



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC CASE NO. 115 OF 2016**

**REBECCA KAKUKO JOSHUA.....PLAINTIFF**

**VERSUS**

**EMMANUEL TINJAA LOKILETUM.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The plaintiff initially filed this suit vide a plaint dated 2/8/2016 on the same date. Subsequently, by an amended plaint dated 27/7/2018 and filed in court on 31/7/2018, the original plaintiff was substituted with the current plaintiff and the amended plaint sought the following orders against the defendant:-

- (a) A declaration that the agreement of 31/7/2010 between the original plaintiff namely Cheyech Chepoturom Joshua Kakuko and the defendant became null and void, six months thereafter for want of consent of the Land Control Board;
- (b) A declaration that the defendant is a trespasser in the land comprised in title No. WEST POKOT/KERINGET A/2534 and the said defendant should be ordered to vacate therefrom and failing which he be evicted;
- (c) Costs;
- (d) Interest;
- (e) Any other relief this court may deem fit to grant.

**PLEADINGS**

***The Plaintiff***

2. In his claim, the plaintiff pleaded that she is the owner of land known as title no **West Pokot/Keringet A/ 2541** and **West Pokot/Keringet A/2534**. They measure **9.37 ha** and **0.10 ha** respectively. By a written agreement dated 31/7/2010 the plaintiff sold one quarter of an acre of land to the defendant for **ksh 85,000/=**. The same was part of **2541**. No consent of the land control board for subdivision or transfer was applied for and the agreement became null and void for that reason. It is pleaded that the defendant is entitled to only a refund of his money. In **2015** however the defendant entered plot no **2534** and erected a structure. The plaintiff avers that this invasion amounted to trespass and that in any event that parcel that the defendant occupied was not part of plot no **2541**, and the defendant should be ordered to vacate therefrom. It is averred that the plaintiff paid to the defendant **Ksh 85,000/=** as a refund of the purchase price. The defendant returned the money and the plaintiff resorted to depositing the same with Ms Kiarie & Co Advocates.

***The Defence***

3. According to the statement of defence filed on 15/9/2016, the defendant stated that he admitted the agreement pleaded in the plaint; that he paid for the land and immediately occupied it and has remained in possession thereof since; that at the time of the execution of the agreement the plaintiff was in the process of obtaining the title to the land in her name and it was the understanding of the parties that the title was to be processed in the plaintiff's name once the defendant obtained title. He averred that instead the defendant and with intent to defraud, cause the

suit land to be registered in the name of one Jackson M. Kakuko and 3 others.

## **EVIDENCE**

### ***The Plaintiff's Evidence***

**4. PW1, Rebecca Kakuko Joshua**, the plaintiff testified on **28/1/2019**. She stated that she was the daughter to the original plaintiff and is administrator to her estate. Her evidence closely followed the contents of the plaint.

**5. PW2, Meshack Kakuko**, testified on **29/1/2019**. His evidence is that he is the son of the original defendant; that that he was not present at the execution of the sale agreement; according to him the defendant had been sold land situate in plot **2451** but he demanded to be given land in plot no **2534**. **PW2's** mother then showed the defendant the plot which he currently occupies. Then his mother said that the purchaser should be refunded his money. They went to the police and the OCS recommended that the purchaser be refunded his money. **PW2** then received advice from his advocate to refund, and he sent the defendant **Ksh 85,000/=** by way of mobile money but the defendant returned the money. The witness then withdrew the money and deposited it with his advocate. According to him the confirmation of grant shows that Chepturom got the two parcels no **3124** and **3125** in succession cause number **13 of 1998-Kitale High court**. They attended the land control board on **24/2/2005**. The witness stated that he was not aware whether the defendant had been taken to the land control board by his mother, but also added that the administrators to her mother's estate had not done so. He also admitted that other purchasers of portions of the deceased's land had not been taken to the land control Board.

