



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.67 OF 2016

ALPHONES M. MWAKULUMBA.....PLAINTIFF

-VERSUS-

DIANA MAGANGA

HENRY P. MAJALIWA

LUCY MAGANGA.....DEFENDANTS

JUDGMENT

PLAINTIFF'S CASE

1. By a Plaint dated 30th March 2016 and filed on 11th April 2016 the Plaintiff avers that on or about 3rd August, 2002 he entered into a written agreement with the 2nd Defendant who was then the sole legal administrator of the Estate of one Henry Maganga (deceased) in which the 2nd Defendant sold to the Plaintiff a portion measuring 65 feet by 45 feet out of the property known as PLOT LR NO.8610/I/MN registered in the name of the deceased at an agreed purchase price of Kshs.240,000/= which sum the Plaintiff states he duly paid. The Plaintiff states that it was an express term of the said agreement that a subdivision exercise was to be carried out and a title to be processed and issued in favour of the Plaintiff in respect of the said portion but the same have never been done to date.

2. The Plaintiff further states that he has since acquisition of the said parcel of land spent massive resources and has put up a residential house in which he now lives in together with his family. The Plaintiff states that the Defendants have on several occasions without any legal justification nor reason threatened to demolish the Plaintiff's said house and evict him from the said parcel of land. The Plaintiff avers that unless the Defendants are stopped, he is fearful of losing his parcel of land and investment.

3. The Plaintiff's claim against the Defendants jointly and severally is for orders as follows:

- a) **A declaration that the agreement of sale dated 3rd August, 2002 is lawful and binding on the Defendants**
- b) **An order compelling the Defendants to subdivide PLOT NO. LR 8610/I/MN and to issue a Title to the plaintiff on the portion of land under the Plaintiff's occupation.**
- c) **A permanent injunction restraining the Defendants either by themselves, their agents, servants, whomsoever, howsoever from interfering with quiet possession of the portion/parcel of land under the Plaintiff's occupation.**
- d) **Any other or such further orders as this Honourable court may deem fit and just to grant.**
- e) **Costs of this suit.**

DEFENDANT'S CASE

4. The Defendants responded to the Plaint by way of a joint written statements of the defence dated and filed on 15th August 2016. The Defendants denied the contents of the Plaint and responded that they are all Administrators of the Estate of Henry Maganga (deceased) who is the registered owner of the parcel of land known as PLOT LR NO. 8610/I/MN. They aver that the deceased died on 8th October 1994 and was survived by the three Defendants only. The Defendants further aver that the 2nd Defendant took out Grant of Letters of Administration

Intestate in respect of the deceased's entire estate on 26/3/2003 which Grant was confirmed on 6/5/2015. That the said Grant was revoked on 13/6/2008.

5. The Defendants aver that in the intervening period between the issuance of Grant of Letters of Administration Intestate aforesaid and the revocation thereof, the 2nd Defendant entered into various Lease Agreements in respect of selected portions of the deceased's estate, including the agreement subject hereof. They state that the arrangement entered into between the parties was a Lease Agreement only by virtue whereof the Plaintiff was allowed to erect temporary structures only.

6. The Defendants aver that they have since jointly procured Grant of Letters of Administration Interstate in respect of the deceased's entire estate which Grant was issued on 27/4/2011 and confirmed on 2/7/2013. That by virtue of the parties cordial relations, they genuinely intended to eventually sub-divide the entire parcel and sell the individual units at prevailing market rates, with preference being afforded to all relevant parties on their respective portions, including the Plaintiff. The Defendants state that they attempted to engage the Plaintiff in talks at furthering their intention, which talks have failed to yield any tangible results, allegedly owing to the plaintiff's grossly misguided sense of entitlement. The Defendants aver that the only legitimate transaction in respect of the Suit Property is in relation to the lease agreement dated 12/12/1998 and state that the plaintiff's claim is untenable and unmerited and prayed that the Plaintiff be struck out and the plaintiff's claim against them be dismissed with costs.

