



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 208 OF 2012

(FORMERLY HCCC NO. 307 OF 2009)

EUNICE NYOKABI.....PLAINTIFF

VERSUS

JAMES CHEPYATOR KENDAGOR....1ST DEFENDANT

SIMON ROTICH.....2ND DEFENDANT

JUDGMENT

1. Through the plaint filed on 23rd October 2009, the plaintiff averred that she bought the parcel of land known as Baringo/Perkerra – 101/791 (the suit property) from the 1st defendant sometime between the years 2000 and 2007. She added that the defendants colluded and fraudulently transferred the suit property to the 2nd defendant on 20th June 2007. Accordingly, she sought judgment against the defendants jointly and severally for:

- a) *Cancellation of the title Baringo Pekkerra 101/791 in the name of the 2nd defendant.*
- b) *An order that the said title be transferred to the plaintiff and defendants do sign all conveyancing documents and in default Deputy Registrar to sign the same.*
- c) *Costs of the suit.*

2. In a joint statement of defence filed on 10th November 2013, the defendants denied the plaintiff's allegations and urged the court to dismiss the case with costs.

3. At the hearing of the case, counsel for the plaintiff informed the court that the 1st defendant had passed away much earlier on and that he would only proceed as against the 2nd defendant. The plaintiff and the 2nd defendant each testified as the sole witness in their respective cases.

4. The plaintiff told the court that she purchased the suit property from the 1st defendant around the year 2006. She added that they had a sale agreement but she lost it during the tribal clashes and that there were witnesses to the agreement. She paid the full purchase price. She went to the Land Control Board with the 1st defendant and obtained consent from Land Control Board on 9th October 2007 (PExb 1). When she later went to transfer the land to herself she was informed that the suit property had been transferred to the 2nd defendant.

5. The plaintiff further told the court that there were tribal clashes in the area in the year 2008 and that her and other victims moved to the police camp but on returning back found that the 2nd defendant had moved into the suit property and had constructed a toilet. There were attempts by the area chief and the District Commissioner (DC) to settle the dispute. She added that the 2nd defendant wrote to her a letter dated 7th July 2009 (PExb 4) seeking a refund of the cost of the toilet and the transfer expenses. She further testified that she was in occupation and possession of the suit property as at the date of her testimony and that the 2nd defendant had never occupied it.

6. Under cross-examination, she stated that she bought the suit property plot from James Kendagor, the 1st defendant. She added that had no dispute with the 1st defendant or any accusations against him. She decided to focus her claim against the 2nd defendant since he is the one who has title to her plot.

7. The plaintiff's case was thereby closed.

8. On his part, the 2nd defendant testified that the suit property belongs to him. He referred the court to paragraph 5 of his joint statement of defence with the 1st defendant where the 1st defendant stated that he sold the suit property to him. He added that the 1st defendant sold the suit property to him on 1st December 2005. They went to Land Control Board and obtained letter of consent dated 8th March 2006. He was later issued with title document on 20th June 2007 (DExb.1). He conducted a search on 6th December 2017 and obtained a Certificate of Search (DExb 2) which shows that is still the owner. He took possession of the plot immediately upon acquiring it and started farming it. He urged the court to dismiss the plaintiff's case.

9. Under cross-examination, he stated that he and the 1st defendant did not have a written agreement and that as at the time of his testimony, the suit property had a permanent house owned by the plaintiff and in which the plaintiff resided. He had never lived on the plot but intends to seek eviction of the plaintiff.

10. The 2nd defendant's case was closed at that point.

11. Parties then filed written submissions. In the submissions filed by counsel for the plaintiff, it was argued that the purported sale of the suit property between the 1st and 2nd defendants was invalid since it was not evidenced by an agreement in writing contrary to the provisions of **Section 3 (3)** of the **Law of Contract Act**. Counsel relied on decision of the High Court in the case of **Mawji -vs- US International University & Another [1976 – 80] 1 KLR 229**.

12. It was further argued on behalf of the plaintiff that having purchased the suit property and having taken possession and retaining such possession, she had acquired a possession right which is equitable and binding on the land. In that regard, counsel relied on the decision of the High Court in **Mwangi & Another -vs- Mwangi [1986] KLR 328**.

13. In conclusion, counsel argued that the 2nd defendant had admitted in his testimony that there was no written sale agreement in the transaction between him and the 1st defendant. As such, the process leading to the registration of the 2nd defendant as owner of the suit property was illegal and unprocedural. He therefore urged the court to grant the plaintiff the relief sought.

14. For the 2nd defendant, it was submitted that the plaintiff had failed to establish the allegations of fraud against the 2nd defendant or even that the plaintiff had bought the suit property from the 1st defendant. Further counsel for the 2nd defendant submitted that the 2nd defendant was the registered proprietor of the suit property and his title could not be defeated in the absence of evidence of fraud. Citing **Section 3 (3) (b)** of the **Law of Contract Act**, Counsel submitted that the plaintiff failed to call any witness to support her alleged sale agreement with the 1st defendant. In view of these submissions, counsel urged the court to dismiss the plaintiff's case with costs to the 2nd defendant.

