



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L CASE NO. 74 OF 2016

MICAH TENAI.....1ST PLAINTIFF

DAVID KIMAIYO KOGO.....2ND PLAINTIFF

VERSUS

STELLAH JEPLETING.....1ST DEFENDANT

NATHAN KIPRUTO ARUSEI.....2ND DEFENDANT

JUDGMENT

By a plaint dated 4th March, 2016 the plaintiffs herein sued the defendants jointly and severally and sought for the following orders;

- a) Permanent injunction from encroaching trespassing, ploughing, constructing, alienating or dealing in any manner with that parcel of land known as SOY/KIPSANGUI BLOCK 5(KIPSANGUI)/53.*
- b) An order of specific performance compelling the 2nd defendant to transfer the suit land in favour of the 2nd plaintiff and in the alternative a vesting order be issued authorizing the executive officer to execute transfer instruments in favour of the 2nd plaintiff.*
- c) An order of eviction against the 1st defendant, her agents employees and servants from the suit land.*
- d) Damages for loss of use.*
- e) Costs of the suit.*
- f) Any other relief that the Honourable Court deems just and fit to grant.*

PLAINTIFF'S CASE

PW1 gave evidence and stated that he bought the suit property known as SOY/KIPSANGUI BLOCK 5 (KIPSANGUI)/53 from the 2nd defendant before disposing it off to the 2nd plaintiff herein on 6th March, 2013. PW1 also stated that in February, 2016 the defendants without authority or consent forcefully encroached into the plaintiff's parcel.

PW1, the 1st plaintiff testified that he purchased the suit land in 2013 from the defendant for a consideration of Kshs 130,000/ which amount was paid in full. It was PW1's further testimony that he took possession immediately, cultivated maize in 2013 and 2014 but the 2nd defendant planted beans necessitating PW1 filing a complaint with the Chief

PW1 stated that he harvested his maize but the 2nd defendant stopped him from further ploughing the suit land. It was PW1's evidence that Micah Tenai had previously sold the land to the 2nd defendant and produced agreements dated 26th March 2012, 29th August 2012 and 15th August 2012 respectively.

PW1 stated that the agreements showed that the purchase price was paid in full and that the 2nd defendant never gave the plaintiff alternative

land as the land is being used by the 1st defendant.

On cross examination PW1 stated that he bought the land from Micah Tenai who had not gotten title from the 2nd defendant but he was aware that the title was in the name of the 2nd defendant. It was his evidence that he was not aware that Micah Tenai signed an agreement with the 2nd defendant to revoke the earlier agreement for sale dated 26th February 2015. That while at the chief's office he informed the defendants that he was not interested in a refund but land. He also stated that he did not sign the agreement for alternative land. PW1 closed his case and urged the court to grant the orders as prayed in the plaint with costs.

DEFENDANT'S CASE

DW1 testified that he is the registered owner of all that parcel of land known as Soy/ Kipsangui Block 5 (Kipsangui)/53 and the 1st defendant is his sister whom he has allowed to live on and utilize a portion of the said parcel of land. He admitted that in 2012 he entered into agreements with the 1st plaintiff over a portion measuring 0.5 of an acre which sale was expressed to be subject to the consent of the Land Control Board being granted and obtained and the said agreement was later cancelled vide an agreement dated 26/02/15 whereupon the 1st plaintiff agreed to move to another parcel of land measuring 0.5 acres.

DW1 also testified that the 2nd plaintiff who had bought the land from the 1st plaintiff was also present and witnessed the agreement and that he purchased another parcel of land measuring 0.5 acres for the plaintiff which he showed him.

It was DW1's further evidence that they went to the Chief's office and it was resolved that if the plaintiff does not want a refund, then he should be given alternative land of which he claimed that there was an agreement that was drafted and signed by all parties including the plaintiff.

DW 1 further stated that the plaintiff did not come to the chief's office on the dates that they were to meet and urged the court to order that the plaintiff takes alternative land and dismiss the suit.

On cross examination, DW1 confirmed that he sold 0.5 acre to Micah Tenai who paid the purchase price in full and that they had agreed that he would consult him before selling the land to anyone else. That the 1st defendant had built a house which was demolished in 2019.

PLAINTIFF'S SUBMISSIONS

Counsel reiterated the evidence of the parties and listed the following issues for determination by the court:

- a) Whether or not there were valid land sale agreements between the 1st plaintiff and the 2nd Defendant and subsequently between the plaintiffs herein.***
- b) Whether the plaintiffs acquired any defined rights over the suit land under the agreements.***
- c) Whether the plaintiffs had performed all their obligations under the agreements and if so, whether specific performance as a remedy is available to the 2nd plaintiff.***
- d) Whether the Plaintiffs are entitled to the orders sought.***

On the first issue, counsel submitted that there were three sale agreements dated 15th August, 2012, 26th August, 2012 and 29th August, 2012 and that the defendants did not object to their presence.

