REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 18 OF 2014

CALEB CHELIMO ARAP ROTICH .....PLAINTIFF

VERSUS

JULIUS L. MARTEN .....DEFENDANT

JUDGMENT

1. By plaint dated 12th March 2014 and filed in court on 12th March 2014, the plaintiff averred that he is the proprietor of the parcel of land known as Oljorai Settlement Scheme Plot No. 35 measuring approximately 5 acres having been allocated by "the Adjudication and Settlement Department" around the 1990s. That fresh numbers were given to the plots in August 2010 and the suit property became known as Plot No. 831 Oljorai Phase II. He further averred that he entered into an agreement dated 30th August 2009 to sell to the defendant 2.5 acres of the suit property at a purchase price of KShs 60,000 which sum the defendant paid and the plaintiff gave him possession and occupation of the 2.5 acres. That sometime in the year 2013, the defendant started claiming that he had purchased the entire 5 acres and demanding that the plaintiff should not enter into or carry out any work on the remaining 2.5 acres.

2. The plaintiff further averred that the defendant had breached the agreement dated 30th August 2009 and in the alternative that the agreement was ambiguous and therefore a nullity. He further averred that the understanding between the parties had been tainted by fraud on the part of the defendant who forged the plaintiff's signature in a second agreement claiming that he had purchased the entire 5 acres. He further stated that the agreement was unenforceable for lack of consent of the Land Control Board and that he is ready and willing to refund the purchase price of KShs 60,000 to the defendant. He therefore sought judgment against the defendant for:

> *(a) An injunction to restrain the defendant by himself, his agents, servants, employees and others whosoever from alienating, transferring, selling, leasing out, charging, developing or in any other manner dealing with property Plot No. 35 (new number 831 Oljorai Phase II).*
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> *(b) A declaration that the agreement signed between the parties on 30.8.2009 is a nullity and therefore unenforceable.*
>
> *(c) An Order of eviction of the defendant from Oljorai Phase II Plot No. 35 (new No. 831).*
>
> *(d) Costs of the suit plus interest at court rate.*

3. The defendant filed a defence in which he denied the plaintiff's allegations and averred that the plaintiff sold to him the entire 5 acres and handed to him the original of the allotment letter. He added that he is ready to receive a refund but at the current market value of the suit property. He therefore urged the court to dismiss the plaintiff's case with costs.

4. The plaintiff testified as PW1 and stated that plot No. 35 at Oljorai settlement scheme which measures 5 acres was allocated to him by the government through an undated allotment letter a copy of which he produced as PExb.1. That he was later issued with a letter of offer dated 16th August 2010 (PExb.2) which demanded some payments from him. He paid KShs 16,000 and was issued with a receipt (PExb.3). He added that he leased 2.5 acres of the plot to the defendant through a lease agreement dated 30th August 2009 (PExb.4) which was drafted by the defendant. He further stated that they did not have any other written agreement with the defendant and that the defendant and some other people entered into a land sale agreement dated 30th August 2009 (PExb.5). That the defendant paid him KShs 60,000 on 30th August 2009 for leasing the land for a period of 5 years. The defendant took possession immediately and started grazing his cattle on the land. He later started claiming that he had bought the entire 5 acres and chased the plaintiff away from the land in the year 2014. He added that he reported to the area chief but the chief did not assist him. He nevertheless decided to go ahead and plant in the remaining 2.5 acres. He also instructed his advocates who issued a demand letter dated 28th February 2014 (PExb.6). He also received a letter dated 28th February 2014 (PExb.7) from the defendant's advocates. He further testified that he never sold the plot to the defendant but only leased a portion of it to him and that he sold 2.5 acres of the plot to one Stephen Kiprono Lelei through a sale agreement dated 14th September 2007 (PExb.8) at a purchase price of KShs 87,500 out of which Stephen Kiprono Lelei only paid KShs 60,000. Stephen Kiprono Lelei later changed his mind and did not want the plot any longer and the plaintiff therefore needs to refund him his KShs 60,000. He added that he is in possession of 2.5 acres while the defendant is in possession of 2.5 acres. He wants the remaining 2.5 acres back from the defendant. According to him, the money that the

defendant paid him for leasing the plot is not refundable since the defendant grazed his cattle on the plot.

