



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 495 OF 2013

JOSEPH OMBAIRE ISABOKE.....PLAINTIFF

VERSUS

MARTHA MACHOKA.....DEFENDANT

J U D G M E N T

1. The plaintiff filed the instant suit against the defendant vide a plaint dated 17th December 2013 filed in court on 18th December 2013 and seeks a declaration that land parcel number **Central Kitutu/Bogetaorio/2292** (hereinafter referred to as “**the suit property**”) belongs to him. Additionally, the plaintiff prays for an order of eviction against the defendant and a permanent injunction against the defendant restraining her from in any manner interfering with the suit property.

2. The plaintiff avers that he is the registered owner of the suit property having purchased in the years 2003 and 2004 from the defendant’s husband one, Patrick Machoka Nyakundi and defendant’s father in law one, Nyakundi Moirongo and was put into occupation which he enjoyed up till 11th December 2013 or thereabouts when the defendant unlawfully entered onto the suit property and started farming thereon and prevented the plaintiff from accessing the property.

3. The defendant in her statement of defence dated 3rd January 2014 filed in court on 16th January 2014 averred that the plaintiff obtained title to the suit property through fraud as per the particulars of fraud set out under paragraph 2 of the statement of defence. The defendant contended that the letter of consent from the Land Control Board used by the plaintiff to have the property transferred to him was invalid having been obtained on 25th August 2005 whereas the alleged vendor had died on 1st July 2005. The defendant further averred that her husband had no land which he could have sold to the plaintiff.

4. The plaintiff testified as the sole witness in support of his claim and the defendant likewise testified as the sole witness in her defence. The plaintiff testified that he purchased land from the husband of the defendant through a series of agreements. According to the plaintiff the defendant’s husband was selling to him what would have been his entitlement of land from his father, Moirongo Nyakundi. The plaintiff produced as exhibits the following documents:-

i. **Agreement dated 13th March 2003 (“PEx.1”).**

ii. **Agreement dated 28th May 2003 (“PEx.2”).**

iii. **Agreement dated 14th April 2004 (“PEx3”).**

iv. **Agreement dated 20th November 2004 (“PEx4”).**

5. The plaintiff stated that he took possession of the portions of land as he executed the agreements with the vendor. The plaintiff testified that the defendant’s husband’s father who was the registered owner of the property the subject of the sale undertook to ensure the purchased property was transferred to the plaintiff. The plaintiff stated further that he obtained the consent of the Land Control Board for the transfer of the suit property. He averred that they attended the land board on two occasions on 24th February 2005 and 26th May 2005. The plaintiff produced extracts of the handwritten minutes of the land board as “PEx5 and 6” respectively. The plaintiff further testified that it was the surveyor who processed the subdivision who obtained the consent and the title for him. The title was produced as “PEx7”. The plaintiff stated that when the surveyor brought the documents to him he noticed there was an anomaly with the letter of consent which was dated 25th August 2005 which the surveyor explained could have been on account of a mistake.

6. The plaintiff explained that he had peacefully been using the land since the date of purchase until the time the defendant entered on the land and started utilizing the same. He stated that upon asking the defendant’s husband who had sold the land to him the husband stated he did not know why the defendant was interfering. The plaintiff stated that he followed due process in acquiring the land and denied that he fraudulently obtained title to the suit property. He sought to be granted orders as prayed in his plaint.

7. Under cross examination by Mr. Nyasimi advocate for the defendant, the plaintiff conceded he was buying the land from Patrick Nyakundi although the registered owner of the land the subject of the sale was his father. The witness further admitted he did not obtain consents from the land board for each individual sale agreement and that some of the sale agreements did not show to what land they related. The witness stated the letter of consent issued by the Land Control Board dated 25th August 2005 related to land parcel 2292 and that by the time it was given, the registered owner of the parcel of land had died he having died on 1st July 2005. The witness further agreed in cross examination that in none of the agreements had the registered owner endorsed he had consented to his son selling any portion of his land. Further, the plaintiff stated there was no involvement of the local administration and/or the defendant who was the wife of Patrick Machoka, the seller of the land.

8. The defendant in her evidence stated that Partick Machoka Nyakundi is her husband and that the land she was using at her home belongs to her father in law one, Nyakundi Nyairo (now deceased). The defendant stated her husband never owned any land which he could have sold. The defendant stated that her father in law died on 1st July 2005 and that the consent of the board issued on 25th August 2005 was after his death and hence he could not have been party to procuring the same. The defendant further stated that the plaintiff did not produce any instrument of transfer duly signed by her father in law and contended that the title obtained by the plaintiff was not genuine and must be fraudulent. The defendant further stated that before her father in law died he had informed her that the plaintiff had leased a part of his land but she did not know for how long. The defendant stated that in 2013 she requested the plaintiff to vacate the land and that it is after that the defendant sued her in these proceedings. The defendant stated she came to learn the plaintiff had title to the land after she was served with the court summons.

