



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 280 OF 2012

Formerly HCC 84 of 2006

FRANCIS PIUS OMWERI & ANOTHER.....PLAINTIFF

VS

ALICE CHESIRE.....DEFENDANT

JUDGMENT

The two plaintiffs commenced this suit through a plaint filed on 24 July 2006. They pleaded that they are the registered owners of the land parcel Eldoret Municipality Block 12/ 358. It is further pleaded that the 2nd plaintiff and the defendant in the year 2000 entered into an agreement to sell the suit land but which sale did not satisfy the provisions of the Law of Contract Act, thus became null and void. That agreement did not involve the 1st plaintiff. It is pleaded that the 2nd plaintiff refunded whatever money was paid by the defendant. It is averred that despite the refund, the defendant still persists on laying claim over the suit land and that the defendant proceeded to demolish a structure on the suit land. The plaintiffs have thus asked that the defendant be restrained by way of an injunction from interfering with the suit land and costs of the suit.

Upon being served, the defendant entered appearance and filed a statement of defence. It is denied that the plaintiffs are the registered owners of the suit land. The defendant has also pleaded that she had a sale agreement with the 2nd plaintiff on his own behalf and on behalf of a third party, not a party to this suit, for purchase of the suit land and that the consideration was paid in full. It is pleaded that at the time the agreement was entered into, the land was unregistered and that the 2nd plaintiff and the unnamed third party were mere allottees of the land. The defendant pleaded that upon purchasing the suit land, she transferred her interest to a company called Mospa Limited, of which the defendant is a director, and an allotment letter was then issued to Mospa Limited. It is pleaded that the plaintiffs acquired the registration of the land in their favour by fraud. She has stated that she has been wrongly sued as the right defendant should be Mospa Limited and asked that the suit be dismissed.

After the preliminaries had been complied with, the matter proceeded for hearing. The two plaintiffs gave evidence in support of their case. PW-1 was the first plaintiff. He testified that the suit land is jointly owned by himself and the 2nd plaintiff. They obtained title in the year 2004. He produced the Certificate of Lease as an exhibit. Sometimes in the year 2006, he noticed that the defendant had deposited building stones on the land ready to commence development. He inquired from the 2nd plaintiff who disclosed that he had taken Kshs. 100,000/= from the defendant, but which money he had refunded through his advocates vide a letter dated 29/5/2006. The lawyers of the defendant wrote back returning the cheque, but PW-1 stated that no such cheque was enclosed.

Cross-examined by Mr. Sirtuy for the defendant, it emerged that a restriction had been placed on the land

on the complaint that the nature of acquisition, by the plaintiffs, of the suit land is not known. PW-1 stated that they held a letter of allotment and later title was issued to them. He denied any knowledge of the land having been allotted to Mospa Ltd. He testified that it is probable that the 2nd plaintiff intended to sell the land, but he was not aware of such sale, and on his part, he never entered into any sale agreement with the defendant.

PW-2 was the 2nd plaintiff. He testified that he had known the defendant as they come from the same area and that he borrowed the defendant Kshs. 100,000/= in December 2005. Nothing was put down in writing and there was never an agreement for sale of land. He testified that when he learnt that the defendant had delivered stones to the suit land, he instructed his lawyer to refund the Kshs. 100,000/= which was done through a cheque.

The defendant in her evidence testified that she knew the 2nd plaintiff but was not familiar with the 1st plaintiff. She came to know the 2nd plaintiff in the year 2000 through her late husband, as they wanted to buy the suit land from the 2nd plaintiff. At that time the 2nd plaintiff did not have a Lease, but had a letter of allotment, which was in the names of the 2nd plaintiff and one Kipsaigut Kiprotich Chebor. This letter of allotment was dated 4/2/1999. She testified that it was agreed that the 2nd plaintiff would change the name in the letter of allotment to Mospa Ltd, which company was owned by the defendant. This was duly done, and the 2nd plaintiff handed to the defendant an allotment letter in favour of Mospa Ltd dated 4/2/1999.

