



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 6 OF 2017

JAMES KIRIMI KIRIGIA.....PLAINTIFF

VERSUS

NKANATA WILFRED KITHINJI.....1ST DEFENDANT

MARTIN MWIRIGI ARIMI.....2ND DEFENDANT

JUDGMENT

1. Vide the plaint filed in court on 9.1.2017, plaintiff claims that in year 2015, he bought a parcel of land Abogeta/U-Kithangari/2567 (herein after the suit land) measuring 0.4 acres at a consideration of Shs.650,000. Plaintiff took over possession of the land. However in 2016 November, he learnt that the suit land had been sold to 2nd defendant.

2. Plaintiff avers that the sale of the land by 1st defendant and 2nd defendant was fraudulent and the particulars of such fraud are set out in paragraph 7 of the plaint.

3. Plaintiff therefore prays for the following orders:

(a) That the defendants hold L.R No. Abogeta/U-Kithangari/2567 in trust for the plaintiff in terms of section 28 of the Land Registration Act.

(b) An order for rectification of the register to have L.R No. Abogeta/U-Kithangari/2567 registered in the name of the plaintiff.

(c) Costs and interests

4. The second defendant filed a statement of defence and counterclaim on 6.2.2017 where he denies plaintiff's claim. He claims to be the absolute registered owner of the suit land. He avers that plaintiff only moved into the suit land hurriedly when he learnt that the suit land had been sold to him (2nd defendant). The 2nd defendant therefore prays for the following:

(i) An order for general damages against the 1st defendant for breach of contract.

(ii) An order that the 2nd defendant do vacate L.R Abogeta/U-Kithangari/2567 and render vacant possession failure to which he be forcibly evicted.

(iii) Costs of the counter claim.

5. The first defendant filed a statement of defence on 27.2.2017 where he denies the claim of the plaintiff. However, he admits having sold the suit land to the 2nd defendant.

The evidence

6. The plaintiff testified and he also adopted his statement dated 20.12.2016 as his evidence. He avers that vide a sale agreement dated 7th February 2015, Wilfred Nkanata Githinji sold to him a land parcel No. Abogeta/U-Kithangari/2134 which measured 0.76 ha. He avers that the surveyor demarcated the land and he got his share which was registered as title no. Abogeta/U-Kithangari/2567, where the remaining

portion of 0.36 ha was left with Wilfred. The purchase price was 650,000. The plaintiff argues that he paid a deposit of 400,000 upon which he took possession of the land. He stated that the remaining 250,000 was to be paid in two installments, one on December 2015 while the 2nd installment was to be on 31st May 2016 but the land was not transferred to him. Before the payment of the 1st installments, the plaintiff argues that his father gave him a portion of his land so that he could sell that portion to enable him pay the balance. The 1st defendant agreed to this proposal vide an agreement dated 17th August 2015 that plaintiff would give 1st defendant the portion at Makandune which plaintiff's father had given him (the plaintiff) to settle the remaining balance. The two (plaintiff and 1st defendant) paid the site visit and the 1st defendant liked the land. 1st defendant had then brought a surveyor who subdivided the land and also informed the plaintiff's father that he was willing to buy another ¼ acre from the same parcel of land i.e. L.R No. Abothuguchi/Makandune/395 at a price of Kshs.100,000 which they agreed and the 1st defendant was told to take possession since the land control board was taking long to give consent to facilitate the transfer.

7. Later on, the plaintiff avers that he discovered that Wilfred had already sold the suit land Abogeta/U-Kithangari/2567 to Martin Mwirigi (the 2nd defendant) without the plaintiff's knowledge and the 2nd defendant had already acquired the title. The plaintiff stated that he went to lands office and placed caution on the land and sought legal counsel from Ms. Maitai Rimita & Co. Advocate. The plaintiff states that he has lived on the suit land for a long time and has also done much developments, and that is the place where his family resides. That is why he prays for an order for the 2nd defendant to transfer the suit land to him (plaintiff).

8. During cross examination PW1 stated that he has no consent from land control board in respect of the transfer of the suit land from 1st defendant to him.

