



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 114 OF 2017**

**FRANCIS WAMBUA NZIOKI.....PLAINTIFF**

**VERSUS**

**PAUL KAMONDE NDUTI.....DEFENDANT**

**JUDGMENT**

1. This suit was commenced by way of a Plaint dated 14<sup>th</sup> March, 2017. In the said Plaint, the Plaintiff averred that on 10<sup>th</sup> April, 1991, he entered into a Sale Agreement with the Defendant, in which the Defendant agreed to sell to him 11.5 acres being undivided share of plot number 301 of L.R. 11930 owned by Mwea Farmers Company Limited.
2. According to the Plaintiff, due to the difficulties he encountered in raising the purchase price, the Defendant agreed to sell to him another portion of land measuring approximately 6.5 acres being Plot Number 245 of L.R. No. 11930; that he took possession of Plot No. 245 and that he was issued with a letter of allotment dated 21<sup>st</sup> April, 2015 by Mwea Farmers Company Limited for the said portion of land.
3. The Plaintiff averred in the Plaint that upon sub-division of plot number 245, he is entitled to a parcel of land known as Mananja/Ndithini Block 1/75; that he has been in possession of the said land and has constructed permanent houses thereon and that the Defendant should transfer the suit land to him.
4. In his Defence and Counter-claim, the Defendant averred that he entered into an Agreement with the Plaintiff; that the Agreement became inconsequential because the Plaintiff was unable to perform the same and that the oral Agreement for Sale was never reduced into writing making it unenforceable.
5. According to the Defendant, there was no consent of the Land Control Board or the land buying company for the oral Agreement; that the Plaintiff never took possession of 6.5 acres of the suit land and that he was issued with a Title Deed for the suit land measuring 28.63 Ha.
6. In his Counter-claim, the Defendant averred that the Plaintiff unlawfully took possession of 2.5 acres of the suit land; that upon taking possession of the said land, the Plaintiff started selling the said land to third parties and that the Plaintiff should be ordered to vacate the suit land.
7. The Plaintiff, PW1, informed the court that he entered into a written Agreement with the Defendant in which the Defendant agreed to sell to him a portion of land measuring 11.5 acres of plot number 301; that when he was unable to pay the purchase price, the Defendant agreed to sell to him a portion of Plot No. 245 measuring 6.5 acres and that upon sub-division of L.R. No. 11930 owned by Mwea Farmers Company Limited, plot number 245 became parcel number Mananja/Ndithini Block 1/75 (*the suit property*).
8. It was the evidence of PW1 that on 18<sup>th</sup> February, 1991, the Defendant acknowledged that he had sold to him 6.5 acres of Plot number 245 on L.R No. 11930 and that he has been in possession of the said land for over 25 years. It was the evidence of PW1 that the Defendant should be ordered to transfer the portion of the suit land that he bought from him.
9. PW1 informed the court that he has developed the suit land; that he built a house on the suit land in 1994; that he was given a Beacon Certificate by the Surveyor for the land that he purchased from the Defendant and that it is not true that the Defendant sold to him 2½ acres only. PW1 stated that the Defendant refused to sign the Application forms for the Land Control Board consent.
10. In cross-examination, PW1 stated that he was unable to complete paying the purchase price in respect to the first Agreement; that the second oral Agreement was entered into in 1993 for 6½ acres and that he paid to the Plaintiff Kshs. 65,000 for the land.
11. It was the evidence of PW1 that he was given a letter of allotment by Mwea Farmers Company Limited in 2015 and that the Defendant was issued with a Title Deed in the year 1999.

12. The Chief of Mananja Location, PW2, informed the court that on 18<sup>th</sup> January, 2014, both parties agreed in his presence to excise 6½ acres out of plot number 245; that both parties signed an Agreement which he drafted and that he duly stamped the letter on 20<sup>th</sup> January, 2014.

13. It was the evidence of PW2 that the Defendant's son also witnessed the signing of the Agreement on 18<sup>th</sup> January, 2014. According to PW2, when the Agreement was taken to him on 20<sup>th</sup> January, 2014 for stamping, he added the words "plot 245" and "6½ acres" which were missing on the Agreement.

