



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO 35 OF 2014

SIMON MUTAI KIPROTICH.....PLAINTIFF

VERSUS

JOHN A TOWETT..... DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 18th July 2014, the Plaintiff instituted a suit against the Defendant claiming an interest in the property known as L.R. NO. KERICHO/OLOKYIN/1411 measuring 0.036 ha or thereabouts, herein after referred to as the suit land. He claims that despite having jointly purchased the suit land with the defendant, the defendant fraudulently registered it in his sole name thereby depriving him of his interest therein.

2. The Plaintiff prays for judgment against the defendant as follows:

- i. An order of cancellation of the title to L.R.NO KERICHO/OLOKYIN/1411 whereby a new title therefor shall issue in favour of the plaintiff to the extent of the plaintiff's half share entitlement.
- ii. An order of eviction to issue against the defendant to vacate the plaintiff's half share comprised in L.R.NO.KERICHO/OLOKYN/1411.
- iii. Costs of the suit.
- iv. Any other relief the court may deem fit and just to grant.

3. This suit was defended through a Statement of Defence dated 4th August 2014 which the Defendant later amended on 13 October 2014 denying the allegation of fraud and asking the court to dismiss the Plaintiff's case with costs to the Defendant.

Plaintiff's Case

4. The Plaintiff's case is that the Defendant are business acquaintances who in 2011 agreed to jointly purchase the suit land herein for a consideration of Ksh. 290,000/-.

5. The Plaintiff and the Defendant entered into a sale agreement to purchase the suit land jointly and executed a sale agreement dated 16/4/2011 to that effect. They bought a portion of land from land parcel NO 1387/KERICHO/OLOKYIN.

6. Both parties contributed equal amounts towards the purchase of the suit land. The sale agreement was witnessed by 6 witnesses. The said sale agreement was produced as an exhibit in court as PEX 1. After taking possession of the suit land, the parties decided to further sub-divide the land into two equal portions measuring 20 x 100 feet each.

7. The plaintiff went ahead to develop his portion of the land and he constructed a structure that he planned to use for his business on his side of the land leaving the defendant's side vacant.

8. The plaintiff had previously been renting out one of the shops owned by the defendant and he relocated his shop to his portion of the suit property after the construction of the structure on his land.

9. It is the plaintiff's contention that he was shocked when he went to work one morning and found

people painting on his trade mark name. On inquiry, the Defendant claimed to have bought the Plaintiff's plot together with the building from the Plaintiff by paying the plaintiff's alleged creditors. The Plaintiff went to report the matter to the area chief whereupon he was referred to the lands office. Upon visiting the land Office, he was advised that the land in question had been registered in the name of the defendant. The plaintiff produced a certificate of official search to that effect as exhibit PEX 3. It is this discovery that prompted the plaintiff to institute this suit.

Defendant's Case

10. The Defendant presented his case to establish that he has a good title over the suit property. He was the first to testify among the 6 defence witnesses and explained that he acquired the Plaintiff's share in the suit property at an agreed consideration of Kshs.600, 000/-.
11. The Defendant averred that there was a mutual oral agreement between himself and the Plaintiff that enabled him to acquire the title to the property in his sole name.
12. He explained that pursuant to the oral agreement, the Plaintiff requested the Defendant to pay of the Plaintiff's creditors and in turn the Plaintiff would relinquish his interest in the suit land to the Defendant. The Defendant averred that he paid off the Plaintiff's creditors.
13. The alleged creditors testified as DW 2 (Zephaniah Rono, the Plaintiff's first creditor) DW 4 (Jonathan Ngeno, the Plaintiff's 2nd creditor) and both claimed that they had received various amounts of money being Kshs. 500,000 and Kshs. 100,000 respectively, from the Defendant on the Plaintiff's orders.
14. These payments made to the Plaintiff's alleged creditors were witnessed by the Defendants witnesses, Mrs. Catherine Ruto, who testified as DW 3 as a witness to the 1st creditor and Mr. Christopher Kosimbey as DW5 as witness to the second creditor
15. The Defendant further testified that the Plaintiff was well aware of, involved in and consented to these transactions that led to the Defendant being registered as the sole proprietor of the suit property.
16. The Defendant further testified that once he paid off the Plaintiff's creditors, the oral agreement, was cemented by the transfer of title by the vendor to himself and the issuance of the Title Deed by a competent and independent entity-the Department of Lands.

