



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 67 OF 2018**

**MOSES KIPROTICH BIRIR.....PLAINTIFF**

**VERSUS**

**ALFAYO K. LELEI.....1<sup>ST</sup> DEFENDANT**

**JOHN CHERUIYOT.....2<sup>ND</sup> DEFENDANT**

**FRANCIS SAMOEI.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. **Moses Kiprotich Birir**, the Plaintiff, commenced this suit through the Complaint dated 28<sup>th</sup> March, 2018 against **Alfayo K. Lelei**, **John Cheruiyot** and **Francis Samoei**, the 1<sup>st</sup> to 3<sup>rd</sup> Defendants respectively seeking for the following prayers;

- (a) Permanent injunction restraining the 1<sup>st</sup> to 3<sup>rd</sup> Defendants by themselves or those claiming under them from laying claim on the suit land, described as **Kiplombe/Kiplombe Block 5/21**, measuring five acres, or in any other way interfering with the Plaintiff's use of the land.
- (b) Order directing the 3<sup>rd</sup> Defendant to execute the transfer documents transferring the suit land to the Plaintiff.
- (c) Alternatively to (b) above, the Deputy Registrar be authorized to execute the transfer documents.
- (d) Alternative to (a) to (c) above, the Defendants be compelled to reimburse the Plaintiff of the purchase price at the current market price.
- (e) General damages for trespass and mesne profits.
- (f) Costs and interests thereon.

The Plaintiff avers that he is the legal, *bonafide* and or equitable owner of the suit land, having acquired it for value from the 1<sup>st</sup> Defendant, who had bought it from the 2<sup>nd</sup> Defendant, on the 8<sup>th</sup> September 2006, and has been using it since then. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have fraudulently attempted to transfer, or transfer the land to the 3<sup>rd</sup> Defendant.

2. The claim is opposed by the 2<sup>nd</sup> Defendant through the defence dated the 29<sup>th</sup> May, 2018 in which he denied the Plaintiff's allegations of fraud. He also denied having sold the suit land to the 1<sup>st</sup> Defendant from whom the Plaintiff subsequently bought it from. The 2<sup>nd</sup> Defendant prayed for the suit to be dismissed with costs.

3. The Plaintiff's claim is also opposed by the 3<sup>rd</sup> Defendant through the defence and counterclaim dated the 10<sup>th</sup> April, 2018. The 3<sup>rd</sup> Defendant denied the allegations of fraud. He avers that he is the registered proprietor of the suit land through the allotment letter dated the 29<sup>th</sup> September, 1989. That after allocation, he took possession and handed it over to the 2<sup>nd</sup> Defendant to farm and graze cattle, but that he never sold it to him or anybody else. That he has never authorized the 2<sup>nd</sup> Defendant to sell the land or consented to it being sold. That the transaction between the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants over the suit land were fraudulent and aimed to dispossess him of his legitimately acquired property. The 3<sup>rd</sup> Defendant claims for the following prayers;

- (a) A declaration that the 3<sup>rd</sup> Defendant is the registered owner of **Kiplombe/Kiplombe Block 5(Kaptich)/21**.
- (b) A declaration that the Plaintiff is a trespasser on the suit land and should be evicted.
- (c) An order of permanent injunction restraining the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves or those claiming under them from interfering with the 3<sup>rd</sup> Defendant's quiet possession land from trespassing on the land.
- (d) General damages for trespass.
- (e) Costs.

4. The Plaintiff filed a reply to defence and defence to the 3<sup>rd</sup> Defendant's counterclaim dated 20<sup>th</sup> April, 2018. The Plaintiff opposed the 3<sup>rd</sup> Defendant's counterclaim averring that the 3<sup>rd</sup> Defendant had willingly and intentionally exchanged the suit land with 2<sup>nd</sup> Defendant and cannot claim it back.

5. The 1<sup>st</sup> Defendant did not enter appearance or file a defence to the Plaintiff's claim or the 3<sup>rd</sup> Defendant's counterclaim. The 2<sup>nd</sup> Defendant did not file any defence to the 3<sup>rd</sup> Defendant's counterclaim.

