



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT IN MIGORI

ELC CASE NO. 227 OF 2017

(Formerly Kisii Elc case No. 423 of 2013)

FRANCIS RIOBA MOSETI.....PLAINTIFF

VERSUS

NANCY MOTONGORI MWITA.....1ST DEFENDANT

DAVID SABAI MWITA.....2ND DEFENDANT

JUDGMENT

A-INTRODUCTION

1. The property in dispute is a portion of land measuring approximately 25 feet by 100 feet of land reference No. Bukira/Bwisaboka/1910 (the suit land). It is a sub division of land reference No. Bukira/Bwisaboka/1234 situate in Migori County within the Republic of Kenya.
2. The plaintiff was initially represented by Abisai and Company Advocates. Presently, he is represented by Kwanga Mboya and company Advocates further to the notice of change of Advocates dated 12th November, 2013. The defendants are represented by learned counsel, Mr. L. Mose of Mose, Mose and Millimo and Company Advocates.
3. The original plaintiff, Francis Rioba Mosei (PW1) as well as the present plaintiff, Leah Boke Francis (PW2) testified before Kisii Environment and Land Court (Mutungi J) on 9th May, 2016. Following the demise of PW1, a notice of motion application dated 13th December, 2016 for substitution of PW1 with PW2, was unopposed and allowed on 23rd February, 2017.
4. On the same date, this suit was transferred to this court for further hearing and determination. Consequently, on 18th July, 2017, it was directed that the matter proceed to further hearing.

B-THE PLAINTIFF'S CASE

5. By a plaint dated 16th October, 2013 and filed on the same date, the plaintiff has sued the defendants jointly and severally for;

i. A declaration that the sale of land agreement dated 19th February 2013 and the agreement dated 23rd July 2013 are null and void and they be nullified and/or rescinded.

ii. The transfer of registration of LR NO. BUKIRA/BWISABOKA/1910 in the 1st Defendant's name be nullified as registration do revert to the Plaintiff's name.

iii. The Defendants be evicted from LR NO. BUKIRA/BWISABOKA/1910.

iv. Costs.

v. Interest on costs.

vi. Any other relief.

6. The gist of the plaintiff's case is that he (PW1) is the registered proprietor of the suit land. That on 19th February 2013, he entered into an

agreement with the first defendant (DW1) for the sale of the land measuring 25 feet by 100 feet thereof. That through fraud, the defendants caused the entire parcel of land to be transferred to the name of the first defendant and started development of the same thus provoking the instant suit.

7. PW1 testified that he sold only a portion of the suit land measuring 25 feet by 100 feet at the consideration of Kshs. 150,000/= as per agreement dated 19th February, 2013 (P Exhibit1). That there was no Land Control Board consent regarding the sale as the DW1 did not pay the consideration balance of kshs 60,000/-=. That DW1 went to the land control board without PW1 who denied ever signing transfer and application to the Land Control Board **(PExhibits 2 & 3 respectively)**.

8. PW1 further stated that he never sold the whole portion of the land measuring 50feet by 100 feet at Kshs 600,000/- in favour of DW1 as alleged by the defendants. During cross-examination, PW1 stated that:-

“I never agreed to transfer my whole portion of land.”

9. PW2, stated that she was only aware of the sale of a portion of land measuring 25 feet by 100 feet. That she was unaware of any other agreement relating to further sale of land for the sum of Kshs 450,000/- in addition to kshs. 150,000/- being purchase price earlier paid to PW1 for a portion measuring 25 feet by 100 feet. In examination in chief, she stated:

“I am not aware of any agreement that my husband sold the other portion of 25ft by 100ft. I am not aware of any agreement where my husband received Kshs 450,000/- in addition to the initial Kshs 150,000/- for the initial sale.”

