



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 175 OF 2014

KANINI KITILI MWENGI (*Suing as the Legal Administrator*

of the Estate of KITILI MWENGI MWAI (deceased).....**PLAINTIFF**

VERSUS

PAUL MULWA LUNGUI**DEFENDANT**

JUDGMENT

Introduction:

1. In the Complaint dated 17th November, 2014, the Plaintiff is seeking for the following orders:

a. A declaration that the sale agreement dated 29th November, 2013 between the Plaintiff and the Defendant is illegal, null and void.

b. A declaration that the property known as Kyangwithya/Tungutu/1124 belongs to the Estate of Kitili Mwangi Mwai, (deceased) who died intestate on 24th April, 1995.

c. A mandatory injunction compelling the Defendant to permanently vacate the property known as Kyangwithya/Tungutu/1124 and to remove at his own cost any structures or developments that he has put in the property within ninety (90) days from the date of the court order.

d. An order that if the Defendant fails to vacate the suit property within ninety (90) days from the date of the order, the Plaintiff be at liberty to forcefully evict the Defendant from the property known as Kyangwithya/Tungutu/1124 with the security assistance of the OCS- Kitui Police Station.

e. Costs of this suit plus interest.

2. In the Complaint, the Plaintiff has averred that the deceased was the registered proprietor of land known as Kyangwithya/Tungutu/1124(*the suit property*); that on 24th April, 1995, the Plaintiff applied for and was granted the letters of administration in respect to the deceased's Estate and that the Defendant purportedly entered into an Agreement of Sale for the purchase of the suit land for Kshs. 500,000.

3. According to the Plaintiff, the purported agreement dated 29th November, 2013 between himself and the Defendant is a forgery because she has never executed any transfer documents and that in any event, she was incapable of transferring the land on 29th November, 2013.

4. In his Defence and Counter-claim, the Defendant averred that it is the Plaintiff who approached him and offered him the suit land; that the Plaintiff and her sons executed the agreement and that the Plaintiff acknowledged receipt of Kshs. 2,100,000 being the purchase price for the suit land.

5. It is the Defendant's case that he entered on the suit land with the consent of the Plaintiff.

6. In the Counter-claim, the Defendant has averred that the sale of the suit land by the Plaintiff was lawful and that he has since developed the land to the tune of Kshs. 7,000,000. The Defendant is seeking for an order of specific performance and in the alternative, the Defendant to pay him Kshs. 7,000,000 being the current value of the suit land.

The Plaintiff's case:

7. The Plaintiff, PW1, informed the court that at the time of his death, the deceased was the registered proprietor of parcel number Kyangwithya/Tungutu/1124; that the said parcel of land is a walking distance from where she stays and that she has never sold the suit land.

8. According to PW1, she handed to a Ms. Florentinah Kamene, who was in the company of her son, the original Title Deed for the suit land to enable them conduct an official search on the land.

9. It was the evidence of PW1 that in the year 2014, she found two men digging a pit latrine on the suit land; that when he obtained a copy of the Sale Agreement from his son allegedly stating that she had sold the land, she noticed that the Agreement had been forged and that the Defendant has trespassed on the suit land.

10. PW1 informed the court that the Defendant took possession of the land in the year 2013 and that he has developed it; that he gave to Mwalimu advocate the Title Deed during the succession proceedings and that he reported the issue of the trespass to the police.

11. PW1 denied ever signing the agreement of 29th November, 2013. She denied ever receiving Kshs. 2,000,000 from the Defendant.

12. One of the sons of the Plaintiff, PW2, informed the court that since 2013, they have never applied for letters of administration in respect of their father's Estate; that his mother has never sold the suit land and that during the family meeting in 2014, it emerged that his brother, Ishmael and his friend Florentinah, had obtained a loan from the Defendant and had used the title document as security.

13. According to PW2, the Defendant admitted that he purchased the land from Florentinah Kamene; that the Plaintiff obtained the letters of administration in the year 2014 and that the purported sale is null and void.

The Defence case:

14. The Defendant, DW1, informed the court that in the year 2013, the Plaintiff and her son, Jackson Ishmael Kitili approached him and asked him if he was interested in purchasing the suit land; that he visited the suit land on 10th October, 2013 and met the Plaintiff and her son Jackson Ishmael with their neighbour Florentinah and that the Plaintiff informed him that the suit land had been allocated to Jackson Ishmael who had opted to sell it and use the proceeds to complete a commercial.

15. It was the evidence of DW1 that he met the family members of the Plaintiff at her home on 20th October, 2013 together with their neighbour, Florentinah; that the Plaintiff and Jackson Ishmael were authorized by the entire family to sell the land and that he first paid Kshs. 1,000,000 for the 1.5 acres he bought.

16. DW1 further stated that on 29th November, 2013, he bought an additional 0.625 acres for Kshs.

500,000 and that on 16th December, 2013, he bought an additional 0.3125 acres for Kshs. 270,000. According to DW1, he purchased the remaining portion of the suit land on 29th January, 2014 whereafter he took possession of the land.

