



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 29 OF 2011

ANDREW WAFULA MASINDE..... 1ST PLAINTIFF

ELIZABETH NABUKWANGWA MASINDE.....2ND PLAINTIFF

SUSAN NABALAYO MASINDE..... 3RD PLAINTIFF

RAEL NEKESA MASINDE.....1ST PLAINTIFF

VERSUS

STEVE MWANGI NGURE.....1ST DEFENDANT

HANNINGTON MUIGAI KARIUKI.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. By a plaint dated 16/3/2011 and filed in court on 25/3/2011 the plaintiffs sought the following orders against the defendants jointly and severally for:-

(a) A declaration that the sale of land agreement made on 1/4/2006 between the 4th plaintiff and the 1st defendant in respect of plot No. 428 and the subsequent subdivision, mutation, transfer to and/or registration of the 1st defendant in respect of KIMININI/KINYORO/BLOCK 3/MATISI/1166 as well as any purported leasing or sale of it to the 2nd defendant or to any other person or at all, are voidable and/or void *ab initio*.

(b) An order for cancellation of the survey plans and mutation of Plot No. 428 into KIMININI/ KINYORO/BLOCK 3/MATISI/1165 and KIMININI/KINYORO/BLOCK3/MATISI/ 1166 as well as cancellation of these titles and title deed therefrom, respectively.

(c) An injunction restraining the defendants jointly and severally by themselves or through their agents, servants, assignees, associates, and families from occupying, developing, leasing, selling, charging, transferring, subdividing or in any way dealing with the land comprising KIMININI/ KINYORO/BLOCK 3/MATISI/1165 and KIMININI/KINYORO/BLOCK3/MATISI/ 1166.

(d) Interest.

(e) Costs of the suit.

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

2. According to the plaint the 4th plaintiff was the registered owner of **LR. No. Kipsongo/Matisi/438** situate in Trans-Nzoia County having inherited it from her late husband one **John Masinde**. The 1st, 2nd and 3rd plaintiffs are her children. It is averred that she held the land in trust for them. On 1st April, 2006 she entered into a sale agreement with the 1st defendant for sale of part of the suit land for **Kshs.100,000/=** but was only paid **Kshs.80,000/=**. The agreement states that he would pay the balance on or before **20/8/2006** which he failed to do. Nevertheless he caused **Plot No. 438** to be subdivided into smaller portions of which **Kiminini/Kinyoro Block 3/Matisi/1166** was registered in his name and the rest being comprised of **Kiminini/Kinyoro Block 3/Matisi/1165** was registered in the 4th plaintiff's name. The agreement also provided that on payment of **Kshs.20,000/=** being the balance the parties would visit Land Control Board and obtain consents

to transfer. The first three plaintiffs have challenged in this suit the contract of sale on the grounds that the 4th plaintiff held the land in trust for them and they were not consulted nor involved in the sale and they did not consent to or witness the same. They also aver that the failure of the 1st defendant to complete the payment of the purchase price vitiates the agreement. They maintain that the 4th plaintiff is illiterate and was duped and therefore the transaction was fraudulent. The 2nd defendant is said to have dumped building materials on the plot sold to the 1st defendant claiming to have bought the same from the 1st defendant. Particular of fraud are leveled against the 1st defendant in **paragraph 12** of the plaint.

The 1st and 2nd Defendants Joint Statement of Defence

3. The 1st and 2nd defendants filed a joint defence on **26/11/2011**. The defendants deny that the land devolved to the 4th plaintiff from her late husband or that it was held in trust. They deny fraud and aver that the 4th plaintiff was paid the full purchase price for the property or that the 1st defendant was in breach and maintain that the sale by the 1st defendant to the 2nd defendant in the year 2006 was legal. They insist that all the proper procedures were followed in respect of transactions regarding the transfer of the property. They seek dismissal of the suit with costs.

The Plaintiffs' Evidence

4. The **PW1, Andrew Wafula** the 1st plaintiff testified on **29/11/2018**. He adopted his statement dated **21/3/2011** as evidence-in-chief in this matter. His evidence is that the defendants purchased the suit land from his mother without involving her children in 2006; that the plot was sold for Kshs.100,000/=; that Kshs.80,000/= was to be deposited in his mother's account; that they enquired at the bank and they were informed by the manager that no money was ever deposited and since then they have not witnessed any proof of deposit of such money in the bank; that his mother went to the Land Control Board; that they live on the land. He maintain this version upon cross-examination by Mr. Waweru for the defendants.

