



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO.948 OF 2017

(Formerly Milimani ELC No. 328 OF 2016)

DAVID KASHONGA PULEI.....PLAINTIFF

VERSUS

NOAH MONERIA OLE KURRARRU.....1ST DEFENDANT

FRIDTJOVWIIK.....2ND DEFENDANT

ROSELYNE ACHIENG OKOTH.....3RD DEFENDANT

DISTRICT LANDS REGISTRAR, KAJIADO.....4TH DEFENDANT

JUDGMENT

By a Plaint dated the 6th April, 2016, the Plaintiff prays for judgment against the Defendants jointly and severally for orders that:

- a) That the agreement dated 26th February, 2013 be declared rescinded for non-compliance thereof;
- b) That subsequent transfer of the suit land to the 2nd and 3rd Defendants be declared null and void ab initio;
- c) That the Registrar of Lands at Kajiado be ordered to cancel the title deed number KJD/OLCHORO – ONYORE/1602 issued on 23rd July, 2013 to the favour of the 2nd and 3rd Defendant and issue a fresh title in favour of the Plaintiff.
- d) Costs of this suit.

The 2nd and 3rd Defendants filed a Defence and a Counterclaim dated the 23rd June, 2017 where they denied the allegations in the plaint except for the descriptive and denied colluding with the 1st Defendant to fraudulently transfer land parcel number KAJIADO/ OLCHORO ONYORE/ 1602 hereinafter referred to as 'the suit land', to them. They insist they are the registered owners of the suit land, having purchased it from the 1st Defendant for valuable consideration. They aver that the inhibition by the Plaintiff over the suit land is prejudicial to their proprietary rights. They filed a Counterclaim where they contended that they took possession of the suit land, wanted the court to uphold their title and claimed damages against the Plaintiff.

The Plaintiff filed a Reply to Defence and Counterclaim dated the 11th July, 2017 where he reiterated the averments in the Plaint and insisted the Defence and Counterclaim contained mere denials. He insisted the purchase of the suit land by the 2nd and 3rd Defendants was fraudulent as the 1st Defendant was not its registered owner and hence lacked the locus to transfer it. He stated that the 2nd and 3rd Defendants did not suffer any prejudice as a result of the inhibition registered against the suit land. He denied that the 2nd and 3rd Defendants are registered owners of the suit land and that the purported sale by the 1st Defendant is fraudulent, null and void. Further, that the 2nd and 3rd Defendants are not entitled to damages.

The matter proceeded to full hearing with the Plaintiff calling one witness while the 2nd and 3rd Defendants also had one witness.

Evidence of the Plaintiff

The Plaintiff as PW1 stated in court that he was the owner of the suit land which he intended to sell to the 1st Defendant and they entered into

a Sale Agreement dated the 26th February, 2013 to that effect. He claimed the purchase price was Kshs. 9.2 million but the 1st Defendant only paid him Kshs. 1.5 million as deposit. He insisted the balance of Kshs. 7.7 million is yet to be paid to him. He explained that the 1st Defendant also gave him a Land Cruiser valued at Kshs. 4 million towards the purchase price but he ended up paying for the same since the 1st Defendant had taken a loan with Angaza and used the car logbook as security but never paid for it. He was hence compelled to enter into another agreement with Angaza to purchase the said land. He was shocked to discover the 1st Defendant had transferred the suit land to the 2nd and 3rd Defendants without his consent. He disputed their title and claims they obtained the same fraudulently hence it is not a good title. Further, that the 1st Defendant did not have capacity to sell the suit land to the 2nd and 3rd Defendants since he did not have a good title to pass to them. He however confirmed that the documents the 2nd and 3rd Defendants availed to court in respect of the transfer were his. He denied receiving any purchase price from the 2nd and 3rd Defendants lawyers or the 1st Defendant's lawyers. He reiterated that the 2nd and 3rd Defendants' title should be cancelled since it was obtained fraudulently. He averred that the 2nd and 3rd Defendants are strangers to him. Further, that the Sale Agreement dated the 26th February, 2013 should be rescinded for non-compliance. He produced various documents to support his claim

