



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 172 OF 2017

ROBERTSON LUMASAI AMALEMBA.....PLAINTIFF

VERSUS

JOHN KIPROTICH KETER.....1ST DEFENDANT

ROSE CHEPKEMOI.....2ND DEFENDANT

JUDGMENT

1. **Lumasai Robertson Amalemba**, the Plaintiff, sued **John Kiprotich Keter** and **Rose Chepkemoi**, the Defendants through the Amended Amended Plaint dated 26th July, 2018, seeking for the following prayers;

- (a) *Extension of time to obtain Land Control Board consent of the sale agreement dated 19th March, 2012 for purchase of two acres.*
- (b) *Order of specific performance for Defendants to seek for Land Control Board consent and avail duly signed documents over 2 acres of **L. R. No. 106/N/Kap Kangani** in favour of the Plaintiff as per the sale agreement dated 19th March, 2012.*
- (c) *Deputy Registrar be authorized to execute all documents necessary to seek consent and transfer of 2 acres of the suit land to the Plaintiff as ordered in (a) and (b) above.*
- (d) *Alternatively, the defendants be ordered to refund the purchase price of Kshs.1,000,000 made pursuant to the sale agreement dated the 19th March, 2012.*
- (e) *Refund of Kshs.855,000 paid for additional acreage of 1.4 acres.*
- (f) *Special damages of Kshs.4,786,252 on account of the value of destroyed developments.*
- (g) *Costs of this suit.*
- (h) *Interest on prayers (d) to (f) at court's rates till payment in full.*

2. The Plaintiff avers that he bought 2 acres of L. R. No. 106/N/Kap Kangani at **Kshs.1,000,000** from the defendants under the sale agreement dated 19th March, 2012. That thereafter, Defendants offered to sell to him, and he accepted to buy 0.2 acres and later 1.2 acres of the said land at Kshs.200,000 and Kshs.1,200,000 respectively. That he paid **Kshs.200,000** for the 0.2 acre portion, and further agreed to pay a balance for the other portion as they await to make a formal sale agreement that would provide how to pay the balance. That the Defendants had undertaken to obtain all the relevant consents and avail the completion documents without delay. That the Plaintiff had taken possession of the portion of the land he had bought upon the Defendants' surveyor identifying the boundaries. That he fenced off the property and planted trees. That after the Plaintiff substantially paid the deposit amounting to Kshs.855,000 for the additional 1.4 acres, the Defendants became evasive on the execution of a formal sale agreement, consents and completion documents. That in the middle of February, 2017, the Defendants unlawfully entered onto the Plaintiff's portion of the land, cut down the trees and destroyed other development occasioning him loss and damages. That the Plaintiff has always been ready, willing and able to complete the payment of the purchase price for the additional portions, but was hindered by the Defendants' acts of non-commitment on the execution of the formal sale agreement, application for the Land Control Board consent and delay in delivering the completion documents.

3. The Plaintiff's claim is opposed by the Defendants through their Defence to the Amended Amended Plaint dated 6th August, 2018. They however accepted the existence of the sale agreement dated 19th March, 2012 and added that the Plaintiff breached it as he never completed

paying the purchase price. That **Kshs.145,000** remains unpaid, though the Plaintiff has possession of the 2 acres. The Defendants denied the existence of any other sale agreement of 0.2 and 1.2 acres. That the sale agreement dated 19th March, 2012 provided that they would obtain the Land Control Board consent after completion of the purchase price, which the Plaintiff has not done. The Defendants denied unlawfully entering into the Plaintiff's two-acre portion, cutting down trees and causing other damages to the developments thereon. That the sale agreement dated 19th March, 2012 has become void and unenforceable, since consent of the Land Control Board was not obtained within six months, as required by **Section 6 and 8 of the Land Control Act**. That as the Plaintiff has been in possession of the two acres, his occupation should be taken as that of a lessee, and the amount he claims be recovered from the proceeds he has earned from the utilization of the said land. The Defendant prays for the Plaintiff's suit to be dismissed with costs.

4. The Plaintiff testified as **PW1** and called **Sarah Muthoni Karanja, Solomon Asura Lumasai, Johnstone Lumasia, Sila Kipyegon, Fred Kirwa Samoei and William Cheptai**, who testified as **PW2 to PW7** respectively. That it is the Plaintiff's case that he had paid the whole purchase price for the 2 acres under the sale agreement dated 19th March, 2012 and has possession of it. That he later paid **Shs.200,000** for the second portion of 0.2-acre offered for sale by the Defendants. That he also paid Kshs.666,000 for the third portion of 1.2 acres. That he built a house of **Shs.800,000** and used Shs.6000 to plant indigenous trees at the 0.2-acre portion, and eucalyptus trees on the 1.2-acre part in 2014. That the 1st Defendant hired young men who chopped down the trees and that the Kenya Forest Service later did an assessment of the damages. PW2 told how she made the payment for the two acres to the 1st Defendant on behalf of her husband, the Plaintiff. She testified that the whole transaction totaled **Kshs.816,000** and produced eleven (11) bank deposit slips as exhibits. **PW3 and PW4** confirmed being witnesses when the Plaintiff entered into the sale agreement for purchase of 2 acres from the Defendants on 19th March, 2012. That they had planted indigenous trees on the 0.2 acre and eucalyptus trees on the 1.2 acres portions that the Defendants had later offered to sell to the Plaintiff in 2014, and which the Plaintiff had made some payment for. PW5, the Chief, confirmed that the sale agreement for two acres at Kshs.1,000,000 was made in his office and payment of Shs.650,000 was acknowledged. That later, the 1st Defendant was paid Shs.150,000 and acknowledgement dated 2nd August, 2012 made at Kapsabet in his presence. That he does not know how the balance of Shs.200,000 was paid. That later, the Plaintiff called him and reported that his trees had been cut. That he visited the area and saw trees had been cut on a portion of the forest belonging to the 1st Defendant, that is different from the 2 acres bought by the Plaintiff. PW6 told the Court how he accompanied the forester to visit the land where the trees had been cut. That he was not involved in the transactions between the Plaintiff and Defendants, and could not tell whether the portion of land the trees had been cut was outside or inside the 2 acres portion. PW7, a forester, produced a damages valuation report done in 2017 by a Forester called **Charles Serem**, now deceased, as exhibit. He however, pointed out that the report does not indicate the parcel number of the land, volume of the trees, acreage of the land the trees were cut from, and has no source documents as required under the Forest Service General order, from which it could have been based. The witness could therefore not tell how the valuation of Kshs.4,186,252 was arrived at.

5. The 1st Defendant testified as **DW1**. It is his case that land parcel Nandi/Kapgangani/106 is registered in the name of his late father. That he is to get 5 acres after distribution of his late father's estate from which he first sold 3 acres leaving 2 acres that he later sold to the Plaintiff under the sale agreement dated 19th March, 2012 at Shs.1,000,000. That the Plaintiff paid him cash Kshs.650,000 leaving a balance of Kshs.350,000. That on the 2nd August, 2012, the Plaintiff paid him Kshs.150,000 leaving a balance of Kshs.200,000. That after about two (2) years, the Plaintiff deposited Kshs.200,000 in his account in 2015. That the Plaintiff had taken possession of the 2 acres, built a house and planted trees, and has been using it without disturbances to-date. DW1 denied having sold the Plaintiff 0.2-acre land or any other portion of land after the two (2) acres. That the Kshs.200,000 deposited in his bank account by the Plaintiff in 2015 was the final payment for the 2 acres under the sale agreement of 19th March, 2012, and was not payment for any additional land. That the Plaintiff has given him soft loans totaling Kshs.400,000 to settle some obligations like school fees which he is yet to refund. That the Kshs.400,000 was not payment for additional land. The 1st Defendant indicated that he will transfer the two acres he sold to the Plaintiff once he got the title after distribution of his late father's estate. That his late father's Succession Cause was finalized in 2015, but three beneficiaries have since passed on, causing delay in the distribution of the estate. That he had sold the 3 acre land next to that of the Plaintiff to a man now in Mombasa who is yet to fully pay for it. That the Plaintiff had not planted any trees on that land. That he would have refunded the Plaintiff the extra money given to him as a loan but for this suit. That he will pay him after this suit is finalized.

6. The learned Counsel for the Plaintiff and Defendants filed their written submissions dated the 18th February, 2021 and 1st March, 2021 respectively.

7. The following are the issues for the Court's determinations:

(a) Whether the Plaintiff and the Defendants entered into any other agreements for sale of land in respect of Nandi/Kaipgangani/106, apart from the one dated the 19th March, 2012, and if so, whether those other agreements are enforceable.

(b) Whether Plaintiff is entitled to the specific performance orders sought.

(c) Whether the Plaintiff took possession of 2 or 3.4 acres of Nandi/Kapgangani/106.

(d) Whether the Defendants have trespassed onto the Plaintiff's land and caused damages valued at Kshs.4,786,252.

(e) Whether the Plaintiff paid the Defendant Kshs.1,000,000 under the agreement dated 19th March, 2012 and Kshs.855,000 under the subsequent agreements and if so, whether the Plaintiff is entitled to refund of the same with interests as an alternative to the prayers for specific performance.

(f) Who pays the costs?