5. Under cross-examination, he stated that the original of PExb.1 is with the defendant who got it from Stephen Kiprono Lelei. He added that both he and the defendant signed PExb.4 and that he was paid KShs 60,000 in respect of the agreement. He further stated that in PExb.5 he is listed as number 1, the defendant is number 2 while William Chepkutanyi who is listed number 3 was the village chairman, Samson Kangogo is a resident of Oljorai while Thomas Lentete Ole Marten is the defendant's father. When asked to read the agreement further he stated that he could not read and that his eye sight is not good. He added that he could see writings on the documents but was unable to read. He further stated that it is true that he sold to Stephen Kiprono Lelei 2.5 acres of the land at KShs 150,000 through a sale agreement dated 14th September 2007. Mr Lelei paid only KShs 60,000 and never paid the balance.

6. Patrick Cherop testified next as PW2. He stated that on 5th October 2013, the plaintiff asked him to accompany the plaintiff to a meeting at the chief's office. The defendant, the plaintiff, the defendant's father Thomas Lentete, the defendant's brother Paul Marten, village elder William Chepkeitany and other village elders were present. While at the meeting he was asked to record the minutes and he learnt that the dispute was over plot No. 35 Oljorai settlement scheme. He duly recorded the minutes (Pexb.9), signed them and wrote his ID number. The minutes were titled land lease agreement dated 5th October 2013.

7. Under cross-examination, he stated that he is married to the plaintiff's daughter and that he is farming on the suit property with the plaintiff's consent and further that he does not have any other plot.

8. The plaintiff's case was then closed.

9. The defendant testified in support of his case as DW1. He stated that he met the plaintiff towards the end of the year 2008 when he was looking for a plot to buy. The plaintiff was introduced to him by Thomas Lentete Marten, his father in law. The plaintiff told him that he had a plot known as Oljorai Phase II measuring 5 acres which he was selling. The plaintiff showed him an allotment letter, the same one whose copy the plaintiff had produced as PExb.1.) The plaintiff showed him the boundaries of the plot which was bushy. He added that they agreed and they prepared the agreement dated 30th August 2009 pursuant to which he bought the plot. He stated that he drafted the agreement and signed as buyer. He paid the plaintiff KShs 30, 000 as cash deposit. He further stated they also prepared a second agreement dated 30th August 2009. He drafted the second agreement the following day the 31st August, 2009. He did so because he had been advised that it was better to reduce the agreement of 30th August 2009 to a document attested by witnesses. The second agreement was signed in a hotel at the Kongasis Market Centre. He added that in the second agreement the plaintiff and he agreed on a purchase price of KShs 33,000 per acre thus making a total purchase price of KShs 165,000 for the 5 acres. He further testified that as at the time of signing the second agreement he had paid KShs 30,000 as part of an agreed first instalment of KShs 80, 000. He added that they agreed that he pays the balance in stages whenever he got money and that he duly paid in bits until he finished. He then cleared part of the bush in April 2010, built a house on it and asked Mr. Thomas Lentete who was living nearby to watch over the plot for him. They thereafter lived peacefully until the year 2010 when Mr. Lentete told him that a certain Mr Lelei was claiming that he had bought 2.5 acres of the plot in the year 2007 through a sale agreement dated 14th September 2007 (PExb.8).

10. DW1 further testified that he got Mr. Lelei's contacts from Mr Lentete and spoke to him. He also travelled from Nairobi to Kongasis and went to ask the plaintiff what was going on. The plaintiff confirmed to him that he had sold 2.5 acres to Mr. Lelei and that Mr. Lelei had paid KShs 60,000 but was no longer interested in the plot. He added that the plaintiff asked him to go and refund Mr Lelei the KShs 60,000. By then DW1 had not finished paying the plaintiff and therefore the plaintiff asked him to get the KShs 60,000 from the balance. DW1 further testified that he consulted Mr. Lelei who agreed to the refund. DW1 therefore paid an initial sum of KShs 40,000 to Mr Lelei through Mr Lentete and the balance of KShs 20,000 through Mpesa in instalments of KShs 10, 000 on 9th February 2011, KShs 8, 000 on 4th May 2011 and KShs 2, 000 on 3rd June 2011. He also paid to the plaintiff the balance by Mpesa in instalments of KShs 10,000 on 2nd May 2010 though Mrs Lentete's mobile number, KShs 10,000 on 14th August 2010 and KShs 5,000 on 7th November 2011 to the plaintiff's number. He produced Mpesa statement printed on 9th April 2014 (DExb1). He further stated that he also paid the plaintiff KShs 20,000 in cash in December 2011 thus fully paying the amount that was owing to the plaintiff.

