



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 568 OF 2012

SIMEON KIPKOECH A CHEPKWONY.....PLAINTIFF

VERSUS

JAPHETH K. KORIR.....DEFENDANT

JUDGMENT

By a plaint dated 9th December, 2009 the plaintiff herein sued the defendant seeking for the following prayers:

- a) General damages for breach of contract.
- b) A declaration that the defendant is a trespasser on the plaintiff's parcel of land.
- c) A permanent order of injunction restraining the defendant his servants and / or agents from interfering with the smooth occupation by the plaintiff of his parcel of land number SOY / KIPSOMBA BLOCK 11 (KIPSOMBA) 185
- d) An order of eviction against the defendant from parcel number SOY / KIPSOMBA BLOCK 11 (KIPSOMBA) 185
- e) Mesne profits
- f) Cost and interests.

Plaintiff's case

It was the plaintiff's case that on or about the year 2006 he wanted to sell his parcel of land known as SOY / KIPSOMBA BLOCK II (KIPSOMBA) 185 measuring 5 acres. The plaintiff stated that the suit land is registered in his name of which he produced a copy of the title deed. He also produced a copy of official search which indicated that the suit land is registered in his name.

The Plaintiff further stated that in the year 2006, the defendant offered himself as a potential purchaser and the plaintiff signed all the transfer documents in his favour of which he produced the transfer and application for the Land Control Board Consent as exhibits in court?

The plaintiff testified that it was a term of understanding between himself and the defendant that the defendant would sell his maize produce at Eldoret Cereals Board where after the defendant was to pay the purchase price of the suit land to the plaintiff.

The plaintiff stated that the defendant did not honour the terms of the agreement forcing him to cancel the whole transaction by writing a letter to the Land Control Board since the payments were not forthcoming.

PW1 also stated that since the parcel of land was originally owned by Nandi Teachers Sacco he had to go to the Sacco to clear the air on who was the beneficial / rightful owner from their records. He stated that the Sacco confirmed vide a letter dated 20th January 2010 clearly indicating that the parcel of land belonged to SIMEON KIPKOECH CHEPKWONY the plaintiff herein which was produced in court.

It was the plaintiff's evidence that the matter was reported to the District Officer Soy Division who heard the case and gave a verdict that the land belongs to the plaintiff and wrote a letter to the Land Registrar confirming the same. Further that the DCIO also confirmed from their investigations that the land belongs to the plaintiff. He therefore urged the court to grant his prayers as per the plaint.

PW 2, one GEORGE K. SAWE told the court that he was the one in charge of allocation of the parcels of land to the teachers who were members of the Nandi Teachers Sacco. He stated that he stays on the ground and that the parcel of land claimed by the defendant is totally different from the suit land. He further stated that he witnessed the defendant pay for land that was next to his parcel of land in Kipsomba.

PW 2 stated that he was present when the defendant bought a bankers cheque of Kshs. 170,000/= and paid to the Sacco when purchasing SOY / KIPSOMBA BLOCK 2 (KIPSOMBA) 183 and not SOY / KIPSOMBA BLOCK 11 (KIPSOMBA) 185 which belongs to the plaintiff.

PW 2 further stated that he is a witness to the defendant in another suit where, the defendant used the same receipt he produced in court to claim another parcel of land. He stated that he was privy to this facts since he stays on the ground and the defendant is his neighbour. It was his evidence that the land belongs to the plaintiff.

Defence Case

The defendant gave evidence and stated that Nandi Teachers Sacco bought 300 acres of land which they later advertised and invited non-teachers to purchase. It was the defendant's evidence that he bought plot No. 165 measuring 5 acres and later bought plot No. 185 which was repossessed from the plaintiff through Nandi Teachers Sacco.

DW1 stated that he paid the full purchase price to Nandi Teachers Sacco and was issued with a receipt which he produced in court as an exhibit. He further stated that he continued cultivating the suit land until 2005 when there was a dispute at Nandi Teachers Sacco. The defendant also stated that the plaintiff signed for him transfer forms and application form and got a Land Control Board Consent which the plaintiff later called the Board to cancel.

It was the defendant's evidence that the plaintiff should be compelled to attend the Land Board and transfer the land to him. He urged the court to dismiss the plaintiff's case with costs and allow his counterclaim as prayed.

DW1 called 3 witnesses to support his case. The witnesses reiterated the defendant's evidence that he bought the land from Nandi Teacher's Sacco. The witnesses relied on their filed statements. On cross examination DW2 who was a Clerk at the Sacco confirmed that he was not an official and that he did not have the notice for repossession of the plots. DW2 also confirmed that he does not stay near the suit plot and that there is no house on the plot.

