



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

ENVIRONMENT AND LAND COURT NO. 23 OF 2013

PETER LETOTIN.....PLAINTIFF

VERSUS

RAEL CHEPNGETICH.....1ST DEFENDANT

ALFRED KIPKOECH.....2ND DEFENDANT

EDWIN KIPYEGON.....3RD DEFENDANT

MACDONALD KIPKURUI.....4TH DEFENDANT

PAUL KIPTONUI LANGAT.....5TH DEFENDANT

PETER KIBET TANUI.....6TH DEFENDANT

JUDGMENT

By a Plaint dated 22nd April, 2013 the Plaintiff filed suit against the Defendants seeking the following reliefs:

- 1. A declaration that the plaintiff is the legal and lawful proprietor of land parcel number KERICHO/SOSIOT/1811 measuring 4.26 ACRES.*
- 2. A permanent injunction restraining the defendants, their servants, agents or assigns from entering, picking tea, constructing structures, planting maize, or any other crop, ploughing, or in any way interfering with the plaintiff's activities and quiet possession of land parcel number KERICHO/SOSIOT/1811 measuring 4.26 acres pending the hearing and determination of the main suit.*
- 3. An eviction order be issued against the defendants to vacate land parcel number KERICHO/SOSIOT/1811.*
- 4. Mesne profits.*
- 5. Costs of this suit.*
- 6. Interest.*

7. Any other remedy that the court may deem fit and just to grant.

Contemporaneously with the plaint the Plaintiff filed a Notice of Motion seeking a temporary injunction restraining the defendants from interfering with the suit property and orders were subsequently granted in his favour.

The defendants filed their defence denying that the plaintiff purchased the suit land and claimed that they have been lawfully occupying the land.

They also raised a preliminary objection that the sale is null and void for want of Succession and failure to obtain consent of the Land Control Board within 6 months of the sale. The court directed that the said preliminary objection be subsumed in the main hearing.

The matter proceeded to full hearing and the plaintiff testified and produced sale agreements showing that he purchased the suit land measuring 4.26 acres in bits from the 5th defendant and his deceased brother Elijah Langat between 2002 and 2005. Upon payment of the agreed purchase price, he was allowed to occupy the land as the 5th defendant and his family moved to Olenguruone. He further testified that once he moved onto the suit land, he planted more tea bushes and he started plucking the tea which he would deliver to KTDA. He produced a summary of delivery notes and copies of delivery statements from KTDA. He testified that he occupied the suit land from 2002 to December 2012 when the defendants forcefully re-entered the land and chased away his worker and stopped him from picking the tea.

In cross examination, the plaintiff stated that the agreement stated the transfer would be completed after the Succession process in respect of the estate of the registered owner -Martha Tapruno Byebei- deceased was concluded. The sale being one involving agricultural land was subject to the consent of the Land Control Board though this was not obtained.

The plaintiff called 4 witnesses who all corroborated the plaintiff's testimony to the effect that he purchased the suit land and took possession thereof until 2013 or thereabouts when the defendants forcefully and unlawfully re-occupied it. Of interest is the evidence of PW3, a co-wife of the 1st defendant and sister-in-law of the 5th defendant who broke ranks with the 1st defendant and admitted that she was present when her late husband Elijah Langat sold land to the plaintiff and they used the proceeds of the sale to buy land in Keringet where they relocated to. PW5 who was the plaintiff's 4th witness and chief of Waldai location testified that he was present when the 1st defendant and her late husband sold the land to the plaintiff in 2002 and he counted the money and witnessed the exchange of the purchase price. He testified that he included the plaintiff's name as a beneficiary of the estate of the late Martha Byebei when the defendants applied for letters of administration.

The 1st Defendant denied that her late husband sold a portion of the suit land to the plaintiff but under intense cross-examination she admitted that she signed the sale agreement. The court noted that she was evasive in her responses though she eventually admitted that she was jailed for returning to the suit land illegally.

DW2 Peter Kibet who is the son of the 1st defendant testified that he was present when the agreement for sale of land was prepared though he did not sign it. He denied that the plaintiff bought land from his late father. His evidence is however contradictory as he tries to distance himself from the sale yet he admits that he was present at the time of sale.

DW3 Betty Chepkemai who is the 5th defendant's wife denied that her husband had sold land to the plaintiff and maintained that she has all along lived on the suit land.

DW4- Andrew Kipngetch Rop who is a nephew to the 1st defendant admitted in his testimony that his uncles Elijah and Paul sold land to the plaintiff. He further testified that the late Elijah intended to transfer the portion he had sold to the plaintiff but he died before he could effect the transfer. He further testified

that after the sale, the plaintiff occupied the suit land and used it though he did not build a house on it. He also testified that even though his uncle had relocated after selling his land to the plaintiff, his family later came back as the land they had relocated to was declared a forest.

From the evidence adduced by both parties and the documentary evidence produced by the plaintiff, it is evident that the plaintiff bought the suit land measuring 4.26 acres from the 5th defendant, his late brother Elijah. What is also evident is that at the time the said land was sold it was still in the name of the late Martha Byebei who was the mother of the 5th defendant. This explains the reason why the plaintiff's name was included as a beneficiary when the 5th defendant applied for letters of administration in respect of the estate of the deceased vide **Kericho HCC Succession Cause no. 93 of 2002. In the matter of the estate of Martha Tapruno Byebei.** The proceedings of the said Succession Cause were produced as exhibit P4.

It would appear that the defendants, being the beneficiaries of the estate of the late Martha Byebei had no problem selling the suit land to the plaintiff as they needed the money at the time in order to relocate to Olenguruone and Keringet. They only reneged on the sale after a period of over ten years when the land they had moved to was declared a government forest and they were rendered homeless.

Counsel for the defendants has submitted that the plaintiff bought land from persons who had no *locus standi* to sell as they had not taken out letters of administration in respect of the estate of Martha Tapruno Byebei who is the registered owner. This fact is conceded by the plaintiff's counsel who however submits that this is a technicality that should not go to the foundation of the case. With due respect to learned counsel for the Plaintiff, I do not agree with his submission, though I sympathize with the plaintiff.

Section 45 of the Law Of Succession Act provides as follows:

“Except so far as expressly authorized by this Act or any other written law or by a grant of representation under this Act, no person shall for any purpose take possession or dispose of or otherwise intermeddle with any free property of a deceased person”

The above provision of law is not a mere technicality but a point of law which goes to the root of the validity or otherwise of the sale agreement. The law takes very serious view of any intermeddling with the property of a deceased person. The section is clear that the status quo at the time of the deceased's death ought to be maintained until such time as a grant has been issued by the court.

Granted that the sale was unlawful, the courts normally look at the circumstances of each case. For instance in the case of **Bob Njoroge Ngarama V Wanjiru Ngarama & Another 2014eKLR** the honourable judge quoting **Re Diplock V Wintle 1984 485** stated as follows:

“By selling the immovable property before a grant was issued the beneficiaries breached the law. However, the third party who was an innocent purchaser for value cannot be penalized for an illegality which was not of his own making. The property should be taken into account at the time of distribution of the estate”

In the instant case, the Plaintiff has an additional hurdle to surmount as he did not obtain consent of the Land Control Board in accordance with **Section 6 (i) of the Land Control Act Cap 302** of the Laws of Kenya thus rendering the sale void. The money paid under such an agreement is however recoverable as provided under section 7 of the said Act.

The upshot of the foregoing is that the Defendant's preliminary objection is upheld and Plaintiffs suit fails as the defendants had no *locus standi* to sell the suit land. Counsel for the plaintiff has passionately submitted that in the event that the sale is declared void, the court should order a refund of the purchase price. Unfortunately I am unable to grant this relief as it was not prayed for in the Plaint. Nevertheless, the plaintiff is at liberty to pursue his refund from the administrator of the estate of Martha Tapruno Byebei- Deceased in **Kericho HC P&A No 93 of 2002** so that his claim can be taken into account at the time of distribution of the deceased's estate.

With regard to costs, even though costs ordinarily follow the event, I am of the considered view that given the chequered history of this case and the conduct of the defendants who displayed open disregard for the courts orders, an exception should be made. I therefore order that each party shall bear their own costs

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF JUNE 2017.

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J.M ONYANGO

JUDGE

In the presence of:

1. Miss Kitur for Koko for the Plaintiff.
2. N/A for the Defendant.