17. Having taken possession and developed the land, DW1 stated that the entire land is now valued at Kshs. 7,000,000.

18. The Defendant denied ever giving Ishmael and Florentinah a loan and stated that he paid the Plaintiff the purchase price in installments of Kshs. 1,000,000, Kshs. 500,000 and Kshs. 270,000. He could however not remember how the other installments were paid to add up to Kshs. 2,100,000.

19. According to DW1, he used to pay the Plaintiff in cash in Mwalimu Advocate's office.

20. DW1 further stated that he started building his house on the suit land immediately he paid the entire purchase price and that because the suit land is agricultural land, he did not need the approvals of the County Government to put up the house on the suit land.

21. DW2 informed the court that they visited the Plaintiff's family on 20th October, 2013 when all her sons attended the meeting in which they approved the sale so that Jackson Ishmael could use the proceeds of the sale to complete a commercial building he was putting up in Kitui Town; that he witnessed the signing of the agreement of 29th January, 2014 and that the Defendant is in occupation of the suit land.

22. In cross-examination, DW2 said that he only met Ishmael on the day the agreement was being signed in Mwalimu advocate's office; that when he was shown the agreement, the sons had already signed it and that he never saw the Defendant sign the agreement.

Submissions:

23. The Plaintiff's advocate submitted that the Defence did not adduce any evidence to demonstrate that the Plaintiff was paid the purchase price and that the Plaintiff colluded with Jackson Ishmael to defraud the Plaintiff.

24. The Plaintiff's advocate submitted that an order of specific performance is not available in favour of the Plaintiff because the agreement was invalid; that the Plaintiff did not sign the alleged agreements and even if she did, she did not have the legal capacity to do so and that the Plaintiff should be allowed. Counsel relied on several authorities which I have considered.

25. The Defendant's advocates submitted that no evidence was called by the Plaintiff to prove that she never signed the Sale Agreements in respect to the suit land; that she entered into the agreement with the consent of the family as the intended administrator and that the Sale Agreements are enforceable.

Analysis and findings:

26. The Plaintiff's evidence is that he never sold the suit property. On the other hand, the Defendant stated that the Plaintiff entered into agreements of 23rd November, 2013, 29th November, 2013, 16th December, 2013, and 29th January, 2014 in which she agreed to sale the suit land to the Defendant. The four (4) agreements were produced in evidence by the Defendant.

27. According to the Defendant, he paid for the suit land in installments, which amount added upto to Kshs. 2,100,000. It was his evidence that on all those occasions, he paid the Plaintiff in cash, which payment was effected in the office of Mwalimu advocates.

28. The only witness that the Defendant called was DW2, who, on cross-examination, stated that he was given to read an agreement that had already been signed by the Plaintiff's sons. It was the evidence of DW2 that he met the Plaintiff only once in the office of Mr. Mwalimu. He however did not see the

Plaintiff sign any agreement although he remember seeing the lady in Mr. Mwalimu's office (*whose name he could not recall*).

29. I have perused the purported agreement of 23rd November, 2013. In the said agreement, it is alleged that the Plaintiff received Kshs. 1,000,000 for the sale of a portion measuring 1.25 acres in the presence of Japheth Kiteme Mwalimu.

30. Although the issue of whether the Plaintiff signed the agreement of 23rd November, 2013 before an advocate was critical in this matter, the Defendant did not call the said Japheth Kiteme Mwalimu to testify. Indeed, that is the same situation in respect to the agreements of 29th November, 2013 where the Plaintiff is alleged to have received Kshs. 500,000; the agreement of 16th December, 2013 where she is alleged to have received Kshs. 270,000 and the agreement of 29th January, 2014 where she is alleged to have acknowledged receipt a total of Kshs.2,100,000.

31. Having failed to call the advocate who is said to have witnessed the Plaintiff sign the four (4) agreements in his presence, I find that the Defendant has not shown on a balance of probabilities that the Plaintiff signed those agreements or that she received Kshs. 2,100,000 from him.

32. Indeed, it is inconceivable that the Defendant paid to the Plaintiff a total of Kshs. 2,100,000 in cash, before an advocate, and yet the said advocate could not be called to testify in the matter.

33. Considering that the only witness that the Defendant called, DW2, informed the court that he never saw the Plaintiff sign the agreements of sale produced in this court, and in view of the failure by the Defendant to call Japheth Kiteme Mwalimu advocate to testify in this matter, I am in agreement with the Plaintiff that she neither signed the four (4) agreements nor received the Kshs. 2,100,000 from the Defendant.

34. In any event, pursuant to the provisions of Section 82 of the Law of Succession Act, provides the immovable property of a deceased person cannot be sold before confirmation of grant. The Defendant has not denied that before he purported to buy the suit land, the letters of administration in respect of the registered proprietor of the suit land had not been issued. Consequently, the sale agreements that the Defendant has relied on are not enforceable. An order of specific performance cannot therefore issue.

35. Having not proved that he paid to the Defendant Kshs. 2,100,000, or that the Plaintiff signed the Sale Agreements in respect to the suit land, the issue of the Plaintiff refunding the purchase price or money equivalent to the value of the suit land does not arise.

36. For those reasons, I allow the Plaintiff's Plaint dated 17th November, 2014 as prayed and dismiss the Counter-claim dated 16th March, 2014 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 2ND DAY OF MARCH, 2018.

O.A. ANGOTE

JUDGE