5. **PW2, Rael Nekesa Wabwire**, the 4th plaintiff testified on **4/4/2019**. Her evidence is that she sold land to the 1st plaintiff who did not pay her; that he promised to deposit the money in the bank and pay the rest of the money by August, 2006; that after making misrepresentation to her that he had deposited the money the parties went to the Land Control Board and the land was transferred to him; that later upon discovering the fraud she reported to the Chief and got a bank statement which showed that the 1st defendant had not deposited any monies into her account. According to her the 1st defendant demolished the houses on the land he was sold and threatened her children. On cross-examination she held closely to her story and maintained that only Kshs.2,000/= was paid to the elders present at the execution of the agreement and that the 1st defendant informed her that if she got the Kshs.80,000/= in cash she may be killed by unknown people hence choice of deposit in a bank. She denied ever getting balance of Kshs.20,000/= from him. When shown an acknowledgement of receipt dated 15/5/2006 she denied having ever seen it.

6. **PW3, Elizabeth Nabukwagwa Masinde**, the 2nd plaintiff testified on **4/4/2019**. She adopted her statement dated **18/2/2011** as evidence-in-chief in this case. Her evidence is that she found their house being demolished and screamed yet people never helped them; that her mother was intent on selling part of the land to enable her buy land for her brothers elsewhere. She denied that she was ever informed of the sale of the land to the 1st defendant.

7. **PW4, Joyce Kiplagat**, the Branch Manager, Post Bank, Kitale testified on **25/4/2019**. Her evidence is that there was no deposit of any amount Kshs.100,000/= in the 4th plaintiff account held at her bank. She produced a copy of the bank statement (**P. Exhibit 2**) for the period 21/8/2006 to 31/12/2006.

The Defendants' Evidence

8. **DW1, Hannington Muigai Kariuki** the 2nd defendant testified on **30/4/2019**. He adopted his statement and all the other statements dated **21/4/2011** as his evidence-in-chief in this matter. His evidence is that the 1st defendant sold him a plot for Kshs.115,000/= on 21/11/2006 and that it was registered in his name. He produced the original agreement as **D. Exhibit 1**; that he averred that the 1st defendant took him to the 4th plaintiff who had sold him the land. He confirmed from the 1st defendant who showed him an acknowledgement of receipt dated 15/5/2006 (**D. Exhibit 2**) that he had paid the 4th plaintiff. He also showed him Land Control Board Minutes dated 7/6/2006 vide which the sale was approved (**D. Exhibit 3**). He produced letter of consent as **D. Exhibit 4** and his original title issued on 10/6/2006 as **D. Exhibit 5**. His belief is that all the consideration was paid. His further evidence is that by the time of the sale the 4th plaintiff was a village elder and the agreement between him and the 1st defendant was executed at her house during which transaction she never complained of non-payment.

SUBMISSIONS

9. No submissions were filed on behalf of any of the parties.

DETERMINATION

10. The issues for determination

(1) Whether the land was held in trust for the family by the 4th plaintiff.

(2) Whether the sale transaction vide agreement dated 3/4/2006 was completed.

(3) *Whether the sale transaction between the 4th plaintiff and the 1st defendant was tainted by fraud and should be nullified.*

(4) *Whether the sale transaction between the 1st defendant and the 2nd defendant ought to be nullified.*

(5) *What should pay the costs?*

11. The issues are addressed as herein under:

(1) ***Whether the land was held in trust for the family by the 4th plaintiff***

12. No evidence of kinship was provided, and they appeared to take it that the court would assume it to be the truth that they were all kin with locus to institute the suit. However, there was no doubt raised by the defence that they were, or that the 4th defendant was the mother to the 1st to 3rd defendants.

13. No evidence of registration of a trust was led. No trust document was produced by the plaintiffs. They only averred that the land was family land left to the 4th defendant by her husband, who was father to the 1st -3rd plaintiffs and that the 4th plaintiff had held the whole land in trust for the family.