11. DW1 further testified that when he completed paying the purchase price, the plaintiff did not have a national Identification Card and title could not therefore be processed. He added that he fully cleared the plot in the year 2013 and built a two bedroom house wherein he settled with his family. As DW1 was preparing to fully clear the bush, the plaintiff asked that he refunds DW1. DW1 told him that it was not possible. The plaintiff and DW1 summoned the witnesses to a meeting on 5th October 2013 to find a solution. DW1, Mr Lentete, the plaintiff and Patrick Cherop were present. A document titled "Land Leasing Agreement" and dated 5th October 2013 was prepared. It is the same document that the plaintiff produced as PExb.9. DW1 stated that he did not sign the document because he did not agree with the proposal that he be refunded KShs 60,000. Even the plaintiff did not sign it. DW1 further testified that the plaintiff was later issued with the second allotment letter dated 16th August 2010 which the plaintiff had produced as PExb.2. He added that it concerns the same plot even though the plot number was changed and that he was neither asked to surrender the original allotment letter nor told why a new allotment letter was issued. He then realized that the plaintiff did not have good intentions and reported the matter to Mark Cherotich, the Chief of Oljorai Location in January 2014. No solution was reached in the chief's office. DW1 therefore instructed his advocates who issued the demand letter dated 28th February 2014 which the plaintiff produced as PExb.7.

12. Under cross examination DW1 stated that the agreement which was produced by the plaintiff as PExb.1 did not mention any acreage or the purchase price. The agreement is signed by me and the plaintiff. He further stated that he did not have any acknowledgment for the KShs 20,000 that he paid to the plaintiff in cash in December 2011 and that the plaintiff did not formally authorize him to pay Mr Lelei the KShs 60,000.

13. Next on the stand was Thomas Lentete who testified as DW2. He stated that the defendant is his nephew and that in the year 2008 the defendant went to my home at Kongasis and told him that he wanted to buy a 5 acre plot on which he would live. At that time the defendant was living at Marigat. DW2 searched for a plot for him and found the suit property which was being sold by the plaintiff. He added that the plaintiff himself went to his (DW2's) home and told him that he was selling the suit property which was located about 1 kilometre away from

his (DW2's) home. He further testified that the plaintiff showed him the plot, its boundaries and the beacons. DW2 then called the defendant who came and met the plaintiff in DW2's home sometime around early 2009. After some discussion, the plaintiff, the defendant and DW2 went to see the suit property together. He added that the defendant liked the suit property and later told him that they had agreed with the plaintiff on a purchase price of KShs 33,000 for each of the 5 acres. The plaintiff and the defendant exchanged contacts. The defendant came back about two months later and brought with him KShs 30,000 which he paid to the plaintiff in DW2's home in the presence of DW2 and DW2's wife. The defendant then took possession and asked DW2 to watch over the plot for him while grazing his (DW2's) cattle on it.

14. DW2 further testified that sometime in the year 2011 Stephen Lelei called him on phone, introduced himself as Chief of Lanet in Nakuru County and asked to meet him in Nakuru. When they met, he told DW2 that he had bought the suit property and that he had paid the plaintiff KShs 60,000 for it. He said he had bought half of the plot. DW2 added that he gave Mr Lelei the defendant's phone number and also called the defendant on phone and informed him about Mr Lelei's claim. The defendant then came home and went to see the plaintiff after which the defendant told DW2 that the plaintiff asked him to refund the KShs 60,000 to Mr Lelei. The defendant then went away to look for money. About a month later, the defendant sent DW2 KShs 40,000 by Mpesa with instructions to give the said amount to Mr Lelei. He added that Mr Lelei told him that he had already received KShs 18,000 from the defendant thus making a total of KShs 58,000.