Counsel relied on the case of **Felix Kipchoge Limo Langat v Robinson Kiplagat Tuwei [2018] eKLR** where the Honourable Court observed in its findings as follows;

"I will rely on the case of Llyods Bank Plc - vs- Rosset, (1991) 1AC 107,132, which held that a constructive trust is based on "common intention" which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant, In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. The plaintiff entered into sale agreement with the seller and took occupation of the suit land. There was a common intention of the parties to the agreement in respect of the suit land which was sold to the plaintiff. What was the intention of the parties when entering into the agreement for sale? The plaintiff had a desire to buy and take possession of the land and the seller had the intention of selling the land for a consideration which was paid in full. Was the seller's intention to sell the land and keep both the money and the land later to transfer to her son the defendant? That would not be feasible in this case"

Counsel therefore submitted that there was an intention between the parties herein to enter into the sale agreement since valuable consideration was paid in full and it is unfair for the defendant to unjustifiably keep the money and the land as well despite the improvements on it that have been done by the plaintiff.

Counsel further submitted that in view of the circumstances of the case, the 2nd defendant created an implied or constructive trust in favour of the plaintiffs herein and that the 2nd plaintiff is therefore protected under Section 25 and 28 of the Land Registration Act (2012) and 2nd defendant is therefore holding the suit property on a constructive trust in his favour.

Counsel relied on the case of **Macharia Mwangi Maina & 87 Others V Davidson Mwangi Kagiri [2014] eKLR** where the Court held that;

“The evidence on record reveals that the appellants are in possession of plots in L.R No. 6324/10 and as such they come within the protection in Section 30 (g) of the Registered Land Act. We find that the respondent having put the appellants in possession of the suit property created an overriding interest in favour of the appellants in relation to L.R No. 6324/10. It is our considered view that the Honourable Judge erred in law in failing to give due consideration to the fact that the appellants were in possession and occupation of L.R No. 6324/10 prior to the title being issued and registered in the name of the respondent.

Pending the sale of all 240 plots by the respondent, the question that comes to mind is what was to be the legal status and relationship between the respondent and the appellants as purchasers who had paid the purchase price for individual plots? It is our considered view that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots.”

Similarly, counsel cited the case of **Mwangi & another -vs- Mwangi (1986) KLR 328**, where it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights.

Counsel also relied on the cases of **Mutsonga - vs- Nyati (1984) KLR 425** and **Kanyi - vs- Muthiora (1984) KLR 712**, where it was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of Section 163 of the Registered Land Act which provides for the application of the common law of England as modified by equity.

Mr. Kibii cited the case of **Steadman - vs- Steadman (1976) AC 536, 540**, where the Court held as follows;

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable.”

On the issue as to whether the plaintiffs had performed all their obligations under the agreement and if so, whether specific performance as a remedy is available to them, counsel submitted that the 1st plaintiff performed his part of the agreement by paying the defendant all the amount he was required to do before disposing off his interests to the 2nd plaintiff but the 2nd defendant on the other hand neglected and/or refused to honour his part and surrender completion document to enable the 2nd plaintiff procure transfer of the said parcel. That there was an express agreement hence specific performance is a remedy and the issue of the consent of the Land Control Board is an afterthought since the 2nd defendant has not even filed a counterclaim for the same. The 2nd defendant was obligated to attend land control board and hand over all completion documents to the 2nd plaintiff.

Mr. Kibii submitted that the 2nd defendant's attempts to avoid the agreements stated that he allegedly agreed with the 2nd plaintiff herein to rescind the contract and bought the 2nd plaintiff an alternative land and produced an alleged agreement dated 26th February, 2015, of which the plaintiff was not party to hence the alleged rescission has not been proved contrary to Sections 107 and 109 of the Evidence Act, which provide; -

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

109. "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".

Counsel cited the case of **Alton Homes Limited & another v Davis Nathan Chelogoi & 2 others [2018] eKLR** where the Honourable Court held that;

"The Plaintiffs have sought for specific performance which is an equitable remedy and is based on existence of a valid and enforceable contract. There is a valid and enforceable contract herein between the 1st Plaintiff and the 1st Defendant. Further, specific performance is granted where complete justice will be done by such an award rather than an award of damages. See the case of Kisumu Wllah Oil Industries Ltd...Vs....Panasiatic Commodities PTA Ltd Another, Civil Appeal No. 100 of 1995, where the Court held that:-

"And in a contract relating to the sale and purchase of land, the law takes the view that the purchase of a particular piece of land or particular house (however ordinary) cannot on the vendor's breach obtain a satisfactory substitute, so that specific performance is available to him"

Mr. Kibii also relied on the case of **Anne Murambi v John Munyao Nyamu & another [2018] eKLR** where the court held that:

"This court's jurisdiction to grant an order of specific performance is guided by common law principles. An order of specific performance decrees the due completion of a contract in its proper form. As a common law principle, the court will not decree specific performance where, if at trial, evidence is tendered to the effect that the vendor is unable to convey the land. This principle is informed by the philosophy that it is the essence of the remedy of specific performance that the purchaser should obtain the land. Secondly, an order of specific performance is an equitable remedy and is granted at the discretion of the court.