14. The suit land was registered under the **Registered Land Act** (now repealed). If any trust was registered it would be noted on the register. However the court is aware that not all interests in land required to be noted on the register under the **Registered Land Act. Section 30** of the Act provided as follows:

“30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, *without their being noted on the register* -

(a) rights of way, rights of water and profits subsisting at the time of first registration under this Act;

(b) natural rights of light, air, water and support;

(c) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(d) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of section 46;

(e) charges for unpaid rates and other moneys which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;

(h) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law;

Provided that the Registrar may direct registration of any of the liabilities, rights and interest hereinbefore defined in such manner as he thinks fit.”

15. Proof of any kind of trust is a matter of evidence. In the case of **Salesio M’ itonga v. M’ithara & 3 Others (2015) eKLR** the Court of Appeal stated as follows regarding trust:-

“It is trite law that trust is a question of fact and has to be proved by evidence. In *Gichuki -vs- Gichuki - Civil Appeal No. 21 of 1981*, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust.....We concur with the following findings by the High Court:-

“Trust must be proved by credible evidence adduced by the person claiming that a trust exists.””

16. I do not hear the plaintiffs to be claiming that there was a customary law trust in the plaint although the witness statement of the 2nd plaintiff alleges so. No evidence of the state of their customary law was however adduced in court by the plaintiffs.

17. In **Esiroyo vs Esiroyo 1973 EA 388 and Obiero Vs Opiyo & Others 1972 EA 227**, it was held that customary law rights are not overriding rights under **Section 30** of the Act. In **Kanyi vs Muthiora 1984 KLR 712** the Court of Appeal held that the title of a registered owner under the registered land act (Cap 300) is free from all interests and claims except all those shown in the register together with such overriding rights that exist and are not required to be noted in the register and that rights under customary law are not overriding rights under

section 30 of the **Registered Land Act Cap 300**.

18. In this case evidence of trust must be sought. A trust can not be inferred merely from a narration or admission of kinship. The mere fact that the property was left to the 4th plaintiff is inadequate to prove that the 4th plaintiff held the land in trust for the other plaintiffs. The court must therefore rely other evidence to establish that there lay a trust beyond the particulars of registration evident in the register.

19. In this case, the plaintiffs produced only two documents at the hearing: the agreement dated **3/4/2006** and a copy of the 4th defendant's bank statement for the period **21/8/2006** to **31/12/2006**. No title or other land records were produced by the plaintiffs.

20. The evidence of the 4th defendant commenced at the point of sale of the land to the 1st defendant and never addressed the history of the land which would have greatly assisted the court in determining whether there was an express or implied trust. Coming from the person who should have been considered the prime witness of the plaintiff's case, it was grossly inadequate and anticlimactic.

21. There was nothing vide which this court could infer that the 4th plaintiff held the land in trust for the rest of the plaintiffs.

22. I find that no trust was proved.

(2) **Whether the sale transaction vide agreement dated 3/4/2006 was completed.**

23. The agreement between the 4th plaintiff and the 1st defendant is admitted by both parties. The agreement in question states that the 4th plaintiff has received Kshs.80,000/= through her Post Bank Account whose number is given and that the balance of Kshs.20,000/= would be paid by 26/8/2006. It also permits the 1st defendant to demolish houses on the portion sold to him after payment of Kshs.20,000/=, that is, after the conclusion of the payment of the purchase price. A visit to the Land Control Board for consent was also dependent on whether the balance of Kshs.20,000/= has been paid.

24. I have examined the witness statement of the 4th plaintiff dated **18/3/2011** and filed on **25/3/2011** and an excerpt of it states as follows:

“Unfortunately I was sick at the moment having had two operations and I did not involve any of my children neither did I inform them for the sum of Kshs.100,000/= out of which I was paid Kshs.80,000/= we had agreed that would pay Kshs.80,000/= on the signing of the agreement and the balance of Kshs.20,000/= to be paid at a later date. He has not paid me the balance of Kshs.20,000/= to date.”

25. It must be recalled that the defendants' defence is that the whole of the purchase price was paid. **Paragraph 6** of the plaint states as follows:-

“On or about 1/4/2006 the 4th plaintiff was duped to enter into a sale agreement with the 1st defendant in which she purportedly sold him part of the said family land comprising plot No. 438 at a price of Kshs.100,000/=, out of which he paid her only Kshs.80,000/=, leaving a balance of Kshs.20,000/=.”

26. The above excerpts from both the plaint and the seller's formal written statement are an express admission that Kshs.80,000/= was paid to her by the 1st defendant. This court's quest to establish the truth as to whether Kshs.80,000/= was paid by the 1st defendant is therefore at an end.

