



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 394 OF 2013

LEONARD LENANA KETERE.....PLAINTIFF

VERSUS

KIPKOECH ARAP TALAAM.....1ST DEFENDANT

GRACE KABACHIA.....2ND DEFENDANT

JUDGMENT

(Plaintiff laying claim to a half portion of certain land; plaintiff having purchased it from another person who it was claimed purchased the same from the original owner; evidence showing that the suit land was in two portions and that the person who sold land to the plaintiff only held one portion which he had earlier sold; no sale agreement exhibited to prove that the seller had purchased the whole land; sale agreement displayed only showing that he purchased one portion; seller claiming that he had an oral agreement for the second portion; oral agreement not proved but in any event cannot be enforced; there could therefore not have been a sale of the second portion to the plaintiff; plaintiff's case dismissed with costs)

1. This suit was commenced by way of a plaint which was filed on 25 October 2011. In his plaint, the plaintiff pleaded to be the owner of a half portion of the land described as Residential Plot No. 14 Nakuru Municipality, having purchased it from the 1st defendant vide an agreement dated 12 October 2009. He pleaded that he thereafter enjoyed quiet possession of the land and started developments and other forms of landscaping. It is averred that the 2nd defendant, with the connivance of the 1st defendant, encroached into the said property and dumped building materials. In the suit, the plaintiff has sought orders for a declaration that he is the owner of the suit land; an injunction against the defendants, and costs of the suit.

2. The defendants filed a joint statement of defence vide which the 1st defendant denied entering into any sale agreement with the plaintiff. It was pleaded that the 2nd defendant is the owner of half of the suit property having purchased it from the 1st defendant on 22 January 2007.

3. In his evidence, the plaintiff testified inter alia that the suit property is half an acre and that he purchased half of it (1/4 of an acre) from one Mr. Masese, vide the sale agreement of 17 September 2009 which he produced as an exhibit. The sale agreement was witnessed by the 1st defendant, who was the original allottee of the said land. He testified that he had known the 1st defendant, and when Mr. Masese informed him that it was he (1st defendant) who was the original allottee, he looked for him and the 1st defendant showed him the suit land. He testified that at that time, half of the property was occupied by a family that had also purchased it from Mr. Masese, and the other half, which he was intending to purchase, was vacant. After visiting the ground, he stated that they proceeded to the offices of Mr. Konosi Advocate, and the sale agreement was drawn, and thereafter, the 1st defendant surrendered the original documents to Mr. Masese for processing of title. He held the original letter of allotment in the name of the 1st defendant, which he produced as an exhibit, and also the original receipts for payment of the plot that were made by the 1st defendant. He testified that in the year 2010, he planted maize and beans, and in the year 2011, he allowed the other occupant of the half plot to take care of it. He stated that she did so until the 2nd defendant came around the month of September 2011 claiming to own this half share of the plot. On inquiry, she told him that she had also purchased the plot from the 1st defendant.

4. PW-2 was Jane Nyanchera Mogere. She testified that her husband purchased one half of the said land (the 1/4 acre portion not in dispute) from Mr. Masese who had informed them that he had purchased the land from the 1st defendant. They took possession and developed a house. She testified that at some point the plaintiff took possession of the other half and cultivated it for one season after which he allowed her to utilize it. It is then that the 2nd defendant emerged, claiming to own the plot.

5. PW-3 was Kefa Gwaro Masese. He testified that he is a lawyer who practices in Eldoret and Nakuru towns. He stated that around mid-2017, he was informed by a colleague that the suit land was on sale. He went to see the plot and the 1st defendant gave him a copy of a letter of allotment. He did his search and found out that though the stand premium had been paid, there were outstanding rent arrears of KShs. 220,000/=. They agreed at a purchase price of KShs. 600,000/= for the whole of the plot (half an acre) and it was up to Mr. Masese to pay the

