



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 181 OF 2013

PAUL NYANGARESI MOKUA (Suing as a legal representative and

administrator of the estate of MOKUOL OLISANDA).....PLAINTIFF

VERSUS

JONES MOKAYA.....DEFENDANT

J U D G M E N T

1. The plaintiff herein is the son of the late Mokuol Olisanda (“**the deceased**”). He instituted the instant suit in his capacity as the legal representative of his deceased father’s estate, vide a plaint dated 4th April, 2013 and filed on 16th April 2013. The plaintiff claimed that in June 2010, the defendant ordered him to vacate from land parcel **Central Kitutu /Daraja Mbili/1791 (“the suit property”)** on the pretext that he was the registered owner of the land. The Plaintiff stated that as he knew his deceased father was the registered owner of the land, he made inquiries at Kisii land office and was surprised to discover that the title had been transferred from the name of the deceased to the defendant for a paltry sum of Kshs. 60,000/= on 15th April, 2002.

2. The plaintiff vide the plaint averred that his late father at the time of the alleged sale to the Defendant was not in a position to understand or comprehend what was happening as he was extremely old and ailing. He averred that the Defendant acted fraudulently and that the sale to him was fraudulently carried out and was therefore illegal and null and void. The Plaintiff sought the following orders:-

a. A declaration that the purported sale of Land Title No. Central Kitutu/Daraja Mbili/1791 to the Defendant by the Plaintiff’s father is illegal, null and void.

b. An order for the reversion and cancellation of the transfer and registration of Land title No. Central Kitutu/Daraja Mbili/1791 unto the names of the Defendant Jones Mokaya and rectification of the register so as to reinstate the name of Mokuol Olisanda.

c. In the alternative and without prejudice, the Plaintiff seeks damages against the Defendant for the true value of Land title No. Central Kitutu/ Daraja Mbili/1791.

d. Permanent injunction to restrain the defendant either by himself, his agents/ servants from entering upon, trespassing onto and/or otherwise interfering or dealing howsoever with Title No. Central Kitutu/Daraja Mbili/1791.

e. A declaration that the Defendant is holding Land title No. Central Kitutu/Daraja Mbili /1791 in trust of the Plaintiff and the dependants of Mokuol Olisanda.

f. Such further and/ or other relief as the Honourable court may deem fit and expedient to grant

g. Costs of the suit to be borne by the Defendant.

3. The Defendant in his statement of defence dated 28th May 2013, denied having defrauded the deceased and averred that the Plaintiff’s father was of sound mind and disposition when he transferred the land to him. He contested the Plaintiff’s assertion that he was unaware of the sale, on the grounds that the suit property **Central Kitutu/Daraja Mbili/1791** was exchanged with land parcel **Matutu Settlement Scheme/396** which was owned by the Defendant and it was where the Plaintiff currently resided and he could not therefore feign ignorance of the transaction that led to the Defendant being registered as owner of the suit property.

Evidence of the Parties:

4. The suit was partly heard before Hon. Justice Okong’o who took the evidence of the Plaintiff. I heard evidence from the Plaintiff’s witnesses and the Defendant who was the sole witness in support of his case.

5. The Plaintiff testified that he came from **Matutu Settlement Scheme**. He testified that his father, Mokuol Olisanda, was registered as the proprietor of land parcel No. **Central Kitutu/Daraja Mbili/1791**. The Plaintiff’s father died on 10th August 2002. The Plaintiff recalled that in May 2012, he went to fence the land parcel **1791** but was stopped by the Defendant whom he later learnt had been registered as the owner of the land. The Plaintiff stated that he lodged a complaint with the Kisii Municipality Land Disputes Tribunal, but the matter was not heard as the Defendant challenged the tribunal’s jurisdiction vide Miscellaneous Civil Application No. 79 of 2010 which was still pending hearing and determination.