This discretion is governed by certain principles. For instance, the remedy will not be granted if its enforcement will entail great hardship or if the vendor's title is in doubt or if its enforcement would entail protracted or difficult litigation. Lastly, the essence of an order of specific performance is that the contract remains in force and the parties are required to discharge their obligations under the contract.”

Counsel therefore urged the court to enter judgment as prayed in the plaint with costs.

DEFENDANT’S SUBMISSIONS

Counsel filed submissions and framed issues for determination as follows;

- a) Is land parcel number SOY/KIPSANGUI BLOCK 5 (KIPSANGUI)/ 53, agricultural land?*
- b) Were the agreements entered into between the 1st plaintiff and the 2nd defendant subject to the consents of the Land Control Board being applied for and obtained?*
- c) Was the agreement between the plaintiffs controlled transaction subject to the consent of the Land control board being applied for and obtained?*
- d) If the answer to the three issues above is in the affirmative, were the consents of the Land Control Board applied for and obtained?*
- e) What is fate of the agreements of 2012 between the 1st plaintiff and the 2nd defendant and the 2013 agreement between the plaintiffs?*
- f) Did the 1st plaintiff and the 2nd defendant review and cancel the agreement dated 26/02/2015?*
- g) Are the plaintiffs entitled to an order of permanent injunction over land parcel number SOY/KIPSANGUI BLOCKS (KIPSANGUI) / 53 as against the defendants?*
- h) Are the plaintiffs entitled to an order of specific performance to transfer the suit land to the 2nd plaintiff and in the alternative a vesting order authorizing the executive officer to execute transfer documents in favour of the 2nd plaintiff.*
- i) Should an eviction order be made against the 1st defendant?*
- j) Are the plaintiffs entitled to damages for loss of use and if so how much?*
- k) Who should bear the costs of the suit?*

Counsel submitted that land parcel number **SOY/KIPSANGUI BLOCK 5 (KIPSANGUI) / 53** is agricultural land and the consent of the Land Control Board was required prior to transfer of the same and failure to obtain the same rendered the transaction null and void.

Counsel relied on the case of **James Njuguna V Paul Wandati Mbochi [2018] eKLR** where the court was faced with the question as to the effect of failure to obtain the consent of the Land Control Board within the stipulated time. Counsel urged the court to find that the transaction was null and void due to lack of consent from the Land Control Board.

Counsel urged the court to dismiss the plaintiff’s case with costs to the defendant.

ANALYSIS AND DETERMINATION

The issues for determination are as follows:

- a) Whether or not there were valid land sale agreements between the 1st plaintiff and the 2nd Defendant and subsequently between the plaintiffs herein.*
- b) Whether the plaintiffs acquired rights over the suit land under the agreements and whether the remedy of specific performance is available to the 2nd Plaintiff.*
- c) Who bears costs.*

On the first issue, it is not in dispute that there were agreements between the 1st Plaintiff herein and the 2nd defendant on diverse dates in 2012 for the sale and purchase of 0.5 acres of land being a portion of **SOY/KIPSANGUI BLOCK 5 (KIPSANGUI) / 53**. The property was sold in portions of 0.1 acres, 0.3 acres and 0.1 acres on 15th August, 2012, 26th August, 2012 and 29th August, 2012 respectively. The said agreements were signed and witnessed as required.

It is also admitted by the defendant that he sold the land to the 1st plaintiff who subsequently sold the land to the 2nd plaintiff. It is also not disputed that the purchase price was paid in full. The 1st Plaintiff subsequently assumed possession of the suit property and sometimes on 6th March, 2013, he sold the property to the 2nd plaintiff who remained in possession until he was evicted by the defendants herein on February, 2016 on grounds that the 1st Plaintiff had sold the property without their knowledge.

The defendants allege that the agreements were invalidated vide an agreement dated 26th February, 2015 wherein the initial agreements were cancelled and the 2nd plaintiff was to be given alternative land which he refused to take.