She stated that she gave the 2nd plaintiff some money, the exact amount of which she could not recall, but that it was over kshs. 100,000/=, before the 2nd plaintiff went to change the letter of allotment. There was some money to be paid for Mospa Ltd to obtain a lease and she testified that the monies were paid. She produced receipts for the payments which show that some money was paid on 19/9/2006. She also paid Kshs. 200,000/= as land rent so that a lease may be prepared for Mospa Ltd. She stated that a Lease in favour of Mospa Ltd was drawn and forwarded for registration. She also produced rates demand documents from the Municipal Council of Eldoret indicating that the Eldoret Municipal Council has been demanding rates from Mospa Ltd over the suit land.

She testified that she took possession of the land on behalf of Mospa Ltd, fenced it and deposited building materials. She was then surprised when people pulled down the fence and removed the building materials. As to the letter dated 29/5/2006 (plaintiff's exhibit No. 1), it was her view that the same ought to have been addressed to Mospa Ltd. She denied receipt of any cheque quoted in the letter of 29/5/2006 and denied receipt of any money from the 2nd plaintiff. She later learnt that title had been issued to the plaintiffs and she then sought a restriction to be put in place. As far as she is concerned the suit land properly belongs to Mospa Ltd. She denied having interfered with the suit land in her personal capacity and stated that her presence on the land was courtesy of Mospa Ltd.

In cross-examination, the defendant testified that there was a written agreement between herself and the 2nd plaintiff but she was unable to produce it. She agreed that the two letters of allotment in issue bear the same date. It was her evidence that it was the 2nd plaintiff who changed the names in the allotment letter to Mospa Ltd. She had no evidence that it was the 2nd plaintiff who handed to her the allotment letter addressed to Mospa Ltd. She admitted that no counterclaim for the suit land has been filed. She stated that Mospa Ltd obtained a lease for the property, but she did not have it, as the information from the Lands office was that the file could not be traced. She conceded that the letter of allotment required payments to be made within 30 days but that she made payments in the year 2006 which is after the plaintiffs had received title to the suit land.

Mr. Momanyi, counsel for the plaintiffs, in his submissions, submitted that there was no written agreement between the 2nd plaintiff and the defendant which could be enforced. He cited the provisions of Section 3 (3) of the Law of Contract Act. He also stated that the plaintiffs have title to the suit land and that the defendant has not demonstrated any claim on the same. He further averred that even if Mospa Ltd had any claim over the land, they were not parties to this suit. He pointed out that no counterclaim has been filed by the defendant. He relied on the cases of *Machakos District Co-operative Union Limited vs Philip Nzuki Kiilu, Court of Appeal at Nairobi, Civil Appeal No. 112 of 1997* (unreported), and *John*

Michael Wanjao vs Alubala Abenayo Andambi, Eldoret HCCC NO. 134 of 2008 (unreported).

Mr. Sirtuy, for the defendant, submitted that there was fraud in the manner in which the plaintiffs obtained the suit land and that is the reason that there is a restriction on the title. He stated that the plaintiff's suit must fail as they have sued the wrong party and their claim ought to have been directed to Mospa Ltd. He further argued that the plaintiffs had nothing to sell in the year 2000 as they had no title and therefore there could not have been any sale of an interest in land.

I have considered the pleadings, the evidence and the submissions of the parties. All that the plaintiffs want in this suit is a permanent injunction to restrain the defendant from interfering with their quiet enjoyment of the suit land and costs. There is no other prayer. This suit is not against Mospa Ltd but against the defendant in her individual capacity. The defendant has not made any counterclaim to state that she has any interest in the suit land. Those are the pleadings upon which I will decide this matter.

