



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

ELC. CASE NO. 51 OF 2017.

CHARLES ODHIAMBO KASERA.....1ST PLAINTIFF

CATHERINE ACHIENG ODHIAMBO.....2ND PLAINTIFF

VERSUS.

SALOME NAFULA RICHARD.....DEFENDANT

JUDGMENT.

[1] The plaintiffs in this case who are man and wife are the registered owners of land parcel E. Bukusu/S. Kanduyi/4147 comprising of 0.05 hectares. They allege that they bought the same from one David Lumbasi Walusekhe and Evans Oyoo Soita. They claim that the defendant who is the sister of the said David Lumbasi Walusekhe continues to live on the land despite the land having changed hands. Their claim against the defendant is for immediate eviction from the said land.

[2] Among the documents annexed by the plaintiffs in support of their claim is an agreement for sale dated 17/11/2016 between David Lumbasi Walusekhe and Evans Oyoo Soita and the plaintiff herein. The said David Lumbasi Walusekhe and Evans Soita are described as 'vendors' and the plaintiffs as 'purchasers'. In paragraph 5 of the said agreement Evans Oyoo Soita is said to be receiving the money Kshs.200,000/= on behalf of the estate of the late Jamin Soita Walusekhe. While in paragraph 8 the vendor undertakes that he will be responsible of removing the caution and discharging the title to the said piece of land to enable transfer in not more than 30 days. Paragraph 11 states that the agreement is subject to the provisions of the Land Control Board Act and that they will both appear before divisional land Control Board when the matter comes up for determination for obtaining consent to subdivide and transfer

[3] Jamin Soita Walusekhe the co-owner of the suit land was registered as a co-owner of this land on 5.5.1988. He died on 13.3.2007. No letters of administration of his estate has been taken by anyone. There is no evidence that anyone attended the relevant Land Control Board as per agreement between the parties. The caution lodged against the suit land was lodged by Namubuya Nekoye Grace ID. No.0999739 of P. O. Box 19 Bungoma on 30.6.1997 claiming interest as a beneficiary. She died on 2/6/2014. The caution was removed on 5.12.2016 some 2½ years after her death. This was 12 days after the agreement of sale of 17/11/2016 that demanded that the caution be removed before 30 days are over. It is therefore not rocket Science to know who had the caution removed. It is certainly not Namubuya Nekoye Grace who had lodged it. She was dead and it could not be the land registrar alone under his powers under Cap 300 now repealed because he would have indicated as much on the register. It must therefore be the Vendors in cahoots with the land office to enable them comply with condition number 8 therein.

[4] The plaintiff admitted that he does not live far away from the suit land. He agreed that he had visited the suit land. That it was not vacant. There were houses and people living therein. He said he thought they were tenants. He admitted he knew one of the co-owners was long dead.

[5] The defendants opposed this case for eviction. They attached several documents to show that one of the co-owners was dead. That there were developments on this suit land, that were occupied by tenants. That the defendant was also a beneficiary of the suit property. That indeed he was the one collecting the house rent and distributing to other beneficiaries in excess of Kshs.8,100/= per month. He averred and gave evidence that the sale of the suit land to the plaintiffs was fraudulent. She set out the particulars of illegality and contended that the sale was a sham and fraudulent.

[6] The question of determination is whether the plaintiffs have made any claim for eviction of the defendant.

[7] There is no doubt that the suit land was registered in the joint names of two people. David Lumbasi Walusekhe and Jamin Soita Walusekhe. Jamin died on 30/3/2007. No one has ever taken any letters of the administration of his estate. Since the suit land was jointly owned no sale of his joint share would be done without first having one appointed to administer his estate. The purported sale to the plaintiffs of the whole plot was therefore illegal.

Equally, no consent of the land Control Board could be legally obtained without an administrator having been appointed by the Court. In any case, no land control consent was shown to have been obtained. That sale was therefore void under Sec. 6 of the land control act Cap 302. No title therefore, could pass and none passed to the plaintiffs. The 'Vendor' removed a caution lodged in the land office illegally. The lodger of the consent was dead. The land registrar did not indicate that he had removed the same under his powers under Sec. 133 (2) (a) (b) and (c) of the now repealed Cap 300, so who removed it? It must be the Vendors with corrupt officers of the land office. This was to enable them to comply with condition number 8 of the agreement for sale aforesaid. The transfer of land must have been signed by one person. This was land jointly owned, how could title pass when the other co-owner was dead, and letters to administer his estate had not been obtained? It must be that this land was not properly transferred to the plaintiffs. In *Flemish Investments Limited Vs. Town Council of Mariakani* the Court of Appeal in Civil Appeal No. 30 of 2015 states;

"A bona fide purchaser exercising due diligence would be expected to inspect the property he is buying, to ascertain its physical location, persons, if any, in occupation, developments, buildings and fixtures thereon among others" had the plaintiffs done this, they would have noticed the legal dangers that were involved in purchasing such a property.

[8] I am persuaded that the defendants have proved their allegation of illegality and fraud in transferring the suit land by one registered proprietor and a complete stranger to ownership of the suit land. I am satisfied that the registration of the land in the names of the plaintiffs is irregular illegal and unlawful. They hold no proprietary rights of land parcel E. Bukusu/South Kanduyi 4147. Consequently they have no power to evict the defendant at all. The plaintiffs suit is dismissed with costs to the defendant.

Judgment read in open Court before the Counsels.

Dated at Bungoma this 27th day of February, 2018.

S. MUKUNYA

JUDGE

In the presence of:

Court Assistant: Anthony

Mr. Khakula: For the defendant

Mr. Kundu for the Plaintiff