9. Pw2 is one Susan Wanja who also adopted as her evidence her statement dated 31.3.2017. She avers that since February 2015, when plaintiff occupied the suit land, they have been neighbours. She is aware that PW 1 bought the land from 1st defendant.

10. Pw 3 is one Peter Kithinji Rutere who adopted as his evidence his statement recorded on 31.3.2017. He is a friend to plaintiff as they even went to school together. 1st defendant was his neighbor for many years and he indicated to him that he wanted to sell his land to plaintiff. The land was located at Gaitome village in Kithangari location and apparently when the sale took place, Pw 3 was called by 1st defendant to go and assist in putting up the boundary marks. Pw 3 used "Mitungugu" trees to put the boundary demarcation on the land of plaintiff. He avers that plaintiff is the one who has been tilling the suit land.

11. PW 4 is one Marete Muchai. He adapted as his evidence, his statement recorded on 3.4.2017. He avers that he used to stay on the suit land as an employee of 1st defendant. This was before subdivision of parcel 2134. However 1st defendant told him to leave as he had sold the land, so he vacated and in came Kirimi.

12. Pw1 produced as his exhibits the documents in his list dated 9.1.2017.

13. DW 1 is Martin Mwirigi, the 2nd defendant. He recorded a statement on 6.3.2017 which he adopted as his evidence. DW 1 desired to buy land so he consulted his father who is DW 2. Around June 2016, he was informed that land was available for sale. He avers that a search was conducted which revealed the title was clean and the land was vacant.

14. On 7.6.2016, DW 1 entered into an agreement with 1st defendant for the sale of the suit land where he purchased the land at a consideration of Kshs.810,000. He then acquired title to the suit land on 9.11.2016. There after he learnt that plaintiff had moved into the suit land and had also reported the dispute to the Nkubu CID. Shortly thereafter, the case was filed. 2nd defendant avers that at no time was he aware of plaintiff's interests on the suit land.

15. DW 2, Leonard Mutwiri Arimi is the father of 2nd defendant. He recorded a statement on 6.3.2017 which he adopted as his evidence. He is the one who scouted for the land for his son. He is also the one who did the search and generally assisted his son in buying the land. He avers that the land is now occupied by plaintiff.

16. The 2nd defendant produced as his exhibits the documents in his list dated 3.2.2017.

17. Dw 3 is the 1st defendant. He recorded a statement on 25.9.2017 which he adopted as his evidence. His evidence is that on 7.2.2015, the plaintiff and himself (the 1st defendant) entered into a sale agreement to sell 1 acre to be excised from L.R No. Abogeta/U-Kithangari/2134 at a consideration of 650,000. DW 3 avers that the plaintiff had paid a deposit of Kshs.400,000 and the balance was to be paid in two installments the first being of Kshs. 100,000 to be paid on or before 31.12.2015 and the 2nd of Kshs. 150,000 to be paid on or before 31.5.2016. DW 3 then subdivided the suit land into two portions namely L.R Abogeta/U-Kithangari/2567 & 2568. He stated that during the negotiations for the sale of 1 acre to the plaintiff, it was orally agreed that the plaintiff would pay the defendant Kshs.300,000 for a three bedroomed semi-permanent house which was on the suit land. They also agreed that the plaintiff would pick the coffee, harvest the bananas and share equally the proceeds of any sale with 1st defendant. They further agreed that the 1st defendant would cut down over 100 gravelia trees. DW 3 averred that the plaintiff did not honour the said agreement and instead, plaintiff went ahead to uproot the coffee trees without DW 3's consent and sold the bananas without sharing the proceeds.

18. The 1st defendant further contends that the plaintiff's father, one Festus Mwobobia Kanampiu and himself entered into an agreement for sale of ¼ of an acre to him (1st defendant) from L.R Abothuguchi/Makandune/935 at a consideration of Kshs.100,000 and DW 3 paid a deposit of Kshs.50,000 and cleared the remaining balance via Mpesa in august 2015. DW 3 argues that the plaintiff's father approached him and told him that the plaintiff was unable to clear the balance of Kshs.250,000 for L.R Abogeta/U-Kithangari/2567. The plaintiff's father then proposed to give the 1st defendant 1 acre from Mwobobia's parcel of land situated at Makandune and transfer the suit land to Mwobobia. The plaintiff's father had told him he would bring him papers to sign for the agreement which he never brought and also never

transferred the 1 acre in exchange to the 1st defendant's land. According to DW 3, the sale agreement dated 17/8/2015 was a forgery and he claims that he never went to any office of the advocate by the name Kiogora Mugambi & co, neither did he sign the said agreement. He also argues that due to breach of the agreement by the plaintiff by failing to pay the remaining balance of Kshs.250,000 as they had agreed, DW 3 went ahead and sold to the 2nd defendant the suit land at a price of Kshs.810,000.

