



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 239 OF 2015

GITONGA WAMBUGU KARIUKI1ST PLAINTIFF

CAMPUS CITY LIMITED2ND PLAINTIFF

DUPOTO FARMS LIMITED3RD PLAINTIFF

VERSUS

ELIUD TIMOTHY MWAMUNGADEFENDANT

JUDGMENT

Introduction:

1. In the Complaint dated 24th November, 2015, the Plaintiffs averred that the Defendant was the registered proprietor of parcels of land known as sub-division numbers 2554-2523 Section 111, Mainland North; that all the nineteen (19) plots add up to 7.82 acres and that the 1st Plaintiff entered into a Sale Agreement of 4th January, 2012 in respect to the suit land. According to the Complaint, the Plaintiffs paid to the Defendant KShs. 31,272,000 for the said land.

2. The Plaintiffs have averred that on 26th September, 2012, the 2nd Plaintiff was registered as the proprietor of parcels of land known as sub-division numbers 2554-2562 Section 111 Mainland North; that on the same date, the 3rd Plaintiff was registered as the proprietor of sub-division numbers 2514-2523 Section 111 Mainland North and that it was an implied term of the agreement for sale that the 1st Plaintiff and his nominees are entitled to take possession of the suit property and enjoy a quiet and peaceful occupation.

3. It is the Plaintiffs' case that the Defendant declined to give them the mother title in respect to the suit land; that the Defendant declined to give them vacant possession of the suit land by not removing the squatters who were occupying the land and that the Plaintiffs have not had a quiet and peaceful enjoyment of the suit land.

4. The Plaintiffs have pleaded in the Complaint that they learnt through a newspaper advertisement that they have been sued alongside the Defendant in Mombasa ELC No. 214 of 2014; that the Plaintiffs bought the suit land with a view of developing the same and that the Defendant should refund the 1st Plaintiff the purchase price.

5. According to the Plaintiffs, the Defendant breaches of the Sale Agreement include: failure to provide the 1st Plaintiff with the mother title relating to the 19 sub-plots; failure to evict the squatters from the suit land; excavation of murram by the Defendant making the suit land inaccessible and failure to receive consideration from the Defendant. The Plaintiffs are seeking for a refund of KShs. 31,272,000; interest on the said amount and general damages.

6. In his Statement of Defence, the Defendant averred that he sold to the 1st Plaintiff the suit land in accordance with the Law Society Conditions of Sale; that the purchaser was to take possession of the suit land upon execution of the Sale Agreement and that he rendered to the 1st Plaintiff vacant possession of the land.

7. The Defendant finally deponed that he performed the terms of the contract of sale; that the suit property was clearly demarcated and that the 1st Plaintiff has willfully connived with the alleged squatters or abdicated his role of defending Mombasa ELC No. 214 of 2014.

The Plaintiffs' evidence:

8. The 1st Plaintiff, PW1, informed the court that until 26th September, 2012, the Defendant was the registered proprietor of sub-division numbers 2514-2523 and 2554-2562 Section 111 Mainland North (*the suit property*); that on 4th January, 2012, he purchased the 19 parcels of

land from the Defendant for Kshs. 31,272,000 and that he nominated the 2nd and 3rd Defendants in whose names the suit land was transferred. It was the evidence of PW1 that on 26th September, 2012, sub-division numbers 2554-2562 Section 111 Mainland North were registered in favour of the 2nd Plaintiff while sub-division numbers 2514-2523 Section 111 Mainland North were registered in favour of the 3rd Plaintiff.

9. PW1 stated that it was an implied term between himself and the Defendant that he would take vacant possession of the land; that he requested from the Defendant for the mother title of the 19 sub-plots without success and that his request to be given vacant possession of the land has not been successful.

10. It was the evidence of PW1 that the Defendant has been unable to evict the squatters who are on the land; that the Defendant has also made the suit property inaccessible by excavating building blocks on the land and that he later on learnt that the squatters living on the land had sued him together with the Defendant in Mombasa ELC No. 214 of 2014. In addition to the said suit, the 1st Plaintiff stated that there is also Malindi ELC. No. 177 of 2015(O.S) in which the Plaintiffs are claiming that the suit plots are part of land measuring 123 acres which was originally known as L.R. No. 313/111/MN but which has since been sub-divided.

11. PW1 stated that in the circumstances, he did not receive any consideration from the Defendant even after paying him Kshs. 31,272,000; that he is entitled to a refund of the said money together with interest and that having been sued in Mombasa ELC No. 214 of 2014, he is entitled to aggravated and exemplary damages. The 1st Plaintiff produced in evidence the numerous letters that were exchanged between his advocate and the Defendant's advocate, together with the Sale Agreement of 4th January, 2012 and the copies of the Certificate of Titles.

