



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 26 OF 2017

SAMUEL NGUGI NGANGA.....PLAINTIFF

VERSUS

ELENA CHEPKURGAT KIPTALAM

(SUING AS THE LEGAL ADMINISTRATRIX OF THE ESTATE OF

KIPTALAM ARAP KOGO (DECEASED).....DEFENDANT

JUDGMENT

THE CLAIM

1. The plaintiff commenced this suit by way of a plaint dated **16/2/2017** which was filed on the same date. He claimed that the defendant is the legal representative of the late Kiptalam Arap Kogo (deceased) and that the deceased sold him **2** acres of land on **14/4/98**. Those **2** acres then formed part of **Kosprin Farm Plot No 315**. He states that he paid the full purchase price and took vacant possession immediately and occupied the land without interference. However what prompted him to file the suit is that the defendant has refused to transfer the two acres to him. He avers that the defendant has discriminated against him by leaving him out while freely transferring other portions to other persons who just like the plaintiff had bought land from the deceased and has caused the remaining land to be registered in her name as **Marinda/Kosprin/381**. He prays that the defendant be compelled by this court to transfer two acres out of **Marinda/ Kosprin 381** to him and in default the deputy registrar of this court be ordered to execute all the relevant documents to effect the transfer of the two acres into his name.

THE DEFENCE.

2. The defendant filed her defence on **23/1/2018**. She denied the allegation of an agreement between the plaintiff and the deceased and averred that no land may be transferred to the plaintiff without proof of purchase.

The plaintiff's evidence.

3. The plaintiff testified on **25/9/2019**. His evidence is in accordance to what is in the plaint. He added that Kiptalam Arap Kogo died in **1998**; that the consideration for the land was **Ksh 44,000/=**; that he paid the consideration in **4** instalments: **Ksh 28,000** on **14/4/1998**; **Ksh 10,000/=** on **9/6/1998**; **Ksh 2000/=** on **19/9/1998**; and **Ksh 4000/=** on **11/10/99**; the last two instalments were paid to the defendant and her son respectively but they were in respect of the consideration nevertheless. The plaintiff averred that the original of the sale agreement and other documents of sale got misplaced and he reported to the police; he produced a police abstract dated **29/1/2019** as proof of the loss. As at the time of the hearing the plaintiff was still in possession of the land. He produced a copy of the death certificate of the deceased as evidence, stating that he obtained a copy thereof while helping the defendant to obtain a grant. He also paid for the succession proceedings. Other persons also purchased land from the deceased. After the defendant obtained title in her name in the year **2016**, she turned against the plaintiff. Upon cross-examination he admitted that the land had not been surveyed and that the defendant never took him before the land control board to obtain a consent. He also stated that he was part of the succession proceedings and he could not raise any objection thereto. In re-examination he averred that he could not have been taken to the land control board in the year **1998** because title to the whole parcel had not issued.

4. **PW2 Singalava E. M. Shadrack**, testified on the same day as PW1. His evidence is that in **1998** he was an assistant chief of Endeless Sub-Location that the deceased and the plaintiff appeared before him and made the sale agreement in his presence. He acknowledged to having signed the agreement and stated that **Ksh 28,000/=** was paid to the deceased on that date and the plaintiff took possession of the land. By the time of his testimony he was no longer the sub-chief of that sub-location, but he was aware that the plaintiff has been utilizing the land.

The defendant's evidence.

5. **DW1, the defendant**, testified on **23/1/2020**. Her evidence is that she knows the plaintiff and that he lives in Endebeess; that the plaintiff never purchased land from her late husband; that in **1998**, she and her husband lived together and she would know whatever he did, but she has never seen the agreement produced by the plaintiff before the suit was brought. She also denied that the plaintiff has ever paid her any money for the suit land; she averred that the plaintiff began to disturb her in **2017** and she asked him for his papers and he lodged this suit against her thereafter; she denied that the plaintiff paid for the succession proceedings; that the plaintiff never took vacant possession of the land.

SUBMISSIONS

6. The plaintiff filed his submissions on **25/2/2020** while the defendant filed hers on **5/3/2020**.

ISSUES FOR DETERMINATION.

- a. Whether the plaintiff purchased land from the deceased in 1998;**
- b. Whether the agreement between the deceased and the plaintiff was binding on the defendant;**
- c. Whether the defendant should be compelled to transfer two acres to the plaintiff and out of what land reference number;**
- d. Who should bear the costs of the suit?**

DETERMINATION.

7. The issues are addressed as hereunder.

Whether the plaintiff purchased land from the deceased in 1998.

8. The plaintiff proved that he had lost the original agreement by producing an original of a police abstract. This court has no reason to doubt that the plaintiff indeed had the original with him and that it was lost without trace hence the abstract.

9. The plaintiff is in occupation of the land, evidence from the former sub-chief of the sub-location shows that the plaintiff is still in occupation of the land.

10. The defendant acknowledged in her cross-examination that other persons were sold land by the deceased but she avers that she never executed the plaintiff's agreement with the deceased. Though she had testified that the plaintiff had never taken vacant possession of the land or that he uses the land to the exclusion of all, she seemed to retract her evidence-in-chief during cross-examination by acknowledging that the plaintiff used to farm on the land. However she was silent as to how the plaintiff had taken possession of the land.

11. The defendant makes her rejection of the agreement even more untenable when she acknowledges that by **1998** she was not residing on the suit land but elsewhere. As she has testified that she used to keep abreast of all her husband did, she must have been aware of the land in question in this suit at all material times and that the plaintiff was farming on it. This court is convinced that the plaintiff was on the land by **1998**. It appears strange that the defendant would allow any person to farm on her land from the year **1998** to date without question unless she was aware of some arrangement by which that person had obtained the right to farm on the land.

