



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 359 OF 2014

SAMWEL PHILIP WERE.....PLAINTIFF

VERSUS

PAUL NG'ANG'A KAMANDILI.....DEFENDANT

JUDGMENT

Samwel Philip Were, (hereinafter referred to as the plaintiff) has come to court against **Paul Ng'ang'a Kamandili (hereinafter referred to as the defendant)** claiming that on 25th of February, 1998 the defendant herein sold him Plot No. 12B (14/1356) Upper Elgon View of size 1/8 an acre for a consideration of Kshs.500,000/= only. That the plaintiff avers that he paid the defendant immediately upon signing of the agreement a sum of Kshs.200,000/= and later on the 19th of May, 1998 he further paid Kshs.150,000/=. That the plaintiff immediately took vacant occupation and possession of the suit property/land after paying partly on the basis of their oral agreement. That there exists a consent agreement between the plaintiff and the defendant in which the defendant admitted the fact that he sold the suit parcel of land to the plaintiff and that plaintiff agreed that he owed him Kshs.150,000/=. The plaintiff reiterates that he still owes the defendant Kshs.150,000/= which remained as balance and has always been ready and willing to hand over the said balance to the defendant but he has been elusive and evading him.

The plaintiff recalls that somewhere in the year 2011, the defendant came and requested him to allow him board in a premise in the suit land which by then he was not using and that he felt for him having suffered post election violence. However, since that initial entry, the defendant has refused outrightly to get out of his property and has on instances threatened him with dire consequences if he ever set foot in the suit property. The plaintiff is categorical that witnesses were present and witnessed the purchase price being given in part to the defendant for the purchase of the suit land and he is willing and ready to procure them to adduce further evidence in support of this claim with the leave of the honourable court. The plaintiff has no objection to vacate the suit property and he will be willing to relinquish the same if he is fully refunded purchase price together with interests and mesne profits occasioned by the defendant's breach. The plaintiff further states that the defendant has become a source of nuisance and disturbance to him and his household. The defendant has severally forced and thrown his household goods outside in a bid to forcefully eject him from what he is legally entitled to.

The plaintiff further claims that he suffered and labored for several years as a Jua Kali artisan so as to secure his family a place to shelter but all these efforts are turning to be a mirage since the defendant has continuously disturbed and interfered with his peaceful and quiet possession. He is a man of meagre means and he has brought this suit in good faith since he has severally informed the defendant through the relevant mechanism to vacate his property but the defendant has been rude and has adamantly refused. That demand and notice of intention to sue has been made in vain.

The plaintiff ultimately prays for judgment for a permanent mandatory injunction restricting the defendant/respondent his servants/agents/employees or persons under his directions and control from gaining entrance/interfering/ploughing/cultivating or demolishing the premise in the suit property and that a declaratory order be issued acknowledging, providing/stating that the respondent/applicant herein is the bona fide owner of the suit land parcel registration No. Eldoret Municipality/Block 14/Upper Elgon View/1356. He prays for costs.

The defendant filed defence to amended plaint stating that no sale agreement was executed between plaintiff and him over suit property as alleged and if any but which is denied then same is a forgery which the defendant shall seek the indulgence of this Honourable for investigations. The defendant in defence contended that the plaintiff was his tenant and that the defendant's interest in the suit property was transferred to his second wife namely Elizabeth Achieng Otondi who is now the beneficial and/or title owner and that the defendant was and is the registered land rates payer. The defendant claims that he has never at any time received any sum from the plaintiff as part of purchase price and denies receipt of any demand and notice of intention to sue.

That the defendant states that the plaintiff is guilty of material non disclosure of previous two Court Cases being Case No. 31 of 2014 (in the Rent Restriction Tribunal at Eldoret) and Misc. Civil Application No. 77 of 2014 (in the Chief Magistrate's Court at Eldoret). That the defendant further states that the plaintiff suit as presented does not disclose any reasonable cause of action against him and they shall at the earliest opportunity possible seek to have it struck out. He prays that the suit be dismissed with costs.

In reply to defence to amended plaint, the plaintiff states that there exists a sale agreement and the allegations levied against him in paragraph 5 are illegal imputation of his character and are criminal in nature and further he wishes to state that he will be requesting the intervention of criminal investigation department to verify the validity of the sale agreement and the alleged forged signature. The plaintiff denies in *toto* the contents of paragraph 6 and states that the defendant was his friend and had given him a room for a while as he sorts out his issues. That in any case the transfer of the suit property to Elizabeth Achieng Otondi who is a total stranger to him and the alleged owner is fraudulent and illegal and in any case the payment of rates are made to the Uasin Gishu County Government is by Paul Ng'ang'a Kamandili. He claims that he could not pay rates because the documents of ownership/possession had not been transferred to him by the defendant herein. That plaintiff states that numerous demand notices had been served to the defendant and or including demand letter from Mwinamo Lugonzo and Company Advocates.

