



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 231 OF 2011

MACKENZIE MUTISO SILA.....PLAINTIFF

VERSUS

SAMUEL DOMINIC MUATHEDEFENDANT

JUDGMENT

Introduction:

1. In his Complaint dated 2nd September, 2011, the Plaintiff averred that at all material times, he was the beneficial owner of two (2) acres of land known as Matungulu/Sengani/3473 which prior to March, 2008, comprised of land known as Matungulu/Sengani/1311 which was sub-divided to create parcels number 3470 and 3473.
2. The Plaintiff averred in the Complaint that it was agreed between himself and Saminico Limited, where the Defendant was a Director, that the said company would pay the Plaintiff the sum of Kshs. 6,500,000 as his share of the proceeds of the sale after the transfer and sub-division of two (2) acres by Saminico Limited.
3. It is the Plaintiff's case that in total breach of the agreement of 27th March, 2008, the Defendant had parcel number 3473 transferred to himself instead of Saminico Limited; that the Defendant proceeded to sub-divide the said land into 22 plots, being plot numbers 3480 to 3502 and sold them to third parties and that the Defendant has declined to pay him the agreed sum.
4. In the prayers, the Plaintiff is seeking for an order against the Defendant for an account of all monies received by the Defendant from the sale of the 22 plots; payment to the Plaintiff of the amount found to be due to him, general damages for breach of agreement and interest at commercial rates.
5. In his Defence, the Defendant averred that the Plaintiff has misinterpreted the agreement of 27th March, 2008; that the Defendant does not have the locus standi to be sued and that if there is any breach of the agreement, then the same was occasioned by the Plaintiff.
6. The Defendant finally deposed that in Machakos ELC Civil Case No. 164 of 2009, the Plaintiff has sued Saminico Limited in respect to parcels number 1311 and 3470 and that ELC No. 164 of 2009 should be determined first.

The Plaintiff's case:

7. PW1 informed the court that his father, Mutiso Sila, died in May, 1998; that his father was the owner

of a portion of parcel of land known as Matungulu/Sengani/1311 measuring 66 acres and that the portion that his father owned was 22 acres which was inherited by his family.

8. According to PW1, before his father died, he informed his brother to scout for a buyer to buy the land and that his brother met the Defendant who agreed to buy two (2) acres of the 22 acres.

9. The evidence of PW1 was that an agreement was entered into whereby the Defendant agreed to buy two (2) acres of Kshs. 6,500,000 and that the family consented to the agreement. However, according to PW1, the family never received the purchase price and that he was only made aware of the Kshs. 1,000,000 that was paid by the Defendant for the purpose of sub-dividing the land.

10. In cross-examination, PW1 stated that the suit land belonged to his father; that Mutuku Sila is his uncle and that his father agreed to be the administrator of the entire parcel of land.

11. PW1 informed the court that the original land was owned by his grandfather, Sila Dimbembe, who had four sons and that all the four sons were entitled to parcel number 1311.

12. PW1 stated that the Kshs. 6,500,000 that was to be paid by the Defendant was the Plaintiff's commission but was not the purchase price for the two (2) acres.

13. When his brother entered into the Agreement with the Defendant, PW1 stated that his father was in hospital and that a Title Deed for his portion of land had not been issued; that Saminico was to buy the land, sub-divide it and then re-sell and that they were to be paid first before the land could be sold to third parties.

14. The Plaintiff, PW2, stated that they sold to the Defendant two plots being parcels numbers 3470 and 3473 and that he is the one who signed the agreement of 27th March, 2008.

15. According to PW2, he sold to the Defendant a portion of land that his father was entitled to for Kshs. 6,500,000 and that he is the one who caused the whole land to be sub-divided.

16. PW2 stated his father agreed to have his portion registered in the name of Peter Sila, his brother and that his father is the one who gave him permission to sell the land to Saminico Limited.

17. PW2 informed the court that he was paid a deposit of Kshs. 1,200,000 for the 2 acres that he sold and that Saminico Limited had three Directors.

18. After the transfer of the land, PW1 stated that the Directors of Saminico started taking him round in circles and that he has never been paid for the land.

19. PW2 stated that parcel number 3473 was registered in the name of the Defendant and that he later on realised that the Defendant wanted to con him.

20. In cross-examination, PW2 stated that it was his father and his uncle Peter Sila who sold to Saminico Limited the suit land; that he was present during the sale and that the whole land was in the name of his uncle, Peter Sila.

21. According to PW2, there was an initial agreement of 30th August, 2007 for the entire land being parcel number 1311 and that after sub-division, parcel number 3470 measured 20 acres while parcel number 3473 was 2 acres and that the first agreement was for parcel number 3470.

22. PW2 denied that the Kshs. 6,500,000 was a commission that he was entitled to and stated that the Defendant signed the agreement on behalf of Saminico Limited.

23. PW2 denied that he was only entitled to the Kshs. 6,500,000 after the sale of all the plots and that due to the breach of the agreement, the said agreement should be rescinded.

24. In re-examination, PW2 stated that his father entered into an agreement of 30th August, 2007 for the 20 acres and that by that time, they had not sub-divided parcel number 1311. However, it was the evidence of PW1 that he is the one who caused the land to be transferred to the Defendant.

The Defence case:

25. One of the majority shareholders of Saminico Limited, DW1, informed the court that the Defendant never personally entered into an agreement with the Plaintiff; that the agreement that the Plaintiff is relying on was between Saminico Limited and the Plaintiff and that the Defendant did not breach the said agreement.