12. In my view the evidence on the record supports the plaintiff's version that he had purchased from the deceased the land he occupies and farms on. The copy of sale agreement which has been identified by **DW2** supports this version. The evidence of **DW2** was not shaken on cross examination.

13. I hold that the plaintiff purchased two acres of land from the deceased vide the agreement whose copy has been produced in court as **PExh 2**.

Whether the agreement between the deceased and the plaintiff was binding on the defendant.

14. It has been argued by the plaintiff's counsel that that the same was not binding as the deceased had no title as at that date and the land was registered instead in the name of the settlement Fund Trustees who were established under the **Agriculture Act Cap 167** (now repealed) until the year **2016** when it became registered in the defendant's name. Therefore, states the plaintiff the suit was unalienated government land and the deceased had no legally transferrable interest in the suit land. This argument is also closely associated with the issue of limitation which was dealt with in a preliminary objection before the substantive hearing of the suit in so far as it asserts that **Section 41** of the **Agriculture and Food Authority Act No. 13 of 2013 (AFA)** is applicable.

15. However in this court's view the issue of limitation and all aspects connected thereto including the issue now being raised should have been raised on a wholesome objection at the preliminary objection stage and not at this moment. Whatever that relates to the limitation issue in this matter is therefore *res judicata*. Besides, the Settlement Fund Trustee was not a party in this case, and further, it has not been shown by evidence that any dues were owing to it by the time the deceased sold the land.

16. There is no denial that the defendant is the legal representative of the deceased. The deceased has been found to have sold land to the plaintiff. While in his shoes the defendant assumes all the assets and liabilities of the deceased and the liabilities herein include the duty to make good the agreement made between the plaintiff and the deceased.

17. I therefore find that the agreement in question is binding upon her.

Whether the defendant should be compelled to transfer two acres to the plaintiff and out of what land reference number.

18. Going by what this court has stated hereinabove the obvious conclusion is that the plaintiff is entitled to have the parcel of land that he occupies transferred to him.

What orders should issue.

19. The defendant has brought up the issue of the numbering of the land in question in her final submissions. Her argument is twofold: first that it has not been shown by way of expert evidence that the plot number **Kosprin 315** is the same one that became plot no **Marinda/Kosprin/381** upon registration in the defendant's name; secondly, that the plaintiff never proved the existence of the land known as **Marinda/Kosprin/381**.

20. It has been stated that the defendant in her witness statement denied knowledge of plot **Marinda/Kosprin/381** and this denial shifted the burden upon the plaintiff. This can not be the case.

21. This court notes that sufficient evidence having been tabled that the plaintiff purchased the land he occupies from the deceased and that he has some interest therein, it would be unjust to reject his claim on the basis of wrong numbering of the plots while he has been in possession of the land for more than a decade and while the evidence of the defendant and **PW1** acknowledges so.

22. The provisions of **Article 159(2)(d)** of the **Constitution** in effect provide that justice shall not be sacrificed at the altar of technicalities. In this case the parties know the land in question and are battling over it.

23. Though the defendant knew the plot number she never pleaded expressly in her defence that that plot is unknown to her and in addition, she led the plaintiff to believe that the number cited in his plaint was correct. Having failed to plead that fact in the defence the defendant can not be allowed at the submissions stage to raise the issue of discrepancy between the numbers cited by the plaintiff vis-a-vis the true number.

24. Parties are bound by their pleadings. It is not for the court to redraft pleadings for them. Pleadings are for the purpose of bringing parties to an issue.

25. In the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** it held as follows:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

26. The necessity of proper pleadings above had been espoused earlier in the case of **Mumo Matemu -vs- Trusted Society of Human Rights Alliance and others, Nairobi Civil Appeal No. 290 of 2012** where the court stated as follows:

"We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims....We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party..." (emphasis mine)

27. Where parties plead in as evasive a manner as the defendant did in this case, it is clear that they are intent on some element of concealment for their own benefit.

28. In the filed defence as well as her evidence the defendant's main focus was not on out of which of the deceased's parcels the plaintiff's 2 acres were carved out but on whether any land was sold to the plaintiff by the deceased's at all and this court has found that it was.

29. The necessary implication of the defendant's pleading is that she acknowledged that number as the correct number. The defendant is then deemed to have admitted that number as pleaded and the mistake should be deemed as a mutual one by this court. That mistake should not affect the fact that the plaintiff has through other evidence established that he is in possession of the suit land.

30. In any event having observed as above regarding **Article 159(2) (d)** of the constitution, this court finds that the plaintiff's claim can not be defeated by matters which were not specifically pleaded in the defence and which raised their head only at the submissions stage.

31. For the above reasons I find that the plaintiff has established his claim on a balance of probabilities against the defendant.

32. I therefore issue the following orders:

a. The parties shall at the earliest opportunity after this order either singly or jointly present themselves to the county

surveyor who shall at the parties' expense visit the suit land and establish the appropriate Land reference number thereof and formally advise the parties in writing as to which land reference number refers to the main parcel in which the portion cultivated by the plaintiff is located.

b. The defendant shall carve out the 2 acres of land occupied by the plaintiff whose number shall be as advised by the County Surveyor as required in this judgment and transfer them to the plaintiff and in default the Deputy Registrar of this court shall execute all the documents necessary to effect that subdivision and transfer.

c. Each party shall bear their own costs of this suit.

It is so ordered.

Dated, signed and delivered at Nairobi via electronic mail on this 29th day of May, 2020.

MWANGI NJOROGI

JUDGE, ELC, KITALE.