Evidence of the Defendants

The 1st Defendant entered appearance but did not file a Defence. The 4th Defendant never entered appearance nor file a Defence. The 2nd and 3rd Defendants called one witness DW1 who was the 2nd Defendant who stated that they are the registered proprietors of the suit land having purchased the same through the 1st Defendant for Kshs. 10, 500, 000/= and took possession thereof. He stated that the transaction was overseen by Messrs W. G Wambugu & Company Advocates who were their lawyers while the 1st Defendant's lawyer was messrs Julius Ries Kaakua & Company Advocates. He explained that prior to the purchase of the suit land they undertook due diligence and attended the Land Control Board. Further, that title deed was issued on 23rd July, 2013. He reiterated that they enjoyed peaceful occupation of the suit land until 2016 when the Plaintiff claimed ownership. He contended that together with the 3rd Defendant, they are bonafide purchasers for value. He sought for the Court to declare them as rightful owners as well as dismiss the Plaintiff's suit and allow their Counterclaim with costs. DW1 produced various documents including Certificate of Title; Certificate of Official Search; Bundle of Bank Remittance Advices; Duly Executed Transfer Form; Consent of the Land Control Board; Sale Agreement; Copy of Plaintiff's PIN and ID and Various Correspondence to prove their claim.

Both the Plaintiff and the 2nd including 3rd Defendants filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the pleadings herein, hearing testimonies of the witnesses as well as perusing the materials presented in respect of the suit herein, the following are the issues for determination:

- Whether the Sale Agreement dated the 26th February, 2013 between the Plaintiff and the 1st Defendant should be rescinded.
- Whether the 2nd and 3rd Defendants are entitled to the orders sought in the counterclaim.
- Whether the title held by the 2nd and 3rd Defendants should be cancelled.
- Who should bear the costs of the suit.

As to whether the Sale Agreement dated the 26th February, 2013 between the Plaintiff and the 1st Defendant should be rescinded.

The Plaintiff seeks for orders from Court to rescind the agreement dated 26th February, 2013 and declare the subsequent transfer of the suit land to the 2nd and 3rd Defendants null and void ab initio as well as direct the Registrar of Lands at Kajiado to cancel their title and revert the same to his name. It was his evidence that they entered into a Sale Agreement dated the 26th February, 2013 with the 1st Defendant for the sale of the suit land. Further, the 1st Defendant never paid the full purchase price but instead sold the land to the 2nd and 3rd Defendants without his consent. He insisted the 1st Defendant did not have capacity to transfer the land to the 2nd and 3rd Defendants. It was his testimony that the said Sale Agreement should be rescinded because the 1st Defendant failed to pay the full purchase price. During cross-examination, the Plaintiff as PW1 was however at pains to explain how his passport size photographs, PIN and ID Card were attached to the various documents which the 2nd and 3rd Defendants produced in court to confirm they adhered to the proper legal process in purchasing the suit land. He admitted signing the Sale Agreement, giving the 1st Defendant who was his mentee and from his village, all the requisite documents for purposes of effecting the transfer. He further confirmed that the address used in the transfer form was his but he had not used it for a long time. Further, that he signed the Sale Agreement when in the 1st Defendant's office at Kiserian. I note that both the Plaintiff and the 1st Defendant were all represented by KAAKUA KABORO KAIRU & Co. Advocates in the Sale Agreement which was witnessed by JULIUS RIES KAAKUA advocate. Further, it is the same advocate who acted for the vendor (Plaintiff) in the agreement with the 2nd and 3rd Defendants dated the 17th January, 2013 in respect of the suit land. The Plaintiff contended in court that even though the 1st Defendant gave him a car as part of the purchase price, he had to pay for it from Angaza, a financier where the 1st Defendant had used it as security for the said loan. He however never pleaded this fact in his plaint and neither did he furnish court with any documents to support this averment. He also insisted that he was supposed to be paid Kshs. 2 million at the time of signing the Sale Agreement but was only paid Kshs. 1.5million. PW1 further admitted that he did not refund the purchase price to the 1st Defendant and claimed he did not know the 2nd and 3rd Defendants and met them in court for the first time. At paragraph 3 of the Sale Agreement, the Plaintiff even admitted receiving Kshs. 2 million upon signing the agreement. I note from the Sale Agreement, it indicated time was of essence but the Plaintiff did not confirm in court whether he issued a notice to the 1st Defendant after 120 days, when the purchase price was not fully paid up so as to rescind the said Agreement. Further, clause (C) of the said Sale Agreement indicates that the Plaintiff was to furnish the 1st Defendant with various documents including