6. That during the hearing, the Plaintiff testified as PW1. He called **Abraham Kipkemboi Kisorio, John Kipleting Bundotich and Christopher Lelei**, who testified as PW2 to PW4 respectively. It is the Plaintiff's case that he acquired the suit land on 8<sup>th</sup> September, 2006 following a sale agreement with 1<sup>st</sup> Defendant for Kshs.620,000. That the 1<sup>st</sup> Defendant had informed him that the land belonged to him as he had bought it from the 2<sup>nd</sup> Defendant through the sale agreement of 5<sup>th</sup> May, 1999 for Kshs.350,000 after he gave 3<sup>rd</sup> Defendant another land in exchange. That he took possession of the suit land in 2006 and have been using it since then without any interference, until a dispute was lodged to the chief by the 3<sup>rd</sup> Defendant in 2018 against the 2<sup>nd</sup> Defendant. That the dispute was decided in favour of the 3<sup>rd</sup> Defendant. The Plaintiff then filed this case.

7. The 2<sup>nd</sup> Defendant testified as DW1. He told the Court that he knew the suit land belonged to the 3<sup>rd</sup> Defendant, who had allowed him to use and in return he allowed the 3<sup>rd</sup> Defendant to use his parcel that is near his home. The 2<sup>nd</sup> Defendant said he took possession of the suit land, fenced it, dug a borehole and erected a latrine. That later, he allowed the 1<sup>st</sup> Defendant to use the land after notifying the 3<sup>rd</sup> Defendant about it. Later, he learnt the 1<sup>st</sup> Defendant had written a sale agreement and when he saw it, he discovered the identity card noted on it and the signature did not belong to him. He prayed for the Plaintiff's suit to be dismissed with costs. The 2<sup>nd</sup> Defendant confirmed that the Plaintiff is the one who has been using the land since 2006. That when he got to know that the Plaintiff was using the land, he notified the 3<sup>rd</sup> Defendant. That neither the 3<sup>rd</sup> Defendant nor himself lodged complaints over the Plaintiff's use of the land.

8. The 3<sup>rd</sup> Defendant testified as DW2. He told the Court how he applied for the land and got the allotment letter dated 29<sup>th</sup> September, 1989. That he visited the land and found it was vacant. That the 2<sup>nd</sup> Defendant who was working with him at State House told him of a relative's parcel of land near his (3<sup>rd</sup> Defendant's) home and they agreed each to use the land that was nearer their respective homes. The 2<sup>nd</sup> Defendant therefore took over the suit land with his permission, while he took the 2<sup>nd</sup> Defendant relative's parcel. Later, the Chief called him over the suit land and he learnt of the dispute between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the Plaintiff. That he notified the Chief that he had not sold the land to the 2<sup>nd</sup> Defendant and he had not received any money for sale of the suit land. He told the court of a time the Plaintiff had gone to see him at his place of work over the land and he asked him to return with the 2<sup>nd</sup> Defendant for further discussion but he did not. That he only got to know that the Plaintiff was using the suit land in 2018. That he has not been paying rates for the suit land as he took it that the 2<sup>nd</sup> Defendant was the one to pay.

9. The Learned Counsel for the Plaintiff, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their written submissions dated 20<sup>th</sup> November, 2019, 29<sup>th</sup> January, 2020 and 28<sup>th</sup> January, 2020 respectively.

10. The following are the issues for the Court's determination;

- (a) **Whether the 1<sup>st</sup> Defendant had good title over the suit land capable of being passed on to the Plaintiff.**
- (b) **Whether the Plaintiff is entitled to an order of specific performance or refund of the purchase price paid.**
- (c) **Whether the Plaintiff is entitled to general damages and mesne profits.**
- (d) **Whether the 3<sup>rd</sup> Defendant is entitled to the declaratory and injunction orders sought.**
- (e) **Whether the 3<sup>rd</sup> Defendant is entitled to general damages for trespass.**
- (f) **Who pays the costs of the main suit and counterclaim?**

11. The Court has carefully considered the pleadings filed, oral and documentary evidence tendered by PW1 to PW4, DW1 and DW2, the written submissions by the Learned Counsel for the three parties and come to the following conclusions;

