



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 76 OF 2012

EZEKIEL KISORIO TANUI PLAINTIFF

VERSUS

JACINTA EKAI NASAK DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiff brought this suit against the defendant claiming the following reliefs;-

(a) A declaration that the defendant's continued possession of 0.5 acres forming part of Parcel No. Chepsiro/Kibuswa Block 1/Kapcheplanget/87 is unlawful and the defendant is therefore a trespasser thereon and should vacate therefrom and give vacant possession to the plaintiff.

(b) General damages for trespass and for mesne profits.

(c) Costs of the suit.

(d) Any other relief that this Honourable court may deem fit to grant.

2. The defendant filed a defence to the plaintiff's claim and raised a counter claim in which she prays for a declaration that the agreement between herself and the plaintiff is valid and that the plaintiff should apply for consent to sub-divide his land to pave way for the defendant to apply for consent to transfer.

PLAINTIFF'S CASE

3. The plaintiff is the registered owner of land Parcel No. Chepsiro/Kibuswa Block /Kapcheplangat/87 measuring 1.983 hectares.
4. On 4/7/2003 the plaintiff entered into a sale agreement with the defendant in which the plaintiff agreed to sell to the defendant 0.5 of an acre at a consideration of Kshs.45,000/=.
5. The Plaintiff contends that the defendant took possession of the land and thereafter went away only to come later. The plaintiff contends that the transaction did not receive consent of the land control board and as such the transaction should be declared null and void.
6. The plaintiff states that if he would have been leasing out the land which the defendant bought he could be getting Kshs.5,000/= per year and this is the amount he claims per year from the time the transaction became void for want of consent of the Land Control Board.

DEFENDANT'S CASE

7. The defendant contends that she has been urging the plaintiff to take her before the Land Control Board for consent but that the plaintiff has refused to do so. The defendant further contends that the plaintiff has deliberately refused to take her before the land control board alleging that he does not want her on the land on claims that she is a witch.
8. The defendant prays for the court to compel the plaintiff to facilitate sub-division of the land to enable her get her individual title. She contends that she does not need a refund of the purchase price saying that she would rather die than move out of the land that she purchased.

ANALYSIS OF EVIDENCE AND THE LAW

9. There is no dispute that the land the subject of the transaction is agricultural land which is subject of the provisions of the Land Control Act Cap 302 Laws of Kenya. Section 6 (1) of the Land Control Act provides that any transaction requiring the consent of the land control board is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with the Act.
10. The defendant in her submissions through her counsel contends that the plaintiff's suit is tainted with malice and is an abuse of the process of court as the defendant conceded in cross examination that he has personal differences with the defendant. She further contends that the plaintiff is malicious in that he is even seeking general damages and mesne profits.
11. The defendant also pleads in her submission that the court do declare the agreement valid and extend the time within which to apply for consent of the land control board.
12. The plaintiff on the other hand contends that it is late in the day for application of the consent of the land control board and that the transaction is null and void.
13. The defendant implies in her submissions that she was unable to move to the land control board for consent as the plaintiff had not subdivided his land to pave way for her to apply for registration of her plot. I do not agree with the defendant's position on this.

Section 8 (1) of the Land Control Act provides as follows;-

“An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto”.

14. It is clear from the above provision that any party to the agreement can apply for consent of the land control board. There is nowhere where it is indicated that the application should as of necessity be made by the person seeking to sub divide or sale land. In cases of sub division as in the present case, the land control regulations provide that the application for consent should be accompanied by a plan in addition to other requirements. The defendant was capable of meeting these conditions. It is therefore not correct for the defendant to claim that she was waiting for the plaintiff to make a first move.
15. The issues which arise for determination in this case are firstly is a party entitled to claim general damages and mesne profits based on a transaction which is void? Secondly can a court validate a transaction which has been rendered void by operation of law? Thirdly can a party to avoid transaction be allowed to apply for extension of time within which to apply to the land control board after conclusion of a hearing seeking to declare the transaction null and void?
16. The defendant is pleading with the court to aid her so that she can salvage the transaction which has clearly become void for all purposes. In other words she is trying to invoke equity to assist her. In the case of *Karuri -Vs- Gitura (1981) KLR 247 at 248*, it was held by the court of Appeal that the provisions of the Land Control Act are of an imperative nature, there is no room for the application of any doctrine of equity to soften its harshness.
17. In the *case of Kariuki -Vs- Kariuki 1983 KLR 225* the court of Appeal held that no general or special damages are recoverable in respect of a transaction which is void for all purpose for

want of consent. The only remedy open to a party in a transaction which has become void under the Act is that he/she can recover any money or consideration paid in the course of the transaction under section 7 of the Act. It therefore follows that the defendant's prayer for a declaration that the agreement is valid is not sustainable. There can be no order of specific performance to compel the plaintiff to apply for consent of the land control board. This was the position held in the Kariuki case hereinabove.

18. On the issue as to whether the defendant can apply for extension of time within which to apply for consent of the land control board, I find that such an application cannot be made in submissions after a case seeking to declare the transaction void has been concluded. The defendant had time to apply for extension of the time within which to apply for consent of the land control board. She did not do so for 9 years and can not therefore make a request for extension in passing by way of submissions.
19. The provision to section 8 (1) of the Land Control Act provides that the High Court may notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason to do so, upon such conditions, if any, as it may think fit. The defendant did not make any application seeking to extend time and a mere request for the court to do so at the conclusion of a case cannot suffice.
20. The plaintiff is seeking recovery of general damages and mesne profits. The transaction herein is void and no party can claim either general damages or mesne profits based on the voided transaction.

DECISION

21. The transaction herein having become void, the defendant has no business remaining on the land. Her remedy lies in refund of the consideration paid. The plaintiff's claim for general damages and mesne profits is hereby dismissed. The plaintiff shall have half the costs of the suit.
22. The defendant's counter-claim is not maintainable. The same is dismissed with costs to the plaintiff.

Dated, signed and delivered at Kitale on this 19th day of February, 2014.

E. OBAGA,

JUDGE

In the presence of Mr Ingosi for Plaintiff and Mr Kaosa for Mr Barongo for the defendant.
Court Clerk Kassachoon.

E. OBAGA,

JUDGE

19/2/2014