



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 119 OF 2008

M'MUKIRI M'MBUTURA.....PLAINTIFF

VERSUS

SIMON GICHUNGE M'RUKARIA.....DEFENDANT

JUDGMENT

Introduction

1. This is a very interesting case that was filed way back in 2008.
2. By a Plaint dated and filed herein on the 17th September 2008, the Plaintiff prays for;
 - a) **A declaration that LR No. ABOGETA/U-CHURE/662 is the property of the Plaintiff.**
 - b) **An order that the registration of L.R. NO ABOGETA/U-CHURE/662 be rectified and the Defendant's name be cancelled and that of the plaintiff be restored.**
 - c) **Costs and interest and any further relief this court may deem fit to grant.**
3. The Defendant on his part filed an amended defence and raised a counterclaim in which he sought the following reliefs:
 - a) **An order of refund of Kshs. 300,000 paid to the plaintiff**
 - b) **That upon compliance with prayer (a) above, the plaintiff to re transfer the suit land to the Defendant**
 - c) **Interest on (b) above at court rates from 7/12/2005**

The Plaintiff's Case

4. The Plaintiff testified as **PW1** and adopted his statement filed on 23/9/2018 as his evidence in chief. It was his evidence that the suit land in question is his and he at no point sold it to a third party; that his title deed got lost when he was in the process of transferring the same to his son, one Phineas Gachigi **PW3**; during cross examination he denied knowing the defendant and even ever entering into a conditional sale agreement with him.
5. **PW2, Bildad Mugambi**, testified and denied ever going to an advocate with the defendant with regards to entering into an agreement; he stated his father lost his title deed to the suit land when they had gone to the Land Board to obtain consent so that he could transfer the same to **PW3** and that upon realization that it was lost, they reported to the Police He vehemently denied signing the conditional agreement for sale.
6. **PW3, Phineas Gacunki**, denied the allegation that his father had entered into a conditional sale agreement with the defendant. He basically advanced his father's claim that the title to the land which he was to be given got lost and it was after a while that they realized that the land had been fraudulently registered in the name of the defendant. With that evidence the plaintiff closed his case.

The Defendant's Case

7. The Defendant called three witnesses in support of his case. **DW1** was **Isaiah Mwenda**, the advocate who executed the alleged conditional agreement for sale. His evidence was that the plaintiff, **PW2** and **PW3** went to his office together with regards to a conditional

agreement for sale where the defendant was to advance a sum of **Kshs 300,000** to **PW2** and the plaintiff's title was to act as security by way of a conditional land sale agreement and that if the monies borrowed was not paid by December **2005**, the land would transfer to the vendor; that the plaintiff did sign the transfer documents in his presence, which transfer could only be realised in the event of a default.

8. DW2 the defendant testified on **18/12/2018**. It was his testimony that as per the conditions of the agreement between him and the plaintiff, the suit land was to be transferred in his favour upon the plaintiff defaulting in repaying **Kshs.300, 000** advanced to **PW1, PW2** and **PW3**; according to **DW1**, the plaintiff did not lose the title but he gave **DW1** as security; it was his position that he would only re-transfer the suit land to the plaintiff upon the repayment, with interest, of money owed to him.

9. DW3, Joel Muriungi, testified on the same date as the defendant and reiterated the defendant's evidence.

10. With that evidence, the Defendants closed their respective cases.

Submissions

11. In his submissions, Mr. Rimita, learned counsel for the Plaintiff, *inter alia* submitted that the Plaintiff's land belongs to him and that he has never sold or entered into any agreement for transfer of any portion to anyone. He relied on **Section 26(1)** of the **Land Registration Act 2012**.

12. Mr. Muia on the other hand submitted that the plaintiff is guilty of material disclosure and as such has not come to court with unclean hands. He further submitted that a contract had been created between the plaintiff and the defendant and when the plaintiff defaulted, the defendant effectuated the transfer of the land.

The Analysis of Evidence and Issues for Determination

13. From the pleadings herein, the evidence and submissions by both parties, the principle issue arising for determination is whether there was an agreement between the plaintiff and the defendant.

14. In this case, it is evident that the Plaintiff did at some point lose physical possession of his title deed but the real dispute is what really transpired that occasioned that loss.

15. The plaintiff did bring his sons as witnesses and not a single independent witness. I would have expected the plaintiff to call the Land Registrar and an officer from the police station where the loss of the title was reported to corroborate his story.

16. As much as I sympathise with the plaintiff, I am inclined to believe the defendant's version of the story based on what was presented before me as evidence.

17. In any event, there was no gazette notice showing the loss of the title in question.

18. I find that the plaintiff's claim has no merit and I hereby dismiss it with costs.

Dated and signed at Kitale this day of 2019.

MWANGI NJORGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered in open court at Meru on this 31st day of October 2019

JUDGE

ENVIRONMENT AND LAND COURT

MERU