Plaintiff's Submissions

17. In their submissions, learned counsel for the Plaintiff relied on **Section 3(3) of the law of Contract Act** which provides as follows:

“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.”

18. The Plaintiff submitted that a sale agreement for the purchase of the land was produced in court as evidence and that it is therefore not in dispute that indeed the plaintiff and the defendant jointly entered into a sale agreement to purchase land which is the subject matter of the suit herein.
19. He submitted that defendant did not produce any agreement for the purported sale of the plaintiff's share of land to the defendant. He reiterated that the Plaintiff and the Defendant entered into a verbal agreement which is not recognized by law as per section 3(3) of the Law of Contract Act.
20. Counsel cited the case of **Patrick Tarzan Matu & Another –vs- Nassim Shariff Abdulla & 2 Others [2009] eKLR** in which **Azangalala, J.** (as he then was), struck out the plaintiff's case where he found the contract relied upon was in contravention of Section 3(3) of the Law of Contract Act and declined to entertain the claim for damages for breach of the contract. He stated as follows:-

“...The applicant in this case has satisfied me that there is no agreement between her and the plaintiffs in terms of the provisions of Section 3(3) of the Law of Contract Act which the plaintiffs can enforce against her. The plaintiffs are urging the view that their claim for damages for breach of the contract of sale is sound. With respect, that view cannot be correct. The claims are made pursuant to an agreement that is contra statute or at the very least does not comply with the law. So, the very foundation of their claim is untenable.”

21. Counsel submits that the contract that the Defendant alleges to have made with the Plaintiff is therefore unenforceable as it related to a

disposition of an interest in land and such a contract has to be in writing and signed by the parties and witnessed as required under Section 3(3) of the Law of Contract Act.

22. Counsel submits that the relationship between the Plaintiff and the Defendant is that of tenancy in common. He highlights the Land Registration Act of 2012 section 91 (6) which provides:

“No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.”

23. He argues that the Defendant has not shown any consent in writing from the plaintiff allowing him to deal with the land that they own in common. He submits that the defendant is out to deprive the plaintiff of his share of the suit land.

Defendant’s Submissions

24. In his submissions, counsel for the Defendant argues that by alleging fraud on the part of the Defendant, what the Plaintiff wishes to do is not merely to trounce the mutual agreement but to reverse an entire transaction which (through initiated orally) was strictly honoured by the parties and well witnessed by credible witnesses and finally sealed off by the issuance of a Title Deed by an independent government agency through a very meticulous process.

25. He argues that the Plaintiff is the one who alleged fraud on the part of the Defendant and that therefore the burden of proof lies on him to prove it. He referred to Sections 107 and 116 Evidence Act CAP 80 Law of Kenya which inter alia, provide that he who alleges must prove:-

S 107. (1) **“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

S. 116 **“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”**

26. He argues that Section 26 of the Land Registration Act protects a registered proprietor of land in the following terms:

(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.

27. Learned counsel argues that it is the burden and duty of the Plaintiff to strictly prove the allegations of fraud made against the Defendant to a level that is beyond the one required in normal civil cases. He goes on to cite various authorities that elucidated on the standard of proof required in cases of fraud including the case of Denis Noel MukhuloOchwada& another v Elizabeth MurungariNjoroge& another[2018] eKLR Court of Appeal observed;

‘As regards standard of proof of fraud, the law is quite clear. In R.G. Patel v. Lalji Makanji (supra), the former Court of Appeal for Eastern Africa stated thus: “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”’

28. He argued that the Plaintiff claimed not to have any financial problems and that he was still in business and doing well in the year 2013 and so he could not have requested the Defendant to pay his creditors on his (Plaintiff’s) behalf. He further argued that despite the Plaintiff’s claim of solvency, the Plaintiff had failed to produce any evidence in court to prove the same.