14. The Chairman of Mwea Farmers Company Limited, PW3, stated that he has been the Chairman of the company since the year 2006; that on 21<sup>st</sup> April, 2015, they gave to the Plaintiff an allotment in regard to Plot No. 245 for land measuring 6½ acres and that the said allotment was given to the Plaintiff after he showed them the Agreement of 18<sup>th</sup> January, 2014 and the letter dated 18<sup>th</sup> February, 1991.

15. In cross-examination, PW3 stated that the Defendant was issued with a Title Deed in respect to the land in the year 1999; that the letter of allotment was given to the Plaintiff after the Title Deed had been issued to the Defendant and that it is the Plaintiff who insisted that they give him the letter of allotment.

16. The Defendant, DW1, informed the court that in 1989, he was allocated plot number 301 and 245 within L.R. 11930; that plot number 245 became parcel number Mananja/Ndithini Block 1/75 (*the suit land*) and that he has since been issued with a Title Deed for the suit land.

17. DW1 informed the court that on 19<sup>th</sup> April, 1991, he entered into an Agreement of Sale with the Plaintiff in respect of 11.5 acres of the suit land; that the Plaintiff was unable to raise the entire purchase price and that on that ground, he was unable to apply for the consent of the Land Control Board.

18. DW1 stated that he allowed the Plaintiff to utilize a portion of land measuring 2.5 acres by way of an oral Agreement; that he rescinded the Agreement when the Plaintiff failed to meet his side of the bargain and that is when he asked him to move out. DW1 stated that in April, 2015, the Plaintiff encroached on the suit land and curved out land measuring 4 acres and that the Defendant offered a portion of the suit land to third parties.

19. The Defendant denied ever signing the Agreement of 18<sup>th</sup> January, 2014. According to the Defendant, the Plaintiff paid him Kshs. 26,650 which was equivalent of 2½ acres then and that the Plaintiff is only entitled to 2½ acres. DW1 admitted that he is the one who authored the letter dated 18<sup>th</sup> February, 1991 addressed to Mwea Farmers Company.

20. The Plaintiff's advocate submitted that the Defendant is a trustee for and on behalf of the Plaintiff for the portion of the suit land measuring 6½ acres; that the Plaintiff is entitled to an order of specific performance and that the Plaintiff performed his part of the bargain when he paid Kshs. 65,000.

21. The Defendant's advocate submitted that this suit is time barred; that there is no order extending time for the Plaintiff to institute the suit out of time and that the suit should be struck out.

22. The Defendant's advocate submitted that the letter dated 18<sup>th</sup> January, 2014 by the Chief was a forgery because Plot No. 214 had ceased to exist; that the land buying company had no mandate in law to issue a letter of allotment after the Title Deed had been issued to the Defendant and that the transaction herein offends the provisions of Section 3(3) of the Law of Contract.

23. The Defendant's counsel submitted that the Plaintiff did not place the Defendant in a position of trust; that the concept of trust cannot arise where the transaction is contrary to the provisions of Section 6 of the Land Control Act and that the remedy available to the Plaintiff is to sue for damages.

#### **Analysis and findings:**

24. The Plaintiff is seeking for an order declaring him to be the owner of land known as Mananja/Ndithini Block 1/75 measuring 6.5 acres (*the suit property*), and for an order of specific performance to issue.

25. It is the Plaintiff's case that vide an Agreement of Sale dated 10<sup>th</sup> April, 1991, he agreed to purchase from the Plaintiff a portion of land measuring 11.5 acres from plot number 301. However, that transaction did not go through after he failed to raise the requisite purchase price. When the first transaction fell through, it is the Plaintiff's case that he entered into an oral Agreement with the Defendant to purchase from him a portion of Plot number 245 measuring 6½ acres.

26. To prove that he indeed purchased 6½ acres of the suit property, the Plaintiff produced a letter dated 18<sup>th</sup> February, 1991 by the Defendant which was addressed to Mwea Farmers Company Limited, a land buying company. The said letters show that the Plaintiff had purchased 6½ acres from the Defendant.

