



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 74 OF 2015

JAAFAR ALI

MOHAMED ABDULMUTALIB HASHIB.....PLAINTIFFS

VERSUS

KAHINDI JEFWA SIRYA.....DEFENDANT

JUDGMENT

BACKGROUND

1. By a Complaint dated 28th April 2015 and filed herein on 13th May 2015, the two Plaintiffs pray for Judgment against the Defendant for:

- a) An order compelling the Defendant to transfer Plot no. 4833/III/MN to the Plaintiffs;***
- b) Vacant possession;***
- c) Costs of the suit; and***
- d) Any other and further relief this Honourable Court deems fit to grant.***

2. The gist of the Plaintiffs' suit is their contention that by two agreements dated 30th December 1996 and 7th March 1997, the Defendant sold portions of his Plot No. 427/III/MN measuring 2.5 acres to the Plaintiffs at a consideration of Kshs 1,300,000/-. Despite the fact that the Plaintiffs paid the full purchase price, the Defendant has since refused and neglected to transfer the portion measuring 1.003 Ha which came to be known as Plot No. 4833/III/MN upon sub-division and consolidation of the parcels of land situated at Kikambala within Kilifi County.

3. The Plaintiffs further accuse the Defendant of proceeding to construct a house and digging up a well on the disputed portion of the land.

4. However, in a Statement of Defence filed herein on 28th September 2015, the Defendant denies the Plaintiffs' claims. According to the Defendant, he only signed the Sale Agreement dated 30th December 1996 with the 2nd Plaintiff. On that account, he received a sum of Kshs 700,000/- in full settlement of the purchase price for 1.5 acres of a Plot No. 1643/III/MN.

5. The Defendant avers that the said sale was predicated on completion of the transaction but the Plaintiffs as purchasers breached the contract thereby forcing the Defendant to rescind the same. The Defendant further states that the Plaintiffs illegally retained the Deed Plans to Plot Nos 3405/III/MN and 3406/III/MN during negotiations they had on the sale. The Defendant thereafter obtained fresh Deed Plans in the year 2008 and he subsequently transferred his interest on the properties to one Jennifer Katunga.

6. It is the Defendant's case that he is willing to refund the purchase price without interest for the Sale Agreement dated 30th December 1996.

THE PLAINTIFFS' CASE

7. At the trial herein, the Plaintiffs called one witness in support of their case. PW1-Mohamed Abdulmutalib Hashib (the 2nd Plaintiff) told the Court that he is a resident of Dubai in the United Arab Emirates. The 1st Plaintiff-Jaafar Ali is his business partner and they both reside in Dubai.

8. PW1 testified that on 30th December 1996 while on a visit to Mombasa, he bought a parcel of land being a Portion of Plot No. 427/III/MN measuring 1.5 acres from the Defendant at a consideration of Kshs 700,000/-. The said Portion was to be surveyed and demarcated by the Defendant. Later on in March 1997, the 1st Plaintiff also visited Kenya and saw the Portion of land PW1 had bought. The 1st Plaintiff liked the area and on 7th March 1997, he also bought a Portion measuring one acre for Kshs 600,000/-.

9. Thereafter PW1 and his partner agreed with the Defendant that the two Portions they had purchased separately be consolidated into one Portion measuring 2.5 acres. The Defendant then handed to PW1 two Deed Plans for Plot No. 3405/III/MN and 3406/III/MN each measuring 0.400 acres. The Defendant then promised to provide them with another Plot-being Portion No. 3982/III/MN to make a total of 2.5 acres.

10. According to PW1, the three Plots, Numbers 3405, 3406 and 3942 were then consolidated into Plot No. 4831/III/MN which measured 12.14 acres. There was then a sub-division into Plot No. 4832/III/MN measuring 0.5 acres and Plot No. 4833/III/MN measuring 2.4 acres which was handed to the Plaintiffs.

11. PW1 told the Court that as they were waiting for the transfer of their Portion, the Defendant allowed a third party to construct a house and dig a water well on the said Plot No. 4833/III/MN. Despite demands made to the Defendant to stop the construction and transfer the Portion of land as agreed, the Defendant refused to do so hence necessitating the institution of this suit.

THE DEFENDANT'S CASE

12. The Defence similarly called one witness in support of the Defence. Testifying as DW1, the Defendant Kahindi Jefwa adopted his Statement as filed dated 23rd November 2016. He told the Court that he did not know the 1st Plaintiff herein and that he had only dealt with the 2nd Plaintiff.

13. DW1 told the Court that he inherited Plot No. 427 from his grandfather who owned Portion No. MN/III/1643 measuring about four acres. He sub-divided this land into three portions, namely 3404, (two acres), 3405(one acre) and 3406(one acre).