When the matter came up for hearing on 26.5.2015, the plaintiff stated on oath that he is a Jua Kali Artisan and who trades as a motor vehicle electrician. On 25.2.1998, the defendant sold him the land No. Elgon View 14/1356 (a 1/8) at Kshs.500,000/=. He paid him Kshs.200,000/=. Initially, he credited Kshs.150,000/= and paid him a total of Kshs.350,000/=. He started living on the land and he has lived on the parcel of land but the defendant refused to receive the balance of Kshs.150.000/=.

In 2007, during clashes the defendant disappeared from the place and came back in June, 2011 and requested the plaintiff to accommodate him in the parcel of land. The plaintiff allowed him to stay in two rooms. In 2012, he brought a letter from the Tribunal requesting that he vacates the premises. On 5.3.2013, he destroyed his iron sheets on the building. He reported to the police who did not help. He went to the chief who called them and wrote a letter that was sent to the OCS, Langas on 15.7.2013.

The defendant had written a letter to the effect that he had refunded him the money and yet he has not refunded his money. He disconnected his water as a result of which the plaintiff called the village elder who talked to him but he did not agree as he claimed the land was his.

On 13.7.2013, the plaintiff broke the padlock disconnecting water, as a result, the defendant went to the police. He was called and when he went to the police station he was arrested and put in the cells.

The chief came and found him in the cells and talked to the OCS and as a result he was released on free bond.

On 9.6.2013, he received a letter from the Tribunal indicating that he had refused to pay rent however the case was dismissed. On the 21.10.2014, S. M. Mokuia issued an order vacating an earlier order made on 19.6.2014. The court directed that the matter be heard by this court. He prays that the defendant be evicted from the parcel of land that he bought from him. He has an agreement of sale dated 25.2.1998 and seeks to rely on the same.

On cross examination by the defendant, he states that there was no witnesses to the sale agreement. When he signed the agreement, they were friends as they worked together in business hence he not require a witness and that He used to buy goods from the defendant. No witness signed the agreement as he had to conclude payment first before signing before the advocate. He has never been his tenant and has never signed a rent tenancy agreement. He states that the receipt books are creations of the defendant. On the issue of the original agreement , he claims that the defendant remained with the original copy of the sale agreement. There was no carbon paper copy as the defendant knew what he was doing. He did not sign the rent agreement. On 21.2.2014, he called the people who were in charge of community policing who forced him to sign the document. They never asked for witness or carbon copy. After being forced to sign the document, he reported the to police and his advocate who recorded that he was forced to sign the document. He claims that land number is Eldoret Municipality/Upper Elgon View 14/1356 is registered in his name. He does not know that the land is in the name of Elizabeth Achieng Otondi. He applied for electricity connection by Kenya Power and paid Kshs.1060/= and was allowed to fix power on the premises.

The defendant testified that he is also a retired mechanic. He has documents to show that the plaintiff is wrong because the land in issue is his. He bought from Samuel Gachanja Ng'ang'a. He bought through Patel & Patel Advocates. The agreement is available. Elizabeth Achieng Otondi is his second wife. His first wife was known as Wanjui and she is deceased. He transferred the land to Elizabeth Achieng Otondi to ensure that she is not harassed by the children of his first wife. She stays on the plot with her 2 children who are in Langas Primary School. He transferred the land to his wife and produced a letter of transfer as DEX1 and confirmed the letter as original. The documents by Mr. Were according to the defendant are a forgery as Mr. Were was his tenant.. He produced the receipts as DEX2 (a, b, c, d, e,f). He has a rent agreement signed by Mr. Were dated 1.3.2013. He signed as a tenant and produced it as DEX3. He claimed that the agreement dated 25.2.1998 is not witnessed and yet such transaction requires a witness. There is no stamp and thumb print and that the signatures are forged. On 21.2.2014, he agreed to vacate the land and produced it as DEX4. In 1998 to-date, it is 18 years, and that the law on limitation in land matters is six years. The Land Control Board's consent was not obtained and yet It is twelve years since the agreement. The delay in obtaining consent is inordinate. He prays that the suit be dismissed with costs.