12. In cross-examination, PW1 stated that he was shown the land by the Defendant's son in the year 2011/2012; that the land was vacant by then; that when he tried fencing the land, his workers were repulsed by squatters and that he never took possession of the land. According to PW1, the squatters sub-divided the suit land amongst themselves and fenced it; that he is willing to re-transfer the land to the Defendant and that it was the responsibility of the Defendant to give him vacant possession. It was the evidence of PW1 that by the year 2013, the squatters were actively dealing with the suit land.

13. PW1 finally stated that he could not have developed the suit land for want of the mother title; that it is the mother title that has the conditions prescribing how the land should be utilized and that he cannot make use of the land.

The Defendants' evidence:

14. The Defendant, DW1, stated that he entered into a Sale Agreement with the 1st Plaintiff on 4th January, 2012; that the 19 plots he sold to the 1st Plaintiff had titles as at the time of entering into the agreement and that ownership of the land passed to the 1st Plaintiff on 21st September, 2012.

15. According to DW1, as at the time they entered into the Sale Agreement of 4th January, 2012, there were no squatters living on the land; that the 1st Plaintiff ascertained the status of the land and that the 1st Plaintiff took possession of the land.

16. DW1 informed the court that the mother title to the suit land was closed upon sub-division; that the suit land was invaded by a few people in January, 2014 and that it is the Plaintiffs who have not defended the suits that were filed by the squatters.

17. In cross-examination, DW1 stated that he acquired the suit land in 1978 when he was a Cabinet Minister; that he does not have the conveyancing documents in respect of the 1978 purchase and that all the letters by the Plaintiffs' advocate to his advocate were never copied to him.

18. DW1 informed the court that he was aware of the two suits in which the squatters have sued him and that he was defending the suit; that it is the 1st Plaintiff who fenced the land after buying it and that he does not know when the fence was brought down.

19. DW2 stated that he is an employee of the Defendant; that prior to the year 2013, there were no squatters on the suit land and that before the land was sold to the 1st Plaintiff they used to do farming on the land.

20. DW2 informed the court that it was not until the year 2014 that some people invaded the Defendants' land and also occupied portions of the 1st Plaintiff's land.

21. In cross-examination, DW2 stated that the suit land was bushy although people used to cultivate the same and that the 1st Plaintiff put poles around the suit land which were pulled down.

Submissions:

22. The Plaintiffs' advocate submitted that the Plaintiffs, through their advocate, requested the Defendant to furnish them with the mother title without any success; that it was a term of the Agreement of Sale that the Plaintiffs be granted vacant possession of the land and that as a result of the invasion of the suit land by the squatters and the refusal to hand over the mother title, the Plaintiffs have not had quiet and peaceful possession of the suit land.

23. Counsel submitted that the Defendant is in breach of the Sale Agreement because he did not grant to the 1st Plaintiff a good title and quiet possession despite having paid to the Defendant Kshs. 31,272,000 and that the Plaintiffs have been sued in Mombasa HCCC No. 214 of 2014

and Malindi ELC. No. 177 of 2015 (O.S).

24. The Plaintiffs' advocate submitted that the Defendant has always known that his possession of the suit land is tainted with serious issues; that the failure to produce the mother title shows that the Defendant did not have a genuine title and that the Defendant is a dishonest and untrustworthy person.

25. Counsel relied on the case of *Munyu Maina vs. Hiram Gathina Maina (2013) eKLR*, in which the court held that where a registered proprietor's title is challenged, it is not enough for the proprietor to flash the instrument of title; that the Defendant was unable to explain how he acquired the title in respect to the suit land and that the agreement herein was procured by fraud.

26. The Defendant's counsel submitted that the 1st Plaintiff and his nominee were given vacant possession of the suit land; that the land was free from any claim and that this court should be guided by the case of *NYK Logistics (UK) LTD vs. Ibrend Estates BV (2011) EWCA Civ 683*.

27. The Defendant's advocate submitted that the Defendant's title to date has not been challenged and that the issue of the Defendant not having a good title does not arise.

Analysis and findings:

28. It is not in dispute that the 1st Plaintiff entered into a Sale Agreement with the Defendant on 4th January, 2012 for the sale of "several plots totaling to 7.82 acres or thereabouts situate in Kikambala, Kilifi District."

