



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**E&L CASE NO. 282 OF 2017**

**ELIUD KARANJA WANYOIKE.....PLAINTIFF**

**VERSUS**

**HILLARY TANUI alias CHRISTOPHER TANUI.....1<sup>ST</sup> DEFENDANT**

**JOSEPHINE CHEROTICH YEGO.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a plaint dated 31st July, 2017 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a) The defendants be restrained by way of temporary injunction from carrying out further interference and/or otherwise in any way, adversely dealing with the land allowing the plaintiff to utilize the land.
- b) The caution placed on the said parcel of land by the 2<sup>nd</sup> defendant and is hereby lifted.

**PLAINTIFF'S CASE**

The plaintiff gave evidence that he entered into a sale agreement with Joseph Kiprotich for the purchase of 1/8 of an acre of parcel of land known as Plot No. 24/503 Kipkenyo at a consideration of Kshs 90,000. It was PW 1's evidence that the amount was paid in installments amounting to Kshs 70,000 and that later agreed that Hillary Tanui would take one cow valued at Kshs. 20,000 in lieu of the cash which was outstanding.

PW1 stated that due to the 2007 -2008 post-election clashes, he was unable to do anything on the land and was informed by a caretaker by the name Kamau who was utilizing the land that someone had encroached on his land.

He further stated that the matter was reported to the chief who advised him to move to court. PW1 stated that he did not enter into an agreement with the 1<sup>st</sup> defendant as he had paid him the money for the purchase of land which he had requested for. That he did not envisage the 1<sup>st</sup> defendant not transferring the land to him.

On cross examination, he stated that the 1<sup>st</sup> defendant approached him and informed him that he would sell the land to him. That the 1<sup>st</sup> defendant later introduced him to Joseph Kiprotich who was the owner of the land. They entered into the agreement with Joseph whom he paid Kshs 90,000.

He further admitted that the suit land had a title but he did not have a copy to it. He also admitted that he did not carry out a search and also that he did not produce a copy of a caution.

PW2 Joseph Kiprotich testified that he sold to the 1<sup>st</sup> defendant ½ an acre of land and later sold the plaintiff 1/8 of an acre. That he was to transfer the land to the buyers but the 2<sup>nd</sup> defendant had lodged a caution on the land. The plaintiff cultivated the land for 3 consecutive years. It was his evidence that he took a cow from the plaintiff worth Kshs. 20,000 for purposes of transferring the land to the plaintiff.

PW2 testified that at that time, the 1<sup>st</sup> defendant had left the parcel of land and moved to live in Maili nne. On being cross examined, he stated that he had 5 acres before subdivision known as Eldoret municipality Block 24 plot No. 110 which was known in 2005 as 503 and that one of the resultant titles is Eldoret Municipality Block 24 (Kipkenyo) 880. He confirmed that he entered into an agreement with the plaintiff and stated the he had received Kshs 90,000 from the plaintiff after being told by the village elder to accept.

PW3 Kamau Waruru stated that he had been requested by the plaintiff to take care of the suit land. That he is the one who informed the

plaintiff that someone had encroached on his land. That they went together to the chief who advised them to move to court.

On cross examination he stated that the land was fenced but he is not aware whoever fenced it. That the trees were cut down and that there is a new house constructed on the plot.

### **DEFENCE CASE**

DW1 Hillary Kiplagat testified that he did not sell the land to the plaintiff and could not remember the land he bought from Joseph Kiprotich Sang. He admitted that he sold land to pastor Karanja, Joseph and Moses which was fenced. It was his evidence that he asked them to go to Joseph Kiprotich Sang the registered owner.

On cross examination he stated that he bought ½ an acre from Joseph Kiprotich and sold 1/8 each to 3 people that is Moses, Josephine and Karanja. However he did not have any agreement to show that he sold the land to Moses and Josephine.

DW2 Josephine Cheruto Yego testified that she bought land from Hillary Kiplagat. It was Plot No. Eldoret Municipality Block 24/503 Kipkenyo before subdivision and currently known as Eldoret Municipality Block 24 Kipkenyo 880. She produced a certificate of search as Dex 1.

It was DW2's evidence that she constructed a house and gave somebody to live on. She had lived on the land for 6 years but it had not been transferred to her name.