10. PW3, Thomas Muniko, a counsel stated that he was aware of PExhibit 1 relating to the sale of land measuring 25 feet by 100 feet at a consideration of Kshs. 150,000/-. He relied on his statement dated 18th December, 2018. **During cross examination**, PW3 denied knowledge of any other agreement save PExhibit1.He stated as follows:

“ That is the only agreement and amount of Kshs 150,000/- being consideration in the agreement dated 19.2.2013(PEX1).”

11. **During cross examination**,PW1stated thus:

“I did draw PEXh1. I am not aware of any other agreement. It is true that PEXh1 is not in contest.”

defendants, the whole of the suit land or a portion measuring 25 feet by 100 feet and whether the defendants effected fraudulent transfer thereof in favour of the plaintiff. Counsel urged this court to allow the orders sought in the plaint.

C-THE DEFENDANTS' CASE

14. Learned counsel for the defendants entered appearance on 23rd October, 2013 as well as filed a statement of defence wherein the plaintiff's claim is denied. The defendants claimed, inter alia, that the plaintiff executed two (2) agreements and transfer documents in respect of portions measuring 25 feet by 100 feet each, in favour of DW1. All in all, the defendants sought the dismissal of the plaintiff's case with costs.

15. By a consent authority dated 19th November, 2013, the second defendant authorized DW1 to oppose the plaintiff's claim on his behalf. The second defendant's statement dated 24th October 2013 is noted accordingly.

16. DW1 testified and relied on her statement dated 24th October 2013 in evidence. She also relied on a copy of transfer dated 22nd February 2013 (DExhibit1), a copy of an application for consent form and consent dated 18th December 2013(DExhibits 2 and 3 respectively).

17. DW2, Lucas Mwita Tururu, Assistant chief, Igena sub location, Kehancha testified and relied on his statement dated 24th November 2013. In examination in chief this witness stated that he arbitrated the dispute between the parties herein and that he found the defendants' buildings on the suit land.

18. DW3, Chacha Marwa Wilson referred to his statement dated 24th October 2013 which he relied upon in examination in chief. He stated that he was a witness as shown in PEXh1 and that he acted as a link between PW1 and DW1 thereof.

19. DW4, David Sabai Mwita did rely on his statement dated 24th October 2013 as part of his evidence herein. He stated that PW1 sold land as per PEXh1 and another vacant land measuring 25 feet by 50 feet by way of a verbal agreement.

20. On 19th September 2019, learned counsel for the defendants filed submissions dated 18th September 2019 where reference was made to the orders sought in the plaint, framed four (4) issues for determination including whether PEXh1 should be annulled and whether the defendants purchased the plaintiff's developed portion of land measuring approximately 25 feet by 100 feet at Ksh 450,000/-. Counsel termed the plaintiff's suit want of merit and sought dismissal of the same with costs to the defendants.

21. Counsel also sought guidance in the authorities as hereunder:

a) **Peter Mbiri Michuki v Samuel Mugo Michuki (2014)** eKLR that section 3(7) of the Law of Contract Act makes exception to

oral contracts for sale of land and contracts with part performance.

- b) **Vijay Morjaria v Nansingh Madhusingh Darbar and another** (2000) eKLR to the effect that it is settled that fraudulent conduct must be distinctly alleged and distinctly proved and not to be inferred from the facts of the case.
- c) **Kinyanjui Kamau v George Kamau** (2015) on the requisite standard of proof of fraud or forgery.
- d) **Kuria Kiarie and 2 others v Sammy Magera** (2018) eKLR that fraud must be specifically pleaded and proved.