6. The Plaintiff testified that he acquired documentation from the land registrar, Kisii County which included copies of the green card, application for consent of the land board, transfer form and letter of consent (PEx. 4, 5, 6 and 7) which showed that the land had been transferred from his father to the Defendant for a consideration of Kshs. 60,000/=. He stated he doubted that his father had signed the transfer forms as he was old and sickly and had permanently moved from Kisii to Nakuru at that time. The Plaintiff also instructed Otundo & Associates a firm of valuers who conducted a valuation of the land and indicated that the land was worth Kshs. 2 million in their report dated 18th February 2013 (PEx. 8).

7. The Plaintiff denied the Defendant’s claim that the land parcel **1791** had been exchanged for land parcel **Matutu Settlement Scheme/396**. He testified that what the defendant got instead was land parcel **Central Kitutu/Daraja Mbili/1364** in the year 1980. The Defendant then gave him Parcel No. **396** in 1993. The Plaintiff denounced the sale agreement for the suit land as a forgery and urged the court to grant him the reliefs sought in his plaint.

8. In cross examination, the Plaintiff admitted that he had no evidence of the exchange of land parcel **1364** with parcel Daraja Mbili with land parcel **396 Matutu Settlement Scheme** which initially belonged to the defendant. He also admitted that he had been arrested for trespass and charged in Criminal Case No. 1351 of 2010 when he went to the suit property in the year 2010. The matter was settled out of court by clan elders upon which he paid the Defendant Kshs. 3,000/= as compensation for trespass.

9. Yunuke Birundu Tinega (PW2) adopted her statement filed on 11th August 2015 as her evidence. She testified that she knew that the Defendant had purchased a plot from the deceased as they were both her neighbours and recalled that the Defendant and the deceased had agreed to exchange plots but she did not know the details of the plots.

10. Charles Sogoro Siro (PW3) also adopted his statement filed on 11th August 2015 as his evidence. He told the court that he knew the Plaintiff and the Defendant quite well as he had gotten acquainted to them in 1985 when he used to work as a driver for the Defendant. He recalled that in 1987, he took the Plaintiff to a shamba he had purchased in Kineni and when land clashes broke out in 1992, he went and picked him from the shamba. The Plaintiff then moved to Matutu Settlement Scheme in a land he had exchanged with the Defendant. PW3 further stated that both the Plaintiff and the Defendant were living in their respective parcels of land in Matutu Masaba and Daraja Mbili.

11. For his part, the Defendant testified that he entered into a sale agreement with the deceased on 16th March 1993 in respect of a piece of land at Daraja Mbili. He recalled that at the time, the deceased was being troubled by his son, the Plaintiff herein, and he wanted to relocate him somewhere away from him. Coincidentally, the Defendant had purchased some land in 1992 measuring 4 acres in the Settlement Scheme as per the agreement dated 21st May 1992 (DEx. 1). He agreed to exchange the parcel of land with the deceased’s ½ acre land at Daraja Mbili and he instructed the vendor of the land in the Settlement Scheme to transfer the land directly to the Plaintiff. The Defendant stated that it was on the basis of that agreement that he entered into the agreement dated 6th March 1993 (DEx. 3). He testified that he had bought the land in the Settlement Scheme for Kshs. 240,000/= and the market value of deceased’s plot was Kshs. 300,000/=. To make up the difference, the Defendant paid the deceased an additional Kshs. 60,000/= in cash. The deceased decided that the land be transferred to his son, the Plaintiff who took possession and built a permanent house thereon.

12. The Defendant further testified that in 2001, he placed a restriction on the land since transfer had not been effected to him and he was unable to trace the deceased who had moved from Kisii to Njoro in Nakuru. Eventually, the land was transferred and duly registered in his name. He testified that in 2010, the Plaintiff trespassed into his land and was arrested and charged. The matter was resolved through arbitration and the Plaintiff was ordered to pay him Kshs. 3,000/=. The payment was witnessed by among others PW2. Referring to the agreement dated 7th January 1985 on page 2 of his supplementary list of documents (DEx.18) the Defendant testified that he had purchased land parcel **Central Kitutu/Daraja Mbili/1364** earlier and that it had not been the subject of exchange. He refuted the claim that he had obtained the suit land fraudulently and urged the court to dismiss the suit.