Both plaintiffs and defendant alluded to a sale agreement although the 2nd plaintiff when giving evidence denied the existence of any sale agreement. I thought the 2nd plaintiff was being fairly economical with the truth in denying the existence of a sale agreement despite pleading that he had an oral agreement to sell the land to the defendant, and to be honest, he did not impress me much. Be as it may, no written sale agreement was produced by either party. If a sale agreement had been demonstrated by the defendant showing that she purchased the suit land, then probably, the matters would not have been as simple for the plaintiffs. However, no sale agreement was produced in evidence and in absence thereof, I cannot hold that there is any enforceable agreement between the plaintiffs and defendant over the suit land. This flows from the provisions of Section 3 (3) of the Law of Contract Act, CAP 3, Laws of Kenya, which provides as follows :-

S. 3 (3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust

Without a written agreement, one cannot enforce a contract for the sale of land. This was indeed the holding in the two authorities availed by the plaintiffs' counsel.

No doubt, there are some unanswered questions that the evidence herein has brought forth. For example, it is not clear to me how the Government could issue two allotment letters, said to be issued on the same date, to two parties. It also appears as though the Government received monies from Mospa Ltd for purposes of issuing a lease over the suit land to Mospa Ltd despite there being another lease issued to the plaintiffs. There is also a restriction on the subject title questioning how the plaintiffs obtained registration. However, I do not have the appropriate pleadings to enable me answer these questions. I have not been asked in these proceedings to nullify the title of the plaintiffs as there is no counterclaim.

I understood the defendant's evidence to be that Mospa Ltd has a legitimate claim over the suit land, but Mospa Ltd is not a party to these proceedings, and the defendant cannot therefore agitate any claim on behalf of Mospa Ltd in this suit.

Much of the evidence brought forth by the defendant was that Mospa Ltd is the proper title holder of the

suit land, but again I stress the point that Mospa Ltd is not a party to these proceedings, and neither was it demonstrated that Mospa Ltd is the registered proprietor of the suit land. What I have before me is a title issued in the names of the 1st and 2nd plaintiffs, and from the material before me, they are the registered owners of the suit land.

The plaintiffs have demonstrated that they have title to the suit land by exhibiting their certificate of lease. As title holders, the plaintiffs are entitled to protection of the law unless a person can demonstrate that the title was received by way of fraud, misrepresentation, or by an illegality. This is spelt out in Section 26 of the Land Registration Act, Act No. 6 of 2012 which provides as follows :-

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.

If the defendant had meant to challenge the title of the plaintiffs, then she ought to have brought a counterclaim upon which she could found an action to have the title of the plaintiffs cancelled for having been obtained by fraud, misrepresentation or illegally. I have stressed the point that there is no counterclaim. If Mospa Ltd feel that they have a legitimate claim over the suit land, they are free to pursue it. This suit is however against the person of the defendant; the defendant has not been sued in her capacity as director of Mospa Ltd.

I therefore do not see how the plaintiffs can fail in their suit, and I do not see why the defendant, in her personal capacity, ought not to be restrained from interfering in the suit land, as she has not demonstrated that she has an interest in her personal capacity, over the land. I think the plaintiffs are entitled to have the defendant restrained by way of injunction.

In so far as costs are concerned, I think the defendant interfered with the suit land on the honest belief that the suit land belonged to Mospa Limited. I cannot blame her for holding this belief, and I think that in the circumstances of this case, and especially given the unanswered questions that I alluded to earlier, it is fair that each party bears its own costs.

I therefore enter judgment for the plaintiff as prayed, save for costs, and issue an order of permanent injunction restraining the defendant from interfering with the plaintiffs' quiet enjoyment of their proprietary rights in the land parcel Eldoret Municipality Block 12/358. For the avoidance of doubt, I have not made any findings on the legitimacy of claims by Mospa Ltd that they are also entitled to the suit land.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 10TH DAY OF OCTOBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. M.J. Omusundi holding brief for Mr. Momanyi for the plaintiffs.

Mr. L. Sirtuy present for the defendant