D-ISSUES FOR DETERMINATION

22. I have anxiously studied the entire pleadings, evidence and rival submissions. I also note the plaintiff's agreed issues 1 to 11 dated 10th February 2015 and filed on 12th March 2015. Having done so and bearing in mind the Court of Appeal decision in **Great Lakes Company (U) Limited v Kenya Revenue Authority (2009) KLR 720**, the issues for determination are hereby condensed thus:

- a) *Is the agreement (PEXhibit1) enforceable?*
- b) *Is the alleged agreement made on 23rd July 2013 between PW1 and DW1 valid?*
- c) *Is the plaintiff entitled to reliefs sought in this suit?*

E-ANALYSIS OF EVIDENCE AND THE LAW

23. On the first issue, it is common baseline that PW1 and DW1 entered into PEXhibit1. It is so disclosed in the pleadings particularly, paragraph 5 of the plaint, and the in testimonies of the parties and their respective witnesses herein.

24. PEXhibit1 is an agreement which was made between PW1 and DW1 for the sale of the suit land. The same was signed by the said parties thereto and attested by the second defendant as well as PW3, DW3 and DW4 as revealed therein. Since PEXh1 was made on 19th February 2013, what is the applicable law?

25. **Section 3(3)** of the Law of Contract Act Revised Edition 2012 (2002)-Cap 23 reads:

“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 parties thereto; and

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

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.” (Emphasis added)

26. I take into account that subsections (4) and (7) of the section, exempt the application of sub section 3(Ibid). This court is truly conscious of the meaning of terms including “**disposition**” and “**sign**” under the section. It is abundantly clear and undisputed that PEXhibit1 meets the requirements of section 3(3)(a) and (b) hereinabove.

27. PW1 stated that DW1 did not settle the sum of Ksh 60,000/- of the agreed purchase price. However, the contents of PEXh1 do not discern the said balance. Therefore, PEXhibit1 did not receive consent under **section 6(1) of the Land Control Act (Cap 302)**. However, the same is valid and enforceable as constructive trust and equitable estoppel doctrines are applicable thereby as noted by the Court of Appeal in **William Kipsoi Sigei v Kipkoech Arusei and another (2019) eKLR**.

28. Similarly, the case of **Mwangi Maina and 87 others v Davidson Mwangi Kagiri (2014) eKLR** the Court of Appeal held, inter alia;

“The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Act (Cap 302) is enforceable.” (Emphasis laid)

29. On the second issue, PW1, PW2, PW3 and PW4 testified that they were not aware of the alleged sale between PW1 and DW1 made after PEXhibit 1. It is the second agreement relating to a portion of land measuring 25 feet by 100 feet of the original land of PW1.

30. According to DW1 in examination in chief:-

“PW1 signed transfer form in respect of the land. There was no agreement for the 2nd land.”

31. DW1 further maintained during cross examination that:

“I paid Kshs 450,000/- for another 25ft by 100ft and there was no written agreement thereof.”

32. The evidence of DW1 was affirmed by DW2 who stated that he was not aware of the alleged second agreement for the sale of another portion of land measuring 25 feet by 100 feet. During cross examination DW1 stated that;

“I am not aware of agreement between the plaintiff and the defendant herein.”

33. The alleged second agreement was not witnessed by DW3. Furthermore, DW4 stated that there was no written agreement thereof during cross –examination, DW4 stated that :-

“I have no document for the 2nd sale agreement. I have no agreement in relation to kshs. 450,000/= . I have no transfer form for kshs 450,000/- for parcel of land of 50 feet by 100 feet in area....”

34. It follows that there is no document relating to the alleged second agreement between PW1 and DW1 hence it was verbal. Nonetheless, DW1 obtained DEXhibits 1 to 3 in respect of the land in dispute.

35. In **Sumaria and another v Allied Industries Ltd(2007) 2 KLR1**, the Court of Appeal was in agreement with Philip Ransley, CA (as he then was) who held that:

“ The plaintiff has based its claim on the verbal agreement made in 1986 and does not allege any agreement in writing. Further the plaintiff is not relying on the doctrine of part performance, as this is not pleaded. The Law of Contract Act was amended by Act 21 of 1990...”