27. It is trite law that evidence must accord with pleadings. The cases of *Dakianga Distributors K Ltd Vs Kenya Seed Co Ltd 2015 eKLR* and *Global Vehicles Kenya Ltd vs Lenana Road Motors (2015) eKLR* are support for the proposition that a party will not be allowed to lead evidence that is contrary to their pleading. If any such evidence is has been led it should be disregarded.

28. In the **Dakianga case (Supra)** the Court of Appeal stated as follows:

“This Court in Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others (supra) cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC SC 91/2002 where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:

“... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

The judges in that case also stated:

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

29. The 4th plaintiff cannot be permitted rely on evidence contrary to the plaint and her witness statement. The other plaintiffs are also bound by the concessions that she makes in the plaint and in her witness statement. This court must on the basis of those documents find that

Kshs.80,000/= was paid. What remains is the question as to whether Kshs.20,000/= is still outstanding.

30. The agreement provided that a visit to the Land Control Board to seek its approval of the transaction was to be paid only after Kshs.20,000/= being the balance was paid to the 4th plaintiff. It also provided that the houses would be demolished upon that same event.

31. The Land Control Board Minutes of 7/6/2006 (**D. Exhibit 3**) shows that the consent of the board was issued. The plaintiffs did not dispute the genuineness of either the minutes or the consent (**D. Exhibit 4**).

32. This court is convinced that the parties attended the board meeting and jointly obtained the consent.

33. There is an acknowledgement of receipt dated 15/5/2006 which was not effectively challenged by the plaintiffs. It shows that the 4th plaintiff received Kshs.20,000/= from the 1st defendant.

34. It must be recalled that the demolition of the houses on the purchased land was subject to payment of that amount. That demolition is confirmed to have taken place.

35. The conclusion that this court arrives at is that the 1st defendant must have paid Kshs.20,000/= to the 4th plaintiff in order for her to agree to attend the Land Control Board meeting. That being the last amount payable under the agreement and this court having found that it was also paid the only conclusion is that the 1st defendant fulfilled his part of the contract.

36. The search certificate which forms part of the court record shows that the 1st defendant was registered as proprietor of **Kiminini/Kinyoro Block 3/Matisi/1166** on **13/6/2006**. This is a date well after the date given in **D. Exhibit 2**.

37. The letter of consent had already been issued by 7/6/2006.

38. The transfer was therefore effected after the entire purchase price had been paid and the proper procedure followed. I do not find any wrong doing on the part of the 1st defendant in causing the land to be transferred to himself.

(3) Whether the sale transaction between the 4th plaintiff and the 1st defendant was tainted by fraud and should be nullified.

39. No fraud is alleged against the 4th plaintiff who was a party to the agreement.

40. Regarding the particulars of the alleged fraud, it is clear that in the light of the holding that the agreement between the parties was properly completed I find that there would be no basis to hold the 1st defendant culpable of any fraud. Merely entering into a sale agreement with a family member without the knowledge of fellow family members is not per se fraud. It was not established by the plaintiffs that the 4th plaintiff was illiterate or that she entered into that sale agreement purely as a result of her illiteracy. Illiterate persons also have a right to buy and sell and so that condition per se is also not evidence of fraud. The 1st defendant was allowed by law to dispose of the 2nd defendant any property that had been properly registered in his name. His disposal of the suit land was therefore not evidence of fraud.

41. In the light of the above facts and conclusions, this court finds that there is no basis for holding that the 1st defendant is guilty of any fraud in the transaction between him and the 4th plaintiff.

(4) Whether the sale transaction between the 1st defendant and the 2nd defendant ought to be nullified.

42. The 2nd defendant purchased the land from the 1st defendant. The transaction between the 1st defendant and 4th plaintiff has been found to have been clean and not tainted by any fraud. No fraud is alleged in the plaint as against the 2nd defendant. I find that there would be no reason to order the title that he holds be nullified.

(5) Who should pay the costs?

43. I find that the plaintiffs' suit against both defendants is not well founded and I hereby dismiss it with costs to the defendants.

Dated, signed and delivered at Kitale on this 9th day of October, 2019.

MWANGI NJOROGI

JUDGE

9/10/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kitembe for Waweru for defendant

N/A for plaintiff

COURT

Judgment read in open court at 12.40 p.m.

MWANGI NJOROGE

JUDGE

9/10/2019