15. I have considered the pleadings, the evidence and the submissions. The issues that arise for determination are firstly, whether there was a sale agreement between the plaintiff and the 1st defendant, and secondly, whether the plaintiff is entitled to the relief sought.

16. Though she testified that she bought the suit property from the 1st defendant around the year 2006 and that there was a sale agreement, she did not produce the agreement or a copy thereof. She explained that she lost the agreement during the 2008 tribal clashes. She did not offer any specifics as to the exact date or month or year when the agreement was executed and who were the witnesses. This confusion is further amplified by the averments at paragraph 5 of the plaint where she stated that she bought the property some time "between the year 2000 and 2007". It is strange that a buyer of land would not be in a position to pin point the date of a sale agreement with some degree of accuracy. It is even stranger that she could not call any witnesses who could attest to the existence of the agreement.

17. **Section 3(3)** of the **Law of Contract Act** provides:

(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 (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

18. So as to gauge the effect of the provisions of **Section 3(3)** of the **Law of Contract Act** to this case, two details are important to note: firstly that although the 2nd defendant admits that the plaintiff is in possession of the suit property, the plaintiff asserts that a sale agreement existed between her and the 1st defendant; and secondly, that the date when the agreement between the plaintiff and the 1st defendant was entered into is not clear at all. According to the plaintiff, it is anywhere between the years 2000 and 2007. In fact, it is not even clear whether there was such an agreement. I have already expressed doubt above about the existence of the agreement.

19. Though the plaintiff attempted to prove existence of the contract between her and the 1st defendant by producing a document said to be consent of the land control board in respect of the transaction between her and the 1st defendant, it is important to note that **Section 3 (3)** is

very specific that such a contract must be in writing, must be signed by all the parties to it and that the signature of each party must be attested by a witness who is present when the party signs. The consent of the Land Control Board does not meet this criteria and cannot therefore be said to be the agreement. I therefore find that there was no sale agreement between the plaintiff and the 1st defendant. That being the case, the plaintiff cannot bring a case to enforce such a contract.

20. Despite asserting that a sale agreement existed between her and the 1st defendant, the plaintiff opted not to pursue her claim against the 1st defendant or his estate. In the circumstances, the court has been deprived of an opportunity to further probe the allegations of existence of a contract between the plaintiff and the 1st defendant. In the absence of proof of a contract, the mere fact that the plaintiff is in occupation of the suit property is not of any consequence considering that the 2nd defendant is the registered proprietor.

21. As a registered proprietor, the 2nd defendant is entitled to the rights and privileges under the provisions of **sections 25 and 26** of the **Land Registration Act**. His ownership can only be challenged on limited grounds. The sections provide:

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ...

22. The plaintiff alleged that the 2nd defendant obtained registration as proprietor of the suit property fraudulently. However, no evidence was tendered to prove the particulars of fraud which were pleaded in the plaint. If anything, the plaintiff did an about-turn at the hearing and stated that she had no accusation against the 1st defendant.

23. The plaintiff also alleged that there was no written contract regarding the sale of the suit property between the 2nd and 1st defendants and that in view of the provisions of **Section 3(3)** of the **Law of Contract Act**, the 2nd defendant's title was liable to cancellation. The words of the subsection couldn't be clearer – "...no suit shall be brought upon a contract for the disposition of an interest in land ..." The section only bars filing suits based on contracts that do not meet the criteria set therein. The 2nd defendant has not filed any suit in these proceedings. Besides, the 2nd defendant was already the registered owner of the suit property by the time this suit was filed. The section cannot therefore be a valid basis for disturbing his ownership.

24. The plaintiff also advanced the case that she purchased the suit property from the 1st defendant and took possession and that she had thereby acquired possessory rights which are binding on the property. The suggestion here was that the 2nd defendant holds the suit property in trust for the plaintiff.

25. Whether or not a trust exists is a matter of evidence which therefore requires proof. The only exception to this general rule would be a situation where it is necessary to presume a trust out of absolute necessity. In **Dorcas Indombi Wasike v Benson Wamalwa Khisa & another [2010] eKLR** the Court of Appeal stated:

The appellant's counsel, Mr Amolo, cited several authorities and a careful reading of all those authorities reveal one thing. Whether or not a trust exists is a matter of evidence. Those authorities, and in particular Mbothu & 8 Others vs Waitimu & 11 Others [1986] KLR 171, are clear that: -

"The law never implies, the Court never presumes a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

26. The only nexus between the plaintiff and the suit property is the alleged sale agreement between the plaintiff and the 1st defendant. Having elected not to pursue her claim against the 1st defendant or his estate and having gone ahead to expressly state that she has no accusation against the 1st defendant, there would be no basis upon which to establish the existence of a trust.

27. In view of the foregoing, I find that there is no basis upon which to interfere with the 2nd defendant's title as is sought. The plaintiff is not entitled [2010] the reliefs sought.

28. In the end, the plaintiff's case is dismissed with costs to the 2nd defendant.

Dated, signed and delivered in open court at Nakuru this 30th day of October 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Mutai holding brief for Mr Kahiga for the plaintiff

No appearance for the defendants

Court Assistants: Gichaba & Lotkomoi