



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 190 OF 2008

FESTUS MWANGANGI MASILA PLAINTIFF

VERSUS

ERICK KYALO MUTINDA 1ST DEFENDANT

PHILIP MWANZA 2ND DEFENDANT

JUDGMENT

1. In the Complaint dated 29th October, 2008, the Plaintiff averred that at all material times, he was the registered proprietor of land known as Mulango/Kathungi/385 and 387; that the common boundary between the two parcels of land is a metre wide rural access road and that his homestead is on parcel of land number 387.
2. The Plaintiff averred that in June, 1996, he sold parcel number 385 to one Wilson Munyasya Mutui; that at the time of the said sale, he was under the mistaken belief that the land he was selling was parcel number 387 and that the said Wilson Mutui occupied parcel number 385 and the Plaintiff occupied parcel number 387.
3. It is the Plaintiff's case that in the year 2001, he sold to the 1st Defendant a portion of parcel number 387; that he retained a portion of parcel number 387 measuring 1.5 acres; that the purchase price of the portion of land that the 1st Defendant bought was Kshs. 255,000 and that the 1st Defendant paid Kshs. 105,000 and defaulted in paying the balance of the purchase price.
4. However, it is the Plaintiff's case that the 1st Defendant eventually paid the balance of the purchase price; that they retained the 2nd Defendant to sub-divide the sold portion of land; that it was during that time that he discovered he had transferred parcel of land number 385 to the 1st Defendant instead of 387 and that he deposited with the 2nd Defendant the original Title Deed for parcel number 385 awaiting the surrender of title number 387 by the family of Wilson.
5. However, the Plaintiff has averred that the 1st Defendant entered into a portion of parcel number 385 and put up a building; that the wife of Wilson sued him in SRMCC No. 450 of 2007 which was withdrawn; that she again filed in Kitui SRMCC No. 326 of 2008 a suit which was again withdrawn and that later on, he discovered that the 1st Defendant had fraudulently transferred to himself parcel of land number 385.
6. The Plaintiff is seeking a declaration that the transfer of title to land parcel number Mulango/Kathungi/385 to the 1st Defendant was unlawful; an order directing the Land Registrar to cancel the Title Deed in respect of parcel number 385 and for a declaration that the Agreement of Sale between him and the Defendant is rescinded.
7. In his Defence, the 1st Defendant averred that he purchased parcel of land number 385 and not 387 as alleged by the Plaintiff.
8. In his evidence, PW1 stated that he sold to the 1st Defendant a portion of parcel number 385; that he remained with 1.5 acres of the said land and that although the purchase price was Kshs. 255,000, the 1st Defendant only paid him Kshs. 225,000 leaving a balance of Kshs. 30,000.
9. It was the evidence of PW1 that the 1st Defendant paid for the suit land in installments between the year 2003-2005; that there was no agreement in writing initially and that by the time they did the Agreement, he had been paid Kshs. 225,000 and that he left the Title Deed with the 2nd Defendant for the purpose of sub-dividing the land.
10. It was the evidence of PW1 that he gave the 2nd Defendant the original Title Deed to enable him sub-divide the land into two portions; that he signed blank forms that he was given and that when he conducted a search, he realised the transfer of the suit land had been effected in favour of the 1st Defendant on 17th November, 2006.