15. Then followed Stephen Kiprono Lelei (DW3) who testified that in the year 2007 when he was Chief Lanet Location in Nakuru Municipality Division he got to know the plaintiff who told me he was selling a 5 acres plot known as Oljorai Scheme Plot No. 35. DW3 went to see the plot and the plaintiff showed him the whole plot and the beacons. The plot had tall grass, had not previously been cultivated and was located in an undeveloped area with neighbours a bit far off. DW3 and the plaintiff agreed that DW3 purchases 2.5 acres at KShs 87,000 out of which DW3 paid KShs 60,000 leaving a balance of KShs 27,000. They executed the sale agreement dated 14th September 2007 which the plaintiff had produced as PExb.8 on the reverse side of which the details of payment which DW3 made are captured. DW3 added that he did not take possession and that as he was preparing to pay the balance of the purchase price, the 2007 – 2008 post-election violence erupted forcing him to relocate together with his family to Kericho and in the process to lose communication with the plaintiff for a while. Later around the year 2011 DW3 learnt that the plaintiff had sold the plot to the defendant. DW3 further testified that he learnt that the defendant was resident in Nairobi but had an uncle known as Lentete (DW2) who was around Nakuru. DW3 met with Lentete in a hotel in Nakuru and he confirmed to DW3 that the plaintiff had sold the whole of the 5 acres to the defendant. DW3 therefore asked Lentete to look for the plaintiff so that they could meet. Later Lentete called DW3 on phone and told him that the plaintiff had told the defendant to refund to DW3 the KShs 60,000. Ultimately, the defendant gave Lentete KShs 60,000 which Lentete took to DW3 in cash. DW3 added that he acknowledged receipt, was satisfied and that he has no claim either against the plaintiff or the defendant.

16. Under cross-examination DW3 stated the refund was done in the presence of only himself and Lentete and that he did not have any document to show that the plaintiff had authorized the defendant to pay him or that the plaintiff had instructed that he collects money from the defendant. Defence case was then closed.

17. Parties then filed and exchanged written submissions. It was argued in the submissions filed by the plaintiff that the first agreement dated 30th August 2009 is not valid since the size of land sold and the purchase price are not stated and it is not witnessed. It was further argued that the parties were as such not of one mind and that the purchase price was not paid in full. Regarding the second agreement dated 30th August 2009, it was argued that it was a forgery. Citing the case of **Michira v Gesima Power Mills Ltd [2004] eKLR**, the plaintiff argued that the two agreements are void and unenforceable owing to ambiguity.

18. For the defendant it was argued that the purchase price was fully paid and that the second agreement dated 30th August 2009 meets the requirements of **section 3 (3)** of the **Law of Contract Act** and is therefore valid and enforceable. Reliance was placed on the case of **Stanley Thyaka Muindi v Matewa Agencies Ltd & 2 others [2019] eKLR**. Regarding the plaintiff's argument that the second agreement dated 30th August 2009 was a forgery, the defendant argued that the plaintiff had himself included the document in his list and that the plaintiff would have reported the matter to police for investigation if it was a forgery. The defendant therefore urged the court to dismiss the plaintiff's case with costs.

19. I have carefully considered the pleadings, the evidence and the submissions. Two issues arise for determination: whether the agreements are valid and enforceable and whether the reliefs sought are available.

20. The question of whether the agreements are valid and enforceable has two aspects to it: validity in view of the **Law of Contract Act** and validity from the perspective of the **Land Control Act**. As a starting point, it is important to remember the basic principle that parties are bound by their pleadings. The court too is in a sense bound by the parties' pleadings since they circumscribe the issues for determination. See **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**. The authors of **Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5)** had the following to say on the central role of pleadings:

> ***The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial***.

21. The plaintiff averred at paragraph 6 of the plaint that "*on 30th August 2009, he entered into an agreement to sell to the defendant 2½ acres of the suit property at the purchase price of KShs 60,000/= the total of which was paid to him by the defendant after the parties signed a written memorandum of the transaction drafted by the defendant on 30th August 2009*". He further stated at paragraph 7 that he gave possession and occupation of the 2½ acres to the defendant and that he retained 2½ acres. Further on at paragraph 11 he averred that the defendant forged his signature in a second agreement purporting that he had purchased the entire 5 acres. The foregoing shows that there were two agreements. Indeed, the plaintiff in his testimony, while attempting to deny the existence of the first agreement dated 30th August

2009 (PExb.4), stated that there was another agreement also dated 30th August 2009 (PExb.5) through which the defendant purported to purchase the entire 5 acres. Being bound by the above averments in his plaint, the plaintiff cannot deny that he sold to the defendant 2½ acres of the suit property at the purchase price of KShs 60,000/= which sum was paid to him in full and that he put the defendant in possession of the 2½ acres. The attempts he made in his testimony to declare the agreement simply a lease are of no consequence. PExb.4 clearly states that he agreed to sell the suit property to the defendant. Equally, the plaintiff's arguments that that the parties in the transaction were not of one mind and that the purchase price was not paid in full do not hold in view of the averments at paragraphs 6 and 7 of the plaint.