(a) That from the testimonies and pleadings presented to the Court in this matter, the 3<sup>rd</sup> Defendant was allocated five (5) acres plot described as Plot No. 21, Ex Lewa Downs vide allocation letter reference Land 16/2/2 VOL.1.1 dated the 29<sup>th</sup> September, 1989. That the Plot is described as Block 11963/R/21 and Block 11963/R Plot No. 21, UPN 17153 in the receipts and invoices issued by the County Council of Wareng and County Government of Uasin Gishu respectively, that were produced as exhibits. The Plot is also described as Kiplombe/Kiplombe Block 5 (Kaptich) 21 in the pleadings and testimonies presented by both sides, including the sale agreement dated the 8<sup>th</sup> September, 2006 under which the Plaintiff allegedly bought the land from 1<sup>st</sup> Defendant.

(b) That the evidence tendered is that the said land is yet to be registered and titled and therefore, still remains in the name of 3<sup>rd</sup> Defendant from the date of allocation. This was confirmed by PW2, who in his testimony informed the Court that he is a member of the Committee dealing with titling of the land in the area and ***"I know Plot 21 has no title"***. That reality must be what informed the Plaintiff to seek under prayer (b) for an order directing the ***"3<sup>rd</sup> Defendant to execute the transfer documents relating to the suit land in favour of the Plaintiff"***.

(c) That the Plaintiff, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are in agreement in their written submissions disposition of interests in land are required by **Section 3(3) of the Law of Contract Act Chapter 23 of Laws of Kenya** to be in writing, signed by the parties and their signatures attested. The Learned Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have in addition pointed out the provisions of **Section 6(1) of the Land Control Act Chapter 301 of Laws of Kenya** on the requirement of consent to transfer interests in land to be obtained in six months from the date of the agreement of sale of agricultural land, failure to which, the agreement becomes void. That having considered the foregoing among, and the testimonies present, it is obvious there was no agreement for sale of the suit land between the Plaintiff and the 3<sup>rd</sup> Defendant. That what the Plaintiff has put forward to the court is that the 3<sup>rd</sup> Defendant had relinquished his interest over the suit land to the 2<sup>nd</sup> Defendant through the verbal agreement to swap or exchange their respective parcels. That the 2<sup>nd</sup> Defendant had through a sale agreement dated 5<sup>th</sup> May, 1999 sold the land to the 1<sup>st</sup> Defendant who subsequently sold it to him through the agreement dated 8<sup>th</sup> September, 2006. That though the 1<sup>st</sup> Defendant did not file defence to the Plaintiff's suit and 3<sup>rd</sup> Defendant's counterclaim, or come to Court to support the Plaintiff's claims, it remained the duty of the Plaintiff, to show on a balance of probabilities that the 1<sup>st</sup> Defendant had acquired a good title to the suit land that was capable of being transferred to him through the sale agreement between them. That is the essence of **sections 107 and 108 of the Evidence Act Chapter 80 of Laws of Kenya**. That the fact of the matter is that no evidence has been presented to the Court to show that the 2<sup>nd</sup> and 1<sup>st</sup> Defendant Sale Agreement of 5<sup>th</sup> May, 1999 had received the Land Control Board consent, or that the 2<sup>nd</sup> Defendant had obtained registrable interest capable of being transferred to the 1<sup>st</sup> Defendant as of the date of the agreement. That further, there is also no evidence adduced to show that the 1<sup>st</sup> Defendant had obtained registerable interest over the suit land capable of being transferred to the Plaintiff vide the Sale Agreement dated 8<sup>th</sup> September, 2006 or that their agreement had received the Land Control Board consent as required under **Section 6(1) of the Land Control Act**. That the said agreement has therefore become void but under **Section 7** of the said Act what the Plaintiff is entitled to is refund of the purchase price paid to the 1<sup>st</sup> Defendant under the sale agreement.