27. The other documents that the Plaintiff produced to prove his claim was a Beacon Certificate that was issued to him by Toplands Engineering Surveys dated 8<sup>th</sup> February, 2014. The said Beacon Certificate does not state the acreage of the land in question, neither does it state the name of the person to whom it is referred to. The Plaintiff also produced in evidence the letter of allotment that was issued to him by Mwea Farmers Company Limited for "Plot No. 245 (6½ acres) on L.R. 11930" dated 21<sup>st</sup> April, 2015. The Plaintiff also produced a purported Agreement dated 18<sup>th</sup> January, 2014 between himself and the Defendant.

28. The Defendant has denied ever selling to the Plaintiff 6½ acres of the suit land. According to the evidence of the Defendant, he only allowed the Plaintiff to occupy a portion of the suit land measuring 2½ acres. It was his evidence that the said 2½ acres was equivalent to the deposit of Kshs. 26,500 that the Plaintiff had paid before the first transaction fell through. The Defendant denied having signed the Agreement of 18<sup>th</sup> January, 2014.

29. The issues for determination are as follows:

- a. Whether the suit by the Plaintiff is time barred.*
- b. Whether there was a valid sale of 6½ acres of parcel of land known as Mananja/Ndithini Block 1/75.*
- c. Whether an order of specific performance can issue.*
- d. Whether an order of eviction as against the Defendant should issue.*

30. It is not in dispute that after the Agreement of Sale between the Plaintiff and the Defendant fell through in 1991, the Plaintiff and the Defendant purported to enter into an oral second Agreement. According to the Plaintiff, the oral Agreement was entered into around the year 1991. To prove this state of affairs, the Plaintiff produced in evidence a letter dated 18<sup>th</sup> February, 1991 authored by the Plaintiff and addressed to Mwea Farmers Company Limited

31. If the Plaintiff's case is based on the oral Agreement that was entered into in 1991, then he can only enforce that Agreement, if at all, within twelve (12) years. Section 7 of the Limitation of Actions Act provides as follows:

***“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”***

32. The cause of action in this matter arose from the time that the Plaintiff entered into the purported Agreement with the Defendant in 1991. Twelve (12) years therefore lapsed in the year 2003. Even if it is argued that the cause of action arose around 13<sup>th</sup> March, 1999 when the Defendant was issued with a Title Deed, the suit will still be caught up by limitation of time. Indeed, the Defendant having obtained his Title Deed in 1999, this suit could only be filed in the year 2011 and not thereafter.

33. It is therefore obvious that the order for specific performance cannot issue in this matter on the ground that the suit is time barred.

34. Having determined that the Plaintiff's suit is time barred, I will not address the issue of whether there was a valid sale in respect of 6½ acres of the suit land.

35. In his Counter-claim, the Defendant has sought for an order of eviction of the Plaintiff from the suit land. I have already held that the Plaintiff's suit cannot succeed because it is time barred. I have perused the Plaintiff's *“Reply to Defendant's Defence and Counter-claim”* and have not seen even a single paragraph where the Plaintiff has stated that he is entitled to the suit land by way of adverse possession.

36. The Plaintiff has not raised the Defence of Limitation of time, and in the absence of evidence to show that he has been in possession of a portion of the suit land measuring 6½ acres, the Defendant's Counter-claim succeeds. Indeed, the Defendant is entitled to the entire suit land having been registered as the proprietor of the same in 1991.

37. If indeed the Plaintiff has been in possession of the suit land since 1994, then he should have raised the Defence of adverse possession in his Reply to the Defence and Defence to Counter-claim, which he never did.

38. For those reasons, I dismiss the Plaintiff's Plaint dated 14<sup>th</sup> March, 2017 with costs and allow the Defendant's Counter-claim in the following terms:

- a. A permanent injunction be and is hereby issued restraining the Plaintiff either by himself, or through his agents, servants, employees, proxies or any one acting on his behalf or capacity from trespassing, entering into, encroaching or in any other way interfering with the Defendant's quiet possession of all that land known as Mananja/Ndithini Block 1/75.*
- b. The Plaintiff be and is hereby ordered to vacate all that parcel of land known as Mananja/Ndithini Block 1/75 within sixty (60) days of the date of this Judgment.*
- c. The Plaintiff to pay the costs of the suit and the Counter-claim.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24<sup>TH</sup> DAY OF MAY, 2019.**

**O.A. ANGOTE**

**JUDGE**