29. Counsel argues that the evidence produced by the Plaintiff falls short and that Plaintiff has failed to prove the alleged fraud to the high standards that are expected in cases of fraud.

Issues for Determination

30. Having gone through the pleadings, evidence and submissions presented before the court, the following issues emerge for determination:

- i. Whether there was a valid sale agreement between the Plaintiff and the Defendant involving the suit land.
- ii. Whether the title to the suit land was obtained fraudulently

Analysis and Determination

31. It is common ground that the plaintiff and defendant jointly purchased the suit land from one Kipkemoi Mosonik. What is in dispute is whether the Plaintiff sold his share to the defendant. Therefore, the first issue I must determine is whether there exists a valid sale agreement between the Plaintiff and defendant in which the plaintiff transferred his share in L.R. NO. KERICHO/OLOKYIN/141 to the defendant.

32. The conditions necessary in a contract for the disposition of land are well settled. Section 38 of the Land Act, 2012 which deals with validity of contracts in sale of land provides as follows:

1.) Other than as provided by this Act or by any written law no suit shall be brought upon a contract for the disposition of interest in land –

a) the contract upon which the suit is founded

i. Is in writing

ii. Is signed by all parties thereto; and

b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party

2.) Sub section 1 shall not apply to –

a) a contract in the course of a public action

b) the creation or operation of a resulting, implied or constructive trust; or

c) any agreement or contract entered into before the commencement of this Act provided that

i. the verbal contracts shall be reduced to writing within two years from the date on enactment of this Act;

ii. the Cabinet Secretary shall put a notice for the requirement to reduce the contracts in writing in a newspaper of a nationwide circulation

33. This section of the Land Act, 2012 essentially reiterates the provisions set out in section 3(3) of the Law of Contract Act.

34. In view of the above statutory provision, the evidence adduced in court and the Defendant's own admission, it is my finding that there was no valid contract between the Plaintiff and the Defendant for the plaintiff to relinquish or transfer his share in the suit land to the defendant. The verbal understanding between the Plaintiff and the Defendant fails to meet the threshold of a contract for sale or transfer of land. The only valid agreement between the parties in this suit was between the Plaintiff and the Defendant (as the purchasers) and Mr. Kipkemoi Mosonik (the Vendor) which was a written contract attested by 6 witnesses.

35. The second issue for determination is whether the title to the suit land was obtained fraudulently. The failure by the Defendant to indicate the Plaintiff's name, as a tenant in common during the transfer of title was a misrepresentation on his part. Registering the title to the suit land in his sole name is proof that the Defendant sought to unlawfully claim absolute ownership of the suit land to the exclusion of the plaintiff. His actions were unlawful and amount to fraud on the part of the Defendant.

36. The upshot is that the plaintiff has proved his case on a balance of probabilities and I therefore enter judgment for him and make the following final orders:

i. Title to L.R. NO. KERICHO/OLOKYIN/1411 be cancelled forthwith.

ii. The Plaintiff and the Defendant be registered as tenants in common to L.R. NO. KERICHO/OLOKYIN/1411 divided in equal shares between the two or alternatively, the said parcel of land be sub-divided into two equal portions and the plaintiff and defendant be issued with titles in their separate names.

iii. Upon issuance of the two titles the defendant shall vacate the plaintiff's share of land forthwith.

iv. The costs of this suit shall be borne by the Defendant.

Dated, Signed and Delivered, at Kericho this 19th Day of October 2018.

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J. M. ONYANGO

JUDGE

In the presence of:

1. Mrs Natome for Mr. Orina for the Plaintiff
2. Mr. Main for the Defendant
3. Court Assistant: Rotich