### ***The Defendant's Evidence***

**6. DW1, Emmanuel Tinjaa**, the defendant testified on **6/11/2019**. It was his evidence that he received information from his brother that the plot was on sale; that he went to view the land and found the deceased, two of her sons and one of her daughters in law. He had with him three of his witnesses. After the plaintiff and his party had viewed the land the area assistant chief wrote down the agreement; after the agreement was executed the deceased instructed him not to construct any permanent structure as the land had been subdivided into **6** portions; he was to await the survey. In the meantime he began farming on the land. Every one of the seller's **5** co-wives had been allocated a quarter acre plot on the parcel. The defendant utilized the parcel till **2014**. In the year **2014** a member of the family of Cheyech (also known as "Chepoturom" in these proceedings) also informed the defendant that he wanted to sell a portion next to his plot. He did not have money and at the request of that family member he brought a purchaser; the defendant's portion on the sketch showing the subdivision was **no "D"**; Joel was the name of the new purchaser. His plot was number **"C"**; later on the cheyech family called him and told him that his land measured an eighth of an acre and not a quarter. The family then went to the plot and erected a semi permanent mabati structure. The defendant then called the chief who wrote a letter asking the family to come meet at the site; that when the agreement was read one of the family members said that the plot bore no plot number and the defendant should be shown a different plot; on **27/1/2014** the family was summoned to the senior chief's office at the request of the defendant; however when they attended they undertook to refund the defendants money and declined to discuss the issue further. The plaintiff was sent by the chief to the Deputy County Commissioner and the latter recommended reconciliation which was rejected by the Cheyech family. The defendant then reported to the police and the family members were arrested. While in the hands of the police Cheyech admitted that she had sold the defendant the land and undertook to help him go through with the transaction however the land title was now in the name of the administrators. The defendant went back to the land and built two brick walled rooms and made one of them into a shop. He acknowledged to having returned the refund monies to the sender, who was not the person he had contracted with over the suit plot. He has also never collected the money from the family's advocate after it was deposited there.

**7. DW2, Allan Lodea Tinjaa**, testified on **6/11/2019**. His evidence is that he witnessed the sale of the land to the defendant; that he attended the meeting with the chief on the land; that at that meeting the family admitted that the land sold to the defendant was a quarter acre; that the land was next to the Kitale Lodwar highway and opposite the Meshack Tomkou Secondary School and SDA church; that the agreement was signed by the signatories and witnesses without demur; that later in **2014** the family of the late Cheyech backtracked on the agreement and said that it had not been recorded that the land sold was a quarter acre; that before the year **2014** the defendant sought a title deed but was told to wait till the land was registered in the name of Cheyech;

**8. DW3, Julius Ptoo**, testified the same date as **DW2**. His evidence is that in the year **2010** two persons informed him that Chepoturom had land to sell; that he informed the defendant by phone of that intended sale; that they went and viewed the land in the company of the two persons and later went to Chepoturom who confirmed that she was intent on selling the land; that in **2014** the two persons came to him and told him to inform the defendant that they had discovered that the parcel sold was big and that it would be split and they would take one half; that the defendant then began construction on the land.

**9. DW4, Philip Tinjaa**, testified on **26/11/2019**. His evidence is that the defendant is his younger brother; that **DW4** and the seller are relatives; that he borrowed **Ksh 10,000/=** which he lent to the defendant and which later formed a part of the consideration the defendant paid for the land; that the defendant was shown a parcel of land next to the Kapenguria-Kitale road and he commenced developments thereon as he awaited the title; that the land sold to the defendant was a quarter of an acre.

**10.** At that point the defendant closed his case.

### ***Submissions Of Counsels***

**11.** In his written submissions filed on **27/1/2020**. The defendant foiled his submissions on the **7/2/2020**. I have considered the pleadings the evidence and the submissions.

### ***Issues For Determination***

12. The issues for determination in this suit are as follows:

*(a) Whether the land sold to the defendant by Chepoturom was located near the Kitale -Kapenguria road and whether it measured a quarter acre.*

*(b) Whether the defendant should be declared a trespasser on the suit land for the reason that the agreement is void for want of the Land Control Board consent.*

*(c) What orders should issue.*

13. The issues are addressed as here below:-

**(a) Whether the land sold to the defendant by Chepoturom was located on parcel number West Pokot Keringet A /2534 located near the Kitale -Kapenguria road.**

14. Having heard the evidence of the parties it is clear that the defendant and his witnesses went to view the plot that was on sale and they all agree that the plot is located on land situate along the Kitale-Kapenguria road.

15. From the evidence of **PW1** and **PW2** the seller's family would not have attempted to revoke the agreement had the defendant kept strictly within the boundaries of the plot that was sold to him. Therefore the dispute is: from which plot was the plaintiff's plot to be carved? The agreement **DExh 2** was not challenged by the plaintiff. However it does not cite a parcel number. It only states that a quarter acre of land was sold to the defendant. The agreement was executed in the presence of the assistant chief of Psigirio sub location who also drafted it. The plaintiff never called the evidence of the chief to indicate the site of the plot with regard to which he drew an agreement yet evidence of the defence, which was not controverted was that the chief had visited the site while the agreement was made. He who asserts proves. The plaintiff has nothing to demonstrate to this court that the plot sold to the defendant was located on land parcel no **2541**. The failure of the plaintiff to call the chief as a witness in the case leads to the presumption that the assistant Chief's evidence would have been adverse to the plaintiff's case.