land rents and any other outstanding arrears for the land. Mr. Masese requested for two weeks to pay up, but before the lapse of the two weeks, they had a chance encounter with the 1st defendant at a hotel, and the 1st defendant requested him for money for he had a pressing problem. Mr. Masese informed him that he has not had time to organize himself and he can therefore only purchase half the plot. He managed to get Kshs. 50,000/= from the ATMs and he called a colleague to draw up an acknowledgment for it, which was handwritten in a fullscap paper. In their agreement, Mr. Masese was to make full payment in 2 months. After about 3 months, the 1st defendant approached him and inquired whether he is still interested in purchasing the other half, which he agreed to purchase, but had problems in paying for it. He stated that the 1st defendant continuously pestered him for money and he would give him some money in bits. But this disturbed him, and he informed the 1st defendant of his inability to continue with the sale and he inquired whether he (the 1st defendant) can allow him to resell the land so that he can be refunded what he has paid, and the 1st defendant agreed. He therefore sold half of the plot to the plaintiff and he handed over to him the original allotment letter. He stated that by coincidence, the two knew each other, and the 1st defendant took the plaintiff to see the land and also informed the plaintiff that Mr. Masese owed him Kshs. 150,000/=. Thereafter, a sale agreement was done vide which Mr. Masese sold half the plot to the plaintiff for Kshs. 345,000/=. He stated that the 1st defendant released all the documents to the plaintiff and that at the office of Mr. Konosi, the 1st defendant was paid Kshs. 150,000/= after signing as a witness to the agreement. Since then, he stated that he has not seen the 1st defendant and for him it was a clean break. He testified that he had previously sold one half of the land to a Mr. Mogere (husband to PW-2). Later the 2nd defendant emerged and when he inquired from the 1st defendant, he stated that the 2nd defendant was his girlfriend and that he had promised her some land.

6. Cross-examined, PW-3 affirmed that the hand written sale agreement was for half the plot and he stated that it was because the 1st defendant persistently called on his office that he was persuaded to purchase the other half. He affirmed that he has no written sale agreement for the purchase of the second portion of the land. He insisted that he made payments for the purchase of this second portion although he had no evidence of the same. He also conceded that in the agreement between himself and the plaintiff, the 1st defendant did not acknowledge having received any money from himself. He stated that he has never met the 2nd defendant and only came to see her in court during these proceedings. He testified that the first portion that he purchased is the portion that he sold to the husband of PW-2, which was the area not abutting the road, and the latter portion (abutting the road) is what he sold to the plaintiff.

7. With the above evidence, the plaintiff closed his case.

8. DW-1 was the 2nd defendant who testified that she works at the Nakuru County offices and averred that she purchased half of the suit land (the half portion in dispute, which is the one that abuts the road) from the 1st defendant on 24 January 2007. She stated that she purchased the plot at Kshs. 300,000/= and they wrote a sale agreement before an advocate. She stated that at the time of purchase, no other person had purchased the land, and the entire plot was vacant. About 10 months later, the 1st defendant informed her that he has now sold the 2nd portion of the land to Mr. Masese (PW-3). She thus went to see Mr. Masese at his office so that they can liaise on payments of the land rates due. Since Mr. Masese was an advocate, and better placed to follow up with the land's office, they agreed that he could keep the original allotment letter. She stated that Mr. Masese mentioned that she was buying the plot for his mother in law and she had no problem with her using the whole land. She stated that she knew her very well and interacted with her as she sold cereals at the main market which was under her in the course of her work. She asserted that Mr. Masese only purchased half the plot which he gave to PW-2 and not the whole plot. When she started developments on it, she got a demand letter from the plaintiff whom she did not know prior to the case. She stated that the plaintiff cannot purport to own this plot and asked for his removal.

9. DW-2 was the 1st defendant. He testified that he owned the plot in dispute which was allocated to him by the Government. In the year 2007, he decided to sell the plot and subdivided it into two portions. He stated that he sold one portion to the 2nd defendant and the second portion to Mr. Masese. He denied that Mr. Masese had purchased the whole plot. He stated that the plaintiff could not purchase the portion that he had sold to the 1st defendant. He denied being present when the plaintiff and Mr. Masese wrote their sale agreement and denied that Mr. Masese paid him for the whole plot. He stated that he signed on the sale agreement when Mr. Masese presented to him that he was selling his portion. He stated that he had left the original agreement with his advocate, a Mr. Tarus and did not know how Mr. Masese got hold of it. He denied that the 2nd defendant was his girlfriend or that he had promised to give her land.