9. The parties filed final written submissions. The plaintiff filed his submissions on 4th November 2016 and the defendant filed hers on 2nd December 2016. I have considered the pleadings, the evidence and the submissions filed by the parties and the issues that stand out to be determined are as follows:

i. Whether the plaintiff validly purchased land parcel Central Kitutu/Bogetaorio/2292.

ii. Whether the registration of the plaintiff as owner of land parcel Central Kitutu/Bogetaorio/2292 was fraudulent and whether a valid consent from the Land Control Board was obtained to effect the transfer to the plaintiff.

iii. **Whether the plaintiff holds a valid title to the suit property.**

iv. **Whether an order for the eviction of the defendant from the suit property ought to issue.**

v. **By whom the costs of the suit are payable.**

10. The plaintiff in his evidence produced four sets of agreements. Plaintiff's Exhibits 1 and 2 being the agreements dated 13th March 2003 and 28th May 2003 respectively related to sale of land parcel **East Kitutu/Bogetaorio/63**. The seller/vendor is indicated to be one, Patrick Machoka Nyakundi while it is acknowledged one, Nyakundi Moirongi was the registered owner. The sale agreement dated 14th April 2004 ("**PEx3**") is said to relate to land parcel **2228** and the registered owner is not indicated. The final agreement dated 20th November 2004 does not indicate the parcel of land it relates to although it shows Patrick Machoka Nyakundi was allegedly adding a portion of 50ft by 50ft to the plaintiff. From the evidence there is no explanation as to what became of parcel **63** which was the subject of the initial two sale transactions. It is unclear when parcel **2228** came into being and if it was as a result of subdivision of parcel **63**, no evidence to that effect was availed.

11. The sale agreements dated 13th March 2003 and 28th May 2003 to the extent that they related to land that was subject to the provisions of the Land Control Act, Cap 302 Laws of Kenya became null and void after the expiry of 6 months from the date when they were made since it has not been demonstrated that any application for consent of the Land Control Board was made within the stipulated period of six months under the Act. Besides the person who purported to enter the agreements as seller was not the registered owner and he could therefore not sell land that he did not own.

12. Nyakundi Moirongo (deceased) who was supposedly the owner of parcel **2228** was not a party to the agreement dated 14th April 2005 and the agreement dated 20th November 2004 and had not constituted Patrick Machoka Nyakundi as his attorney and therefore the acts of the latter could not bind him. The agreements the plaintiff relies on to support his purchase of the suit property could not be enforced against the registered owner and I would therefore hold and find the agreements were not valid agreements for the purchase of the suit property and that disposes of the first issue.

13. As relates to the 2nd issue there is evidence that the plaintiff is registered as owner of land parcel **Central Kitutu/Bogetaorio/2292** as per the copy of title deed produced as "**PEx7**" although no copy of official search or abstract of title was tendered in evidence by the plaintiff. Under section 26(2) of the **Land Registration Act, 2012**, a certified copy of the register or the registered instrument is receivable in evidence.

26(2) A certified copy of any registered instrument signed by the registrar and sealed with the seal of the registrar, shall be received in evidence in the same manner as the original.

14. The plaintiff tendered the original title which the court returned to him after confirming it was similar to the copy exhibited. The plaintiff stated it was a surveyor who processed the title for him although in his evidence in support of his assertion that due process was followed, he said that they (presumably the plaintiff and vendor) attended the Land Control Board on two occasions on 24th February 2005 when consent for subdivision of land parcel 2228 was granted and on 26th May 2005 when consent for transfer of land parcel 2292 was granted. The consent that was eventually issued is dated 25th August 2005. Owing to the apparent discrepancy between the extract of the minutes and the letter of consent, the court has had to have a close scrutiny of the documents.

15. Firstly, respecting the abstract of the minutes, it is normally usual for the Land Control Board Minutes to be typed. The abstract of the Minute of 24th February 2005 shows under **Minute B/9/2005** that Nyakundi Moirongo had sought consent to subdivide land parcel **2228** into two portions which was approved. The abstract of the Minutes of 26th May 2005, the minute number under parcel **2292** is unclear and appears to have been tampered with. There is an alteration to the parcel number and appears to have

been erased and/or overwritten which undoubtedly casts doubts as to its authenticity.

16. Secondly, as regards the contested letter of consent the letter of consent carries a date of 25th August 2005 and a **minute number B/10/8/2005**. The letter is addressed to Nyakundi Moirongo (deceased). Under paragraph one, the letter of consent reads thus:-

1. With reference to your application dated 24th August 2005 the board gave consent to the following controlled transaction at its meeting held on the 28th August 2005.

17. There is a discrepancy as relates to the date the letter was issued and the date of the board meeting but it is clear the application for consent was made on 24th August 2005 and from LCR No. B/10/8/2005 there is no doubt the board gave its consent during the month of August 2005. This contradicts the abstract of the Board Minutes of 26th May 2005. Transfer of land parcel **2292** could not have been effected without the consent of the Land Control Board. The transfer could only have been executed after the consent of the Land Control Board was issued. The plaintiff did not furnish the court with a copy of the application made to the Land Board or a copy of the registered transfer to verify when the same was executed. These should have been documents which would have been available from the land office parcel file. On the basis of the consent to transfer the suit property, I am satisfied that the application for the Land Control Board’s consent was applied for and issued after the death of the registered owner who from the copy of the burial permit tendered in evidence died on 1st July 2005 aged 91 years. The application for the land board’s consent and the letter of consent issued posthumously are a nullity. The deceased could not transact when he was already dead. The registration of the transfer effected on the basis of the letter of consent is fraudulent and a nullity.

18. My foregoing analysis of the evidence disposes the second and third issues and it is my holding that the plaintiff does not hold a valid title to the suit property as I have held and found the consent used to register the plaintiff as the owner of the suit property was irregularly obtained. The title in the hands of the plaintiff relating to the suit property is hereby held to be invalid and I direct the same to be surrendered to the land registrar for cancellation. The plaintiff’s claim, if any is against Patrick Machoka Nyakundi with whom he contracted.

19. It follows from what I have discussed above that the plaintiff’s suit against the defendant is unsustainable as it is predicated on a defective title. I therefore order the plaintiff’s suit dismissed with costs to the defendant.

Judgment dated, signed and delivered at Kisii this 12th day of May, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

.....for the plaintiff

..... for the defendant

..... court assistant

J. M. MUTUNGI

JUDGE