokot in 1978; that he was in the treasury section in the revenue department but he retired in 2015; that he used to issue receipts; that on 29/7/2009 the plaintiff came to his office accompanied by Felix Limarus; that they asked for the outstanding rates amount in respect of the suit land; that the records then showed that Felix was the owner; that the plaintiff paid transfer fees of **Kshs. 1650/=** and **Kshs. 6500/=** being outstanding rent and was issued with **PEXh 1** and **2** respectively; that he entered the name of the plaintiff in the rent card whose copy was produced as **PEXh 5**.

7. This matter relates to **Plot No. C/3 Ortum Market** which was initially allotted to one Felix Ruto Limarusi (**PW3** herein). From the pleadings and the testimony adduced in court, the said **PW2** sold the same suit land to the Plaintiff and the 1st defendant at one point. The 2nd Defendant has been sued for fraud in its capacity as the custodian of plot records with regards to the allotted land. Upon cross examination he stated that Felix was still a councillor at the time of the transaction.

8. **PW3** testified on 20/7/2016. He stated that he wanted to sell the suit land in 2003 and the 1st defendant who is a chief paid him Kshs. 120,000/= and he gave him the allotment letter. The 1st defendant was supposed to pay a further Kshs. 80,000/= according to their agreement. When pressed to pay the balance the 1st defendant refused and, strangely, asked to be repaid the monies he had already paid to **PW3**. **PW3** then looked for a buyer and got the plaintiff. However when he took the Kshs 120,000/= back to the 1st defendant the latter refused to accept the same. Thereafter he went to the County Council offices and caused the plot to be effectively transferred to the name of the plaintiff and later entered into an agreement with the plaintiff on 10/8/2009. The witness admitted that they 1st defendant has never taken back his Kshs. 120,000/= and has also not paid the balance of Kshs. 80,000/=.

9. **DW1** testified on 26/9/2016. His evidence was in accordance with the contents of his defence. He produced an agreement dated 26/8/2008. The said agreement purports that out of the purchase price of **Kshs 200,000/=** **Kshs. 180,000/=** has been received by the seller and **Kshs. 20,000/=** was to be paid "any time." Later Felix came in the company of one Thomas Madasia and asked the 1st defendant to pay Madasia Kshs. 20,000/= and an agreement, **DEXh 5** was written down and executed between the two in the presence of the 1st defendant. According to the defendant he paid Kshs. 20,000/= to Madasia on 25/8/2008 whereupon Felix gave him the letter of allotment produced as **DEXh 2**. The 1st defendant then paid the transfer fees and plot rent. The original receipts in acknowledgement of which produced as **DEXh 7(a)** and **(b)** and the records at the council offices were duly changed to reflect his name. Thereafter he obtained an approved plan (**DEXh 3**). However when he began developing the land the plaintiff raised a complaint. The county council then summoned the plaintiff, the 1st defendant and Felix. He and the plaintiff appeared but Felix however never appeared. When they were asked for the letter of allotment the plaintiff had none. The 1st defendant produced **DEXh 2** and the clerk to the council advised the plaintiff to lodge a complaint with the police and seek a refund from Felix as he may have been defrauded.

10. **DW2** Thomas Madasia testified on 13/3/2018. He adopted his written statement. According to him Felix showed him the suit land between 2004-2005 and offered to sell it to him. He paid Kshs. 80,000/= to him; however he was unable to pay the balance of Kshs. 60,000/= and asked for a refund of the Kshs. 20,000/=. Later Felix got a buyer, the plaintiff; an agreement (**DEXh 5**) was written and executed by all the three persons. On 5/11/2008 the 1st defendant paid **DW2** Kshs. 20,000/= evidenced by **DEXh 6**.

11. **DW3** John Lopoyetum, testified on 3/7/2018 and adopted his statement. His evidence is that he is an accountant with the county assembly of West Pokot; that he worked as a revenue officer with the defunct council, that in 2009 the plaintiff complained to the council that the 1st defendant had interfered with the suit land which he had allegedly bought. The town clerk, on hearing of the complaint summoned the parties; that the 1st defendant was the first buyer of the plot; that **DW3** did a site visit and verified the plot as C/3 Ortum; that later on at a meeting convened by the town clerk the transfer of the plot to both the plaintiff and the 1st defendant was discovered. However it was found that the 1st defendant had the proper documents including the letter of allotment. The plaintiff was said to have produced **PEXh 1**. **DW3** averred that the entry of the plaintiff's name into the council records was irregular as the officer who did so was unauthorized to do so but was only in charge of revenue collections. Following that meeting the 1st defendant was assured that he could continue paying the annual plot rents.