22. **Section 3 (3)** of the **Law of Contract Act** provides:

> ***No suit shall be brought upon a contract for the disposition of an interest in land unless—***
>
> ***(a) the contract upon which the suit is founded—***
>
> ***(i) is in writing;***
>
> ***(ii) is signed by all the parties thereto; and***
>
> ***(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:***
>
> > ***Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.*** [Emphasis supplied]

23. A perusal of PExb.4 shows that it meets the criteria of being in writing and signature by all the parties. The parties' signatures are however not attested. PExb.4 does not therefore satisfy the requirements of **Section 3 (3)** of the **Law of Contract**. Nevertheless, the non-compliance is of no material significance in view of the plaintiff's own averments at paragraphs 6 and 7 of the plaint. In any case, the plaintiff has not brought this suit to enforce the contract contained in PExb.4. Instead, he has brought the suit to declare the agreements a nullity.

24. Regarding the second agreement also dated 30th August 2009 (PExb.5) the plaintiff stated in his evidence-in-chief that "the defendant and some other people entered into a land sale agreement dated 30th August 2009". When cross examined about the document, he admitted that he is listed in it as number 1 and the defendant as number 2. He also identified the witnesses and their respective positions in the list of signatories. When it came to identifying his signature on the document, he suddenly declared that he could not read and that his eye sight was not good. One wonders how he was reading everything else. I found his conduct as far as PExb.5 is concerned quite erratic and unreliable. If the document is a forgery as he contends, one wonders why he has not made a report to the police about it considering that he all along had it and even introduced it into the case through his list of documents. Even assuming that he was not minded to commence criminal proceedings in respect thereof, one would have expected him to procure a report from a forensic document examiner who would give an opinion on the signatures therein. His failure to do so must be construed against him. I am persuaded that he signed the second agreement also dated 30th August 2009 (PExb.5).

25. As regards whether PExb.5 meets the requirements of **section 3 (3)** of the **Law of Contract Act**, I note that it meets the criteria of being in writing and signature by all the parties. Further, the parties' signatures are attested by witnesses. PExb.5 therefore satisfies the requirements under the section.

26. The plaintiff also argued that the agreement (PExb.5) is unenforceable for lack of consent of the Land Control Board. The requirement of consent is found at **Section 6** of the **Land Control Act** which provides:

> ***Transactions affecting agricultural land***
>
> ***(1) Each of the following transactions that is to say—***
>
> > ***(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;***
> >
> > ***(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;***
> >
> > ***(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area,is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.***
>
> ***(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1)***.

27. The plaintiff has himself admitted that that on 30th August 2009, he sold 2½ acres of the suit property to the defendant at the purchase price of KShs 60,000 which sum the defendant paid in full and further that he gave possession and occupation of the 2½ acres. In such

circumstances, the equitable doctrines of constructive trust and proprietary estoppel apply to the transaction to supersede the **Land Control Act.** Thus, mere lack of consent of the Land Control Board does not automatically render the transaction void and unenforceable. See **William Kipsoi Sigei v Kipkoech Arusei & another [2019] eKLR**. I therefore find that the agreements (PExb.4 and PExb.5) are valid. Considering that the defendant has not filed any counterclaim, I do not find it necessary to determine whether the purchase price stated in the second agreement dated 30th August 2009 (PExb.5) was paid.

28. Is the plaintiff entitled to the reliefs sought? He seeks an injunction to restrain the defendant from alienating, transferring, selling, leasing out, charging, developing or in any other manner dealing with the suit property; a declaration that the agreements are a nullity and therefore unenforceable and lastly, an order of eviction of the defendant from the suit property. Having sold 2½ acres of the suit property to the defendant, having received the purchase price and having given the defendant possession and occupation of the 2½ acres, there would be no basis for the reliefs sought to issue to the plaintiff. As regards the remaining, I have found earlier in this judgment that the plaintiff signed the second agreement also dated 30th August 2009 (PExb.5) pursuant to which the entire 5 acres was sold. I am equally not persuaded that the plaintiff is entitled to the reliefs sought in respect of the remaining 2½ acres.

29. In view of the foregoing discourse, I find no merit in the plaintiff's case and dismiss it with costs to the defendant.

30. This judgment is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 30th April 2020.

D. O. OHUNGO

JUDGE