



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L CIVIL CASE NO. 173 OF 2012

JOEL KIPTANUI CHEMWENO.....PLAINTIFFS

VERSUS

JOSEPH K M TIREITO.....DEFENDANT

JUDGMENT

By a plaint dated 4th August 2004 the plaintiff herein sued the defendant seeking for the following orders:

- a) Specific performance as prayed for above
- b) Injunctive relief
- c) Any other relief that this court may deem fit to grant.

The defendant filed a defence and counterclaim dated 8th October 2014 whereby he denied selling 5acres to the plaintiff and claimed that the Land Control Board consent was obtained fraudulently.

PLAINTIFF'S CASE

PW1 gave evidence and stated that he together with Elijah Sumbeywo bought the suit land measuring 10 acres whereby he paid Kshs. 50,000/ and a LCB consent to transfer was issued. He produced a copy of the consent and pex No 1. It was further PW1's evidence that the defendant and himself signed a copy of application to LCB dated 28th June 1984

PW1 stated that the land sale agreement was taken by Elijah Sumbeywo who was entitled to 5 acres but is now deceased. He further stated that the defendant subdivide the land and gave him 5 acres but later took away 3 acres living him with 2acres.

It was PW1's testimony that the defendant together with Elijah Sumbeywo further subdivide that suit land in 2004 prompting him to file a complaint before the Land Disputes Tribunal. He stated that the Tribunal heard the case and awarded him 2 acres of the suit land and urged him to claim the 3 acres in another forum which is the gist of this case.

PW1 further testified that he wrote a bankers cheque to the defendant for the purchase price for Ksh. 100,000/ He therefore urged the court to enter judgment as prayed in the plaint.

On cross examination PW1 stated that the application for LCB consent to transfer was for 10 acres and that the suit land had not been subdivided. He also confirmed that he paid Kshs 100,000/ but the amount written on the application was 50,000/ and that he did not know the exact acreage of the land.

On further cross examination PW1 admitted that he issued a cheque No. 142802 that was dishonoured on account that signature of drawer differs and that it exceeds arrangement. PW1 confirmed that he filed this case in 2004 which is 21 years from the date of the agreement.

The plaintiff produced the proceedings of the Land Disputes Tribunal No 19 of 2005 but admitted that the High Court in Eldoret Misc CA No 297 of 2005 declared that the tribunal had no jurisdiction to determine the issues as this was registered land.

DEFENCE CASE

DW1 testified and stated that he did not enter into any agreement with the plaintiff and that Elijah Sumbeywo wanted to buy 10 acres from him. It was his evidence that the plaintiff was working for Elijah Sumbeywo and had asked the plaintiff to stand in for him at the Land

Control Board as he had travelled to Ethiopia.

DW1 stated that he asked the plaintiff for the cheque of Kshs 500,000/ that Sumbeywo had written but he did not give the defendant. That the plaintiff later wrote a cheque No. 142802 for Kshs. 100,000/ to but the cheque was dishonoured 6 times.

It was DW1's evidence that Elijah Sumbeywo paid Kshs. 100,000/ through the defendant's sister Margaret Jebet which he eventually received and was the basis of giving Elijah Sumbeywo 2 acres out of the suit land. He further stated that the plaintiff is only entitled to 2 acres and not 10 acres as claimed. He therefore urged the court to dismiss the plaintiff's case with costs.

On cross examination DW1 stated that the LCB consent was for 10 acres for the plaintiff and Elijah Sumbeywo but they only paid for 2 acres which he is ready to transfer. DW1 urged the court to find that the consent is null and void as it does not serve any purpose.

DW2 Selina Sumbeywo gave evidence and stated that she was the wife of the late Elijah Sumbeywo who gave out Kshs. 100,000/ for 2 acres and that she is not aware of the 5 acres the plaintiff is claiming.

ANALYSIS AND DETERMINATION

The issues for determination in this case are as to whether the plaintiff entered into a sale agreement with the defendant and for purchase of what acreage of land, whether the plaintiff is entitled to the orders sought, and whether the suit is time barred.

From the onset, it should be noted that there was no agreement produced to show that there was an agreement for sale entered into between the plaintiff and the defendant. The plaintiff stated that they entered into an agreement but the same was retained by one Elijah Sumbeywo who is deceased. This agreement would have shed light on the parties to the agreement, the acreage being purchased, consideration and the terms of payment. This was lacking.

It was the plaintiff's word against the defendant's. The consent letter for the LCB could not solve this issue as the acreage and the amount that was paid did not tally. The acreage was indicated as 10 acres and the amount paid as Kshs. 50,000/. The plaintiff stated that he had paid 100,000/ vide a cheque which was dishonoured. He stated that after the cheque was dishonoured he paid cash to redeem the cheque but was not able to substantiate this.

The plaintiff claimed 5 acres and the consent indicated 10 acres, DW2 who is the widow of the late Elijah Sumbeywo stated that the plaintiff was doing business with his late husband and had approached him that there was land being sold. It was here evidence that the late husband sent the plaintiff with a cheque of Kshs 500,000/ to the Land Control Board but later paid kshs 100,000/ cash for 2 acres. This explains that the two were only entitled to 2 acres which the defendant has admitted that he is ready and willing to transfer.

On the issue as to whether the suit is time barred, the plaintiff alleged to have entered into an agreement in 1983 which agreement he did not produce. Supposing that the said agreement was produced, the plaintiff filed this suit in 2004 which makes the claim time barred as per section 7 of the Limitation of Actions Act which stipulates that an action may not be brought by a person to recover land after the end of 12 years from the date on which the right of action accrued. This case was filed 21 years after which is beyond the stipulated 12 years.

On the issue as to whether the plaintiff is entitled to an order of specific performance, the orders of specific performance is an equitable remedy which is not readily available if there is an adequate alternative remedy. It is also a discretionary remedy which can only be granted on well know principles.

In the case of ***Reliable Electrical Engineers Ltd.....Vs....Mantrac Kenya Limited (2006) eKLR***, wherein 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 are an adequate remedy, specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”

In this case the remedy for specific performance is not available to the plaintiff as he has not met the threshold for such an order. The contract is not clear and it suffers from limitation of actions together with lack of fulfilment of the basis terms that make a contract. I find that the plaintiff has not proved his case against the defendant.

On the defendant's counterclaim on the revocation of the land Control board consent for transfer of 10 acres, I find that from the evidence of both the plaintiff and the defendant that such consent was not supported by any documentation. The plaintiff also is not claiming 10 acres given in the consent. I therefore find that the consent is null and void and is therefore revoked as it is of no purpose.

However it is clear from the evidence that the defendant is willing to transfer 2 acres to the plaintiff which they were to share with one Elijah Sumbeywo. Since this is an admission I will exercise my discretion in the interest of justice to that effect.

I have considered the pleadings, the evidence and the submission of counsel and find that the plaintiff's case is dismissed with costs and the counterclaim in respect of revocation of the Land Control Board consent is hereby allowed with costs to the defendant.

DATED and DELIVERED at ELDORET this 23RD DAY OF APRIL, 2020

M. A. ODENY

JUDGE