



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA.

ELC. CASE NO. 316 OF 2013

JACOB KASIMWAKA MACHACHA.....PLAINTIFF

VERSUS.

MOSES WESWA MABONGA.....1ST DEFENDANT

FRANCIS MUKORO.....2ND DEFENDANT

JUDGMENT.

[1]. The plaintiff Jacob Kusimwaka Machacha filed this case and claimed that he was a bona fide purchaser for value of land parcel West Bukusu/North Mateka/2401 and that the 1st defendant was the registered proprietor thereof. He alleged that the 2nd proprietor was the occupier and purported buyer thereof. He alleged that he purchased the said land for a consideration of Kshs.735,000/= from the first defendant. He claimed that when he purchased the same, it was underdeveloped and that he developed the same by building 2 conference rooms, 3 hotel rooms a borehole a roundavel and a pit latrine all valued at Kshs.6,000,000/= as at 19/2/2010. He claims that he ran a bar therein called Forest Inn which had an average annual income of Kshs.3,488,400/=. He alleges that on or about the 14th April, 2012 the 1st defendant unlawfully and without any colour of right caused and or permitted the defendant to enter into and occupy hotel rooms developed by the plaintiffs and chased away the plaintiffs staff therein on the 1st defendant instructions and the 2nd defendant started running the premises on 16/11/2013.

He therefore claims for an order of specific performance on the purchase of the suit land and pray that the 1st defendant do give to him the title to the same Alternatively he prays for an order for compensation on the value of the suit land at the current market price.

[2]. The first defendant filed a statement of defence dated 19/12/2013. In that defence he stated that he never offered for sale any portion or part at all of land parcel West Bukusu/N. Mateka/2401. In reference to Paragraph 4, 5, and 9 of the Plaintiff, the land referred to in paragraph 4 relates to the original LR W. Bukusu/N. Mateka/1856 which created parcel Numbers 2401 and 2402 where the Plaintiff was duly registered as owner of Land Parcel 2402 which he mortgaged to the bank. The first defendant states that no developments exist in West Bukusu/N. Mateka/2401. He denied the particulars of fraud alleged in the plaintiffs plaint.

[3]. The second defendant filed his defence and denied each and every allegation in the plaint. He claimed that he is a bona fide purchaser for value and is a registered co-owner of parcel Number West Bukusu/N. Mateka 2402 together with all developments thereon having purchased the same from an Auction arising from a charge to Co-operative Bank. He denies any connection with land parcel West Bukusu/North Mateka/2401. He denied the particulars of fraud alleged by the plaintiff.

[4]. In his statement filed in court the 1st defendant stated that on/or about December, 2009 he sold '150' by '175' out of land parcel W. Bukusu/N. Mateka/1856 to the plaintiff and upon completion of payment. The said parcel 1856 was subdivided into parcels W. Bukusu/E. Mateka/2401 and 2402. The plaintiff got his parcel 1402 and developed the same. He says that he has now come to learn that the plaintiff charged his land to Co-operative Bank of Kenya Ltd for Kshs.250,000/=. That he was unable to repay the loan and the property was sold by Public Auction. He denied having sold W. Bukusu/N. Mateka 2401 or at all.

[5]. The second defendant stated that he is a co registered owner of W. Bukusu/N. Mateka 1402. He stated that they purchased the same in an auction conducted by M/s Guram Investments for Kshs.1,500,000.00 and was issued with a certificate of sale dated 17/3/2012. He avers that he conducted a search in the land office and learnt that the plaintiff had charged it to the Bank for Kshs.250,000.00 and was unable to repay the loan and the bank exercised its power of sale and sold to them the property. He stated that the said parcel abuts W. Bukusu/N. Mateka 2401 and that those two parcels were a subdivision of LR W. Bukusu/N. Mateka/1856. He stated that no property was ever sold to him by the 1st defendant as alleged. He states that the developments referred to by the plaintiff in his plaint were effected on LR W. Bukusu/N. Mateka/2402 and not 2401 as alleged. He averred that, that can be ascertained from the valuation report of Shelter (M) Valuers Ltd dated 20/9/2011 and filed in court.

[6]. Mr. Jacob Kasimwaka Machacha, the plaintiff herein in answer to cross examination by Mr. Gichamba learned Counsel for the defendants, while being cross examined on Plot No. 2401 admitted that he had no written agreement between himself and the first

defendant. He had no proof of payment of the Kshs.735,000/= paid to the first defendant, and that he had no proof of payment of money from 11/3/2010. He admitted that he had no documents to prove any development on plot 2401. He had no construction approvals from the local authority and that he had no valuations of any development in Plot 2401.

[7]. Andrew Wafula Sululu gave evidence and stated that he is an accountant and he stays in Mombasa. He said that he was aware of this suit. That he is a co-owner with the 1st defendant of the suit property. He stated that the property was advertised for sale and that he combined forces with the 1st plaintiff and bought it and got a title that was duly produced in court. He said that the property had developments therein. That it had 3 buildings, empty tank holes, a petrol station and trees. He stated that all the developments were on that land and that, they had not encroached on anybody's land. He said that he visited the site before purchasing the same and that there was no business going on therein.

[8]. The issue for determination is whether the plaintiff has proved his case on balance of probabilities and whether he is entitled to the orders sought in his plaint.

[9]. Having looked at all the documents produced by the plaintiff, I am convinced that the plaintiff purchased a piece of land of 175 x 150 out of land parcel W. Bukusu/S. Mateka/1856. That the resultant parcels of 1856 were W. Bukusu/S. Mateka/1401 and 1402. The plaintiff portion of 175 x 150 became W. Bukusu/N. Mateka/1402. This is the portion that the plaintiff bought and developed. He got a title for the same on 26/1/2010. From the records produced, this is also the portion he charged to Co-operative Bank to secure a bank loan of Kshs.250,000 on 26/2/2010. It would appear that he was unable to repay his loan forcing the Bank to exercise its power of sale. The Bank then instructed M/s Shelter (M) Valuers to value the same and on 20th September 2011. W. Bukusu/N. Mateka/2402 was valued at an open market value of 1,500,000/= and a forced value of Kshs.1,000,000/=. On instruction of Co-operative Bank Ltd, Garam Investments Auctioneers of Nairobi sold the same to the 2nd defendant and another for Kshs.1,150,000/= and issued a certificate of sale dated 17th March, 2012. A title deed was issued by Bungoma District Land Registry to Andrew Wafula Sululu and Francis Mukoro Wesonga on 21st June, 2012.

[10]. The records produced in court clearly show how parcel 1402 was created, how it was registered in the name of the plaintiff and how it was charged to the Co-operative Bank. It equally shows that the Bank sold the same to the 2nd defendant and another and how the title was issued now to the 2nd defendant and his co-owner. The plaintiffs allegations in his suit and evidence cannot be believed in regard to the purchase of W. Bukusu/N. Mateka 1401. There is no agreement for sale. No proof of purchase price. No prove of any developments. No prove of occupation. The plaintiff himself was unable to prove his claim at all when cross examined by the Counsel for the defendants.

[11]. Consequently, the plaintiff suit must fail. His claims has no basis at all. The claim is not substantiated. I therefore dismiss the plaintiff claim with costs to the defendants.

Judgment read in Open Court.

Dated at Bungoma this 21st day of February, 2018.

S. MUKUNYA

JUDGE

In the presence of:

Joy – Court Assistant

Gichumba - For the defendant

Mukholi & Co. - For the defendant absent