36. As already noted, the alleged second agreement was based on a verbal agreement. Bearing in mind the decision in **Peter Mbiru Michuki case (supra)** cited in the defendants’ submissions, I find that the alleged second agreement was made either on 20th February 2013 all through to May 2013 and not on 23rd July 2013 as alleged in the plaint. The same does not fall within the exception under the following sub sections of section 3 of the law of Contract Act per Edition 2012 (2002):-

(4) “Subsection (3) shall not apply to a contract made in the course of a public auction by a licensed auctioneer within the meaning of the Auctioneers Act (Cap 526) nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust.”

(5) “The terms of a contract may be incorporated in a document either by being set out in it or by reference to some other document.”

(7) “The provisions of subsection (3) shall not apply to any agreement or contract made or entered into before the commencement of that subsection.”

37. The plaintiff alleged particulars of fraud in relation to the land sale agreement on the part of the defendants at paragraph 10 of the plaint. That the defendants connived with their counsel to transfer the entire land in the name of DW1.

38. In **Abiero v Thabiti Finance co Ltd and another(2001)KLR 496** it was held that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleadings; **see also Ndolo v Ndolo (2008) IKLR (G & F) 742 cited in the case of Kinyanjui Kamau (supra).**

39. Moreover, fraud and misrepresentation as grounds for impeaching a certificate of title must be distinctly pleaded and proved as noted in **Kuria Kiarie and Vijay cases (supra)**. The certificate of title can be challenged on the ground of fraud or misrepresentation to which the person is proved to be a party or where the same has been acquired illegally, unprocedurally or through a corrupt scheme as provided for under **section 26(1) of the Land Registration Act, 2016 (2012)**.

40. It was the testimony of DW1 that she followed the prescribed procedure and obtained DEXhibits 1 to 3. Notably, DEXhibits 2 and 3 are dated 18th February 2013. DW1 stated that PW1 signed DEXh1 which enabled DW1 to get title deed in respect of portion land measuring 50 feet by 100 feet.

41. During cross examination, DW1 stated in part that:

“PW1 and myself agreed to use PEXhibit1..... DEXhibit2 was made on 18th February 2013 and I obtained DEXhibit 3 on the same day... I obtained title for 50 feet by 100 feet of the suit land...”

42. It is abundantly evident that DW1 obtained the certificate of title to another portion of land measuring 25 feet by 100 feet by way of a verbal agreement and DEXhibits 1 to 3 were procured on the ground of misrepresentation. Having noted **Kinyanjui Kimani, Ndolo and Abiero cases (supra)**, the particulars of fraud on the part of the defendants herein are distinctly pleaded in the plaint and proved accordingly.

Therefore the title to the additional portion of land is suspect and cannot hold in the circumstances,

DISPOSITION:

43. Having observed that the agreement in the form of PExhibit 1 between PW1 and DW1 is enforceable by the application of constructive trust and equitable estoppel and that the alleged second agreement between them is a non-starter at law, I find that the plaintiff is partially entitled to the reliefs sought in the plaint. The plaintiff has partially proved his claim against the defendants jointly and severally on a balance of probabilities.

44. Accordingly, I enter judgment for the plaintiff against the defendants jointly and severally in terms of order (i) in part and orders (ii), (iii) and (iv) sought in the plaint dated 16th October 2013.

45. For the avoidance of doubt, as the sale of land agreement dated 19th February 2013 (PExhibit 1) is hereby declared enforceable, the plaintiff's claim thereof is disallowed with costs to the defendants. Judgment is only entered with regard to the additional portion of the suit land measuring 25 feet by 100 feet allegedly bought by way of a second agreement between PW1 and DW1 (dated 2nd July 2013 as alleged in the plaint).

46. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 9th day of OCTOBER 2019.

G.M.A. ONGONDO

JUDGE

In the presence of :

Mr M. Odero holding brief for Kwanga Mboya learned counsel for plaintiff.

Mr Nyang holding brief for L. Mose learned counsel for the defendants.

Court Assistant – Tom Maurice