29. According to the 1st Plaintiff, immediately after the 19 plots, being sub-division numbers 2554-2523 Section 111 Mainland North, were transferred to his nominees, squatters pulled down his fence and occupied the said land. As if that was not enough, the said squatters sued both the 1st Plaintiff and the Defendant in Mombasa ELC. No. 214 of 2014 claiming that the suit property is their ancestral land.

30. The issues that I am supposed to determine are as follows:

a. Did the Defendant hand over to the Plaintiffs vacant possession of the suit land?;

b. Is the 1st Plaintiff entitled to a refund of the purchase price and damages?

31. According to the Agreement of Sale of 4th January, 2012, the 1st Plaintiff purchased the suit land for Kshs. 31,272,000, which he duly paid. The completion date was given as 120 days. Paragraph 14 of the Agreement provided that the 1st Plaintiff shall take possession of all the pieces of land which have their respective Deed Plans upon execution of the agreement and the payment of Kshs. 12,000,000. The Law Society Conditions of Sale were applicable in so far as they are not inconsistent with the conditions in the agreement. The copies of the Certificate of Titles in respect to the 19 plots that the 1st Plaintiff bought were produced in evidence. All the Certificates of Title show that they were issued to the Defendant on 9th March, 2012 and registered on the same day. However, the Deed Plans for the said plots were all registered on 19th October, 1993. It is therefore clear to this court that by the time the Defendant was selling to the 1st Plaintiff sub-division numbers 2554-2523 (*Section 111 Mainland North*), he was only in possession of the Deed Plans and not the Certificates of Title.

32. The evidence before me shows that it was not until 26th September, 2012 that the transfers in respect to the suit plots were registered in favour of the 2nd and 3rd Plaintiffs, the 1st Plaintiff's nominees.

33. Other than the Certificates of Title that were issued to the Defendant in March, 2012, and the Deed Plans of 1993, there is no other document to show the genesis of the 19 Certificates of Title. DW1 informed the court that he bought the suit land from the Estate of Alibhai Kanji in the early 1970's while serving as a Cabinet Minister in the Kenyatta's government. However, the Defendant did not produce any evidence to show if indeed the land was registered as at the time of the purported purchase and what led to the issuance of the Deed Plans for the 19 plots in 1993. It is also not clear to this court the land that was sub-divided to create the 19 plots.

34. The evidence of PW1 was that after the land was registered in favour of the 2nd and 3rd Plaintiffs, he put up a fence which was immediately pulled down by squatters. It was the evidence of PW1 that his workers were chased away from the land in the late 2012 and early 2013 and that he has not taken possession of the land. PW1 produced in evidence the photographs showing the buildings that the squatters have put up on the plots that he purchased.

35. The Defendant and DW2 confirmed that indeed the land that the 1st Plaintiff purchased was invaded by a few squatters. Other than the suit land, it was the evidence of DW2, who is an employee of the Defendant, that indeed the rest of the land that belongs to the Defendant has been invaded by the squatters. The said squatters have gone ahead to institute two suits in which they are claiming that the land has always belonged to them. Those two suits are still pending.

36. It would appear that it was upon being prevented from taking possession of the suit land that the 1st Plaintiff sought to know the genesis of the Certificates of Title that he was holding. In the letter dated 27th September, 2013, the Plaintiffs' advocate informed the Defendant's advocate as follows:

"We have also noted that we never had sight of a copy of the mother Title, which was sub-divided, resulting to the nineteen (19) plots. We should be grateful if you could let us have a copy for our client's records."

37. In their letter of 2nd December, 2013, the Plaintiffs' advocate informed the Defendant's advocate that they had not responded to their inquiry of the copy of the mother title from which the 19 titles were excised. Again, on 10th June, 2014, the Plaintiffs' advocate reminded the Defendant's advocate that he had not forwarded to them a copy of the mother title from which the 19 titles arose. He further stated as follows:

“Please note that, it is important that our client gets a copy of this document so he may acquaint himself with the special conditions set out therein.”

38. Another letter was authored by the Plaintiffs' advocate on 28th November, 2014 in which the Plaintiffs' advocate lamented that: “*despite our repeated requests for a copy of the mother title out of which the nineteen (19) plots were created, you have not supplied the document. Is there something your client is hiding from us, regarding the said Title? We now demand that you let us have the document without further delay.*” It was after that letter, and the suit filed by the squatters suing the Plaintiffs, that the Plaintiffs filed this suit.

39. None of the letters by the Plaintiffs' advocate requesting for a copy of the mother title that gave rise to the 19 plots was ever responded to. Indeed, DW1 did not also respond to that issue when he testified, other than stating that he bought the land in 1970's when he was a Cabinet Minister, and that he had surrendered the mother title upon sub-division. He did not even tell the court the title number of the mother title and when the same was issued to him and if it has since been closed.