Issues, Analysis and Determination:

13. The parties filed written submissions in support of their respective positions after conclusion of the trial. The Plaintiff filed his submissions on 11th July 2019 whereas the Defendant filed his on 26th June 2019. I have considered the pleadings, the evidence and the submissions filed by the parties and the following are the issues emerging for determination;

a. Whether the plaintiff’s claim is barred by the provisions of the Limitation of Actions Act;

b. Whether the sale, transfer and registration of the suit land in favour of the defendant was fraudulent;

c. Whether the plaintiff and by extension the estate of Mokuol Olisanda, have any legitimate rights and or interests over the suit land and/or Whether the defendant is holding the land in trust for the plaintiff and other dependants of Mokuol

Olisanda;

d. Whether the plaintiff is entitled to the orders sought; and

e. Who should bear the costs of the instant proceedings?

14. The Plaintiff brought the instant suit against the defendant contending that the Defendant was fraudulently registered as the proprietor of land parcel **Central Kitutu/Daraja Mbili/1791**. The parties agreed that title to land parcel **1791** passed from the deceased who was the registered proprietor to the Defendant on 15th April 2002 and henceforth the Defendant became the registered absolute proprietor of the suit property. The Defendant in his defence had alluded to the Plaintiff's suit being statute barred on account of limitation of actions. Even if it is assumed the cause of action arose as from the time the Defendant was registered as proprietor of the suit property, the Plaintiff's suit would still have been instituted within time. Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya provides that, **"an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him...."** The Plaintiff filed the present suit against the Defendant on 16th April 2013 which was well within the period of limitation as the period of 12 years had not elapsed since the accrual of the action.

15. On the second issue, the Plaintiff argued that the transfer of the land from the deceased to the Defendant was fraudulent. He stated that the deceased was 90 years old and the Defendant took advantage of the deceased's old age by involving him in a transaction he could not comprehend. According to the Plaintiff, the deceased was incapable of making independent decisions due to his age and it would have been prudent for the Defendant to involve other family members in the transfer of the land. He relied on the case of **Grace Wanjiru -vs- Gedion Githunguri and 5 Others Civil Appeal No. 202 of 2005[2011]eKLR** where the Court of Appeal had held that an 83 year old was incapacitated by mental infirmity from entering into a binding contract.

16. The Defendant for his part argued that the deceased had the right and capacity to sell or deal with the land as he pleased with any interested person without seeking permission from the Plaintiff. The Defendant also argued that the Plaintiff had not shown how he obtained the land by fraud. Section 26 of the Land Registration Act provides that the certificate of title is conclusive proof of proprietorship unless there is evidence to show the title was obtained fraudulently or through misrepresentation or unprocedurally through a corrupt scheme. The Defendant relied on the case of **Virani t/a Kisumu Beach Resort -vs- Phoenix of East Africa Assurance Company Ltd Civil Appeal No. 88 of 2002[2004] 2KLR** where the Court of Appeal held that fraud is a serious quasi-criminal imputation which requires more than proof on a balance of probability though not beyond reasonable doubt. A party cannot merely allege fraud and leave it at that. He must furnish proof of the fraud allegations through cogent evidence which the Plaintiff clearly failed to do.

17. The Defendant in his oral evidence explained that the transaction had involved an exchange of the suit parcel **1791** with land parcel **Matutu Settlement Scheme /396**. He testified that he had purchased land parcel **396** on 21st May 1992 for a sum of Kshs. 240,000/=. At that time, the deceased was looking for a parcel of land to relocate his son to and the Plaintiff agreed with the Defendant to swap the suit land with the land in the Settlement Scheme. The Defendant testified that since the value of the suit land was Kshs. 300,000/= he gave the deceased an additional Kshs. 60,000/= to make up for the difference. He also instructed the vendor of the land parcel 396 to transfer the land in the Settlement Scheme directly to the Plaintiff. The terms of the agreement dated 6th March 1993 between the deceased and the defendant were as follows;

Whereas Mokuol Olisanda is the registered owner of Plot Number Central Kitutu/Daraja Mbili/1791 measuring 0.22 ha, AND Whereas Jones Mokaya is the owner of Plot Number Matutu Settlement Scheme/ 396 measuring 1.6 ha (Approx 4 acres)(Sic)

THIS AGREEMENT NOW WITNESSETH:

1. THAT Mokuol Olisanda has offered for exchange with Jones Mokaya his aforementioned plot at his price of Kshs. 300000/= (Read Kshs. Three Hundred Thousand only).

2. THAT Jones Mokaya has agreed for exchange with Mokuol Olisanda his herein aforementioned plot at his price of Kshs. 240,000/= (Read Two Hundred and Forty only).

3. THAT for the difference of Kshs. 60,000/= (Read Sixty Thousand only) in the value of the exchanged lands, Jones Mokaya has in full paid cash to Mokuol Olisanda (Mokuol Olisanda whereof acknowledges receipt thereof), and the amount paid shall be a duly consideration in this agreement.

4. THAT the parties shall immediately put each other in respective possession of the herein exchange plots and each party shall thereto enter and assume ownership interest.

18. At the outset, the Plaintiff, in his oral testimony, vehemently denied that the Defendant had exchanged land parcel **1791** with land parcel **396**. He testified that the defendant had exchanged parcel **1791** for land parcel **Central Kitutu/Daraja mbili/1364**. But in his written submissions, the plaintiff seemed to change his stance and argued that the agreement between the defendant and the deceased was in respect of a part of land parcel **1791** and not the whole land. The plaintiff submitted that PW3 had testified that the defendant exchanged Parcel **396** for the upper portion of land parcel **1791** and not the entire land. The plaintiff argued that mere possession of title does not imply that one is the rightful owner of property.

19. Section 24 (a) and 26 (1) of the **Land Registration Act** are relevant in determining the question whether or not the Defendant acquired the suit property fraudulently. They provide as follows;

24. Subject to this Act-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

26(1)The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

20. It is common ground that the Defendant is the registered proprietor of land parcel **Central Kitutu / Daraja mbili /1791**. A copy of the green card produced by the Plaintiff as PEX. 4 confirmed as much. The Plaintiff contested the legitimacy of the Defendant's title. He listed particulars of fraud against the defendant in his plaint, accusing the Defendant of forging the agreement dated 6th March 1993 and further alleged that the deceased did not have the mental capacity to enter into the transaction due to his age. The Plaintiff's father as per the death certificate tendered in evidence died on 10th August 2002 aged 90 years. The transaction between him and the Defendant was in 1993 when the Plaintiff admits the land the subject of exchange belonging to the Defendant was transferred to him (the Plaintiff). There is no evidence to suggest his deceased father had any infirmity that could have impacted his capacity to deal. There was no evidence that the deceased had any medical condition that affected his mind. It is instructive that although the Plaintiff got registered as owner of the Matutu Settlement land courtesy of the Defendant in 1993, he woke up after 20 years to question the validity of the transaction that culminated in his being the beneficiary of the scheme land.

21. Sections 107 and 109 of the Evidence Act places the evidentiary burden on the party who wishes the court to believe in the existence of a particular fact. My analysis of the evidence tendered before this court leads me to the conclusion that the plaintiff failed to discharge this burden of proof to the required standard. The plaintiff merely alleged that the deceased was of old age but did not demonstrate to the court that his deceased father lacked the mental capacity to enter into the sale agreement with the deceased. Since he was the registered owner of the land, the deceased had the right to transact with the land without reference to any person in accordance with Section 24(1) of the Land Registration Act.

22. The Plaintiff's claim that the transaction was done without his or the family members' knowledge was proved untrue. During cross examination, the Plaintiff conceded that one of the witnesses to the agreement dated 6th March 1993 was his deceased brother, Peter Onsongo. The Plaintiff also questioned the time it had taken for the land to be transferred to the Defendant but this was satisfactorily explained by the Defendant who stated that the deceased had moved from Kisii and it had taken time for him (Defendant) to trace the deceased after he relocated to Njoro in Nakuru.

23. The Defendant also rebutted the Plaintiff's assertion that he had purchased the land below the market value. The Plaintiff had instructed the firm of Otundo & Associates who inspected land parcel **1791** on 24th February 2013 and placed the open market value of the land at the time as Kshs. 2,000,000/=. In my considered view, that valuation was not relevant as the land had been purchased by the Defendant in 1993 more than two decades earlier for the price of Kshs. 300,000/=. The valuation would only have had relevance if it had been carried out in 1993 when the transaction was taking place.

24. The Defendant proved through the agreement dated 6th March 1993 that land parcel **Central Kitutu/Daraja Mbili/1791** was exchanged for land parcel **Matutu Settlement Scheme/396** and that he paid the difference of Kshs. 60,000/= to match the value agreed upon with the vendor. The Plaintiff's witnesses also acknowledged that the deceased and the Defendant had exchanged the parcels of land and the Plaintiff also confirmed that he resided in land parcel **396 Matutu Settlement Scheme**.

25. Further, the Plaintiff admitted in cross examination that he had been charged with trespass to the suit land in Criminal Case No. 1351 of 2010 and that he paid Kshs. 3,000/= to settle the matter out of court. This amounted to an acknowledgement by the Plaintiff that the Defendant was the lawful owner of the suit property and thus the instant suit was instituted by the Plaintiff as an afterthought. It is for these reasons that I answer the second issue in the negative and hold that the Defendant was a lawful and bona fide proprietor of land parcel **Central Kitutu/ Daraja Mbili/1791**.

26. Section 25 of the Land Registration Act provides that a proprietor's right to land is subject to the liabilities, rights and interests declared under Section 28 of the Act. Trusts are one of the overriding interests which are provided for in Section 28 (b) of the Land Registration Act.

27. The Plaintiff contended that the Defendant was holding land parcel **Central Kitutu/Daraja Mbili/1791** in trust for him and the other dependants of the deceased. He stated that it was not the deceased's intention to transfer the whole land to the Defendant and that the Defendant was holding the rest of the land for the Plaintiff and other dependants. The Plaintiff thus claimed there was a resulting trust in his favour and the other dependants in regard to the suit property. The Court of Appeal considered what constitutes a resulting trust in the case of **Twalib Hatayan and Anor -vs- Said Saggah Ahmed Al-Heidy and others [2015]eKLR** where the Court stated as follows;

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour

of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see. Snell's Equity at p.177) (supra).

28. In the case of **Salesio M'itonga versus M'ithara & 3 Others** [2015] eKLR the Court of Appeal held:

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.”

29. Having already found that there was a valid agreement between the deceased and the Defendant in respect of the suit property, it follows that the Plaintiff's claim that there existed a resulting trust must fail. In the agreement dated 6th March 1993, whose terms I have reproduced elsewhere in this judgment, the parties agreed that what was being purchased by the Defendant was land parcel **Central Kitutu /Daraja Mbili /1791** measuring 0.22 Ha. That was the entire parcel of land according to the green card (PEX. 4). The Plaintiff has not shown that the deceased intended to sell only a portion of the land and has failed to prove that the proprietorship by the Defendant of the suit land was subject to a resulting trust. Moreover this court cannot rewrite the contract between parties. They are bound by the terms of their contract, unless coercion, fraud or undue influence are proved which was not done in the instant case. In the premises, I answer the third issue in the negative and hold that the Defendant does not hold the suit property in trust for the Plaintiff.

30. In the net result, I find and hold that the Plaintiff has failed to prove his case on a balance of probabilities and the same is ordered dismissed with costs to the Defendant.

JUDGMENT DATED AND SIGNED AT NAKURU THIS 27TH DAY OF SEPTEMBER 2019.

J. M. MUTUNGI

JUDGE

JUDGEMENT DELIVERED AT KISII THIS 8TH OCTOBER DAY OF 2019.

J ONYANGO

JUDGE