HEARING

7. The matter came up for hearing on 25th February 2019.

PW1 ALPHONES MWANDA MWAKULUMBA relied on his witness statement dated 30/3/2016 and testified that he entered into an agreement with the Defendants in the year 2002 in which the Defendants sold him a portion of PLOT NO.8610/I/MN at a price of Kshs.240,000/= which he paid. He testified that he was issued with a title deed for the portion he purchased but has not been given to date. He testified that he has substantially developed the said parcel of land by constructing a residential house in which he lives with his family. He stated that the Defendants have now without any justification threatened to demolish his house and evict him therefrom and is fearful that he will lose his house and investment if the Defendants are not stopped. He produced the list of documents dated 30th March 2016 and the supplementary list of documents dated 2/5/17 as p.exhibits 1-13. PW1 testified that he cannot pay the equivalent of the current market rate because he had purchased the property at an agreed purchase price.

8. On cross-examination, the Plaintiff stated that he entered into an agreement with the 2nd Defendant though he knew that the property was not owned by the 2nd Defendant alone. He stated that there was a lease agreement in which he paid the sum of Kshs.150,000/= and extra sum of Kshs.10,000/= to the 1st Defendant. That the lease was entered on 12/1/21998 between the 1st Defendant and the Plaintiff PW1 stated that on 3/8/2002 he entered into an agreement for sale with the 2nd Defendant, though he did not know whether the 2nd Defendant had consent from the other co-owners whom he did not reach out to. He testified that the 1st Defendant has not approached him to tell him that he could buy the plot at the current market value. In re-examination, PW1 stated that the agreement dated 12/12/1998 was between him and the 2nd Defendant who however, did not sign it, but was signed by the 1st Defendant whom he paid the money to.

9. DW1 CHRISTINE DIANA MAGANGA testified that in 1998 the Plaintiff came to their home and went to PLOT NO. 8611/I/MN but the Defendants grandmother referred him to the Defendants over PLOT NO. 8610/I/MN. The plaintiff showed them a lease. DW1 denied signing the lease agreement dated 12/12/1998 which she produced as D.exhibit but admitted that the plaintiff paid the sum of Kshs.100,000/=. That the 2nd Defendant did not sign the lease agreement because he was away in the seas but was told the reason why the lease was entered into and he understood. DW1 testified that the Grant of Letters of Administration which the 2nd Defendant had obtained were revoked on 13/6/2008 and later the three Defendants were made joint Administrators. That as Administrators, they subdivided the leased houses and the suit portion went to DW1. She stated that she was shocked to learn that her portion had allegedly been sold. That they nonetheless told the Plaintiff who had leased to buy the suit plot at current market value which is approximately Kshs.1,500,000/=. DW1 produced the receipts as D.Exhibit 2. She stated that they are still willing to sell the Suit Property to the Plaintiff at the current market rate. DW1 denied knowledge of the Agreement dated 3/8/2002 which she produced as D.exhibit 3.

10. On cross-examination, DW1 stated that she only signed the second page of the Agreement dated 12/12/1998 and confirmed that the measurement is 65 x 45 feet. She stated that the Grant that had been issued to the 2nd Defendant was revoked in 2008 while the agreement indicates it was entered into in 2002. She maintained that they are willing to sell the property to the Plaintiff at the current market value with she put at about Kshs.1,600,000/=, adding that an offer of between Kshs.300,000/= and Kshs.500,000/= is impossible. She denied that in the year 2002 the property was valued at kshs.240,000/=.

11. When re-examined, DW1 stated that the 2nd Defendant was issued with the Grant of Letters of Administration in respect of their deceased father in the year 2003 while the sale agreement entered into in 2002, adding that when the 2nd Defendant purported to sell the Suit Property, he had no consent from the other Defendants and had no Grant of Letters of Administration. DW1 stated that their late father's name is Henry Paul Majaliwa while the 2nd Defendant's name is Paul Henry Paul Majaliwa. That the agreement is in their late father's name, Henry Paul Majaliwa Maganga who died in 1986.

12. DW2, PAUL MAJALIWA HENRY testified that he would like the court to decide and see if the 1st and 3rd Defendants could go to his portion and the Plaintiff remains in the suit property. On cross-examination, he stated that he signed the sale agreement dated 12/12/1998 in which the plaintiff bought the suit plot and received the sum of Kshs.150,000/=. He agreed that he sold the suit plot in 1998 while he obtained the Grant of Letters of Administration in the year 2003.

SUBMISSIONS

13. The Plaintiff filed his submissions on 1st April 2019 while the 1st and 3rd Defendants filed theirs on 24th April 2019. However, the 2nd Defendant chose not to file any submissions.

ANALYSIS AND DETERMINATION

14. I have considered the Plaintiff, the Defendants joint statement of defence, the evidence adduced by all parties as well as the submissions on record. The court is called upon to determine whether the agreement of sale dated 3rd August 2002 is lawful and binding on the Defendants and whether the Plaintiff is entitled to the reliefs sought.

15. It is common ground that PLOT LR NO. 8610/I/MN was registered in the name of Henry Paul Majaliwa Maganga (deceased). It is also not in dispute that the deceased died on 8/10/1994 and was survived by the three Defendants.

16. It is also clear that the 2nd Defendant took out Grant of Letters of Administration Intestate in respect of the deceased's estate on 26/3/2003 which Grant was later confirmed. The said Grant was however revoked on 13/6/2008. Thereafter, the three Defendants were made co-administrators of the deceased's estate and a joint Grant was issued to them on 27/4/2011 and confirmed on 2/7/2013.

17. The Plaintiff' case is that on 3rd August 2002 he entered into an agreement for sale with the 2nd Defendant who was then the sole Administrator of the estate of the deceased in which the 2nd Defendant sold to the plaintiff a portion of the deceased's plot measuring 65x45 feet at an agreed price of kshs.240,000/=. It is clear that the said transaction was entered into after the demise of the registered proprietor of the property. It is also clear that the 2nd Defendant allegedly sold the suit property to the Plaintiff on 3rd August 2002 as legal Administrator of the estate of the deceased when he was not yet an administrator. The 2nd Defendant became an Administrator of the estate of the deceased on 26/3/2003. It therefore follows that by the time the 2nd Defendant sold the Suit Property Plaintiff, Grant of Letters of Administration Intestate in respect of the deceased's estate had not been issued, and thus the estate of the deceased had not been distributed. Moreover the Grant that was issued to the 2nd Defendant was later revoked and a joint Grant issued on 27/4/2011 in joint names of the three Defendants herein.

18. It will therefore not be necessary to belabor the point that the purported Agreement of Sale between the plaintiff and the 2nd Defendant was improperly entered into and the 2nd Defendant could not dispose of and the plaintiff could not have legally acquired the suit property. Section 45 of the Law of Succession Act provides as follows:

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of the deceased person.

(2) Any person who contravenes the provisions of this section shall-

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such time and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

19. Section 55 of the Law of Succession Act stipulates that:

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by Section 71.”

20. Having considered the evidence before me as well as the exhibits herein produced, it clearly emerges that Section 55 of the Law of Succession Act was not complied with before the suit property was sold. Moreover, the receipts that have been produced both by the plaintiff and the Defendants indicate that the property had been leased to the plaintiff. In his evidence, the Plaintiff testified that he purchased the Suit Property from the 2nd Defendant on 3rd August 2002. In their defence, the 1st and 3rd Defendants are categorical that they never consented to the said sale and therefore the said agreement is not binding on them.

21. The sale agreement herein produced as p.exhibit 1 and D.exhibit 3 is dated 3rd August 2002 and the other is dated 12/12/1998. From the said agreements, the vendor of the suit property herein is shown as Paul Majaliwa Henry, the son of Henry Paul Majaliwa Maganga, the registered proprietor of PLOT NO.8610/I/MN. From the discourse above and having found that the proprietor of the suit land was the deceased, Henry Paul Majaliwa Maganga, it therefore goes without saying that the 2nd Defendant herein who was not the registered owner had no interest on the land to pass. Further, the said sale transaction was carried out after the death of the proprietor of the suit land and before a grant of representation had been issued with the result that there was intermeddling with the deceased's estate.

22. I find that the said agreement for sale is not binding on the 1st and 3rd Defendants who were not parties to the transaction and who never consented. Since the Defendants are willing to sell the suit property to the plaintiff at the current market value, it would be prudent for the plaintiff to engage the Defendants who are now co-administrators of the estate of the deceased with a view to reaching an agreement.

23. I find that the plaintiff herein has not proved his case on a balance of probabilities. The upshot is that the plaintiff's suit is without merit and the same is dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 24th day of July 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Bakari holding brief for Mokaya for Plaintiff

Oroso holding brief for Apollo for 1st and 3rd Defendants

No appearance 2nd Defendant

Yumna Court Assistant

C.K. YANO

JUDGE