19. 1st defendant avers that he had fees problem, that is why he looked for another buyer as plaintiff never paid him the Shs.250,000 balance. He avers that he was ready to refund to plaintiff the money the latter had paid.

20. He also avers that he had left his workman on the land but he was not sure if this workman is the one who allowed plaintiff to enter the land illegally as there was a house. 1st defendant admits that he never told 2nd defendant that he had sold the land to plaintiff. He sold the land to 2nd defendant when there was a five roomed semi-permanent house, a cow pen, bananas, coffee trees, yams and arrow roots on the land.

Submissions

21. For the plaintiff, issues have been framed as follows:

- (i) Whether the 1st defendant sold the suit land to the plaintiff
- (ii) Whether the plaintiff took possession and embarked on developments.
- (iii) Whether the defendant is in breach of trust in terms of section 28 of the Land Registration Act.
- (iv) Whether the plaintiff who is in possession of land can be defeated by the rights of the registered proprietor who put him in possession.
- (v) Whether failure to obtain land control board consent rendered the transaction void.

22. On the 1st issue, it is submitted that plaintiff and 1st defendant did enter into a contract for the sale of the suit land via the agreement of 7.2.2015, whereby plaintiff paid Shs. 400,000 and was put into possession.

23. On the second issue it is submitted that plaintiff has been living on the suit land since he took possession. His witnesses PW 2, 3 and 4 have backed him on this issue of occupation. On the 3rd issue, plaintiff avers that vide the agreement of 17.8.2015, the balance of SHs.250,000 was marked as settled hence 1st defendant was in breach of trust when he entered into another transaction with 2nd defendant. Accordingly, and going by section 28 of the Land Registration Act, plaintiff's claim is an overriding interest which crystalizes when one is in possession of the land.

24. On issue no. 4 it is submitted that plaintiff is the one on the suit land having been put into possession by the 1st defendant.

25. On issue no. 5 it is submitted that the failure to obtain land control board consent does not render the transaction void for all interests and purposes and reference has been made to the case of **Nyamunyu vs Nyaga (1983 KLR 282)**.

26. In conclusion, it was submitted that defendant received payments for the suit land of which 1st defendant doesn't dispute, that this court is bound to deliver substantive rather than technical and procedural justice, that this is a court of law and is a court of equity and equity shall suffer no wrong without a remedy and that no man shall benefit from his own wrong doing and that equity detests unjust enrichment.

27. Plaintiff also cited the case of **Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri Nyeri Court of Appeal no. 6 of 2011** to support his submissions.

28. For the 2nd defendant issues were framed as follows:

- (a) Whether the suit as filed reveals any cause of action against the 2nd defendant.
- (b) Whether there was any fraud in the transfer of the suit land to the 2nd defendant.
- (c) Whether any trust is proved.
- (d) Whether the defendant is an innocent purchaser for value without notice.

29. On the first issue, the 2nd defendant submitted that the suit against him was a non-starter since he was not privy to the transaction between the plaintiff and the 1st defendant and that the agreement between the 1st defendant and the plaintiff for the purchase of the suit land was totally independent of the agreement between the 1st defendant and the 2nd defendant. The 2nd defendant also submits that by the time he entered into an agreement with the 1st defendant, the land was without encumbrances, thus the 2nd defendant was not to blame for the woes of the plaintiff and that the plaintiff has a remedy against the 1st defendant for a refund of the consideration paid.

30. On issue no. 2 it was submitted that the plaintiff did not lead any evidence as to whether there was any fraud involved in the transfer of the suit land to the 2nd defendant and that the particulars of fraud as contained in the plaint have not been proved. The 2nd defendant avers that he was a purchaser for value and should not be victimized.

