



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC NO. 703 OF 2017

DAVID LETELA LOUAYA.....PLAINTIFF

-VERSUS-

DAVID PATEL LETOYA.....1ST DEFENDANT

KAJIADO COUNTY LAND MANAGEMENT BOARD.....2ND DEFENDANT

JUDGMENT

1) David Letela Louaya (the Plaintiff) seeks the following reliefs against David Patel Letoya (first Defendant) and Kajiado County Land Management Board (second Defendant).

- (a) A permanent injunction against the first Defendant his successors and assigns from trespassing, encroaching, entering and or claiming ownership of the suit property herein.
- (b) A declaration that the proceedings conducted by the second Defendant herein are a nullity.
- (c) Costs of the suit.
- (d) Interest on (b) above.
- (e) Any other relief this Honourable Court may deem just and expedient to grant.

2) The Plaintiff's case is as follows. He is the registered proprietor of L.R. KAJIADO/KILONITO/205 which measures 120 acres.

He acquired the land through purchase from the first Defendant in April, 2004. He paid the full purchase price. He took possession immediately and for 12 years he has been in exclusive occupation.

In the year 2015, the first Defendant raised a complaint with the second Defendant's branch office at Kajiado claiming that he had sold half of the suit land and not the entire parcel.

The plaintiff was coerced into accepting the verdict of the second Defendant which was in favour of the first Defendant and which was to the effect that the suit land be shared equally between the two.

The threats to the Plaintiff included destroying of the Title Deed to the suit land which the chairman of the second Defendant described as mere prayer.

(3) In support of his case, the Plaintiff filed the following evidence.

- (i) *His own witness statement dated 28/3/2019.*
- (ii) *Copy of sale agreement dated 18th March, 2004.*
- (iii) *Copy of Mutation Form with various dates in March and April 2004.*

(iv) Copy of Title Deed for L.R. KAJIADO/KILONITO/205 dated 29/4/2004.

(v) Copy of Consent Agreement dated 21/4/2016 which the Plaintiff seeks to rescind.

(vi) Copy of letter dated 28/4/2016 written by the Plaintiff's family members denouncing the consent agreement at (v) above.

(4) The first Defendant through his counsel on record filed a defence and counterclaim dated 27/9/2018 in which avers that he was drunk when he purportedly sold his land to the Plaintiff. He denies giving the Plaintiff vacant possession and says that instead the Plaintiff entered the land forcefully.

It is the first Defendant's case that he did not attend the Land Control Board to give his consent to transfer the land to the Plaintiff. He did not sign any transfer instrument either. He urges the Court to find the agreement of 21st April, 2016 valid.

Finally, the first Defendant prays that he be declared the rightful owner of the suit land, the Court to order a historical search of the title among others.

(5) In support of the defence and the counterclaim, the first Defendant filed the following evidence;

(i) His own witness statement.

(ii) Witness statement by Eunice Tianina Pateli.

(iii) Copy of caveat dated 13/12/1998 said to have been placed at the Chief's Office Lodokilan Location.

(iv) Protest letter dated 28/4/2016.

(6) On the hearing date on 10th November, 2021, neither the Plaintiff nor his counsel turned up in Court even though counsel was present when the date was taken on 22/4/2021.

In fact, the first Defendant's counsel was absent and it is the Plaintiff's counsel who served so as to appear on 10th November, 2021.

Even though the Court had ordered for dismissal of the Plaintiff's case, on further reflection the order that best serves the interest of justice is to deem the Plaintiff's case as closed. This will allow the Court to evaluate the evidence by both sides and probably arrive at a balanced and just decision.

(7) The evidence by the first Defendant and his wife Eunice adduced on 10th November, 2021 is to the effect that the first Defendant was drunk when he sold his land to the Plaintiff.

He got 25 goats and 2 cows as the purchase price. There was no sale agreement, no Land Control Board Consent and no transfer instrument executed by him.

Secondly, the agreement of 21st April, 2016 was arrived at in the presence of 200 members of the community at the chief's office at Mile 46. At that meeting, the Plaintiff agreed to return 50 acres of the suit land.

(8) Only the Counsel for the first Defendant filed written submissions dated 4th February, 2022. No submissions were filed on behalf of the Plaintiff.

The issues raised by the first Defendant's Counsel were as follows;

1) Is the Plaintiff's claim justified?

2) Was his Title Deed obtained legally and procedurally?

