



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 816 OF 2012

PAUL KIPKEMBOI NGETICH.....PLAINTIFF

VERSUS

PHELICON AKELLO OCHOLA.....1ST DEFENDANT

PAUL O. BADIA.....2ND DEFENDANT

JUDGMENT

By plaint amended on 19th July 2013, the plaintiff claims that he entered into a written sale agreement with the 1st defendant where the 1st defendant sold him a plot measuring 0.03 Ha out of ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT) 608 for consideration of Kshs. 200,000/-. The plaintiff paid the sum in full, 2 years and 11 months down the line the property had not been transferred to the plaintiff. The 2nd defendant was found to be in possession of the title of the suit property. the 1st defendant had told him that he had engaged the services of the 2nd defendant to subdivide and process title deeds for the land in question. The 2nd defendant informed him that he could not hand over the title to him and that he could only deal directly with the 1st defendant.

The plaintiff filed this suit seeking orders that he be declared the owner of the suit property and that the 2nd defendant be ordered to transfer the suit property to him.

The plaintiff paid for the suit property in full and the same was subdivided. The 1st defendant told him to wait as she had engaged the services of the 2nd defendant for subdivision and processing of ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)855 in order to transfer the same to him.

When he conducted an official search at the District Land Registry in Uasin Gishu, he found that the 2nd defendant was registered as the owner of his parcel. He attempted to have the chief and sub-chief intervene but the property was never transferred to him.

He produced a sale agreement dated 21st March 2009 and the official search showing the 2nd defendant as the registered owner of the suit property. He averred that he had developed the suit property and enjoyed uninterrupted possession for 3 years. He proceeded to write demand notices to the plaintiff but to no avail. He then filed this suit seeking the aforementioned prayers. Further, he filed a request for judgment on 13th March 2011 seeking orders for specific performance on the part of the 1st defendant.

The 1st defendant has never entered appearance. The 2nd defendant filed a statement of defence where he denied the existence of any privity of contract between himself and the plaintiff. His defence was a denial of the claims in the plaint. He did not file any witness statements or any documents in support of his ownership.

The issues to be determined by this court are whether the Plaintiff is entitled to ownership of the suit property and whether the plaintiff is entitled to orders for specific performance.

On whether the plaintiff is entitled to ownership of the suit property, the plaintiff has provided evidence that he entered into an agreement to purchase the portion of 0.03 ha out of Eldoret Municipality BLOCK 20(KAPYEMIT) 608 for the sum of kshs. 200,000/-. As per the agreement, the money was paid upon the signing of the sale agreement. He took possession of the property and has occupied the same. From the evidence provided, it is clear that there was a sale agreement and the plaintiff completed his part of the agreement. Further, the defendants have not provided evidence on how the property came to be registered in the name of the 2nd defendant despite the existence of an agreement to sell the property to the plaintiff.

Section 26 of the Land Registration Act provides;

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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

In **Thomas Agure Arap Ndonee v Kipserem Arap Kemboi & 3 others [2016] eKLR**, the court held;

As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya), which provides:

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

The plaintiff did offset the burden of proof as to ownership when he produced the sale agreement as proof that he indeed purchased the suit property. The burden of proof then shifted to the 2nd defendant to prove how he acquired the suit property. He did not offset the burden of proof as he did not provide any evidence on how he acquired the suit property. It was evident, on a balance of probabilities, that he was party to the fraud as he maintained that the plaintiff deal with the 1st defendant directly.

This court finds that the plaintiff is entitled to ownership of the suit property.

On whether the plaintiff is entitled to orders for specific performance, I do rely on the treatise of **Halsbury’s Laws of England (4th Edition) at paragraph 487 Vol. 44** states that,

“A plaintiff seeking specific performance must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implications and which ought to have been performed at the date of the writ in the action. However, this rule only applies to term as which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance or is in default in some non-essential or unimportant term although in such cases it may grant compensation”

In **Thrift Homes Ltd V. Kenya Investment Ltd 2015 eKLR**, the court stated:

Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract.

It was held in the case of Reliable **Electrical Engineers Ltd Vs Mantrac Kenya Limited (2006) eKLR**, where 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 laid 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 unenforceable. 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 an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

It therefore follows that the requirements for one to be granted orders for specific performance are the Plaintiff has performed all terms of the contract he has undertaken to perform and the existence of a valid enforceable contract. The plaintiff did perform his terms of the contract and there exists a valid enforceable contract therefore he is entitled to orders for specific performance.

However, the 2nd defendant was not a party to the contract and therefore there arises a question as to whether orders for specific performance can be granted against a party who is not a party to the contract. Therefore, the orders for specific performance can be granted with the effect that they issue against the 1st defendant.

Section 80 of the Land Registration Act states;

80. Rectification by order of Court

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

Given that the 1st defendant has not entered appearance, the allegations against him are not controverted and therefore the plaintiffs suit ought to succeed.

Damages would be an adequate remedy but in this particular instance, the defendants will face no hardship if the plaintiff is registered as the owner of suit property as he has already enjoyed possession of the same continuously and the defendants have not proven that there will be any hardship occasioned on themselves in ordering the transfer of the property to the Plaintiff.

Ultimately, I do grant judgment in terms that it is hereby declared that the registration of the 2nd defendant as the owner of ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT) 855 is illegal and a nullity and that the plaintiff is the legal owner of ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT) 855 and that the 2nd defendant to transfer the said property in the names of the plaintiff failure of which the executive officer of the court to execute all necessary documents to effect the transfer of the property to the plaintiff. Costs to the plaintiff. Orders accordingly.

Dated and delivered at Eldoret this 8th day of February, 2019.

A. OMBWAYO

JUDGE