16. I therefore find that the defendant was sold a plot on parcel number **West Pokot/ Keringet A /2534** which is located near the Kitale-Kapenguria road.

17. The defendant's testimony is that he took possession of the land as soon as he had paid the purchase price and conducted farming activities on it. That was in the year **2010**. The agreement stated that the land measured a quarter of an acre. The plaintiff's plaint and witness statement of the original plaintiff admits that the land sold to the defendant was a quarter acre.

***(b) Whether the defendant should be declared a trespasser on the suit land for the reason that the agreement is void for want of the Land Control Board consent.***

18. It is admitted by both sides that there was no land control board consent obtained in respect of the agreement. The plaintiff makes this the basis of her claim. At **paragraph 5** of the plaint she states that no consent of the land control board was applied for regarding both subdivision and transfer and the agreement became null and void for that reason.

19. **Section 8 (1)** of the **Land Control Act** provides that an application for consent in respect of a controlled transaction shall be made to the appropriate Land Control Board within six **(6)** months of the making of the agreement for the controlled transaction by any party thereto.

20. It is clear that any of the parties may apply for the consent, but very unfortunate that many purchasers consider this a task of the seller. It is also surprising that a vendor, as in this case, who is supposed to be at the frontline in seeking a consent after a purchaser has paid the full purchase price, should turn around and claim that no consent was applied for and that invalidates the agreement.

21. In the case of **Florence Asami Agoro & 5 others v Samuel Oyindi Agoro & 2 others [2019] eKLR** where the appellants' contention that the sale of the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents was void for failure to obtain the consent of the Land Control Board, the Court Of Appeal, while dismissing the appeal, stated as follows:

**“23. In the instant appeal, it was clearly the intention of the 1<sup>st</sup> respondent to sell the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and the intention of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to purchase the suit property from the 1<sup>st</sup> respondent. It is notable that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents paid the agreed purchase price in respect of the suit property in full and that the registration of the transfer was effected in their favour. We therefore find that the 1<sup>st</sup> respondent established a clear intention to sell the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. It is on record that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have been in possession of the suit property since 2011 when they purchased it.**

**24. In the circumstances of this case, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, being innocent purchasers for value, without notice would suffer injustice if they were evicted from the suit property. The doctrine of constructive trust therefore comes into play to ensure that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as the rightful owners of the suit property, retain the suit property, the absence of Land Control Board consent, notwithstanding.”**

22. In the instant case also this court finds that Chepoturom was intent on selling a quarter acre of land and the defendant was intent on purchasing the same and the land was clearly identifiable on the ground and the defendant took possession thereof upon purchase and has

been in possession since.

23. I find the plaintiff's claim that the agreement was rendered void to be insufficient. This is a situation in which this court ought apply the principles of equity to effect the contract between the parties as was the case in **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR – Civil Appeal No. 51 of 2015**. Therefore the plaintiff must be estopped from relying on the claim that there was no consent as a basis of offensive while the intent of both parties to the contract was clear.

24. For the foregoing reasons this court declines to declare the defendant a trespasser on the suit land.

**(c) What orders should issue?**

25. In the final analysis, the court finds that the plaintiff has failed to prove her claim against the defendant on a balance of probabilities.

26. I therefore issue the following orders:

**a. The plaintiff's claim is dismissed with costs.**

**b. The plaintiff shall effect the transfer of a quarter of an acre of land out of land parcel title No. WEST POKOT/KERINGET A/2534 to the defendant and in default the Deputy Registrar of this court shall execute all necessary documents to effect the transfer of quarter of an acre of land out of land parcel title No. WEST POKOT/KERINGET A/2534.**

**It is so ordered.**

**Dated, signed and delivered via teleconference at Nairobi this 20<sup>th</sup> day of May, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**

**Judgment read in the presence of:**

**Hon Mercyline Lubia; and**

**In the absence of the parties and their counsel who had been duly notified of the judgment date.**

**MWANGI NJOROGE**

**JUDGE ELC, KITALE.**