14. DW1 testified that sometime in 1996, a Land broker by the name Salim approached him and requested for 1 ½ acre of land to build a hotel. They then proceeded to Khatib Advocates where an Agreement was prepared between himself and the 2nd Plaintiff who was represented by the broker. He was paid Kshs 700,000/- for the parcel of land.

15. DW1 further told the Court that after the lapse of about a year, the same broker went back asking for another one acre. This time round, they never did any Sale Agreement. He then gave Deed Plans for two acres to the broker in the year 2000. In the year 2005 however, the broker told DW1 that the 2nd Plaintiff who was to invest in the land, had misplaced the Deed Plans.

16. Later on in the year 2008, the same broker approached DW1 with another group who were seeking to buy the same parcel of land. DW1 disagreed with the broker. He testified that he thereafter approached Omondi Waweru Advocates who started following up the process of getting back the Deed Plans. DW1 swore an Affidavit showing the Deed Plans were lost on 8th October 2008. He was thereafter issued with fresh Deed Plans.

17. It was DW1's testimony that he thereafter started looking for another serious buyer. He then sub-divided Plot No. 3404 and got Plots 3928 and 3939. In 2011, he did another sub-division of 3929 and sold a Portion thereof measuring 50 x 100ft to one Jennifer Katuga in 2012. In addition, he had also sold two acres comprised in Plot 3405 to Jennifer in 2008. DW1 also sold Plot 3406 to the same Jennifer while one acre comprised in Plot No. 3939 was sold to one Muhsin Ali Salim.

18. DW1 testified that when they went to process the titles, they were told that the land had been consolidated and sub-divided without DW1's knowledge and he therefore wrote a letter dated 12th March 2012(Dexh 5) seeking to stop the same. It was his case that he neither saw nor signed any mutation forms for the consolidation.

19. DW1 told the Court that he can no longer give the Plaintiffs the parcels of land as he has already transferred the same to the said Jennifer who has since built a house and resides thereon. He is however ready to refund the sum of Kshs 700,000/- to the 2nd Plaintiff as the money had been given to him.

ANALYSIS AND DETERMINATION

20. I have carefully perused and considered the pleadings herein, the testimony of the witnesses and the evidence placed before me. I have equally perused the written submissions and the authorities to which I was referred by the Learned Advocates for the parties.

21. According to the Plaintiffs, they purchased 2.5 acres of Plot No. 427/III/MN from the Defendant for a total consideration of Kshs 1,300,000/-. The said purchase was done by way of two sale agreements respectively dated 30th December 1996 and 7th March 1997. It is their case that after the sale, the Defendant surveyed the property and divided it into three portions, namely Plot No. 3405/III/MN, 3406/III/MN and 3928/III/MN

22. It was further the Plaintiff's case that after the sub-divisions, the Defendants handed over to them the Deed Plans for Plot Nos 3405 and 3406 each measuring 0.400 acres. The Defendant then agreed to give the Plaintiffs another Plot being Plot No. 3942/III/MN in order to make the requisite 2.5 acres. The Plaintiffs then undertook to consolidate the three plots. That consolidation produced Plot No. 4831/III/MN which measured 12.4 acres. This new Plot was then again sub-divided to produce Plot No. 4832/III/MN and Plot No. 4833/III/MN.

23. The Plaintiffs testified that it is this last Plot No. 4833/III/MN measuring 2.5 acres which the Defendant agreed to hand over to them. However, as they were waiting for the transfer to be done, they noticed a house and a well being constructed on their portion of the land. When they confronted the Defendant, they realized that he had resold the said portion to a third party and it was the third party who had built the house and dug a well on the land.

24. On his part, the Defendant denies that he executed the second sale agreement dated 7th March 1997 with the 1st Plaintiff. While he acknowledges that he entered into the first Sale Agreement dated 20th December 1996 with the 2nd Plaintiff and that he was paid a sum of Kshs 700,000/- for 1 ½ acres of his parcels of land, he accuses the Plaintiffs of being in breach of the same when they took too long to contact him thereafter and also failed to pay stamp duty for the transfer to be effected.

25. The 1st Sale Agreement executed between the 2nd Plaintiff and the Defendant on 30th December 1996 provided in the relevant part as follows:-

“Property: A portion of all that piece or parcel of land known as Plot No. 1643/III/MN(Original No. 427 Sec III/MN) measuring One Point Five Acres(1.5) or thereabout.

Consideration: Kenya Shillings Seven Hundred Thousand (Kshs 700,000) only.

Mode of Payment: The full purchase price to be paid upon execution of this Agreement the receipt of which the Vendor hereby acknowledges.

Other Terms: 1) The Vendor to obtain the title for Plot No. 1643/III/MN upon which he shall transfer the portion sold to the Purchaser.

2) The Vendor shall be responsible for the survey and sub-division of the Plot.

3) The Vendor to obtain the consent of the Land Control Board to transfer the property to the Purchaser.