On cross examination by Mr. Were, he states that he transferred the land to his wife in 1997. The dispute began in 1998 whilst the suit was filed on 4.12.2014. The agreement was in 1998 and therefore there was a delay of 12 years. He called the plaintiff to pay rent but he refused. Rent Tribunal ordered that the matter be dealt with in Environment and Land Court. The Tribunal found that the matter should be dealt with by this court first.

He sued him before the chief claiming the land is his but the chief referred the matter to this court. He did not have witnesses, no original agreement, no carbon paper, copy of the agreement. He did not know the village elder. He did not call village elder to witness agreement.

In the Rent Tribunal, he appeared on 9.6.2014. The case was filed in the year 2013. The rent tribunal had dismissed the case. The case before the Magistrate's Court was filed after the decision of the Tribunal. The matter was filed on 11.6.2014. The eviction was done through the police.

The plaintiff correctly submits that the issue for consideration is whether land parcel No. Eldoret Municipality/Block 14/Upper Elgon View 1356 measuring 0.8 acres was sold to him by the defendant and whether the plaintiff was living in the suit land as a tenant and whether the plaintiff is entitled to expenses, costs and interest.

On whether the plaintiff's land in dispute was bought, the plaintiff submits that the same was bought vide sale agreement executed on the 25.02.1998 between the plaintiff and defendant.

On the issue as to whether the plaintiff was living in the suit land as a tenant, the plaintiff submits that he produced the sale agreement indicating that he had made a part payment of Kshs.350,000/= towards the property and that the balance was Kshs.150,000/=. He claims costs of the suit plus interest.

The defendant on his part argues that he was the owner of the disputed parcel of land and transferred the same to Elizabeth Otondi in a letter dated 10.6.1997. The defendant submits that the agreement dated 25.2.1998 is not valid as it was not witnessed as required by law. The defendant submits further that the plaintiff was his tenant and started demanding the property when he defaulted in rent.

I have considered the pleadings, evidence on record and read submissions and do find that on the 19th July, 1980, Mr. Samuel Gachanja Ng'ang'a sold Mr. Paul Ng'ang'a Kamandili one half of the one quarter (one eighth) of land situated on LR No. 8746 in Eldoret Municipality in Uasin Gishu District of Kenya which had been bought by sale agreement dated 7.12.1979. The said parcel of land was sold in vacant possession and unbuilt and free from any encumbrances thereon but otherwise submit to the terms and conditions under when it was held by the vender Samuel Gachanja Ng'ang'a.

The purchase price of the said parcel of land was Kshs.3000/=. The said parcel of land was sold in the same status and boundary thereof as had been inspected and occupied by the defendant. The defendant was under duty to obtain the necessary consent as required by law. Though the defendant did not produce any document of title to the land the sale agreement dated 7.12.1979 is proof that he has beneficial interest in the property.

The plaintiff now claims that he bought the said parcel of land from the defendant. He produced a photocopy of the agreement. Though the defendant did not object, the agreement is not witnessed as required by law.

Section 3(3) of the **Law Of Contract Act** provides that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing is signed by all the parties thereto and incorporation all the terms when the parties have expressly agreed in one document and the signatures of each party signing has been attested by a witness who is present when the contract is signed by such party.

It follows that one cannot attempt to enforce an agreement for sale of land which has not been attested to by an independent witness. This court finds that the sale agreement produced by the plaintiff is a nullity as it does not comply with the said section of trite law.

The plaintiff prays for a refund of the money he claims to have paid the defendant. However, this court finds that failure to attest to the contract implies that there is no evidence that the agreement was property executed hence no evidence of payment, and therefore the plaintiff is not entitled to a refund. Moreover, Mr. Kamandili has denied the existence of the agreement. It was the plaintiff's duty to prove existence of such agreement.

Both the plaintiff and the defendant produced a document known as Ministry of Lands Housing and Urban Development, Kenya Informal Settlement Improvement Programme (KISIP). The plaintiff produced his as PEX5 whilst the defendant produced his as DEX.7. This court finds that this document is not proof of legal ownership or occupancy and cannot be relied upon by any party to confer title. Section 24, 25, and 26 of the Land Registered Act are very clear. Section 24 provides that;

"24. (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging

or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

Section 25 provides that;

“25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

Section 26 provides that;

“26.(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(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.”

The burden of proof in this matter falls on the plaintiff to prove that he was the legal or beneficial owner of the suit property. This court finds that he has not discharged the burden of proof on a balance of probability. The upshot of the above is that the suit is dismissed with costs to the defendant.

DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF FEBRUARY, 2016.

ANTONY OMBWAYO

JUDGE