



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC CASE NO. 211 OF 2014**

**NANCY CHEPKIRUI SOL.....PLAINTIFF**

**VERSUS**

**GIDEON MARITIM.....DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this suit through the plaint dated 19<sup>th</sup> June 2014 and amended on the 18<sup>th</sup> July, 2014 against the defendant, seeking for the following prayers:

- i. A declaration that the Plaintiff is the legal owner of all that parcel of land known as **Eldoret Municipality Block 20 (Kapyemit)/2663**; that the defendant is a trespasser on the said land; and for an order of evicting the defendant from the suit land;*
- ii. A permanent injunction restraining the defendants, their agents, servants and or employees from trespassing into the land parcel **Eldoret Municipality Block 20 (Kapyemit) 2663**;*
- iii. An order evicting the defendant, his servants, agents and or employees from the suit land;*
- iv. Costs and interest of this suit; and*
- v. Any other or further relief that this Honourable Court may deem fit to grant.*

The plaintiff avers that she is the registered owner of Eldoret Municipality Block 20 (Kapyemit)/2663, the suit land. That the defendant has without justification trespassed onto the said land by carrying out development on it, thereby interfering with the plaintiff's possession and use thereof.

2. The plaintiff's claim is opposed by the defendant through the defence and counterclaim dated 14<sup>th</sup> July, 2014 wherein the following prayers were sought:

- i. Dismissal of the plaintiff's suit for being frivolous;*
- ii. A declaration that the plaintiff acquired and transferred land title No. **Eldoret Municipality Block 20 (Kapyemit)/2663** illegally;*
- iii. A declaration that the defendant is the legal owner of all that parcel known as **Eldoret Municipality Block 20 (Kapyemit)/2663**;*
- iv. Revocation of the title deed issued in the name of the plaintiff;*
- v. A permanent injunction restraining the plaintiff from interfering with the defendant's quiet possession, and enjoyment of the parcel of **Eldoret Municipality Block 20 (Kapyemit)/2663**; and*
- vi. Costs of the suit.*

The defendant avers that he is the bona fide owner of the suit land. That he acquired the said land legally by purchasing it from **Hassan Salim Kabwere alias Hassan Salim Namwelei** in February 2013, and has been in possession since then. That the plaintiff illegally transferred the suit land to herself, and the equitable remedy she seeks is not available to her, as her hands are tainted. That the title document over the suit land held by the plaintiff was procured fraudulently, without following the due process of the law and should be revoked.