I perused the agreement of 26th February, 2015 and the parties to the said agreement are Nathan Arusei who is the 2nd defendant and a person named David Cheruiyot wherein the said Mr. David Cheruiyot accepted to be moved elsewhere on a similar piece of land after the defendant offered to relocate him there. There is a mention of Mr. Micah Tenai as having resold the property to Mr. David Cheruiyot. The 2nd Plaintiff herein is known as David Kimaiyo Kogo and not David Cheruiyot and there was no evidence that the names belonged one and the same person. The 2nd plaintiff also denied signing such agreement before the chief to be given alternative land. The 2nd defendant also confirmed that the plaintiff indicated that he was not interested in alternative land and as such did not attend the meetings in two occasions at the Chief's office.

The allegation that the agreement was cancelled does not hold any water as the party that was crucial in the cancellation was not present. The other glaring issue is that the 2nd defendant informed the court that they had agreed that the plaintiff would not sell the land without informing him. This was not in writing and the moment the 2nd defendant entered into a land sale agreement and received the purchase price in full, he ceased to have an interest in the suit land. The purchaser was at liberty to do whatever he wished with the land.

I find that the agreement dated 26th February, 2015 did not involve the 2nd plaintiff herein and as such cannot be relied upon by the defendant as having cancelled the earlier agreements. To do so would cause the 2nd plaintiff prejudice.

On the agreements dated 15th August, 2012, 26th August, 2012 and 29th August, 2012, the same are not disputed and point to the fact that indeed the 2nd defendant sold the property to the 1st plaintiff.

It is on record that the 2nd defendant disposed of a portion of his property to the 1st plaintiff and the plaintiff took possession of the property and developed the same. Accordingly, there was an intention between the 1st plaintiff and the 2nd defendant herein to enter into the sale agreement since valuable consideration was paid in full and it is unfair for the 2nd defendant to unjustifiably keep the money and the land as well despite the improvements on it that have been done by the plaintiffs.

In the case of **Nelson Kivuvani...Vs...Yuda Komora & Another, Nairobi HCCC No.956 of 1991**, the court held that:-

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

The agreements contained the names of the parties, the parcel of land to be sold, the purchase price and the parties appended their signatures. There was no evidence that it was tainted with illegality I find that the agreements were valid.

In case of **Macharia Mwangi Maina & 87 Others V Davidson Mwangi Kagiri [2014]eKLR (supra)** the Court held that;

“The evidence on record reveals that the appellants are in possession of plots in L.R No. 6324/10 and as such they come within the protection in Section 30 (g) of the Registered Land Act. We find that the respondent having put the appellants in possession of the suit property created an overriding interest in favour of the appellants in relation to L.R No. 6324/10. It is our considered view that the Honourable Judge erred in law in failing to give due consideration to the fact that the appellants were in possession and occupation of L.R No. 6324/10 prior to the title being issued and registered in the name of the respondent.

Pending the sale of all 240 plots by the respondent, the question that comes to mind is what was to be the legal status and relationship between the respondent and the appellants as purchasers who had paid the purchase price for individual plots? It is our considered view that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots.”

The defendant told the court that the plaintiff should take the alternative land and not the original parcel sold to him. No reason has been given why the plaintiff should take alternative land. The 2nd defendant wants to have his cake and eat it and bulldoze his wishes on the 2nd plaintiff. The terms of agreements once entered into must be fulfilled unless they are tainted with illegality.

On the issue whether the plaintiff is entitled to an order of specific performance, the principles of grant of specific performance were enunciated in the case of **Reliable Electrical Engineers Ltd....Vs....Mantrac Kenya Limited (2006) eKLR**, where Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles”

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

The plaintiff’s sale agreement being valid was capable of being enforced as it did not suffer from any defects. There was no evidence of illegality of the sale agreement and therefore find that the plaintiff has proved his case on a balance of probabilities against the defendants and hereby enter judgment for the plaintiff in the following terms

- a) A Permanent injunction is hereby issued barring the defendants and/or their agents or servants or anybody acting under their instructions from encroaching trespassing, ploughing, constructing, alienating or dealing in any manner with that the 1st Plaintiff’s parcel of land known measuring 0.5 acres on SOY/KIPSANGUI BLOCK 5(KIPSANGUI)/53***
- b) An order of specific performance is hereby issued compelling the 2nd defendant to transfer the suit land in favour of the 1st plaintiff within 45 days failure to which the Deputy Registrar of this Court shall execute transfer instruments in favour of the 1st plaintiff.***
- c) An order is hereby issued directing the defendants to vacate the suit premises within 45 days in default eviction to issue.***
- d) The costs of this suit to be borne by the defendants.***

DATED, SIGNED AND DELIVERED AT MALINDI THIS 2ND DAY OF NOVEMBER, 2021.

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M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.