8. The Court had carefully considered the parties' pleadings, the evidence tendered by **PW1 to PW7, DW1**, the written submissions by both learned Counsel, Superior Court's decisions cited thereon and come to the following determinations;

(a) That from the evidence tendered by the Plaintiff and the 1st Defendant, and confirmed by **PW2, PW4** and the Chief who testified as PW5, there was indeed a written sale agreement between the parties in respect of sale of 2 acres of land parcel L. R. No. 106/N/Kap Kangani at Kshs.1,000,000. That the written sale agreement was produced as exhibit and carries the names, signatures and Identity Card numbers of the Plaintiff, Defendants, PW2, PW4 and one **Benjamin K. Keter**. That the agreement was witnessed by PW5, the Chief who signed and also affixed the official stamp.

(b) That under the said sale agreement for 2 acres, the Defendants acknowledged payment of Kshs.650,000 and the balance of Kshs.350,000 was indicated it would be paid in instalments in April and May, 2012. That the 1st Defendant has confirmed that he subsequently received the balance of Kshs.350,000 paid in two instalments of Kshs.150,000 on 2nd August, 2012 and Kshs.200,000 deposited in his Equity Bank Account. That the written acknowledgment of Kshs.150,000 was produced as exhibit 2. That according to the 1st Defendant, the balance of Kshs.200,000 left after the payment of Kshs.150,000 was paid in 2015 through a deposit to his bank account. The Plaintiff through PW2 produced among others the following deposit slips as exhibits of the payments made to the Defendants;

(i) Two deposit slips to 1st Defendant's account with I&M Bank dated 2nd or 3rd April, 2013 and 3rd May, 2013, each of Kshs.100,000 totalling Kshs.200,000.

(ii) Eight deposit slip to 1st Defendant's Equity Ban Account dated 14th July 2014, 16th July 2014, 25th July 2014, 30th August 2014, 8th January 2015, 27th June 2015, 23rd October 2015 and 1st December, 2015 for Kshs.50,000, shs.6000, Shs.55,000, Shs.55,000, Shs.100,000, Shs.400,000, Shs.100,000 and Shs.50,000 respectively totaling Kshs.816,000.

That the Court takes the payment made in April and May, 2013 detailed in (b) (i) above, totaling Kshs.200,000 to be the last instalment under the sale agreement of 19th March, 2012.

(c) That the total payments set out in **(b)(ii)** above clearly shows that the 1st Defendant had received a total of Kshs.816,000 between July, 2014 and December, 2015. That the foregoing shows the Defendants had by December, 2015 received Kshs.816,000 above the Kshs.1,000,000, they were entitled to under the sale agreement of 19th March, 2012. That the Plaintiff's case is that out of that amount, Kshs.200,000 was for total payment of 0.2-acre land under the first oral sale agreement, and the balance was deposit of additional 1.2 acres land pursuant to a second oral agreement. That the Defendants have denied the existence of any other sale agreement with the Plaintiff apart from the one dated the 19th March, 2012. That their position as put by DW1 was that the additional or extra money received from the Plaintiff totaling Kshs.400,000 was a soft loan to enable him settle some obligations like school fees. That while the Plaintiff's position appears more probable than that of the Defendants, the provision of **Section 3(3) of the Law of Contract Act Chapter 23 of Laws of Kenya** makes the Plaintiff's claim over the 1.4 acres land allegedly purchased under the two oral agreements unenforceable. That this is especially so as the Plaintiff's claim that he had been placed into possession of the said 1.4-acre portion is disputed by the Defendants, and he had not fully paid for it. That the area chief, PW5, also in cross examination testified as follows;

"The sale agreement was over two acres of land. The Plaintiff was shown the land before the agreement. The trees had been cut outside the two acres subject matter of the agreement as it was part of the forest. I do not know whether Plaintiff had bought that section of the forest where the trees had been cut. Nobody was living on that section. It was the 1st Defendant who had sold Plaintiff two acres and owned the portion where the trees had been cut. I have not heard 1st Defendant selling the land where the trees had been cut." [emphasizes mine]

That from the available evidence the court finds that the Plaintiff's claim over the 1.4 acres based on the oral agreements is therefore not maintainable. That the Court is in agreement with the decisions in ***Daudi Ledama Morintat Vs Mary Christine Kiarie & 2 Others [2017] eKLR*** and ***John Michael Wanjau Vs Alubala Abenayo Andambi [2011] eKLR***.

(d) That while the Defendants had appeared to dispute the existence of the sale agreement dated 19th March, 2012 in their pleadings, DW1, the 1st Defendant, in his testimony in Court conceded entering into the said agreement. The 1st Defendant further accepted having received the total purchase price of Kshs.1,000,000 and placing the Plaintiff into possession of the two-acre land. That indeed, during cross examination, the 1st Defendant stated that;

"I agree I sold to the Plaintiff two acres of land. I am yet to transfer the two acres to the Plaintiff since 2012. I am ready to transfer the land once I get the title."