11. The Plaintiff denied ever signing the Transfer document and that the signature on the Transfer document does not tally with the signature on the Application for the consent of the Land Control Board.
12. In cross-examination, PW1 stated that he lives on parcel number 387 which he had sold; that he uses plot number 385 and that the 1st Defendant has a small house on plot number 385.
13. The 1st Defendant informed the court that he purchased parcel of land number 385 measuring 7.8Ha in the year 2005; that he put up a three bedroomed house on the land; that the transfer of the suit land in his name was lawful and that the Plaintiff has always occupied parcel number 387.
14. In cross-examination, DW1 denied having authorized his agent to sign the Agreement of 3rd November, 2005; that by the time the purported agreement was signed, they had finalized the transaction and that he is entitled to the land.
15. The Plaintiff's advocate submitted that the 1st Defendant disowned the Agreement of 3rd November, 2005; that he did not give evidence on how the parcel number 385 was registered in his favour and that the consent of the Board to transfer the land to the 1st Defendant was never produced.
16. Counsel submitted that the Plaintiff's signature on the transfer form was forged; that the Plaintiff has never appeared before Kalili advocate to sign the alleged Transfer document and that the whole transaction is a nullity.
17. On his part, the Defendants' advocate submitted that the Plaintiff departed from his pleadings; that the allegations of fraud were never proved and that the Sale Agreement of 3rd November, 2005 is not binding on the 1st Defendant because he never signed it.
18. The Plaintiff's case is that the 1st Defendant procured the registration of parcel of land known as Mulango/Kathungi/385 in his name fraudulently; that he never signed the Transfer documents; that he never appeared before the Land Control Board and that in any event, the 1st Defendant did not pay the full purchase price. The Plaintiff therefore wants this court to order for the cancellation of the Title Deed that was issued to the 1st Defendant.
19. The 1st Defendant has maintained that he purchased the entire portion of parcel of land number 385 and not a portion of parcel of land number 387. It was the 1st Defendant's case that the Agreement between him and the Plaintiff was an oral one and that he never signed the Agreement of 3rd November, 2005. Indeed, the Plaintiff admitted that the Agreement of 3rd November, 2005 was signed by the 1st Defendant's agent, and not the 1st Defendant himself.
20. The Plaintiff produced in evidence the copy of the extract of the register for parcel of land number 385. The said extract of the register shows that the suit land was transferred to the 1st Defendant on 17th November, 2006. Although the Plaintiff admitted having signed the Application for the consent of the Board to transfer the land, he denied having signed the Transfer document. The 1st Defendant produced in evidence the two documents. The 1st Defendant also produced in evidence the copy of the extract of the register for parcel of land number 387.
21. The extract of the title for parcel of land number 387 shows that the said land was registered in favour of Wilson Munyasya Mutui on 22nd January, 1998. It was the evidence of the Plaintiff that the land he sold to Wilson was parcel number 385 and not 387 and that the said Wilson has settled on parcel number 385. However, the said Wilson or his wife never testified in this matter. In the circumstances, the question of which land Wilson actually purchased was never proved by the Plaintiff.
22. The Transfer document produced by the 1st Defendant shows that the purchase price for parcel of land number 385 was Kshs. 255,000. The Transfer document does not show the date that the Plaintiff purportedly signed it. Indeed, the document does not show the date that both the Plaintiff and the 1st Defendant appeared before Kalili advocate to execute it.
23. Although the Transfer was registered by the Land Registrar on 17th November, 2006, the same was recorded in the presentation book on 18th November, 2006, a day after the registration. The 1st Defendant did not call the Registrar of Lands to explain this anomaly considering that the Transfer document ought to be entered in the presentation book before the same can be registered.
24. The failure to indicate in the Transfer document the date that the Plaintiff purportedly signed the document or to give a plausible explanation for that omission in my view supports the Plaintiff's assertion that he never signed the document. Indeed, the Plaintiff having denied that he signed the Transfer document, the Defendant should have called Mr. Kalili advocate to testify on the authenticity of the Plaintiff's signature on the said document. However, the 1st Defendant failed to do so.
25. The 1st Defendant did not also place any evidence before the court to show that the Plaintiff appeared before Land Control Board, and that the consent of the Board was granted before parcel number 385 was transferred to him. It is trite that under Section 6 of the Land Control Act, any sale in respect to agricultural land requires the consent of the Land Control Board, and where there is no such consent, the transaction becomes void for all purposes. Having not produced such evidence, I find that the purported transfer of the suit land to the 1st Defendant is null and void.
26. The other ingredient in the purported sell of the suit property that the 1st Defendant was required to prove, which he did not do, was the payment of the full purchase price. Although the Transfer document shows that the purchase price was Kshs. 255,000, the 1st Defendant did not place any evidence before this court to show that he paid to the Plaintiff the entire purchase price. Having denied that he did not sign any

Agreement, it follows that it was upon the 1st Defendant to satisfy this court that he paid to the Plaintiff the entire purchase price before lodging the Transfer document for registration.

27. Lastly, the 1st Defendant failed to comply with the provision of Section 3(3) of the Law Contract Act. The said Section 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 (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

28. The 1st Defendant having denied signing the Sale Agreement of 3rd November, 2005, and having found that the Plaintiff did not sign the Transfer document, the claim by the 1st Defendant is an affront to the provisions of Section 3(3) of the Law of Contract Act and cannot succeed.

29. It is for the above reasons that I am in agreement with the Plaintiff that parcel of land known as Mulango/Kathungi/385 was fraudulently transferred to the 1st Defendant. Consequently, I allow the Plaintiff’s Plaintiff in the following terms:

a. A declaration that the transfer of title of land parcel number Mulango/Kathungi/385 from the names of Festus Mwangangi Masila to the names of Erick Kyalo Mutinda was unlawful, illegal, and therefore null and void.

b. An order be and is hereby issued, directed to the District Lands Registrar, Kitui County, to rectify the register regarding land parcel number Mulango/Kathungi/385 by cancelling the names of Erick Kyalo Mutinda, and inserting that of Festus Mwangangi Masila.

c. A permanent injunction be and is hereby issued, restraining Erick Kyalo Mutinda, by himself, his authorized agents, his successors and by whosoever else acting on his behalf, and/or claiming through him, from encroaching or in any manner interfering with any portion of the property comprised in and/or known as land parcel title number Mulango/Kathungi/385.

d. The 1st Defendant to surrender vacant possession of the portion of land number Mulango/Kathungi/385 in lieu whereof the 1st Defendant be forcefully evicted.

e. Costs of the suit to be paid by the 1st Defendant to the Plaintiff.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE