



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 127 OF 2017

(FORMERLY NAIROBI HCCC NO. 290 OF 2002)

JEREMIAH MATOKE.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT

WILLIAM WILHITE AYENDA.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated 7/3/2002 the 1st defendant/applicant sought the following orders:-

(1) That the 1st defendant be permanently estopped from selling and /or disposing the 10 acres parcel of land forming part of LR No 7847/4 specifically delineated and given title number LR 7847/7 as shown on survey deed plan No 238374 and 238375.

(2) The 2nd defendants do pay general damages to the plaintiff as prayed in paragraph 15 above;

(3) The defendants do pay to the plaintiff costs of this suit as will be determined by the court.

2. The plaintiff filed an application seeking leave to amend the plaint and on the **19th December 2014** the application was allowed as prayed. The plaintiff's amended plaint dated **17/6/2014** was thereby deemed as properly filed and served.

3. In response to the plaintiff's amendment of the plaint the defendant filed an amended defence and applied to have the same deemed as properly filed. By the time the suit proceeded to hearing the loan amount owed to the 1st defendant had been repaid and the title to the 2nd defendant's whole piece of land discharged and the application for amendment of the 1st defendant's defence was never argued.

4. At the close of the plaintiff's case on the **14/2/18** the 2nd defendant's counsel stated that he did not wish to call any evidence and the plaintiff's and the defendants' respective case were deemed as closed. Though the 1st defendant was not represented that day it later successfully applied to reopen the case and cross examine the plaintiff and present its evidence these events took place on **27/9/2018**.

5. The plaintiff filed his submissions on the **20th June 2018** and the defendant on the **26th October 2018**.

The Amended Plaint

6. In his amended plaint the plaintiff stated that on **18th September 1990** he entered into an agreement with the 2nd defendant for the purchase of **10 acres** of land out of the 2nd defendant's **99.5 acres** comprised in **LR Number 7847/7 - Trans Nzoia District** and immediately paid the full consideration of **Kshs 290,000/=**. It was a term of the agreement that the 2nd defendant would immediately transfer the **10 acres** to the plaintiff but the 2nd defendant did not comply with this term prompting the plaintiff to sue him for specific performance in **Kitale HCCC No 132 of 1997** and the court found for the plaintiff in that case and ordered specific performance. However during the hearing of that suit it emerged that the land was charged to the 1st defendant and the court observed in its judgment that the bank was to effect a partial discharge of the plaintiff's **10 acres** since the balance of **89.5 acres** could sufficiently cover the loan then standing at **Kshs. 2,000,000/=** while the value of the land was **Kshs 7,000,000/=**. After judgment, the decree and the transfer documents were prepared and the partial discharge of charge was lodged with the 1st defendant's branch manager at Kitale for processing; that the plaintiff followed up with the 1st defendant for the release of the documents in vain; that in the meantime survey for the excision of the plaintiff's parcel of **10 acres** had been done and a number, **LR Number 7847/7** given to the said portion; that the 1st defendant was aware that the 2nd defendant was

selling off ten acres to the plaintiff; that the defendant's action of sale of the entire parcel of land as to include the plaintiff's portion is unlawful; that the 2nd defendant's act of failing to liquidate his loan with the 1st defendant has continued to expose the plaintiff to a lot of cost, damage hardship and embarrassment.

The Defence of the 1st Defendant

7. The 1st defendant's defence filed on the **15th March 2002** is the pleading to refer to in this suit in respect of the 1st defendant's case. In that defence it stated as follows: that it holds a legal charge over the suit property and that it was an express term reserved in the said charge that the 2nd defendant shall not sell or agree to sell the suit property or any part thereof without the prior written consent from the 1st defendant and the purported sale of the **10 acres** to the plaintiff was conducted without such consent and can not therefore confer any proprietary right to the plaintiff. The 1st defendant further pleaded that it was not party to ***Kitale HCCC No 132 of 1997*** and is not bound by any order emanating therefrom and that the same was made without hearing all the parties with vested interest in the property.

The 2nd Defendant's Defence

8. I have perused through the entire record and I have not seen any defence filed on behalf of the 2nd defendant. However I note that the 2nd defendant filed a notice to act in person on **21/10/2003** and that at the hearing he was represented by an advocate, Mr. Kirwa from Kirwa Koskei & Co advocates.

ANALYSIS OF EVIDENCE

The Plaintiff's Evidence

9. The plaintiff adopted his statement dated **20/7/2016** and filed in the court record on **22/6/2016**; his evidence in his oral and written statements reiterates most of what he states in his amended plaint. He produced a copy of the agreement between him and the 2nd defendant. He took possession of the land after the purchase and he has developed the land and lives thereon. According to **Article 3(b)** of that agreement the 2nd defendant was to conduct subdivision in **3 months**. However up to the date of the hearing the plaintiff had not been issued with the original title deed or transfer. According to him the determination in ***Kitale HCCC 132 of 1997*** was that the seller do apply for Land Board Consent and in default the Deputy Registrar of the court applies; that the then local County Council had approved the subdivision of the land vide a notification dated **25/7/2001**; that the Ministry of Lands approved the subdivision vide a letter dated **29/8/2001** and deed plans showing the proposed excision of 10 acres were approved in **2001**; that the subdivision was approved on **9/10/2001**; that the Kitale Land Control Board authorized the subdivision of the land; that the surveyor visited the ground and carved out the land and caused it to be issued with a number; that the new number in respect of the 10 acres he bought was **LR 7847/7** and its deed plan was issued number **238374**; that after this transfer documents were prepared and the plaintiff signed them; that he took the documents to the bank manager; that he was asked to check later to see if they had been returned from the bank office in Nairobi; that the documents have never been returned to him to date; that after failing to return the documents the bank began arrangements to sell the land and gave notice of a public auction scheduled for **8/3/2002**; that the plaintiff halted the auction and wrote to the bank manager a letter dated **20/6/2002** enclosing a partial discharge and those documents were forwarded to an advocates' firm, never to be seen again by the plaintiff; that the 1st defendant asked for the sale agreement between the plaintiff and the 2nd defendant vide a letter dated **21/6/2007** and that the bank therefore had knowledge of the sale.

10. Upon cross examination he stated that the 2nd defendant has never asked him to leave the land, but that he also never tried to stop the sale of the land by the Bank. He averred that after an order of partial discharge was made in ***Kitale HCCC 132 of 1997***, his advocate prepared a fresh discharge which after being forwarded to the bank was also never returned.

The 1st Defendant's Evidence

11. The evidence of the 1st defendant's witness, **Doris Rono**, showed that the 2nd defendant was a customer with her employer bank; that he took a loan of **Kshs. 700,000/=** in **1987** upon the security of title to **Land Reference Number 7848/4** at Cherangany Trans Nzoia District; that a charge was registered in favour of the Kenya Commercial Bank; that the 2nd defendant never repaid the loan as expected; that the bank attempted the sale and the court enjoined the realization of the security at the 2nd defendant's instance; that the bank never knew the plaintiff; that the bank was not involved in the sale transaction; that the loan was finally liquidated in **2014** and the title deed was finally discharged and the title documents and discharge of charge forwarded to the 2nd defendant in **2015** for registration.

Determination

12. It is not in doubt that the charged land was referred to as **LR Number 7847/4**. It was the same land from which, according to the agreement dated **18/9/1990**, **10 acres** sold to the plaintiff by the 2nd defendant were to be excised. Later the said land was entirely discharged and the title documents forwarded to the 2nd defendant through his erstwhile advocates. This court must take this to be the truth for if it not the case, the 2nd defendant would have raised a defence against the 1st defendant's claims to that effect. An order against the 1st defendant in accordance with prayer **Number (b)** of the amended plaint, if any, must take this admission into consideration.

13. However I have also taken note that by correspondence between the 1st defendant and the 2nd defendant dated **1/7/2002**, **20/6/2002**, **20/2/2002**, **21/6/2007**, **19/1/2009**, and **21/10/2010** whose copies are in the plaintiff's bundle the plaintiff has adequately demonstrated that the 1st defendant was aware of the sale transaction between the plaintiff and the 2nd defendant, and that the 2nd defendant was selling off parts of his charged land to offset the loan with the 1st defendant. In the letter dated **20/6/2002** evidently acknowledged by the 1st defendant by its stamp thereon, the plaintiff was requesting for the partial discharge prepared by Onyancha & Co. In the letter dated **1/7/2002**, the 1st defendant was forwarding copies of the discharge and decree to the plaintiff's advocates; in the decree in ***Kitale HCCC 132 of 1997*** which is

an attachment to that letter, an order of specific performance issued against the 2nd defendant on 8/7/1999 is evident; the decree also orders the excision of the plaintiff's portion of land from the main parcel and mandates the Deputy Registrar to execute the necessary documents if the defendant failed to comply with the specific performance order.