That as no document of title in respect of L. R. No. 106/N/Kap Kangani, from which the Plaintiff was to get 2 acres under the sale agreement of 19th March, 2012 was produced by the parties as exhibit, the evidence adduced by the 1st Defendant that the land remains in the name of his late father is unchallenged or unrebutted. That it was the 1st Defendant's testimony that though his late father's family filed a Succession Cause over his estate, and that the cause was finalized in 2015, the estate is yet to be distributed. That further, three of the beneficiaries of the estate have since passed on. That his **(1st Defendant's)** entitlement to the estate is five **(5)** acres of L.R. No. 106/N/Kap Kangani. That evidence raises the question as to whether the Defendants had capacity to enter into the sale agreement of 19th March, 2012 or any other agreement aimed at disposition of interest in the said land in view of the provisions of **Sections 45 and 82 (b) (ii) of the Law of Succession Act Chapter 160 of Laws of Kenya**. That the suit land was not registered in the name of the Defendants as at 19th March, 2012 when the sale agreement was entered into. That there is no evidence that it has since been registered in their names, and the submissions by the learned Counsel for the Plaintiff that the Court should infer constructive trust in favour of their client is misplaced. The Plaintiff should have done due diligence before entering into the sale agreement of 19th March, 2012 over land that was legally not registered in the name of the Defendants. That the Defendants could not have lodged application for consents to subdivide and or transfer land that they did not own, or where they had not

obtained confirmed grant. That as the Defendants are not sued as administrators of the estate of the registered proprietor of the said land, the prayer for enlargement of time to apply for Land Control Board consent cannot be issued. That further, the Court is unable to direct the Defendants to avail to the Plaintiff completion documents for transfer of the suit land that is not in their names, or to authorize the Deputy Registrar to execute such documents on their behalf, in case they decline to do so. That the completion of the sale agreement of 19th March, 2012 will be left to the parties, as from what the 1st Defendant told the Court, he intends to effect the transfer once he become the registered proprietor of the same. That should the Defendants fail to effect the transfer, the Plaintiff will be entitled to refund of the Kshs,1,000,000 paid for the 2 acres with interests at court's rate from the date of filing of the suit until payment in full.

(e) That in terms of **Section 7 of the Land Control Act Chapter 302 of Law of Kenya**, the Plaintiff is entitled to the refund of Kshs.816,000 that was paid to the 1st Defendant between July, 2014 to December, 2015 over and above the purchase price under the sale agreement dated the 19th March, 2012 with interest at court's rates from the date of filing this suit till payment in full.

(f) That the claim for special damages of Kshs.4,786,252 has no basis in view of the dispute as to whether the Plaintiff had possession or any legal or beneficial interest over the portion where the trees had been cut, that was reportedly part of the forest. That in any case, the Court is unable to confirm the number or volume of the trees damaged from the report produced on behalf of the maker by **PW7**. That there is also no way of confirming that the details in the said valuation report have any relationship to the land in dispute.

(g) That as the Plaintiff has only partially succeeded in his claim, the Court finds it fair to award him half the costs of the suit. That the Court has discretion to so order under **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

9. That flowing from above, the Court finds that the Plaintiff has partially proved his claim against the Defendants and enters judgment in his favour in the following terms;

(a) That the completion of the transactions over the 2 (**two**) acres of L. R. No. 106/N/Kapkangani based on the sale agreement dated 19th March, 2012 pursuant to which the whole purchase price, of Kshs.1,000,000 has been paid by the Plaintiff and acknowledged by the 1st Defendant, is hereby left upon the two parties for reasons that specific performance orders cannot issue as the Defendants are not the suit land's registered proprietors. That should the parties fail to complete the transaction, the Defendants do refund the Kshs.1,000,000 received under the sale agreement dated 19th March, 2012 to Plaintiff with interests at court rates from the date of filing the suit until payment in full.

(b) That the Plaintiff has proved that he had paid the 1st Defendant Kshs.816,000 over and above the purchase price in the sale agreement dated the 19th March, 2012 and is entitled to a refund of the same with interests at court's rates from the date of filing the suit till payment in full.

(c) That the Plaintiff is entitled to half the costs of the suit.

Orders accordingly.

DELIVERED VIRTUALLY AND DATED AT ELDORET THIS 21ST DAY OF APRIL, 2021.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: No appearance.

Defendants: No appearance.

Counsel: M/s Kibichy for Defendants.

Court Assistant: Christine

and the Judgment is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.