



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 11 OF 2013

SARAH NASAMBU MUSUNDI.....PLAINTIFF

VERSUS

DAVID WAFULA TELA.....DEFENDANT

JUDGEMENT

INTRODUCTION

1. The plaintiff filed this suit against the defendant seeking an order directing the District Surveyor now called County Surveyor to go to plot No. 250 at Birunda within Trans-Nzoia County and open UP an access road which had been created by a surveyor but which road was LATER blocked by the defendant. The defendant filed his defence and raised a counter claim in which he seeks to have the plaintiff evicted from her portion of land measuring 0.2 of an acre comprised in plot No. 250 at Birunda Farm.

PLAINTIFF'S CASE

2. The plaintiff testified that in 1995, she entered into a sale agreement with the defendant in which the defendant agreed to sell to her 0.2 of an acre to her. She paid the full purchase price and took immediate possession. A surveyor came to the ground and created a road of access. The defendant thereafter closed the road. The plaintiff tried to have the defendant open the road through assistance of the then Provincial Administration but the defendant remained adamant.
3. The Plaintiff further testified that she has been staying on the land which she bought. She has put up her house on it and is staying there to date. It is on this basis that she came to court seeking

orders that a surveyor goes to the ground to reopen the road which the defendant blocked.

DEFENDANT'S CASE.

4. The defendant in his defence conceded that he indeed entered into an agreement with the plaintiff for sale of 0.2 of an acre to her in 1995. The defendant then showed her an access road which she was to use but the plaintiff instead called in a surveyor in 1997 who came and created an access road behind his house in his absence. The defendant contends that the transaction did not receive the consent of the land control board and hence is null and void. He now wants the plaintiff evicted from the land as she has been threatening him.

ANALYSIS OF EVIDENCE THE LAW AND ISSUES FOR DETERMINATION:

5. There is no contention that there was an agreement for sale between the plaintiff and the defendant. The plaintiff produced the agreement as plaintiff exhibit 1. There was payment of full purchase price. The defendant's land from which he sold 0.2 of an acre was initially plot No.36 but it changed to plot No.250.
6. There is also no contention that the plaintiff took immediate possession and has been residing on the land since 1995. It is also not contested that a surveyor went to the ground and created an access road which was later blocked by the defendant. It is also true that there was no consent of the land control board obtained. The issues which emerge for determination are firstly whether the plaintiff is entitled to an order that the surveyor do proceed to the ground and re-open the road which had been created early on. Secondly, can the mere fact that the transaction did not receive consent of land control board entitle the defendant to orders of eviction against the plaintiff?
7. It is common knowledge that once one sells a portion of his land, the seller must give the buyer an access road which the buyer will use to access the portion bought. These kind of roads of access are properly made by qualified surveyors because at the end of the day there will be need for sub-division of the land to create individual titles. Maps are supposed to be drawn even though at a later stage even if the property is not registered as in the current case. There was therefore nothing wrong in a surveyor going to the ground and creating an access road. The defendant claims that the road was created in his absence. The practice is that when roads of access are created all affected parties are informed. The defendant must have been informed and if he chose to be away, that should be his problem. The plaintiff is entitled to a road of access and the defendant cannot dictate where it should be. I therefore find that the plaintiff is entitled to an order that the county surveyor should visit the ground and re-open the road of access which had been created.
8. There is no doubt that there was no consent of the land control board obtained. The transaction therefore became null and void for want of consent of the land control board. But does this fact leave the plaintiff without a remedy? The plaintiff as at the time of hearing of the suit had lived on the land for 20 years. There were absolutely no other issues between the plaintiff and the defendant except the road of access. The defendant had been paid his full amount. The only point of argument by the defendant is that he does not want the road to pass behind his house.
9. The plaintiff's counsel cited a court of appeal decision from Nyeri Court of Appeal in Civil Appeal No. 6 of 2011 consolidated with civil Appeal No. 26 and 27 of 2011 between Macharia Mwangi Maina & 87 others -vs- Davidson Mwangi Kagiri. In this case, the respondent had sold 240 portions of one acre each to various individuals between 1983 to 1990. The respondent had promised the purchasers that he was going to obtain the consent of the land control board after he had sold all the 240 portions. When he sold all the portions, he approached the appellants to give money for processing of titles. The appellants allegedly refused to pay the money. This prompted the respondent to file a suit against the appellants for orders of injunction and eviction of the appellants on grounds that there was no consent of the land control board and therefore the agreements between him and the appellants had become null and void. The High Court found in his favour and issued orders of eviction. The appellants then moved to the court of Appeal.
10. The court of Appeal set aside the judgement of the High court holding that there had been created a trust between the respondent and the appellants and that the respondent who had permitted the appellants to take possession could not turn against them and seek to evict them. The same reasoning can apply in this case. The defendant had put the plaintiff in possession. The plaintiff

has stayed on the land for over 20 years. It will therefore be unfair for the defendant to seek to evict the plaintiff from the land on ground that the transaction has become null and void for want of consent of the land control board. The doctrine of proprietary estoppel and constructive trust are applicable in this case as properly observed by the judges of Appeal in the above case.

11. The court of Appeal judges referred to the observations of Lord Bridge in Lloyds Bank Plc -vs- Rosset (1991) 1 AC 107, 132 where Lord Bridge said that a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted by the claimant.

12. Regarding the issue of the consent required by the Land Control Board the judges had this to say:

“Nothing in the Land Control Act prevents the claimants from relying on the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention”.

13. The defendant had made the plaintiff believe that she was to have proprietary interest in the property. He cannot be allowed to go back on this.

DISPOSITION:

14. I find that the Plaintiff's claim is well founded. I make an order that the County Surveyor do proceed to plot No. 250 at Birunda and create a road of access to the property which the plaintiff purchased. The defendant's counter-claim is hereby dismissed. The plaintiff shall have costs of the suit and for the dismissed counter-claim.

Dated, signed and delivered at Kitale on this 19th day of January, 2016.

E. OBAGA

JUDGE

In the presence of Mr. Chebii for M/S Arunga for Plaintiff and Mr. Ngeywa

for defendant. Court Assistant - Isabellah.

E. OBABA

JUDGE