3. The plaintiff filed a Reply to Defence and Defence to Counterclaim dated 31<sup>st</sup> July, 2014 generally denying the defendant's counterclaim.
4. The plaintiff testified as **PW1** on the 31<sup>st</sup> January, 2017. It is her testimony that she bought the suit land from Hassan Namwele under the sale agreement dated the 24<sup>th</sup> February, 2014. She produced a copy of the agreement, title deed, application for consent and letter of consent as exhibits **Pex1** to **Pex4** respectively. That after purchasing the suit land, she went to the site and found someone had built on it. During cross examination, PW1 confirmed that the Land Control Board letter of consent she produced as **Pex4** is dated 28<sup>th</sup> November, 2013 and that she had obtained it before she bought the suit land. That she had however presented the sale agreement to the office before she got the consent, and therefore only the Lands Office could explain the discrepancy on the dates. That Mr. Hassan, the vendor, had told her that the defendant had leased the suit land, but he did not show her a lease agreement to that effect. That Mr. Hassan was to hand over vacant possession of the suit land to her, but when she went to the land, she found someone had ploughed it and she has never taken possession. PW1 confirmed that she is aware of parcels 2662 and 2664, and that there was a dispute relating to parcel 2664 between herself and another lady. That she did not know the number of the parcel of land she was buying, but was given the number later. That though she entered into the sale agreement on the 24<sup>th</sup> February 2014, she could not remember when the consent was applied for.
5. The defendant testified on the 2<sup>nd</sup> December, 2020 as **DW1**. He adopted his witness statement dated 10<sup>th</sup> September, 2014 as his evidence in chief, and produced the documents contained in his List and Bundle of Documents as **Dex1** to **Dex6**. During cross examination, DW 1 stated that he bought the suit land in February, 2013 for Kshs.200,000.00. That the land was a portion from the original parcel number 73 that measured six (6) acres. That the sale agreement does not contain the parcel number of the land that he was purchasing since subdivision had not taken place, and the parcel number had not been identified. He confirmed that he did not obtain a Land Control Board Consent to transfer the suit land to his name, and to date the suit land is not in his name. That he does not have any document authorising him to use the suit land. That the plaintiff, who had a dispute with another lady over parcel 2664, later registered the suit land in her name fraudulently. That the suit land was registered in 2013-2014 after he had taken possession of it, and he remains in possession to date. That Hassan showed him the position of the land which he purchased for Kshs.200,000.00 and he took possession before subdivision. The defendant called **Shadrack Kipkemboi Rutto, Solomon Chepsiror, and Eliud Kipkoach Kebenei**, who testified as **DW2** to **DW4** respectively. They adopted their witness statements dated 10<sup>th</sup> September, 2014 as their evidence in chief. During cross examination, DW2 stated that he was the elected secretary of the committee of the land buying society since 1973. That though he is not a surveyor, he participated in getting a government surveyor to conduct the survey of the land, and he assisted in pointing out the parcels to the owners. That he was aware the defendant had bought a portion of parcel 73 from Hassan, and that he is in possession. **DW3** testified that he is the one who wrote the sale agreement between the defendant and Hassan on the 5<sup>th</sup> February 2013. He confirmed that the defendant took possession of the land he bought from Hassan, built a semi-permanent house and fenced it in 2013. That by the time he drafted the sale agreement for sale of a portion of land parcel No. 73 on the 5<sup>th</sup> February, 2013 subdivision and registration of parcel 2663 had not been done. That he got to know the plaintiff when he was invited as the village elder to the land neighbouring the suit land, which was subject of a dispute between the plaintiff and another. He stated that he is aware that the Plaintiff has title to the suit land. **DW4** testified that the defendant, who is his neighbour, bought the suit land in 2013 and has been in possession since then.
6. That by the written consent of counsel for both parties dated the 25<sup>th</sup> May 2021, the witness statements of **Nicholas Koech, Antony Kurgat, Justus Wafula, Joly Muhindi and Joel Kipkurui Kosgei** were admitted in evidence without calling them to testify. Their testimony is that the defendant is their neighbour, and that they know he bought the suit land from Hassan. That the defendant has lived on the said land peacefully until February 2014, when the plaintiff, who had previously claimed to have bought parcel 2664, started claiming it. Joel Kipkurui Kosgei added that an agent of the plaintiff called **Sammy Kitur Bitok**, had engaged him to fence parcel 2664 that she had allegedly bought from Hassan Salim Kabwere.
7. That at the closure of the parties' cases, the learned counsel for the plaintiff and the defendant filed their written submissions dated the 2<sup>nd</sup> June, 2021 and 21<sup>st</sup> June, 2021 respectively. The submissions are as summarized here below;

A. The learned counsel for the plaintiff submitted that the plaintiff has through production of exhibits **Pex1** to **Pex4**, proved her case on balance of probability. That the plaintiff relied on the case of **JOSEPH N.K. ARAP NG'OK V MOIJO OLE KEIWUA & 4 OTHERS [1997] eKLR**, where the Court of Appeal held that once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title holder. That the defendant's claim relates to **ELDORET MUNICIPALITY TITLE NO. 73** and not **ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/2663**, the suit land. That the plaintiff submits that the sale agreement the defendant relies on was void since he failed to seek consent of the Land Control Board within 6 months from February, 2013. That the defendant's prayer of cancellation of title in the counterclaim cannot be issued as the Attorney General and the Land Registrar of Uasin Gishu are not parties to the suit. That it is not enough for the defendant to plead fraud as he failed to lead evidence to prove the same. The counsel cited the case of **GLADYS WANJIRU NGACHA V TERESA CHEPSAAT & 4 OTHERS [2013] eKLR**, in support of their submission in that aspect.

B. The learned counsel for the defendant submitted that the defendant had purchased a portion of **ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT) 73** vide the sale agreement dated 5<sup>th</sup> February, 2013. That the aforementioned agreement is valid as between him and Hassan, the vendor, since it has not been controverted, and it complies with the **Law of Contract Act**. That the portion of the land the defendant bought and took possession of was 0.125 acres, which is the same size of the land later registered as **Eldoret Municipality Block 20 (Kapyemit)/2663**, the suit land. That the defendant's rights over the suit land crystallised on 5<sup>th</sup> February, 2013 when he was given vacant possession by **Hassan Salim Namwele**, in exchange for a sufficient consideration. That the plaintiff cannot purport to have acted in good faith when she purported to purchase the suit land, because she failed to conduct due diligence, which if she did, she would have established that the proprietary interest on the suit land had already passed to the defendant, who was in possession at the time when she purchased the land. That the plaintiff is not entitled to the protection offered to a *bona fide* purchaser for value, because she entered into a contract for the purchase of the suit land in full awareness that the defendant was occupying it. That **section 8(1) of the Land Control Act** requires that the Land Control Board consent be obtained within 6 months from the date of the sale of land, which in the plaintiff's case, should have been by 23<sup>rd</sup> August, 2014. That no consent obtained between the 24<sup>th</sup> February, 2014 and 23<sup>rd</sup> August, 2014 was obtained and exhibited by the plaintiff. That the