12. The then Town Clerk Kipkogei M. Tanui, was deceased by the time of the hearing of this suit and the court ordered that his signed statement filed on 2/7/2015 in the suit be adopted. In his statement he termed the plaintiff's receipts as forgeries.

Issues Arising

13. The main issues for determination in this suit are as follows:

- a. *Who is the owner of plot no C/3?*
- b. *Whether there was fraud on the part of both the defendants*

(a) **Who is the owner of plot no C/3?**

14. On the issue of who is the owner of the suit land, it is not in dispute that **PW3**, the vendor, sold the same parcel of land to both the Plaintiff and the 1st defendant. The question is who has a good title to that suit land?

15. The Plaintiff alleges that he bought the suit land from **PW3** vide an agreement dated 10/8/2009 with the terms set therein. That the said

agreement was drawn by the 2nd Defendant's advocate came out in his testimony but no party raised that issue from the onset.

16. I have examined the evidence of the parties before me. It shows that though both bought the land, with the 1st defendant being the first to buy it, the 1st defendant took possession of the suit land before the plaintiff.

17. I am also satisfied that the 1st defendant paid all the consideration demanded by the common seller. He paid Kshs. 180,000/= at the execution of the agreement dated 26/8/2008 and a further Kshs. 20,000/= to Thomas Mudasia which amounted to a refund for the money earlier paid by Mudasia to the seller for the plot.

18. The 1st defendant also bore the proper title documents over the said land, the seller having issued them to him amicably pursuant to the sale transaction between them.

19. The transfer to the plaintiff was effected without the production of those title documents. That is an unsafe thing for any officer of the 2nd defendant to do, and it reeks of collusion between the officer who effected it on the one hand and the plaintiff and the seller on the other hand to snatch the land from the 1st defendant's hands.

20. It is the view of this court that if there was default on the part of the 1st defendant the seller need not have clandestinely sought buyers for the suit land which was already in the hands of the 1st defendant.

21. The seller's evidence that the 1st defendant demanded back his money is not credible as it is not supported by any evidence. Further there is no evidence that the seller tried to refund any money to the 1st defendant.

22. It is also notable that the seller would have needed to inform the plaintiff beforehand that there was a previous buyer so that the plaintiff may prepare himself for any eventuality and proceed with the transaction or abandon it. There are also legal avenues including notice to the buyer to complete the transaction, and an official communication of rescission without which the seller can not convince this court that the agreement between him and the 1st defendant was already rescinded.

23. Apparently, the plaintiff, on learning of a previous buyer, appears to have been very keen on getting the suit land registered in his name and forgot that the seller was obligated to deliver clean title to him. He ignored the 1st defendant's rights under his agreement with the same seller and proceeded to have the land irregularly transferred into his name.

24. The 2nd defendant has already recognized the 1st defendant as the proper owner of the suit land and going by the strength of the 1st and 2nd defendants' evidence before me I also take that view. In my view the plaintiff has not proved any fraud as against the 1st defendant at all.

25. The only fraud that is evident from the evidence in this case is on the part of the officer of the 2nd defendant who effected the transaction in favour of the plaintiff in the absence of a letter of allotment, and the plaintiff and the seller, being the sole beneficiaries at whose urgings and inducement that officer must have acted, must be taken to have been part of that fraud.

26. I do not therefore find any truth in the plaintiff's claim that the 1st defendant with the assistance of the 2nd defendant's agents interfered with the records in a bid to disinherit him of the suit land which he bought from PW3.

CONCLUSION

27. It is clear that PW3 was aware all along that the 1st defendant was in possession of the allotment letter; it is also clear that it is on the basis of that letter and compliance with the council's demands for rent and transfer fee that the suit land was eventually transferred to the 1st defendant.

28. The facts of this case therefore point to the 1st Defendant as the person who rightfully holds a good title to the suit land.

29. If the Plaintiff was diligent enough about the safety of his money and the validity of title, he would have arranged to have the seller formally rescind his sale agreement over the suit land with the 1st defendant before he bought the same from the seller.

30. In the final analysis I find that the plaintiff has failed to prove his claim against the defendants on a balance of probabilities. His remedy lies in pursuing the fraudulent seller who defrauded him of his money for a plot he had already sold to the 1st defendant.

31. The plaintiff's suit is hereby dismissed with costs.

It is so ordered.

Dated, signed and delivered at Kitale on this 31st day of **January, 2019.**

MWANGI NJOROGE

JUDGE

31/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kaosa for the plaintiff

N/A for the defendants

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

31/01/2019