Original title deed; Transfer in triplicate; Valid Land Control Board Consent photocopy of ID, PIN and three passport size photographs, upon payment of the full purchase price, before the completion date. It emerged that all these documents were furnished by the Plaintiff to the 1st Defendant. Which brings me to the point that if the plaintiff signed a Sale Agreement in 2013, why did he wait upto 2016 to undertake a search, register an inhibition and file a suit claiming that the said Agreement should be rescinded as it was not complete, yet the completion clause indicated that it should have been 120 days. Further, that upon discovering the transfer of suit land to the 2nd and 3rd Defendants, he never lodged any complaints with the Police for fraud. The Plaintiff never requested for witness summons to issue to the advocate who acted for them in the said Sale Agreement nor sued him and to my mind he seems he wants the court to rewrite the terms of the contract with the 1st Defendant, yet his conduct is to the contrary. He has denied knowledge of his advocate who was his agent in the two transactions but did not indicate whether he lodged any complaints with the Law Society of Kenya against him. DW1 stated in court that he got to purchase suit land through the 1st Defendant who was a broker. Further that the 1st defendant consulted the owner of the land when he was present to confirm the purchase price at Kshs. 10.5 million. In the Court of Appeal case of **Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of The Estate of Gulamhussein Ebrahim Pothiwalla vs. Kidogo Basi Housing Corporative Society Limited and 31 Others Civil Appeal No. 330 of 2003** it held that:

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence concerning the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”

In the current scenario and relying on the Court of Appeal decision which binds me, I find that from the Plaintiff’s conduct, he has failed to prove coercion, undue influence or fraud on the part of the 1st Defendant in that transaction and I find that he is hence bound by the terms of the said Sale Agreement. In the circumstances, I am unable to rescind the said Sale Agreement dated the 26th February, 2013.

As to whether the 2nd and 3rd Defendants are entitled to the orders sought in the counterclaim.

The 2nd and 3rd Defendants claim to be registered proprietors of the suit land hence entitled to it and that the Plaintiff’s action of registering an inhibition over the same has occasioned them damages.

The 2nd and 3rd Defendants through DW1 stated that their advocate undertook the transaction in respect of the suit land on their behalf. It was DW1’s testimony that they undertook due diligence and executed a Sale Agreement dated the 17th January 2013. He produced various documents including Certificate of Official Search; Bundle of Bank Remittance Advices; Duly Executed Transfer Form; Consent of the Land Control Board; Sale Agreement; Copy of Plaintiff’s PIN and ID to confirm they adhered to the legal process when they purchased the suit land. The 2nd and 3rd Defendants insists they are purchasers for value.

From the Sale Agreement dated the 17th January, 2013, I note it is between the Plaintiff and the 2nd and 3rd Defendants. The total purchase price is Kshs. 10. 5 million which was payable to JULIUS RIES KAAKUA’S bank account at Equity Bank. I note JULIUS RIES KAAKUA’S Advocate witnessed the Plaintiff’s signature while WANJA G. WAMBUGU Advocate witnessed the 2nd and 3rd Defendants’ signature. The said JULIUS RIES KAAKUA was the vendor’s advocate and he is the same advocate who undertook the transaction between Plaintiff and 1st Defendant. From the Bank Statements produced by DW1, it is evident that the total purchase price was indeed paid to the account of JULIUS RIES KAAKUA’S bank account at Equity Bank. DW1 explained in court that their advocate undertook the whole transaction on their behalf. Further, that before signing the Sale Agreement, they negotiated the price and the 1st Defendant who was the conduit to the Plaintiff informed them that the owner of the suit land had accepted their offer. DW1 stated in court that they were issued with a Certificate of title dated the 23rd July, 2013 and took possession of the suit land. Further, they learnt about the dispute in 2016. He however confirmed that he had never met the Plaintiff and only saw him in court. He reiterated that they enjoyed peaceful occupation of the suit land until 2016 when the Plaintiff claimed ownership.