DW4 stated that there is neither a house nor jacaranda trees as was stated by DW3 who testified that there are jacaranda trees. Her evidence mostly amounted to hearsay.

Plaintiff's submission

Counsel for the plaintiff submitted that it is clear that from the proceedings that the suit land is registered in the name of the plaintiff and that the defence and counterclaim does not have a prayer for cancellation of the plaintiff's title.

Counsel submitted that the law is clear that parties are bound by their pleadings and the court cannot give what a party has not pleaded for. He stated that the defendant's counterclaim must fail.

Further that the defendant did not plead that the plaintiff had fraudulently acquired the title to the suit land. That the plaintiff's title was acquired procedurally and without fraud. Counsel also submitted that the defendant alleged that he paid money to Nandi Teachers Sacco and at that time the title had already been issued to the plaintiff.

It was Counsel's submissions that the defendant having failed to prove ownership of the suit land, his counter claim should be dismissed and be ordered to give vacant and peaceful possession to the plaintiff.

Defendant's Submission

Counsel for the defendant filed submissions and reiterated the defendant's evidence. Counsel submitted that the issues for determination are as to whether the plaintiff fraudulently registered the suit land in his name and whether the defendant is lawfully on the suit land.

On the first issue as to whether the plaintiff fraudulently acquired the suit land, Counsel submitted that the matter was referred to DCIO Nandi who investigated the Nandi Teachers Sacco acquisition of the EATEC farms. It was Counsel's submission that the plaintiff had not paid the full purchase price to Nandi Teachers Sacco hence the transfer was fraudulent.

On the second issue as to whether the defendant is lawfully on the suit land, Counsel submitted that the defendant paid the full purchase price to Nandi Teachers Sacco and was issued with receipts. It was his submissions that the defendant paid for the suit land directly to Nandi Teachers Sacco of which he produced receipts for payment.

Counsel therefore urged the court to dismiss the plaintiff's case and allow the defendant's counterclaim as prayed.

Analysis and Determination

The issues for determination in this case are as follows:

- 1) Whether the plaintiff and the defendant entered into a sale agreement for the sale of the suit land,
- 2) Whether the defendant paid the purchase price as agreed with the plaintiff,

- 3) Whether the suit land belongs to the plaintiff or the defendant,
- 4) Whether the suit land was repossessed by Nandi Teachers Sacco and later sold to the defendant
- 5) Whether the suit land is the one that the defendant bought from Nandi Teachers Sacco.

The plaintiff gave evidence and produced exhibits which included a copy of a title deed, search certificate, transfer form, application for consent for the Land Control Board. The plaintiff further produced a letter dated 18th December 2006 cancelling the transfer to the defendant and a letter dated 20th January 2010 from Nandi Teachers Sacco which indicated that the land belonged to the plaintiff.

It is on record that this matter was referred to the Provincial Administration who confirmed that the land belonged to the plaintiff from their investigations. A letter dated 5th February 2010 by the District Officer Soy Division which was produced as Pex No. 7 informed the Land Registrar that upon presentation of the ownership documents by both the plaintiff and the defendant they established that the plaintiff was the registered owner of the suit land. They advised the defendant to lodge his complaint with Nandi Teachers Sacco.

Further the DCIO Nandi Central/North who also investigated the matter wrote a letter to the Land Registrar that upon their investigations it revealed that the real owner of the suit land was the plaintiff herein having produced the documents to prove ownership.

The plaintiff also produced receipts from Nandi Teachers Sacco as proof that he was a member, bought the suit land and paid for it. PW2 confirmed that the plaintiff was the rightful owner of the suit land as he was in charge of allocation of the plots. It was PW2's evidence that the land that the defendant is claiming is totally different from the plaintiff's.

The defendant gave evidence and stated that he bought the land from Nandi Teachers Sacco which had been repossessed and paid in full. It was also his evidence that plot No. 185 which he is claiming is the one that was repossessed from the plaintiff. The defendant called three witnesses who testified that the land belonged to the defendant. It was the defendant's case that the plaintiff had signed a consent to transfer the suit land to him therefore he should be compelled to do so.

On the first issue as to whether the plaintiff and the defendant entered into a sale agreement, from the evidence on record, the question that one should ask is why the

Plaintiff signed a transfer of land form and an application to the Land Control Board if they did not have a relationship of buyer and seller? This shows that the two parties entered into an agreement which went sour due to unfulfilled terms and conditions especially on the payment of the purchase price leading to revocation of the agreement as per the letter dated 18th December 2006 to the Land Control Board.