26. DW1 stated that the Plaintiff is guilty of duplicity and misuse of court process because he has sued Saminico Limited over the same Sale Agreement in ELC No. 164 of 2009.

27. DW1 informed the court that it was an express term of agreement between the Plaintiff and Saminico Limited that the Kshs. 6,500,000 was payable immediately Saminico Limited completes the process of selling and transferring the plots to the new buyers; that Saminico has not completed the process of re-selling the plots and that the Plaintiff has breached the agreement by frustrating all the prospective purchasers of the suit land.

28. DW1 informed the court that he joined Saminico as a Director for the purpose of purchasing the suit land and that by the time he joined the company, the Defendant was already negotiating with the Plaintiff for the purchase of the land.

29. According to DW1, the correct date of the Agreement is 30th March, 2008; that as at this time, the suit land had not been transferred to the company and that the Defendant requested him to join the company so as to assist him to purchase the land.

30. It was the evidence of DW1 that the purported agreement produced by the Plaintiff was not an agreement and that after sub-dividing the land, they entered into the agreement of 30th March, 2008.

31. DW1 stated that the company was to compensate the Plaintiff by paying him Kshs. 6,500,000 for services he had rendered.

Submissions:

32. The Plaintiff's advocate submitted that in total breach of the agreement of 27th March, 2007, the Defendant transferred parcel number 3473 into his name.

33. Counsel submitted that from the onset, the Defendant proceeded to commit fraud and that he has continued selling the land to third parties before paying the purchase price.

34. The Defendant's counsel submitted that the Plaintiff never entered into any agreement with the Defendant; that the Plaintiff did not pray in the Plaint for the cancellation of the agreement dated 27th March, 2008 and that the Plaintiff should have sued Saminico Limited in respect to the agreement of 27th March, 2008.

35. Counsel submitted that the Plaintiff has not proved his case against the Defendant on a balance of probability.

Analysis and findings:

36. The evidence by PW1 and PW2 was that parcel of land known as Matungulu/Sengani/1311 was initially one big piece of land belonging to their grandfather. The land measured 66 acres.

37. According to the evidence of PW1 and PW2, the administrator of their grandfather's estate was one Peter Sila, who is their uncle. When their grandfather died, parcel number 1311 was distributed amongst his four sons equally. Consequently, their father was entitled to land measuring 22 acres.

38. It is not clear to this court how the said parcel of land was sub-divided. However, according to the evidence of PW1 and PW2, after the sub-division of the family land, their father's land gave rise to parcel number 3470 measuring 20 acres and 3473 measuring 2 acres. The Plaintiff's case is that the agreement of 27th March, 2008, the subject of this suit, was in respect of plot number 3473 measuring 2 acres.

39. The "*irrevocable agreement and payment guarantee*" of 27th March, 2008 was between the Plaintiff and Saminico Limited.

40. According to the said Agreement, Saminico Limited undertook to pay the Plaintiff or his appointees Kshs. 6,500,000 "*being agreed share emanating from the sale of Matungulu/Sengani/1311 plots.*"

41. The agreement further provided that the payment of Kshs. 6,500,000 was to cover the cost of the Plaintiff "*incurred in preparing and perfecting the sale of the said plots*" and the amount was payable immediately Saminico Limited completes the process of transferring the plots to the new buyers and when the title documents are ready for transfer. The Agreement was signed by the Defendant on behalf of Saminico Limited.

42. The Plaintiff herein sued the Defendant alone. It is not clear to this court why the Plaintiff sued the Defendant, and not Saminico Limited considering that the Plaintiff entered into the Agreement of 27th March, 2008 with Saminico Limited and not the Defendant.

43. The Agreement between the Plaintiff and Saminico Limited was not in respect of 2 acres as claimed by the Plaintiff.

44. According to the terms of the Agreement, the Plaintiff was to be paid Kshs. 6,500,000 to cover the cost incurred by him in perfecting the sale of the plots. The said payment was only to be done after the plots within parcel number 1311 had been sold out to third parties.

45. PW1 and PW2 stated in evidence that the payment of Kshs. 6,500,000 was to be paid before the Defendant could be allowed to sub-divide the land and sell it. PW1 and PW2 stated that indeed they are the ones who have frustrated third parties from buying the sub-plots.

46. It is trite that it is not the function of the courts to re-write contracts for parties. Having agreed to receive his "*share*" of Kshs. 6,500,000 upon the sale of the sub-plots to third parties, the Plaintiff cannot turn around and claim that he was entitled to the said amount before the said plots could be sold out.

47. As I have stated above, the Agreement of Sale of 27th March, 2008 was not for the sale of two (2) acres as claimed by the Plaintiff. Consequently, the issue of the Defendant surrendering the plots back to them due to breach of the said agreement does not arise.

48. Although the Plaintiff has claimed that the Defendant should account for all monies that he has received from the sale of 22 plots, the Plaintiff did not produce any document to support that claim.

49. Having agreed to receive a share of Kshs. 6,500,000 from Saminico Limited after the sale of all the plots, which has not happened, and having not sued Saminico Limited, I find that the Plaintiff has not proved his claim on a balance of probabilities.

50. For those reasons, I dismiss the Plaintiff's Plaint dated 2nd September, 2011 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9TH DAY OF NOVEMBER, 2017.

O.A. ANGOTE

JUDGE