consent relied on by the plaintiff is dated the 28<sup>th</sup> November 2013, and the plaintiff cannot purport to have obtained consent to transfer the suit land before the date of purchase of the suit land. That the defendant submitted that the Hassan Salim Namwele's signature on the application for consent dated 28<sup>th</sup> November, 2013 does not correspond with his signature on the sale agreement, which fact points to an element of fraud. The counsel cited to among others, the case of **LAWRENCE P. MUKIRI MUNGAL, ATTORNEY OF FRANCIS MUROI MWAURA V. ATTORNEY GENERAL & 4 OTHERS (2017) eKLR**, where the Court of Appeal held that the conduct of the 3<sup>rd</sup> Respondent was not of a diligent *bona fide* purchaser as described in the **KATENDE V. HARIDAR & COMPANY LIMITED (2008) E.A. 173**. The defendant also urged the court to impeach the plaintiff's title pursuant to the provisions of **section 26 and 80 of the Land Registration Act, 2012** and that the court do allow his claim with costs.

8. The following are the issues that arise for determination in this suit:

- i. Whether the Plaintiff has proved her claim against the Defendant to the required standard; and*
- ii. Whether the Defendant has proved his Counterclaim against the Plaintiff to the required standard.*
- iii. Who pays the costs in the suit and counterclaim?*

9. The court has considered the pleadings, oral and documentary evidence tendered, the written submissions, the superior courts decisions cited, and come to the following determinations;

a. The plaintiff produced copies of the agreement for sale dated the 24<sup>th</sup> February 2014, undated application for consent of land control board, letter of consent dated the 28<sup>th</sup> November 2013, and title deed that she relied on in her claim of being the bona fide purchaser and registered proprietor of the suit land. The defendant challenges the plaintiff claim to the suit land on the grounds among others that, the plaintiff **"illegally transferred his parcel of land to herself and thus her prayer that the honourable court declare that she is the owner of the parcel of land will be furthering her illegal acts"**,...that **"the plaintiff's acquisition of the suit parcel is tainted with illegality"**,...and that **"the title document held by the plaintiff was procured fraudulently and without following the due process of law and the same should be revoked."** That from the oral and documentary evidence tendered by both sides, the court has no difficulty concluding that both parties claim to have acquired the suit land from the same vendor, namely Hassan Salim Kabwere alias Hassan Salim Namwelei, albeit on different dates. That the said vendor was however neither not made a party nor called as a witness by any of the parties in these proceedings.

b. That in the case of **JOSEPH GICHUHI KAMAU & ANOTHER V SALOME WACHEKE KANYINGI [2018] eKLR**, the court held as follows:

***"In the present case, it is not disputed that the LCB consent dated 8<sup>th</sup> July, 2010 was obtained before the agreement for sale dated 22<sup>nd</sup> July, 2010 between the 1<sup>st</sup> plaintiff and the defendant was entered into. Under the Land Control Act, LCB consent should be obtained within 6 months of the agreement for sale. The Act does not provide for instances where LCB consent can be obtained before a sale agreement is made. I am of the view that there was no valid agreement for sale between the 1<sup>st</sup> plaintiff and the defendant as at 8<sup>th</sup> July, 2010 on the basis of which LCB consent could have been issued. The LCB consent dated 8<sup>th</sup> July, 2010 could not therefore validate an agreement for sale dated 22<sup>nd</sup> July, 2010 that was not in existence when it was issued."***

The Land Control Board consent dated 28<sup>th</sup> November, 2013 which the Plaintiff sought to place reliance on, to validate the sale agreement dated 24<sup>th</sup> February, 2014 was acquired before the said contract was executed. The said consent was not therefore obtained within the six months of the agreement. That as was held in the case above, the plaintiff herein has not exhibited a consent legally and regularly obtained from the Land Control Board to validate the sale agreement.

c. That where the authenticity or the validity of a title to land is the issue in contention in a claim like in this case, more is required of the person who claims to have acquired interest on the basis of the said title document. It is not sufficient for the title document holder, like the plaintiff, to seek the protection of the doctrine of indefeasibility of title, without adducing evidence to confirm that the said title document was obtained regularly and in accordance with the law. That in the case of **MUNYU MAINA V HIRAM GATHIHA MAINA [2013] eKLR**, the Court of Appeal held as follows:

***"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."***

And in the case of **ARTHI HIGHWAY DEVELOPERS LIMITED V WEST END BUTCHERY LIMITED & 6 OTHERS (2015) eKLR**, the court held that a party cannot invoke indefeasibility of title where the process of acquisition of the title is irregular. That in view of the foregoing, I find that the plaintiff has failed to establish that the title deed she obtained over the suit land on the 28<sup>th</sup> February 2014, pursuant to the sale agreement dated the 24<sup>th</sup> February 2014, and allegedly validated through the letter of consent dated the 28<sup>th</sup> November 2013, was regularly and procedurally acquired. That the plaintiff has not discharged the burden of proof placed upon her and as such her claim fails. That the defendant is therefore entitled to costs of the suit in accordance with **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

d. That the defendant in his counterclaim relies on the sale agreement dated 5<sup>th</sup> February, 2013 which he produced as exhibit, together with the fact that he occupies the suit land herein, to assert his proprietary interest on the suit land. That it is not in dispute

that the suit land is agricultural land, and therefore subject to the provisions of the **Land Control Act**. That **Section 6(1) of the Land Control Act** is instructive as it provides that any transactions affecting agricultural land is void for all purposes unless the Land Control Board for the area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act. That **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:***

***Provided 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 so to do, upon such conditions, if any, as it may think fit.”***

That in the case of **DAVID SIRONGA OLE TUKAI V FRANCIS ARAP MUGE & 2 OTHERS [2014] eKLR**, the Court of Appeal made the following observations:

***“Granted the centrality of the provisions of the Land Control Act in this appeal, it is important at this point to set out verbatim, some of the important provisions of that legislation. For present purposes, these are sections 6, 7, 8 and 22... How are the above provisions of the Land Control Act to be interpreted? The learned authors of THE LAW OF CONTRACT, Butterworths Common Law Series (General Editor, Prof Michael Furmston), 3<sup>rd</sup> ed. 2007, p. 1000 state as follows regarding express statutory prohibitions, like those of the Land Control Act:***

***“Where contracts of a specific type are expressly declared to be illegal by a particular statute, the contract is rendered void and unenforceable from its very inception or formation. There is no need to embark on any inquiry into the legislative intent as such for the very simple reason that the legislative intent is evident from the express language of the statute itself. In other words, while the legislative intent remains crucial, the plain language on the face of the statute itself saves the court the time and trouble of inquiring into the intention of Parliament in so far as that particular statute (or material provision thereof) is concerned.”***

***The following five fundamental conclusions, in our view, are self-evident and flow directly from the above express provisions of the Land Control Act:***

***1- All transactions involving agricultural land situate in a land control area are void for all purposes unless the land control board within that land control area has sanctioned them...”***

Further, in the case of **DAVID SIRONGA OLE TUKAI V FRANCIS ARAP MUGE & 2 OTHERS [2014] eKLR**, the Court observed as follows:

***“In LEONARD NJONJO KARIUKI V NJOROGE KARIUKI ALIAS BENSON NJONJO, CA. NO. 26 OF 1979, this Court affirmed that once the land in question was proved to be agricultural land within a controlled area, transactions affecting it were controlled transactions which in law became void in the absence of consent from the land control board. And in KARURI V GITURA [1981] KLR 247, the Court concluded that the provisions of the Land Control Act are of an imperative nature to the extent that there is no room for the application of any doctrine of equity to soften its provisions.”***

And in the case of **HIRANI NGAITHE GITHIRE V WANJIKU MUNGE [1979] eKLR**, the Court held as follows:

***“Section 6 of the Land Control Act is an express provision of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The court cannot do that; for it is not for us to legislate but to interpret what parliament has registered. So in this case that agreement between the parties having being entered in June 1969 became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it; and since no consent had been obtained within that time, nothing can revise or resurrect such an agreement. Failure to obtain the necessary Land Control Board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a land control area unless the consent of the Land Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes.”***

That applying the foregoing to the case at hand, it is the finding of the court that the defendant has not adduced evidence that Land Control Board consent was applied for and obtained within six months following the execution of the sale agreement that he claims was entered between himself and the vendor, Hassan Salim Namwele. That therefore, the defendant’s claim of proprietary interests on the suit land, on the basis of the sale agreement made over the suit land, which is agricultural land, cannot be sustained for failure to obtain the said consent.

e. That it is trite law that when a party alleges fraud on the part of the other party, the said fraud must be pleaded, particularized and proved. That in the case of **TELPOSTA PENSION SCHEME REGISTERED TRUSTEES V INTERCOUNTRIES IMPORTERS AND EXPORTERS LIMITED & 4 OTHERS [2016] eKLR**, the Court held as follows:

***“It is trite law that whoever alleges fraud must prove. It was therefore incumbent upon the plaintiff to prove the fraud allegations against the defendants to the requisite standard. The standard of proof in fraud cases is higher than that in ordinary civil cases, it is higher than on a balance of probability. As was observed in Njuwangu Holdings Ltd v Langata Kpa Nairobi & 5 others [2014] eKLR:***

*The standard of proving fraud in civil cases, the courts have consistently held, is higher than on a balance of probability. An allegation of fraud is a serious indictment against a party to whom it is made and though the standard of proof is not beyond a reasonable doubt as in criminal cases it is no doubt near there but is certainly higher than on a balance of probability and thus when a party in a civil matter makes an allegation of fraud against a party he should be prepared to tender and adduce evidence to prove the allegation to the required standard. In the present case, I am afraid the fraud allegations against the plaintiff have been generalized and lack specificity and are generally unproved...*

*Thus, mere suspicion of fraud cannot suffice. It is this Court's finding that besides generalisations, the plaintiff has not proved that the 1<sup>st</sup> defendant acquired the title illegally or through a corrupt scheme. More particularly, there is no proof of the fraud allegations against the transferee, the 1<sup>st</sup> defendant as to warrant the cancellation of the title."*

That the defendant pleaded fraud and illegality in the way the plaintiff acquired registration with the suit land, in his Defence and Counterclaim. The defendant further invited the court to infer fraud on the part of the plaintiff on the basis that Hassan Salim Namwele's signature on the application for consent is not similar with his signature on the sale agreement. That however, no evidence, like a report from a handwriting expert on the said signatures, was availed in proof thereof. That though it has already been found as above that the provisions of the Land Control Act were not complied with by the plaintiff, and therefore her title has on that basis been impugned, the defendant has failed to establish fraud attributable to the plaintiff. That in the case of **KENNEDY OTIENO OPIYO V ROSEMARY KASUKU [2021] eKLR**, the Court cited with approval the case of **Kinyanjui Kamau v. George Kamau (2015) eKLR**, where the Court of Appeal held that:

*"It is trite law that any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged. It is not enough to inter (sic) from the facts."*

f. That the defendant's claim to the suit land, and possession of the same, is based on the sale agreement between him and Hassan Salim dated 5<sup>th</sup> February, 2013. That it follows that there is no privity of contract established between the defendant and the plaintiff. That the person from whom the defendant should claim his land from, if any, is the vendor of the said land who is not a party or witness in the proceedings. That though the defendant has therefore succeeded in proving that the plaintiff obtained registration with the suit land irregularly and illegally, he has failed to prove that he is entitled to a declaration that he is the legal owner of the suit land.

g. That as the defendant has partially succeeded in his counterclaim, he is awarded half the costs of the counterclaim.

10. That flowing from the foregoing, the court finds and orders as follows;

(a) that the plaintiff has failed to prove her case against the defendant on a balance of probability and it is hereby dismissed with costs.

(b) That the defendant has partially succeeded in proving his counterclaim against the plaintiff in the following terms;

i. That a declaration is hereby issued that Nancy Chepkirui Soi, the plaintiff, acquired and transferred land title **No. Eldoret Municipality Block 20 (Kapyemit)/2663** to herself illegally.

ii. That the Land Registrar, Uasin Gishu is hereby directed to revoke and cancel the registration of the plaintiff as proprietor of the suit land upon receipt of a certified copy of this order.

iii. That the plaintiff to pay the defendant half the costs in the counterclaim.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 6TH DAY OF OCTOBER, 2021.**

**S. M. KIBUNJA**

**ENVIRONMENT AND LAND COURT JUDGE**

**In the presence of:**

Plaintiff: Absent.

Defendant: Absent.

Counsel: Mr. Keter for Mwinamo for Plaintiff and

M/s Korir for Kenei for Defendant.

Christine: Court Assistant