On the second issue as to whether the defendant paid the purchase price as agreed, there is no evidence that any money was paid towards the purchase price as was agreed between the plaintiff and the defendant. The defendant did not produce any receipts or acknowledgment from the plaintiff indicating that he had paid the purchase price. His claim was that he bought the suit land which had been repossessed by Nandi Teachers Sacco from the plaintiff. The plaintiff gave evidence that the defendant had promised to pay him with the proceeds of maize sale at Eldoret Cereals Board but the same was not forthcoming, he therefore cancelled the sale by writing a letter to the Land Control Board not to give consent to transfer. I find that no purchase price was paid to the plaintiff by the defendant.

On the third issue as to whether the suit land belongs to the plaintiff or the defendant, the plaintiff produced a copy of a title deed registered in his name. This is prima facie evidence that the suit land registered in his name belongs to him.

Section 26 of the Land Registration Act provides that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. It also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally.

There was no evidence that the title was procured fraudulently or through misrepresentation or corrupt schemes. If the plaintiff was not the rightful owner of the suit land then why was he registered as an owner? The plaintiff proved that he is the indefeasible absolute owner of the suit land having produced a title deed in his name and the process of acquisition through outright purchase.

On the fourth issue as to whether the suit land was repossessed by Nandi Teachers Sacco and later sold to the defendant, the defendant tried to lead evidence that the plaintiff's plot No. 185 was repossessed because he did not complete payment of the purchase price. He did not produce any evidence of the advertisement or notice for the repossession of the plots by defaulters. The witnesses that he called from Nandi Sacco also failed to produce any evidence of repossession either by showing the minutes that approved the repossession or notices or advertisement. This makes the allegation mute.

If the plaintiff's plot was repossessed, then how come he got a title to it, the Sacco would not have allowed a person who had not completed payment to be registered as an owner. In fact it would have been Nandi Teachers Sacco suing the plaintiff for the cancellation of title which he had not paid for. This was not the case here. The defendant who believed that the plaintiff got the title to the suit land fraudulently did not sue for cancellation of the title.

Further if the defendant bought the repossessed land from Nandi Teachers Sacco, why did he not pursue them for a refund or for the suit land? This explains why the defendant called very junior officers from Nandi Teachers Sacco like clerks to come and give evidence on his behalf. DW 4 was a Principal of a School but was not an official of Nandi Teachers Sacco during the time of the alleged transaction. Their evidence did not add value to the case. They were not directly involved in the suit land as they do not stay near where the suit land is.

On the last issue as to whether the suit land is the one that the defendant bought from Nandi Teachers Sacco, from the evidence and the documents produced in court, it is clear that the suit land plot No. 185 is not the one that the defendant bought from Nandi Teachers Sacco. The receipt that he produced dated 9th February 2001 neither indicates the plot No. nor what he was paying for. Unlike the plaintiff's receipt which has a TSC No. and indicates that he was paying for EATEC (5 acres) the defendant's receipt does not have a TSC No. because he was not a teacher.

From the evidence on record the defendant's woes should be directed to the Nandi Teachers Sacco whom he purports to have sold to him land of which he paid in full. The defendant wanted to take advantage of the fact that the plaintiff had signed forms before payment of the purchase price. He should not be allowed to take the plaintiff's land unprocedurally.

Mesne profits is a special damage which must be specifically pleaded and proved. In the case of *Njeri Kimani vs Joseph Njoroge Murigi and others HCCC. 819 of 2009*. It was held that ;

“A claim for mesne profits is in the nature of special damages, which require to be pleaded and strictly proved”.

The plaintiff did not prove the mesne profits that he would be entitled to therefore this limb of his claim fails.

Having considered the evidence on record and the submissions by Counsel, I find that the plaintiff has proved his case against the defendant to the required standard.

I therefore make the following orders:

- a) A declaration that the defendant is trespasser on the plaintiff's parcel of land known as parcel No. SOY / KIPSOMBA BLOCK 11 (KIPSOMBA) 185.
- b) A permanent order of injunction is hereby issued against the defendant his servants and / or agents from interfering with the smooth occupation by the plaintiff of his parcel of land.
- c) The defendant to give vacate possession of the suit land within 30 days failure of which an eviction order to issue.
- d) The claim of mesne profits fails as it has not been proved
- e) The defendant's counterclaim is dismissed with costs to the plaintiff.
- f) Defendant to pay costs of the suit.

Dated and delivered at Eldoret on this 23rd day of January, 2019.

M.A ODENY

JUDGE

Read in open court in the presence of:

The Plaintiff

Miss Tum for defendant.

Miss Topista – Court Assistant