31. On the 3rd issue the 2nd defendant submitted that no trust is proved either by the pleadings or the testimonies on record and that the 1st defendant did not put the plaintiff into possession for there to be construed a trust, customary, constructive or otherwise and that the plaintiff moved to the suit land when he learnt that the land had been sold to another party. The 2nd defendant termed the plaintiff as a trespasser who should be ordered to vacate the suit land and seek a remedy elsewhere.

32. On the 4th issue that no evidence was tendered in court to disprove the contention that the 2nd defendant was an innocent purchaser, the 2nd defendant submitted that the plaintiff has utterly failed to prove any cause of action as against the 2nd defendant and that the suit land was transferred pursuant to law and procedures and termed the title owned by him as a good one. His prayer is for the dismissal of the plaintiff's suit against the 2nd defendant and find in his favour as per the relief sought in the counter claim.

33. The 1st defendant did not proffer any submissions.

Analysis and determination

34. This is a case whereby 1st defendant sold the suit land to plaintiff but the transaction for one reason or another was not completed and transfer was not effected either. The 1st defendant then sold the suit land to 2nd defendant who promptly obtained a title to that effect.

35. I frame the issues for determination as follows:

- (i) Whether the defendants held and still hold the parcel of land L.R Abogeta/U-Kithangari/2567 in trust for the plaintiff.
- (ii) Whether there was fraud in the sale of land from 1st defendant to 2nd defendant
- (iii) What relief is available to the claimants (plaintiff and 2nd defendant).

Trust

36. It is trite law that a party relying on the existence of a trust which is a matter of fact must prove through evidence the existence and creation of such a trust – see **NBI Court of Appeal Civil Appeal no. 33 of 2009 Gakanga Gatanga & 3 others vs Gatanga Ngari & 2 others. Kirwere Njogu vs Pius Mugo. Nyeri COA no. 59 of 2015**

37. **Section 107** of the Evidence Act provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person”.

38. **Section 109** of the aforementioned act provides that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

39. Thus the onus is upon the plaintiff to prove the existence of the trust.

40. From the evidence adduced herein, it is not disputed that plaintiff is the one in occupation of the suit land. However the question arises as to how and when the plaintiff came to occupy the land.

41. The 1st defendant has not denied having entered into the land sale agreement with plaintiff. I believe this is the agreement dated 7.2.2015, Clause 7 there of states that **“The purchaser shall get vacant possession of the said parcel immediately”.**

42. There is hence a likelihood that plaintiff did take up possession of the suit land thereafter. However, the plaintiff was to pay a balance of Shs.250,000 though he had paid shs.400,000. This balance was to be paid as follows: Shs.100,000 on 31.12.2015 and Shs. 150,000 on 31.5.2016.

43. Apparently these amounts were not paid ostensibly because of the further agreement of 17.8.2015, where 1st defendant was given some other land belonging to plaintiff's father but which was plaintiff's share in lieu of Shs.250,000. Thus as far as plaintiff is concerned he had settled the balance of Shs.250,000.

44. However 1st defendant denies existence of this agreement of 17.8.2015. What he says is that the father of plaintiff did sell to him ¼ acre of land at Makandune which land he utilizes. What emerges from the evidence of these two parties is that the agreement of 17.8.2015 is vague and did not state in clear terms that it was amending the earlier agreement of 7.2.2015.

45. Further the agreement of 17.8.2015 was between plaintiff's father and 1st defendant and not between plaintiff and 1st defendant. In P-Exhibit 2, plaintiff is but only a witness to that agreement of 17.8.2015.

46. The other agreement availed by plaintiff as P-Exhibit 3 and which is acknowledged by 1st defendant is the one of 7.4.2015 for sale of ¼ acre of land. Plaintiff is not in the picture in so far as that agreement is concerned.

47. From the foregoing it is clear that plaintiff and 1st defendant had entered into a contract of which plaintiff was in breach as he never complied with terms of payment set out in their agreement (P. exhibit 1). Plaintiff cannot claim that his agreement was amended via P. exhibit 2, in view of the fact P. exhibit 2 is not only vague but it was never implemented. Furthermore plaintiff is just a witness and not a party in it and finally that agreement has been disclaimed by 1st defendant.