The Plaintiff insisted that the 1st Defendant did not have a proper title to pass to the 2nd and 3rd Defendants. Further, that he had never met the 2nd and 3rd Defendants and their title over the suit land should be cancelled. Further that there was no privity of contract between him and the 2nd and 3rd Defendants. The Plaintiff however failed to provide plausible reasons as to why he provided all the relevant documents to ensure the transfer was effected to the 2nd and 3rd Defendants. As I have alluded to above, his conduct during the transaction was contrary to his averments in court. His only explanation was that the 1st Defendant was his mentee and used to work for him. Further, that he gave him all the relevant documents including the Title Deed over the suit land as he was selling the same to him. Initially, he was not sure of the date he commenced selling the suit land to the 1st Defendant nor the date he furnished all the documents in respect of the suit land to the 1st Defendant. During cross examination, he even stated in court that he was selling two parcels of land to the 1st Defendant. Further, that 1st Defendant was holding most of his documents and returned to him everything except the title of the suit land. He even confirmed that the details contained in the Sale Agreement with the 2nd and 3rd Defendants were his. I note the Certificate of Title in the name of the 2nd and 3rd Defendants was issued more than 120 days after his agreement with the 1st Defendant. Further, that the Certificate of Title was issued after all the relevant documents in respect of the suit land had been presented. I opine that the Plaintiff should have proceeded to rescind the contract with the 1st Defendant before any transaction to a third party was effected. In the Uganda Court of Appeal Case of **Katende V Haridar & Company Ltd** cited with approval in the Kenya High Court the case of **Lawrence Mukiri V Attorney General & 4 others ELC 169 of 2008**, on what amounts to bona fide purchaser for value thus:’ ...a bonafide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

a. He holds a certificate of Title

b. He purchased the Property in good faith;

- c. He has no knowledge of the fraud;**
- d. The vendors had apparent valid title;**
- e. He purchased without notice of any fraud;**
- f. He was not party to any fraud.**

A bona fide purchase of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.'

From my analysis above and in relying in the above cited decision, I find that the 2nd and 3rd Defendants were purchasers for value and did not collude with the 1st Defendant to defraud the Plaintiff. Further, from the evidence in court, it is clear that JULIUS RIES ADVOCATE who prepared the Sale Agreement for the Plaintiff and 1st Defendant is the same lawyer who undertook the transaction between the Plaintiff and 2nd and 3rd Defendants. From the correspondence between JULIUS REIS ADVOCATE and WAMBUGU ADVOCATES, which were produced in court and the conduct of the Plaintiff, I hold that JULIUS REIS ADVOCATE was indeed the Plaintiff's agent and he did not have to meet the 2nd and 3rd Defendants at the time of purchase of suit land as they were represented by their lawyers. Further, if he indeed did not receive the purchase price from his advocate, then he has a legal recourse to pursue him for the same. In the circumstances, I am unable to make an order for cancellation of the 2nd and 3rd Defendants title over the suit land and will proceed to uphold it.

As to who should bear the costs of the suit.

The costs generally follow the cause, and I will award the costs of the suit to the 2nd and 3rd Defendants' , to be borne by the Plaintiff and 1st Defendant equally.

In the circumstances, I find that the Plaintiff has failed to establish his case on a balance of probability and will proceed to dismiss it with costs. I further enter judgement for the 2nd and 3rd Defendants in respect of their counterclaim and uphold their title. I will however decline to award them damages in respect of the inhibition registered against the suit land as it is evident the same was registered to protect the substratum of the suit before determination of its ownership.

I so order.

Date signed and delivered in open court at Kajiado this 6th day of May, 2019

CHRISTINE OCHIENG

JUDGE