40. The evidence before me shows that although the 19 plots were transferred to the Plaintiffs in December, 2012, the Plaintiffs do not know how the same were created. Despite asking for the documents from the Defendant on the history of the suit land, the Defendant, who had already received Kshs. 31 million, remained mute. Indeed, he remained mute when the issue of how he acquired the suit land was put to him in cross-examination.

41. The question that arises is this: How are the Plaintiffs required to respond to the squatters' claim in Mombasa ELC. No. 214 of 2014 in which they are claiming that the suit land is their ancestral land? Considering that the Defendant has already sold the suit land, is he likely to defend ELC. No. 214 of 2014? Those are the questions that the Plaintiffs are faced with as they defend the squatters' claim that the suit land was fraudulently acquired by the Defendant.

42. In my view, the Plaintiffs are entitled to have the documents showing how the Defendant acquired the suit land-atleast, if not any other document, the copy of the mother title that gave rise to the 19 sub-plots. This is moreso considering that the claim by the squatters came up immediately after the Plaintiffs attempted to take possession of the suit land, which they did not. The issue of what vacant possession means was addressed by Lord Greene in the case of *Cumberland Consolidated Holdings Ltd vs. Ireland (1946) KB 264 at 270* as follows:

“The right to actual unimpeded physical enjoyment is comprised in right to vacant possession. We cannot see why the existence of a physical impediment to such enjoyment to which a purchaser does not expressly or impliedly consent to submit should stand in a different position to an impediment caused by the presence of a trespasser. It is true that in each case the purchaser obtains the right to possession in law, notwithstanding the presence of the impediment. But it appears to us that what he bargains for is not merely the right in law, but the power in fact to exercise the right...since the presence of the rubbish which the purchaser never bought and to whose presence he never submitted did in fact make it impossible for him to use a substantial part of the property which he had bought...”

43. It is true that the Plaintiffs have the right in law over the suit land. However, the evidence by both the 1st Plaintiff and DW2 shows that the Plaintiffs have been prevented to use the suit land. Indeed, the Plaintiffs attempt to fence the land were thwarted when the said fence was put up. Some portions of the land have been occupied by the squatters and the Plaintiffs cannot take possession of the land. The squatters have subsequently filed suits claiming that the land belongs to them.

44. Indeed, the test of whether a person has taken vacant possession of land or not is this: if the physical condition is such that there is substantial impediment to his use of the property or a substantial part of it or even a portion thereof during the purchase or immediately after the purchase, then vacant possession will not have taken place.

45. It is not for the Plaintiffs to fight the Defendant's wars in respect of the genuineness of the initial title when the Defendant does not want to divulge the details of how he acquired the suit land. Indeed, this court cannot fold its hands in a situation where a party sells land to a third party, knowing very well that the property is shrouded in mystery, which mystery he is unwilling to resolve even after being prompted to do so. In such a scenario, the most justifiable thing to do is to order for a re-transfer of the land to the uncooperative Vendor and for the Vendor to refund the purchase price. He can then resell the land when he is in a position to give vacant possession.

46. In conclusion, I am of the view that the Defendant, while selling the land to the 1st Plaintiff, was aware of the underlying challenges that were to arise in respect to the nineteen (19) Certificates of Title. Consequently, he was under an obligation to give to the Plaintiffs a copy of the mother title, whether closed or not, when they requested for it, and in the face of the squatters' claim that the suit land is their ancestral land.

47. Consequently, the evidence before me shows that the Defendant never gave to the Plaintiffs vacant possession of the suit land as contemplated under the Agreement of Sale. Indeed, the Plaintiffs have never taken vacant possession of the land and they cannot do so until the suits that the squatters have filed are heard and determined. In the circumstances, the Plaintiffs are entitled to a refund of the purchase price together with interest. The prayer for aggravated and exemplary was never proved.

48. For those reasons, I allow the Plaintiffs' Plaint dated 24th November, 2015 in the following terms:

a. The Defendant to refund to the 1st Plaintiff Kshs. 31,272,000 whereafter the 2nd and 3rd Plaintiffs will re-transfer parcels of land known as sub-division numbers 2514-2523, Section 111 Mainland North and sub-division numbers 2554-2562 Section 111 Mainland North to the Defendant.

b. The Plaintiff to pay interest on the above amount from the date of this Judgment until when the payment shall be made in full.

c. The Defendant to pay the costs of the suit.

DATED AND SIGNED AT MACHAKOS THIS 12TH DAY OF JULY, 2018.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 19TH DAY OF JULY, 2018.

J.O. OLOLA

JUDGE