



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 171 OF 2013

GILBERT KERORO MASAKI.....PLANTIFF

VERSUS

CHARLES NYARIKI MABEYA.....1ST DEFENDANT

ANTHONY MUMIO THOITHI.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 5th February 2013, the plaintiff prays for judgment against the defendant for:-

2. It seeks orders

(a) A declaration that the plaintiff is the legal and bonafide owner of Kajiado/Kitengela/10791 and Kajiado/Kitengela/10792.

(b) A declaration that the purported transfer of Kajiado/Kitengela/10791 and Kajiado/Kitengela/10792 by the 1st defendant to the 2nd defendant is illegal, null and void.

(c) An order directed to the defendants to execute and transfer the subject properties being Kajiado/Kitengela/10791 and Kajiado/Kitengela/10792 to the plaintiff.

(d) An order of permanent injunction restraining the defendants, their severnts, workmen, licensees, agents, or any other persons acting on his own behalf or on behalf fo the defendants from howsoever transferring, fencing, subdividing, trespassing, erecting any structures thereof, dispossessing, alienating, reclaiming and or harassing the plaintiff or interfering with his peaceful occupation and possession of the parcels of land more particularly known as Kajiado/Kitengela/10791 and Kajiado/Kitengela/10792.

(e) Costs of the suit plus interest.

(f) Any other or further relief as this court may deem fit and just to grant.

3. Upon being served with copies of plaint and summons to enter appearance the 1st defendant neglected to enter appearance and/or file defence within the stipulated period.

4. The 2nd defendant entered appearance through the firm of M/s Kiptinness & Odhiambo Advocates. He also filed a statement of defence dated 5th April 2013 denying each and every allegation of ownership by the plaintiff in the plaint. He prays that the plaintiff be ordered to vacate the suit property and that the plaintiff's suit be dismissed with costs.

5. PW1 Gilbert Keroro Masaki told the court that he has known the 1st defendant Charles Nyariki Mabeya for a long time. He said the 1st defendant worked for Kenya Bureau of Standards. He was therefore a member of Ubora Housing and Cooperative Society Limited. The 1st defendant suggested to the plaintiff that he could buy land through the said Cooperative Society using his name. The plaintiff thought this to be a good deal and by 19th July 1999 he had paid a total of Kshs.100,000 directly to the said Cooperative Society for the two plots. He produced a deposit slip dated 9th July 1999 and a receipt from the said Sacco dated 12th July 1999 as exhibit P1 and P2 in this case.

6. The 1st defendant then acquired the suit properties on his behalf on 19th October 1999. There are title deeds for Kajiado/Kitengela/10791 and Kajiado/Kitengela/10792. The title deeds were produced as exhibit P3 and P4 respectively. The 1st defendant signed transfer forms in favour of the plaintiff in respect of the suit properties. He produced the signed transfer forms as exhibits p5 and p6 respectively.
7. The plaintiff further told the court that he misplaced the transfer forms. He requested the 1st defendant to execute fresh transfers but he became reluctant. In 2012, the plaintiff was able to trace the original transfer forms. He started the process of fencing the suit properties. He told the court he met the 2nd defendant at the 1st defendant's home in early 2013, the 2nd defendant was complaining that someone was interfering with his plots. This is when the plaintiff informed him that the plots were his.
8. The plaintiff further told the court that he paid Kshs.16,000 for water, he produced the receipts and letters as exhibit P7 and P8 respectively. He also produced the photographs of the suit properties as exhibits P9A and B. His advocate did a search at the land registry and realized that the 1st defendant had claimed that the title deeds were lost. There was a gazette notice dated 11th February 2011 to replace the title deeds. He produced the gazette notice as exhibit P10. He also produced certificate of official searches showing that the suit properties are in the name of the 2nd defendant as exhibit P11 A and B respectively. He also produced copies of title deeds in the 2nd defendant's name as exhibit P12 and P 13 respectively. He also produced the demand notice as exhibit P14 and a job card showing that the 1st defendant was working for Kenya Bureau of Standards as exhibit P15. He prays that the title deeds in the name of the 2nd defendant be cancelled and the same do revert to him. He also seeks costs of the suit.
9. DW1, Anthony Muniu Thoithi, told the court that he bought the suit properties from the 1st defendant whom he met in April 2011. He told the court that the 1st defendant was introduced to him by a Mr. Ogoti. He bought three ¼ acre pieces of land from the 1st defendant being Kajiado/Kitengela/10791, 10792 and 10793 respectively. He said the 1st defendant handed him copies of title deeds in his name. He also did a search at the land registry and confirmed the parcels belonged to the 1st defendant. He produced the certificates of official searches as exhibit D1. Sale agreements were then drafted and executed in respect of the suit parcels. He produced them as exhibit D2.
10. He said he paid Kshs.650,000 for each plot. He paid Kshs.1,650,000 through cash electronic bank transfer. The balance of Kshs.250,000 was paid to the 1st defendant's wife through cash and cheques. After payment of the full purchase price, the 1st defendant executed transfers in his favour. The transfer forms were produced as exhibit D3 and D4. He was later issued with title deeds which he produced as exhibit D5. He was ready to develop the suit properties but on 12th January 2013 he went to the site and found part of it had been fenced. He asked the neighbours who gave him the plaintiff's phone number. He called the plaintiff who claimed he owned the suit properties. They agreed to meet at the 1st defendant's home. The plaintiff showed him title deeds in the 1st defendant's name. He further stated that he commenced construction on the suit properties. He prays that he be allowed to continue developing the suit properties. He prays that the plaintiff suit be dismissed with costs.
11. At the end of the trial both parties tendered written submissions. It is the plaintiff's submissions that he purchased the suit properties. The titles were in the name of the 1st defendant who executed transfer on his favour. He also gave him the original title documents which were misplaced. He was therefore unable to effect transfer immediately. He states that he has been in possession since 1999 without any interference. He relies on the case of **Kimani Ruchire vs Swift Rutherfords & Co. Ltd [1980] eKLR; Francis Muriuki Gikigi & Others vs Richard Murithi Tito & Another [2014] eKLR.**
12. He further submitted that the 1st defendant did not have ownership of the suit properties before effecting transfer to the 2nd defendant. The 1st defendant, illegally and unprocedurally transferred the suit properties to the 2nd defendant. He has also relied on the case of **Elijah Makori Nyang'wara vs Stephen Mungai Njuguna & Another [2013] eKLR; Chauhan vs Omagwa [1985] eKLR.** He prays that he be granted the prayers sought.
13. The 1st defendant on the other hand submits that the plaintiff has not produced any sale agreement, transfer or title documents in his name in respect of the suit properties. Under Section 3(3) of the Law of Contract Act, and Section 38 of the Land Act 2012 no action may be brought in relation to the contract for sale of land unless the contract is in writing and has been executed and attested. He relies on the case of **Margaret Muthoni Wanyee vs Mukenia Cooperative Society Ltd [2018] eKLR.**
14. He further submits that his titles to the suit properties were obtained legally. He did due diligence to determine the owner of the property he intended to purchase. The plaintiff has not shown any evidence to prove illegality or fraud in the acquisition of titles to the suit properties. The plaintiff has failed to give any particulars of fraud or illegality in the plaintiff. The burden of proof of fraud and conspiracy to defraud is higher than an ordinary civil case; the plaintiff has not discharged this burden. He states that he legally obtained titles to the suit properties and is therefore the absolute proprietor. He prays that the plaintiff's suit be dismissed with costs.
15. I have considered the pleadings, the evidence on record and the exhibits produced. I have also considered the written submissions of counsel and the authorities cited. The issues for determination are:-
- (i) *Whether the plaintiff is the bona fide owner of the suit properties.*
 - (ii) *Whether the 2nd defendant's title was fraudulently obtained.*
 - (iii) *Whether the 2nd defendant herein is an innocent purchaser who purchased the properties with utmost good faith.*
 - (iv) *Who should bear costs?*
16. The plaintiff has produced the title deeds of the suit properties in the name of the 1st defendant and the transfer forms duly signed by the

1st defendant in his favour. These transfers were never lodged with the land registry to effect transfer in his favour. The plaintiff produced a deposit slip dated 9th July 1999 for Kshs.100,000 in favour of Ubona Housing Cooperative Society Limited. The same is indicated as paid by Charles Nyariki Mabeya. He also produced a receipt dated 12th July 1999 in favour of Charles Nyariki Mabeya. There is nothing to show that it is the plaintiff who deposited the cash.

17. Section 3(3) of the Law of Contract Act provides that:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(iii) incorporates all the terms which the parties have expressly agreed on in one document and

(iv) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party”

18. In the instant suit the plaintiff did not produce an agreement of sale between him and the 1st defendant for the disposition of the same to him. The same legal provision is also shown in Section 38(1) of the Land Act, 2012. The plaintiff did not produce any agreement between himself and the 1st defendant to confirm that the 1st defendant was purchasing the suit properties on his behalf.

19. The plaintiff claimed that he has been in occupation since 1999. This cannot be true as he confirmed on his testimony that he started the process of fencing in 2011. The 2nd defendant on the other hand told the court that he had fenced the suit properties and has constructed a site office.

20. Section 26(1) of the Land Registration Act provides that:-

“The certificate of title issued by the Registrar upon registration or on purchase of land upon transfer....shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. and the title of that proprietor shall not be subject to challenge except-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

The plaintiff has alleged that the 1st defendant fraudulently obtained duplicate title deeds to enable him to transfer the suit properties to the 2nd defendant. The plaintiff has however failed to prove that the 2nd defendant was a part to the fraud or misrepresentation. In my opinion the 2nd defendant followed the proper procedure in acquiring the titles to the suit properties.

21. The suit properties are now registered in the 2nd defendant’s name. The plaintiff may have been misled by the 1st defendant to deposit money on his name as the plaintiff believed the 1st defendant was buying the plots on his behalf. It appears the 1st defendant changed his mind once he obtained the titles on his name. This is a case of a friend betraying another.

22. It is clear to the court that the 1st defendant did not obtain Land control Board Consent in order to transfer the suit properties to the plaintiff. He however did it for the 2nd defendant. Clearly the 1st defendant was not desirous of transferring the suit properties to the plaintiff. In the case of **Thrift Homes Limited vs Kays Investment Limited [2015] eKLR** the court held that “specific performance like any other equitable remedy is discretionary and the court will only grant it on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable”.

23. In conclusion, I find that the plaintiff has failed to prove his case on a balance of probability as against the defendants. He is therefore not entitled to the reliefs sought. Accordingly the plaintiff’s case is dismissed. Each party do bear own costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 25th day of September 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Kirimi advocate for the Plaintiff

Mr. Gicheha advocate for the 2nd Defendant

No appearance for the 1st defendant+

Kajuju - Court Assistant