14. The ruling dated 24/5/2001 in *Kitale HCCC No. 111 of 2000 - William Anyenda vs Kenya Commercial Bank Ltd* which the 1st defendant produced in evidence also showed that the 1st defendant knew from the pleadings, application and other documents in that suit (and also the ruling) that the 2nd defendant was in the process of selling his land to third parties to offset the loan owed to the 1st defendant. It is also an uncontested fact borne by the record in the instant suit that the court on 6th May 2002 noted that the plaintiff herein had obtained an order of specific performance against the 2nd defendant herein in *Kitale HCCC 132 of 1997* and ordered in this suit that the 1st defendant could go ahead and exercise its statutory power of sale, that the plaintiff's quiet enjoyment of the 10 acres he occupied should not be disturbed pending the hearing of the suit.

15. The letters from the 1st defendant to the 2nd defendant dated 21/6/2007 seek that the 2nd defendant do supply the 1st defendant with a copy of the sale agreement in respect of the portion of land that he wished to sell to offset the loan amount.

16. I have considered the fact that the 2nd defendant has been a silent participant in this suit, not willing to file pleadings or to testify or to file submissions. The only notable activity that the 2nd defendant engaged himself in through his counsel was cross examination of the plaintiff. I consider that he has conceded that all the facts as pleaded by the plaintiff are correct and that he only awaits the court's decision on the facts.

17. This court takes note of the fact that owing to the discharge of the suit land, the protection of the interests of the 1st defendant is no longer an issue or a priority anymore herein and it must only deal with the agreement between the plaintiff and the 2nd defendant.

18. This court notes that no evidence was tabled to the effect that the orders of specific performance issued in *Kitale HCCC 132 of 1997* were set aside or successfully appealed against. The same case applies to the orders made by this court in this suit on 6th May 2002 when the court noted that the plaintiff herein had obtained an order of specific performance against the 2nd defendant herein in *Kitale HCCC 132 of 1997* and proceeded to order that the 1st defendant could go ahead and exercise its statutory power of sale and that in the process, the plaintiff's quiet enjoyment of the 10 acres he occupied should not be disturbed pending the hearing of the suit.

19. The 2nd defendant's debt obligations to the 1st defendant having been fully discharged the plaintiff and the defendant are therefore left in the same situation they would have been in had the charge document not existed. The 1st defendant admits so at page 8 of its written submissions. For those reasons, the 1st defendant's submission that the agreement between the plaintiff and the 2nd defendant is a stranger's argument in this matter, and it is not also concurred to or supplemented by the 2nd defendant whose interests are at stake, and it will not therefore move this court to reject the agreement dated 18/9/1990. It would therefore be a mere academic exercise to delve into the issue of whether the agreement was invalid for reason of existence of a charge over the suit land by the time the agreement was entered into.

20. Orders of the court are valid and must be complied with unless set aside on review or appeal. The 1st defendant's argument that the judgment was invalid for reason of non-involvement of the 1st defendant, or for reason of it's not being privy to the contract between the plaintiff and the 2nd defendant, does not hold water. The discharge has pulled the rug from the 2nd defendant's feet. The further argument that the judgment was a judgment in persona and could not be binding on the 1st defendant is also invalid in that the judgment, if enforced, would doubtlessly affect the interests of the 1st and 2nd defendants and it was open to these defendants which they never did, to apply to set it aside.

21. As I have stated before it was incumbent on any of the two defendants herein to demonstrate that the judgment was set aside and they did not demonstrate that. As the judgment of the court in *Kitale HCCC No. 132 of 1997* still stands, and the 1st defendant has exited the scene in the manner described above and left the plaintiff and the 2nd defendant to tussle between themselves, this court can not issue orders different from the orders issued in *Kitale HCCC No. 132 of 1997* for that would be contrary to public policy. Those orders would have to be duplicated herein just for the sake of clarity. They can only be tweaked a bit to reflect the exit of the 1st defendant from the imbroglio.

22. In the final analysis I find that the plaintiff has established his claim against the defendants on a balance of probabilities. I hereby enter judgment against the defendants jointly and severally and issue the following orders:

(a) An order of permanent injunction restraining the 2nd defendant from disposing of the land comprised in LR Number 7847/7 as shown on Survey Deed Plan Number 238375;

(b) An order of specific performance directed to the 2nd defendant compelling him to register the partial discharge or full discharge as may have been supplied by the 1st defendant, against the land known as LR No 7847/4 and thereafter to execute and register all necessary documents required to transfer title over LR Number 7847/7 to the plaintiff within 3 months of this order and in default the Deputy Registrar of this court do obtain and/or execute all such documents needed to effect such final transfer of LR Number 7847/7 to the plaintiff.

(c) Each of the defendants shall half of the total taxed costs of this suit.

It is so ordered.

Dated, signed and delivered at Kitale on this 15th day of November, 2018.

MWANGI NJOROGE

JUDGE

15/11/2018

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant -Picoty

N/A for plaintiff

N/A for defendant

(Plaintiff present in person)

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

15/11/2018