On cross examination she stated that she went to the suit land in 2010 but could not remember whoever took him to the land. That she did not meet Hillary but just called him and Hillary told her to be shown the land by Joseph. Later in 2017 someone came and alleged that the land belonged to him.

DW3 Benjamin Kipsang testified that the 2<sup>nd</sup> defendant was his neighbor and that he does not know the plaintiff. That Josephine came to the suit land in 2010 and planted trees.

### **PLAINTIFF'S SUBMISSIONS**

Counsel for the plaintiff submitted that the plaintiff entered into an oral agreement with the 1<sup>st</sup> defendant for purchase of 1/8 of an acre of parcel of land known as **ELDORET MUNICIPALITY BLOCK 24(KIPKENYO) 503** which land the 1<sup>st</sup> defendant had purchased from PW2. That he entered into an agreement with PW2 who signed on behalf of the PW1 and that at the signing of the agreement, PW1 had already received the amount in full.

Miss. Karuga further submitted that the 1<sup>st</sup> defendant admitted to having purchased ½ acre of land from PW2 and later sold ¼ of an acre to Moses and the other ¼ was sold to Pastor Karanja and therefore the plaintiff by law is entitled to the reliefs sought since the plaintiff has proved his case on a balance of probability and that he indeed had a binding agreement with the 1<sup>st</sup> defendant which was formally executed through the registered owner Joseph Kiprotich.

### **DEFENDANTS' SUBMISSIONS**

Counsel for the defendant submitted that the plaintiff's claim and evidence that he bought a portion of land known as block 24/503 (KIPKENYO) from one Joseph Kiprotich who was acting as an agent neither shows that the money was paid to the 1<sup>st</sup> defendant nor that the 2<sup>nd</sup> defendant had any contact or transaction with the plaintiff.

It was Counsel's submission that the plaintiff has failed to prove his case and the prayers sought are not tenable as he did not enjoin a party whom he transacted with. The 2<sup>nd</sup> defendant gave evidence that she is currently in occupation of land known as **ELDORET MUNICIPALITY BLOCK 24 (KIPKENYO) 880**. The plaintiff never challenged the ownership of the said parcel of land which is in occupation by the 2<sup>nd</sup> defendant. Counsel urged the court to dismiss the plaintiff's suit with costs to the defendant.

### **ANALYSIS AND DETERMINATION**

The main issue for determination is whether the plaintiff has proved his case and whether he is entitled to the reliefs sought. The dispute involves ownership of a parcel of land, and the specific prayers sought by the plaintiff in the plaint is for restriction by way of a temporary injunction against the defendants from dealing with the suit land.

The law on grant of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides:-

**"Where in any suit it is proved by affidavit or otherwise—**

**(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;**

**(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order**

**for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."**

The circumstances for consideration before granting a temporary injunction under **order 40 Rule 1 of the Civil Procedure Rules** requires proof that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such situation enjoined to grant a temporary injunction to restrain such acts.

Order 40 rule 6 of the Civil Procedure Rules provides that "*where a suit in respect is not determined within a period of (12) months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise*".

A temporary injunction is only meant to preserve the property in dispute until the legal rights and conflicting claims are established and therefore cannot be granted as a final prayer.

The plaintiff sought for a temporary injunction which was supposed to be an interlocutory measure pending the hearing and determination of the suit. If the court grants the order of temporary injunction would it serve the purpose as temporary measures are put in place pending the hearing and determination of a suit? Temporary injunctions have an expiry date either until the suit is heard or determine to ascertain the rights of parties or within 12 months from the date of the grant unless the court orders otherwise.

Further this is a case of non – joinder of a party to this suit. The plaintiff's claim and evidence was that he bought the suit land from one JOSEPH KIPROTICH who was acting as an agent of the 1st defendant. Such agency was neither pleaded nor evidence led to prove the same. The plaintiff chose not to sue the said JOSEPH KIPROTICH whom he called as a witness. Parties are bound by their pleadings

I find that the plaintiff has not proved his claim on a balance of probability and is therefore dismissed with costs to the defendants.

**DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF FEBRUARY, 2020**

**M. A. ODENY**

**JUDGE**

**JUDGMENT** read in open court in the presence of Mr. R.M. Wafula holding brief for Miss. Tum for Defendant and Mr. Maina holding brief for Miss. Karuga for Plaintiff.

Mr. Yator – Court Assistant