4) The property is sold free from any encumbrances and in vacant possession.

5) The Purchaser to pay for Stamp Duty and registration fees for the property.

6) The completion date of this Agreement shall be 30th June 1997.

26. The 2nd Sale Agreement dated 7th March 1997 whose existence the Defendant denies is like the 1st Agreement drawn by Khatib & Company Advocates, the Advocates on record for the Plaintiffs herein. Save for the subject property described therein as “Sub-Plot No. II C measuring one acre” and the Purchase Price shown as Kshs 600,000/-, the same is worded exactly in the same manner and has similar terms to the 1st Agreement.

27. While the Defendant denies the existence of the 2nd Agreement, he for some reason did not deny that the signature appended thereon was his own. While at paragraph 6 of his Statement of Defence he had termed the Agreement an outright forgery, his answer during cross-examination at the trial herein when shown the Agreement(Pexh 2) was as follows:-

“The signature is mine but I do not know about the Sale Agreement. Jaffer (the 1st Plaintiff) did not buy. I never received his (Kshs) 600,000/-.”

28. This Court was unable to reconcile how the Defendant’s signature could be in an Agreement which he did not know about. A casual examination of the signature in the 1st and 2nd agreements indeed reveals some glaring similarities. In the absence of any evidence of coercion, fraud or undue influence exerted upon the Defendant, I think the Defendant is bound by his signature on the document and the terms thereof.

29. Indeed further evidence that the Defendant executed the two Agreements can be discerned from the fact that the Defendant chose to give two Deed Plans for Plots Nos 3405 and 3406 to the Plaintiffs in the course of their negotiations. The Defendant clearly stated during both cross-examination and his re-examination that the two Deed Plans were for two acres of land. I was unable to find any reason why he would choose to handover the Deed Plans for two acres of land if indeed what he had sold was only the 1 ½ acres sold to the 2nd Plaintiff.

30. Having established that the Defendant duly executed both Agreements, the next issue for determination is whether indeed the Plaintiffs breached the terms of any or both Agreements as stated by the Defendant. At paragraph 5 of his Statement of Defence, the Defendant asserts as follows:-

“5. In further reply to Paragraph 4(of the Plaint) the Defendant avers that the sale was predicated on the completion of the transaction and the Plaintiffs as Purchasers breached the contract between them.

PARTICULARS OF BREACH OF CONTRACT

a) Failing to pay for Stamp duty and registration fees for the transfer of the 1.5 acres of Plot No. 1643/III/MN;

b) Failing to contact the Defendant on completion of the contract despite numerous letters to the Plaintiff's Advocates seeking completion;

c) Failing to avail an offer on variation of terms of completion;

d) Failing to complete the contract for an unreasonable amount of time; and

e) Failing to answer the Defendant's notice rescinding the contract following their disappearance. The Defendant thus rescinded the Sale Agreement dated 30/12/96.

31. A perusal of both Agreements (Pexh 1 and 2) reveals that the Vendor was required to obtain the title for Plot No. 1643/III/MN upon which he was to transfer the Portion(s) sold to the Purchasers. The Vendor was also responsible for the Survey and sub-division of the Plots and was required to obtain the Land Control Board Consent to transfer the purchased Portion(s) to the Purchasers.

32. As it were, the Defendant did not provide any evidence at the trial herein that he had taken any of those steps as was required of him under either of the Agreements. Evidently the Plaintiffs had paid the full purchase price for the land that was being sold and all that remained was for the Defendant to move the process forward. There was no need for the Plaintiffs to contact him on completion when the documents they had signed were self-explanatory. Neither was there any reason for the Plaintiffs to pay Stamp Duty and registration fees for the transfers when he was yet to obtain the title and/or survey and sub-divide the land he had sold.

33. Knowing that he had given the two Deed Plans for Plots Nos 3405 and 3406 to the Plaintiffs, the Defendant had no business swearing a false affidavit as he did on 8th October 2008 purporting that he had misplaced the Deed Plans and that he could not find them in his office, house or cabinets. Knowing that he had sold the land in dispute in 1996/1997, he had no business selling the same again to third parties in the year 2008 and beyond.

34. The Defendant's attempt to rescind the sale in 2011 came too late in the day and was nothing but a masquerade to shield himself from his obviously fraudulent acts. I refuse to believe that he should be allowed to benefit from his failure to move the transfer process forward by turning around to blame the Plaintiffs for the delay in finalizing this transaction. To-date, the Defendant remains on a Portion of the property he had sold.

35. In the circumstances of this case, I am satisfied that the Plaintiffs are entitled to the remedies sought in the Plaintiff having proved their case on a balance of probabilities. Judgment is accordingly entered as prayed in the Plaintiff.

36. The Plaintiffs will have the costs of this suit.

Dated, signed and delivered at Malindi this 29th day of May, 2019.

J.O. OLOLA

JUDGE