In submitting that the Plaintiff's title was not obtained legally and procedurally, the first Defendant's counsel relied on **Section 3 of the Law of Contract** which requires all contracts for disposition of an interest in land be in writing, signed by all the parties thereto and the signature of each party be attested by a witness who is present when the contract is signed by the parties.

Secondly, counsel urged that the Plaintiff is bound by the terms of the agreement of 21/4/2016 unless he pleads and proves coercion, fraud or undue influence, which, counsel urges, is not the case here.

Thirdly, counsel urges that the Plaintiff is not in occupation since 2004 and the door of adverse possession has opened to estop him.

For the above reasons counsel urges that the first Defendant's counterclaim be allowed together with costs.

(9) I have carefully considered all the evidence adduced by both sides. I have also considered the submissions by leaned counsel for the first

Defendant.

I agree that the issues identified by the first Defendant's counsel will fairly determine the dispute. The burden of proof of the main suit lay with the Plaintiff while the one for the counterclaim lay with the first Defendant.

I make the following findings;

(10) Firstly, the Plaintiff has not proved that the title to the suit land was obtained procedurally. He has no evidence of consent of the Land Control Board to transfer, transfer instrument or agreement for sale of land duly executed by the parties and their witnesses. There is no evidence of payment of stamp duty.

Section 26(1) (b) of the Land Registration provides that a Certificate of Title issued by the Registrar upon registration shall not be subject to challenge except where it has been acquired illegally, unprocedurally or through a corrupt scheme.

There is no doubt that the Plaintiff's Title Deed to the suit land KAJIADO/KILONITO/205 was acquired unprocedurally. It is therefore null and void.

(11) Secondly, the first Defendant has not proved that he is entitled to any of the orders in the counterclaim.

In paragraph 5 of the defence and counterclaim dated 27/9/2018, the first Defendant avers as follows; "vacant possession was never granted thus the Plaintiff forcibly took possession".

This is in sharp contrast to what the first Defendant and his witness said when they testified in Court on 10/11/2021. Eunice Tianina (DW2) said as follows;

"Letela is not on the land. I occupy the land. The Plaintiff has never occupied it".

This is a big contradiction on the part of the first Defendant. He has not proved that the Plaintiff has not occupied the land. The first Defendant has also admitted that he received 25 goats and 2 cows from the Plaintiff in exchange for the land. This is proof that some consideration was paid.

(12) Thirdly, **Article 159 (2) (c)** of the **Constitution of Kenya** provides (2)

"In exercising judicial authority, the Courts shall be guided by the following principles (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)".

The meeting of 21/4/2016 where elders met at the Loodokilani chief's office and resolved the dispute between the parties calls for promotion by this Court.

In fact the first Defendant at page 2 of his statement dated 29/11/2019 is in agreement with the verdict of the traditional Court. This is what he says;

"The Plaintiff is now trying to use this Honourable Court to help him dishonor an agreement that he entered into in the presence of the whole community and later executed as witnessed by an advocate, an officer of this Court. The Plaintiff had agreed to return 50 acres of the suit property to the first Defendant....."

Neither party should be allowed to go back on this agreement which I am satisfied was arrived at voluntarily. The Plaintiff never proved coercion, fraud or undue influence.

For the above reasons, I dismiss the Plaintiff's suit against the Defendants. For the same reasons, I dismiss the first Defendant's counterclaim. I enter judgement in accordance with the consent agreement dated 21/4/2016 which provided as follows;

- 1) That 50 acres to be excised and to revert to the complainant.
- 2) That the 50 acres being the remainder to be retained by the Respondent.
- 3) That the Respondent shall sign all relevant transfer documents to facilitate the said transfer failing which the Deputy Registrar to do so.
- 4) That the 50 acres to be registered in the name of David Patel Letoya and Eunice Tianina Pateli.
- 5) The complainant's family to take immediate possession of the 50 acres and upon the signing of this agreement move into the said parcel and settle at a suitable place and begin peaceful enjoyment of the property.

- 6) The Respondent shall bear the costs of registration of transfers, consents and all such other incidentals.
- 7) That the Title Deed held by Agricultural Finance Corporation shall be redeemed by the Respondent.
- 8) That upon compliance with the above conditions the matter shall be marked as settled amicably.
- 9) That this agreement is adopted by the County Management Board as a successful dispute resolution measure.

No order as to costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 20TH DAY OF APRIL, 2022.

M.N. GICHERU

JUDGE