



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 17 OF 2013

KATANA LUGHANJE MASHA.....PLAINTIFF

=VERSUS=

JOSEPH K. NYAGAH.....DEFENDANT

J U D G M E N T

Introduction:

1. According to the Plaintiff's Plaint dated 31st December, 2012, the Plaintiff is the registered owner of plot number 269/Kikombe Thele Scheme in Goshi, Malindi in trust for the family.
2. The Plaintiff has averred that him, together with his brothers, sold plot number 269/Kikombetele Scheme (the suit property) to the Defendant on 10th August, 2004 for Kshs. 45,000. The Defendant only paid Kshs. 38,000 leaving a balance of Kshs. 7,000.
3. It is the Plaintiff's contention that on 8th May, 2012, he was to refund the money paid by the Defendant but the Defendant refused to receive the same; that his family has refused to give the consent for the Sale of the property to the Defendant and that the Defendant has formed the habit of trespassing on the land.
4. The Plaintiff has prayed for a permanent injunction to restrain the Defendant from dealing with the suit property.
5. In his Defence, the Defendant has deponed that he is unwilling to accept the refund of the purchase price because he has already honoured his part of the bargain and that he cannot be accused of trespassing on his own land.

The Plaintiff's case:

6. According to the evidence of the Plaintiff, Pw1, he is the registered owner of Goshi/Kikombetele Scheme/269 (the suit property) measuring 1.8 ha. Pw1 produced in evidence the Title Deed in respect to the suit property as PEXB 1. The Plaintiff informed the court that he sold to the Defendant the suit property and pursuant to the sale agreement, the Defendant paid him Ksh. 38,000 leaving a balance of Kshs. 7,000. The Sale Agreement was produced as PEXB2.
7. It was the evidence of Pw1 that his children subsequently rejected the sale of land and refused to appear before the Land Control Board for the purpose of obtaining the Board's consent before the sale of suit property. It is the Plaintiff's contention that he is willing to refund to the Defendant the Kshs. 38,000 that was paid to him. The Plaintiff also produced in evidence a letter dated 19th April, 2012 allegedly authored by the Defendant as PEXB 3.

Defendant's case:

8. The Defendant, Dw1, stated that on 23rd August, 2004, him, together with his brother-in-law met the Plaintiff with his four brothers and the village elder. On that date, the Plaintiff agreed to sale to him the suit property and he gave him some money. The agreement was reduced into writing and the signatures were duly witnessed.
9. On 10th September 2004, the Defendant paid to the Defendant a further sum of Kshs. 26,000 before the then acting Chief and Assistant Chief. By that time, a title deed had not been issued to the Defendant and the only document in his possession was a letter of allotment which he gave him. The letter of allotment was produced as DXB1.
10. It was the evidence that he agreed to pay to the Plaintiff the balance of the purchase price being kshs. 7,000/ together with interest of Kshs. 10,000. He gave to the Chief this money together with a letter which he produced as DEXB4. However, the Plaintiff never went to collect the money from the Chief although the Chief informed the Plaintiff to collect the money by way of a letter dated 21st May 2012.
11. In cross-examination, the Defendant stated that there he was supposed to pay the balance of the balance price within a specific period and that although the title was issued to the Plaintiff in October 2013, he was never informed of that fact by the Plaintiff. The Defendant stated that the Land Control Board has never given its consent for the transfer of the suit property.

Submissions

12. The Defendant submitted that the sale Agreement between himself and the Plaintiff for the sale of the suit property did not provide the period within which the balance of the purchase price was to be paid. The Defendant submitted that he would have paid the balance of the purchase price of kshs. 7,000 before the end of May 2005.
13. The Defendant further submitted that he cleared the suit property which was a thick forest; that the Plaintiff sold the suit property to a third party without informing him and that he deposited with the Chief the balance of the purchase price together with interest and that the Plaintiff was supposed to collect the Kshs. 17,000 from the Chief.

Analysis & findings:

14. It is not in dispute that on 10th September, 2004, the Plaintiff entered into an agreement for sale of the suit property with the Defendant. The Agreement, which was produced as PEXB2, provided that the purchase price was kshs. 45,000. The agreement showed that Kshs. 30,000 had been paid to the Plaintiff leaving a balance of Kshs. 15,000. The Defendant then paid to the Plaintiff Kshs. 5,000 on 10th December 2004 and Kshs, 3,000 leaving a balance of kshs. 7,000.
15. The Defendant deposited the said balance of Kshs.7,000 with the Chief together with the interest of Kshs.10,000. This fact was acknowledged by the Chief vide his letter dated 2nd May 2012.
16. The Defendant admitted that the Plaintiff has never obtained the consent of the Land Control Board to transfer the suit property to him as required by the law. Section 6 of the Land Control Act provides that the consent of the Board should be obtained for the transfer of agricultural land within six months from the date of the Sale Agreement. In the absence of the consent of the Board, the agreement of sale of the suit property becomes void at the expiry of the six months.
17. Where a transaction becomes void for want of the consent of the Board, the Defendant is only entitled to the purchase price paid to the Plaintiff and not the land. That is what section 7 of the Act provides.
18. This Court cannot therefore enforce the agreement for sale of agricultural land where the consent of the Board was not obtained within six months. In the absence of the consent of the Land Control Board, this court can do no more than to hold that the only thing that the Defendant is entitled to is a refund of Ksh. 38,000/= that he paid to the Plaintiff and not the suit property. In any event, the Defendant did not file a counter-claim seeking for specific performance.
19. In the circumstances, and for the reasons I have given, I find and hold that that the Plaintiff has proved his case on a balance of probabilities. The Plaintiff's Plaint dated 31st December, 2012 is

allowed as prayed.

Dated and delivered in Malindi this **4th** day of **July**, 2014.

O. A. Angote

Judge