(d) That the Plaintiff took possession of the suit land and has been using it since the sale agreement of 8<sup>th</sup> September, 2006. That the 2<sup>nd</sup> Defendant knew that the Plaintiff was in possession and in his testimony, he confirmed it as follows; ***"I know that the Plaintiff started using the land in 2006 and by today, he has been on the land for about twelve to thirteen years"***. That however, from 8<sup>th</sup> September, 2006 to the 29<sup>th</sup> March, 2018, when this suit was filed through the Plaint dated 28<sup>th</sup> March, 2018 only about 11 years 6 months had lapsed. That period falls short of the twelve years that would have barred the 3<sup>rd</sup> Defendant to reclaim the land under **Sections 7 and 38 of Limitations of Actions Act Chapter 22 of Laws of Kenya**. That period does not allow the Plaintiff to seek to extinguish the 3<sup>rd</sup> Defendant's title under adverse possession principle and be registered as proprietor. That in any case the Plaintiff has not pleaded the adverse possession claim in his suit or defence to the 3<sup>rd</sup> Defendant's counterclaim. That the Court cannot grant a prayer that is not based on the pleadings filed.

(e) That flowing from (d) above that the Plaintiff has been in possession of the suit land from 2006 to to-date, then his claim for general damages for trespass and mesne profits under prayer (e) is misplaced, unsustainable and without basis. That likewise as the Plaintiff took possession of the suit land with permission of the 1<sup>st</sup> Defendant who had authority to use the land from 2<sup>nd</sup> Defendant, who in turn had authority of the 3<sup>rd</sup> Defendant to use the land, the Plaintiff cannot be declared a trespasser nor would the claim of general damages for trespass be sustained against him. That from the testimony of 2<sup>nd</sup> defendant, the 3<sup>rd</sup> Defendant knew that the Plaintiff was the one using the land long before the suit was filed. That accordingly, prayers (b) and (d) of the 3<sup>rd</sup> Defendant's counterclaim fails.

(f) That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not file a defence to the 3<sup>rd</sup> Defendant's counterclaim, yet under paragraph 19 and the prayers in the counterclaim, they were the Defendants with the Plaintiff. That however, the 3<sup>rd</sup> Defendant failed to adduce evidence to the standard of above balance of probabilities to show that the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants were fraudulent in the process of taking possession of the suit land. That while the Court finds that the 2<sup>nd</sup> Defendant did not appear to be forthright or reliable on matters to do with his dealings with 1<sup>st</sup> Defendant over the suit land transactions, as he never went to the police to lodge a complaint for investigation and possibly criminal prosecutions over the agreement dated 5<sup>th</sup> May 1999, the evidence tendered by 3<sup>rd</sup> Defendant also falls short of proof of fraud. That indeed, the 3<sup>rd</sup> Defendant's counterclaim appears to be a knee jerk reaction to the Plaintiff's suit, as he had not taken any legal steps earlier to reclaim the suit land, even after learning that the 2<sup>nd</sup> Defendant had given possession to others, ostensibly without his consent. That the 3<sup>rd</sup> Defendant's counterclaim therefore fails.

(g) That the Plaintiff having failed to establish any privity of contract between him, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, his claim against the two fails. That however, the Plaintiff succeeds in prayer (d) and (f) as against the 1<sup>st</sup> Defendant only.

12. That flowing from the foregoing, the Court finds and orders as follows;

(a) That the Plaintiff has proved his case against the 1<sup>st</sup> Defendant and the Court order as follows;

(i) That the 1<sup>st</sup> Defendant do refund to the Plaintiff the purchase price paid pursuant to their sale agreement that has become void, totaling Kshs.620,000 (**Six Hundred Twenty Thousands**) with interests at court's rate from September, 2006 till payment in full.

(ii) That further, the 1<sup>st</sup> Defendant will pay the Plaintiff costs of the suit.

(iii) That the Plaintiff's claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant is dismissed with each party bearing his own costs.

(b) That the 3<sup>rd</sup> Defendant has failed to prove his counterclaim to the standard required and the same is dismissed with each party bearing his own costs.

Orders accordingly.

**Dated and signed at Eldoret this 4<sup>th</sup> day of March, 2020.**

**S. M. KIBUNJA**

**JUDGE**

Judgment read in open court in the presence of:

Mr. Kandie Advocate for Plaintiff.

Mr. Mukabane for Otieno & Langat for Defendants.

Court Assistant: Christine