48. Neither party appear to have invoked clause 10 in the agreement of 7.2.2015 which was to the effect that the innocent party was to be paid shs.1,300,000 by the defaulting party. Thus it can be said that both parties (plaintiff and 1st defendant) abandoned their obligations midstream of the contract.

Can a trust be construed in such circumstances?

49. In the case of **Ayub vs Standard Bank of S.A 1963 E.A 619** quoted with authority in **Solomon Amian vs Salome Mutenyo Otunga (2016) eKLR** it was held that "**Courts will not imply a trust save in order to give effect to the intentions of the parties. The intentions of the parties must be clearly determined before a trust can be implied**".

50. I find that although some substantial consideration flowed from the transaction of plaintiff and 1st defendant, there is no clear picture or common intention of the parties on how the shs.250,000 was to be paid after 31.5.2016.

51. This is a case where there was a contract, which contract was breached and or frustrated by parties. Plaintiff's occupational or possessory rights have therefore been eclipsed by the greater issue of breach of contract. The doctrine of constructive trust ought to favour persons who have paid full consideration in fulfillment of the agreements. The plaintiff never paid the full consideration and hence his recourse is not in equity.

52. I must also add that plaintiff's occupation of the suit land must have taken place after February 2015 and the dispute had already arisen by the end of year 2016. It cannot therefore be said that the suit land is where plaintiff had raised a family. Even the semi-permanent house had belonged to 1st defendant. I therefore find that plaintiff's nature of occupation on the suit land does not amount to an overriding interest.

53. I must also point out that there is a clear distinction between this case and the Macharia Mwangi case (Supra). In the **Macharia Mwangi** case, there was no issue of unpaid consideration and the dispute arose as the land was expansive and there was an issue as to who was to meet costs of procuring the titles and how the land was to be subdivided. The appellants' in the Macharia Mwangi case had also been put in possession of land since 1983-1990 and had been on the land for many years. That is not the scenario in the present case.

54. I conclude that a trust does not arise in this case.

Was there fraud in the sale of the suit land by 1st defendant to 2nd defendant?

55. Fraud has to be proved by evidence – see **ELC 27 of 2016 Kisii Elijah Ouko Matagaro & another vs Roselyne Dola Ouko & 4 others**. As I have stated earlier, the agreement which appears to have been capable of being enforced between plaintiff and 1st defendant is that of 7.2.2015. The last instalment was to be paid by 31.5.2016. Thus the contract was broken after 31.5.2016. The agreement between the 1st defendant and 2nd defendant commenced on 23.9.2016 (see 2nd defendant's exhibit 3). The 1st defendant was by then the registered owner of the land having all the rights and privileges set out under section 25 of the Land Registration Act, where it is stipulated that. "**The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever**".

56. I find no evidence of fraud in the transaction that culminated in the issuance of title to 2nd defendant.

What relief is available to plaintiff and 2nd defendant?

57. I have already established that 2nd defendant is lawfully entitled to the suit land which means that it is no longer tenable for plaintiff to continue occupying the land. On the other hand, I have taken into account the fact that plaintiff did pay a sum of shs.400,000 to the 1st defendant which sum the 1st defendant has admitted in his evidence that he was willing to refund.

58. In order to try and bring litigation to an end in respect of the suit land, I find it expedient to give the following orders:

(1) **It is hereby declared that 2nd defendant MARTIN MWIRIGI ARIMI is the lawful proprietor of land parcel no. Abogeta/U-Kithangari/2567.**

(2) **The plaintiff is hereby ordered to vacate the land registration no. Abogeta/U-Kithangari/2567 within a period of 60 days failure to which eviction to take place.**

(3) The 1st defendant is hereby ordered to pay to the plaintiff the sum of Shs.400,000 within 60 days failure to which interest to start accruing on the amount at courts rates.

(4) Each party is directed to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 15TH DAY OF OCTOBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Rimita C. for plaintiff

Mokua for 2nd defendant

HON. LUCY. N. MBUGUA

ELC JUDGE