10. With the above evidence, the defendants closed their case.

11. I invited both counsel for the plaintiff and the defendants to file written submissions which they did and I have taken these into consideration in arriving at my decision.

12. It is apparent from the evidence tendered that the whole of the suit property measures 1/2 of an acre. There is no dispute over half a portion of this land, which the 1st defendant acknowledges to have sold to PW-3, who in turn sold it to the husband of PW-2. None of the parties claim this portion of the land. What both plaintiff and the 2nd defendant claim, is the other half portion which abuts the road. The plaintiff contends that he properly purchased this land from Mr. Masese, whereas the 2nd defendant asserts that she is the one entitled to the land, as she properly purchased it from the original allottee, who is the 1st defendant.

13. I opt to first interrogate whether there was an actual sale of this disputed portion of the land to PW-3, for if there was not, then automatically, the plaintiff's claim must fail, for his claim to the suit land is derived from the assertion that PW-3 had good title to it.

14. I have carefully assessed the evidence of PW-3. He claims that his intention was only to purchase half portion of the suit land but later, owing to pressure from the 1st defendant, he agreed to purchase the whole of the suit land. This contention is denied by the 1st defendant who avers that all that he sold to PW-3 was only half the plot and that it is this half plot which was later sold to PW-2. I have seen the sale agreement between PW-3 and the 1st defendant which is the handwritten agreement dated 28 October 2007. I have seen that the property being sold is described as being 1/4 of an acre to be excised from the land measuring 1/2 acre and the purchase price is Kshs. 300,000/=. PW-3 himself, despite insisting that he also purchased the other portion of the land, acknowledged that no sale agreement was ever written between himself and the 1st defendant over this portion of land.

15. It is trite law that agreements over sale of land must be in writing for them to be enforced which is brought out by Section 3 (3) of the Law of Contract Act, Cap 3, Laws of Kenya. The said law provides as follows :-

(3) 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 the 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, nor shall anything in it affect the creation of a resulting, implied or constructive trust.

16. There is nothing in writing that evidences that there was ever a sale of the second portion of the suit land to PW-3. I do not even have uncontested oral evidence that there was indeed such an agreement. The 1st defendant has denied the existence of such agreement and no independent witness was called to corroborate the assertion of PW-3 that there was ever such an agreement. I regret my inability to believe that there was ever such an agreement especially given that PW-3 is a lawyer who certainly knows the importance of having a written agreement for the sale of land. It is therefore probable, that when the 1st defendant signed as a witness, to the agreement between the plaintiff and PW-3, he executed it in the knowledge that the half portion of the suit land being sold, was the same half portion which he had earlier sold to PW-3. I have absolutely nothing before me that would suggest that the 1st defendant sold the whole of the 1/2 of the suit land to Mr. Masese and the evidence before me points to a sale to PW-3 of only half of the suit land which is 1/4 of an acre.

17. It does appear, and indeed it is acknowledged by PW-3 himself, that he sold the whole of the suit land, comprised in two separate portions, to two persons, the plaintiff and PW-2's husband. He could not do this as all that he was entitled to was only one of the two portions. He had already sold one portion to the husband of PW-2 and he could not therefore purport to sell another portion to the plaintiff as he could not sell what he does not own. Since the whole of the plaintiff's case is hinged on the claim that PW-3 was properly entitled to sell this portion as he had earlier purchased it, which assertion I am unable to agree with, it is apparent that the plaintiff's case must fail. I indeed wonder why the plaintiff did not sue PW-3 since it is him who sold to him the land and he ought to have thought it wise to include PW-3 to the suit. He made his bed and must lie in it.

18. In essence I do hold that the plaintiff has not proved that he is entitled to any portion of the suit land, and given that position, the plaintiff's case must, and is hereby, dismissed with costs to the defendants. With the dismissal, the orders of injunction which barred the 2nd defendant from utilizing the suit land are hereby vacated.

19. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 15th day of May 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Wairimu holding brief for Ms. Njeri Njagua for the defendants.

No appearance on the part of M/s Ochweri Ngamate & Co. Advocates, for the plaintiff.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU