



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 363 OF 2012

SAMUEL KIPKENY YEGO..... PLAINTIFF

VERSUS

LUKA NGOSOSEL.....1ST DEFENDANT

MATHEW KETER.....2ND DEFENDANT

ERNEST BIRGEN.....3RD DEFENDANT

BENJAMIN KATAM.....4TH DEFENDANT

COSMAS KORIR.....5TH DEFENDANT

JANE JEPKORIR.....6TH DEFENDANT

ROSE MAIYO.....7TH DEFENDANT

JUDGMENT

Samuel Kipkeny yego (hereinafter referred to as the plaintiff) has sued the defendants claiming that at all material times of this suit, the plaintiff was and is still the sole registered absolute proprietor of the land title No. **UASIN GISHU/KORMAET SCHEME/120** herein referred to as the suit property. That the plaintiff avers that on several occasions all the seven defendants jointly and severally have purported to lay interests and claims on portions of the plaintiff's land title No. UASIN GISHU/KORMAET SCHEME/120, the suit property without any justifiable cause.

The plaintiff's claim against the defendants jointly and severally is for a permanent order of injunction, restraining all the defendants jointly and severally, their agents, servants, assigns and any other person claiming and or acting under them from entering into, trespassing, laying any claims, interest, alienating, taking possession and or altering the register in respect of the suit property title No. UASIN GISHU/KORMAET SCHEME/120. The plaintiff further avers that the defendants have all jointly and severally trespassed into the suit property without any justifiable cause, where they have excised portions, fenced and constructed huts illegally.

The plaintiff prays for a permanent order of injunction and declaration and an order of eviction plus costs of this suit and Interests.

The defendants filed a joint statement of defence claiming that they have a beneficial interest of the said land hence the plaintiff holds the title in trust for and on behalf of all the defendants.

The defendants herein claim that they entered into land sale agreements with the plaintiff on different dates whereupon the plaintiff sold the portions of land title No. Uasin Gishu/Kormaet Scheme/120 to the defendants who have entirely paid to the plaintiff the consideration agreed upon, they have taken possession of the said parcels of land and have developed it since hence the allegation of trespass holds no water at all. That ever since, the plaintiff has been dodging the 1st to 7th defendants by neglecting or refusing to obtain consent from the relevant Land Control Board.

The particulars of negligence are failing to obtain consent from the relevant Land Control Board despite several representations and reminders to him. Short-changing the defendants by filing this suit for injunction and evictions against the defendants notwithstanding the purchase price depicted by the sale agreements.

The defendants state that the plaintiff does not deserve the prayers sought as he has come to court with unclean hands and the defendants purchased their respective portions for value between early 1990's to 2000 some have been in possession over 12 years to the adverse

interests of the plaintiff.

In the counterclaim, the defendants state that they own portions of the plaintiff's land title No. Uasin Gishui/Kormaet/Scheme/120 having purchased them lawfully and for value from the plaintiff. The plaintiff at all times knew and approved the sale agreement as he was the registered absolute proprietor of land Title No. Uasin Gishu/Kormaet Scheme/120 and for umpteenth times promising the defendants that he will apply for consents at the Land Control board to no avail and that defendants prior to the filing of this suit had met the plaintiff at Kapsaret Location Chief's place Mr. Henry A. Togom who accepted that he truly sold the defendants his land and was willing to obtain the Land Control Board consent for the purposes of the transfer into their respective names.

The defendants further state that they have become owners of the said portions of land in Title No. Uasin Gishu/Kormaet Scheme/120 as they bought it for value although the plaintiff has at all times refused to obtain consent from the relevant Land Control Board and by fact that the defendants have been occupying and developing the said parcels of land for several years now.

The defendants pray for a declaratory order that they are the owners of the portions of land under Title No. Uasin Gishu/Kormaet Scheme/120 and in the alternative without prejudice to the foregoing a refund of the entire purchase price by the defendants jointly and/or severally at the current market rate, interests from the date of contract, damages both general and exemplary for breach of contract and other expenses which have been incurred by the defendants that is, costs of fencing, construction of semi-permanent structures, trees and all other developments.

The plaintiff filed a reply to the joint statement of defence and defence to the counterclaim denying the existence of any sale agreement between the plaintiff and defendants in respect to Uasin Gishu/Kormaet Scheme/120 and denies that the defendants own any portion of the suit land. The plaintiff prays that defendants' counterclaim be dismissed with costs.

When the matter came up for hearing, **Samuel Yego (PW1)**, the plaintiff stated that he currently stays at Chemomi location within Nandi Hills. He is a farmer by profession. That he filed the present suit against the defendants to re-claim his land parcel Uasin Gishu/Kormaet Scheme/120. That he knows the defendants very well. They invaded his land on diverse dates and started to settle and plough it. His land parcel Uasin Gishu/Kormaet Scheme/120, it is situated at Tuiyo Farm. He has the original title. It is currently in the custody of his eldest sister Magdaline Barmei. The title deed was issued to him in the year 1986. He was then residing on the said parcel of land. The land measures 27.5 acres.

He testified that the defendants are persons he has known for a long time. He used to rent them his farm. The defendants used to till portions of his farm, would pay for the lease in small bits. They would pay Ksh 200/=, or Ksh 500/=. The defendants were his drinking friends and most of the payments were made in the course of their drinking sprees. There was no agreement or any acknowledgement of the said payments. This happened for several years until when the payments went up. By the time he filed the suit in the year 2007, the 1st defendant and the other defendants had ploughed the land for over seven years. They have been claiming the ownership of the suit land. He states that he has never at all offered his land for sale either to the defendants or any other persons. He has never attended a Land Control Board in order to give consent to the defendants to take over his land. He has never discussed with any of the defendants the issue of attending any Land Control Meetings. There was a family meeting at the Kapsaret Location Chief. They were complaining over the defendants' invasion of his Suitland. The defendants also attended the said meeting in the year 2006. The defendants were told to prove that he sold them land but could not. They were also told to avail witnesses to confirm the alleged sale. They also failed to avail the witness. He confirms that he has never sold the suitland to any of the defendants. If he did so then he would have facilitated transfer of the same. He is asking the court to issue an eviction order and that the defendants be compelled to pay him compensation for what he has lost.

When the matter came up for defence hearing, **DW2, Mathew Keter**, stated that around the year 2000 to 2003, one Samwel Yego sent his aunt called Veronica Rono to request him to buy his land. When they met with Samwel Yego, he asked him if he really wanted to sell him land which he agreed. That Samuel yego sold him 3.4 acres on at Kshs. 80,000 per acre and he paid Kshs. 160,000 and left a balance of Kshs. 136,500 which he cleared on 5.4.2003 then immediately he began using the land.

He later approached him telling him to buy another piece of land because he needed money for his medication. Samwel added him 1.9 acres at Kshs.96,000 which he paid upon signing the agreement on 23.12.2005 and he immediately took possession of the added land. That in 2007, his sister went to an advocate and they received summons to vacate the land. They were a total of seven (7) people that were to be evicted.

He has no problem with the plaintiff as a person and what he wants is the title deed to the land he bought from the plaintiff as he legally bought the land having signed a sale agreement with him and having paid him the full agreed amount which he acknowledged receipt.

DW2, Benjamin Katam states that in the year 1997, Samuel Kipkeny Yego, the plaintiff approached him and requested that he buys his land as he was in dire need of money for his treatment. He agreed and they made an agreement dated 5.08.1997 whereby he sold him 8 acres of Plot 120 Kormaet Scheme/Tuiyo at Kshs.350,000. He gave him the money in cash. Immediately, moved into the land and built his house and made developments.

He again approached him in 1998 and asked him to buy his land because he had a court case with his wife and he wanted some money for legal fees. DW2 agreed to buy the land in an agreement dated 4.8.1998. He bought 2 acres at Kshs.119,000. He paid Kshs.78,200 in cash leaving a balance of Kshs.40,800. He cleared the balance of Kshs.40,800 on 13.2.1999 by paying the cash to Samuel Yego.

By the end of year 1998, he had bought 10 acres of Plot 120 Kormaet Scheme/Tuiyo for Kshs.469,000 from Samuel Kipkeny Yego. Samuel Yego again approached him in 1999 and told him he wanted to sell his land to settle legal fees. He again agreed to buy the land. He bought 0.4 of an acre for Kshs.28,000 in an agreement dated 17.4.1999.

He further bought 0.3 of an acre for Kshs.20,000 and made the payment immediately in cash. He also bought an additional 0.2 of an acre for

Kshs.24,000 and he paid all in cash in an agreement dated 18.4.2000. In the year 2000, he again bought 0.2 of an acre for Kshs.16,000 from the plaintiff. It is an agreement dated 20.7.2000. He paid the purchase price to Samuel Yego in cash. He purchased an additional 0.8 of an acre from Edwin Mutai who had purchased from Samuel Yego.

All these purchases made a total of 12.3 acres of land bought part of Plot 120 Kormaet Scheme/Tuiyo purchased from Samuel Yego. He has lived in that land since 1997 and he has made so many developments on it.

He laments that the plaintiff is just a vexatious litigant who wants to run away from the contracts he made with him and the other defendants. He wishes that this court holds him responsible.

Luka Kiptoo, DW3 gave the correct value of the properties. He is a valuer with Sterling Valuers. He visited the suit property registered in the name of Samuel Kipkeny Yego. The entire land was 27.7 acres. Benjamin Katam was occupying part of the land valued at Kshs.10 Million. Mathew Keter was occupying 5.5 acres valued at Kshs.4,500,000 on cross examination by Mr. Aseso, he admits that there is no improvement on the farms since fencing.

The gravamen of the plaintiff's submissions is that there is no evidence of any contract between the plaintiff and the defendants and that the agreements relied upon do not mention the suit land as Uasin Gishu/Kormaet Scheme/120. Therefore, the defendants have not proved on a balance of probabilities that they bought the land in dispute.

Moreover, the plaintiff argues that the consent of the Land Control Board was not obtained and therefore, the same are nullities due to the provision of section 6 of the Land Control Act, Cap. 302, Laws of Kenya.

The gravamen of the defendants' submissions is that the 2nd and 4th defendants purchased the land legally and therefore, they are entitled to the same. Furthermore, that it is the plaintiff who refused to move the Land Control Board and obtain the consent to transfer. The plaintiffs submit that they have been in occupation of the land for 15 and 21 years respectively. The defendants rely on the principle of constructive trust or implied trust.

I have considered the evidence on record, the submissions of parties and do find that the plaintiff is very evasive and unreliable as to the period the defendants entered his land. There is no evidence that the defendants leased his land at any particular period of time. The plaintiff did not produce any demand notice written to the defendants asking them to vacate from the suit property. Though there is no consent of the Land Control Board in respect of the agreements dated 10.1.2004, 23.12.2003, 5.8.1998, this court is satisfied that the plaintiff entered into agreement with the 2nd and 4th defendants. He sold the 2nd defendant 5.3 acres of Uasin Gishu/Kormaet Scheme/120 in the year 2003 and 2005. He had sold the 4th defendant 123 acres between 1197 and 2000.

This court finds that the defendants are in possession of the disputed parcels of land. Having been put in possession by the plaintiff after they entered into contracts for the sale of the disputed parcel.

In the case of *Mwangi & Another Vs Mwangi* (1986) KLR 328, it held;

“the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under Section 126 (1) of the Registered Land Act is merely permissive and not mandatory.”

In *Mutsonga Vs Nyati* (1984) KLR 425 and *Kanji Vs Muthiora* KLR 712, it was held;

“the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of Section 163 of the Registered Land Act which provides for the application of the common law of England as modified by equity.”

In *Macharia Mwangi Maina & 87 Others Vs Davidson Mwangi Kagiri*, it was held;

“a constructive trust relating to land subject to the Land Control Act is enforceable.”

I do find that in this matter, the plaintiff signed the agreements of sale and gave the defendants possession of the suit property, hence he is estopped from repudiating the sale. By receiving money from the defendants and entering into agreement of sale and giving possession to the defendants, a constructive trust was created relating to the suit parcel. The upshot of the above is that the suit is dismissed. The counterclaim is allowed; thus, a declaratory order is hereby issued that the defendants are the owners of the portions of land under Title No. Uasin Gishu/Kormaet Scheme/120 and that the said parcel of land be registered in the names of the defendants. Orders accordingly.

Dated and delivered at Eldoret this 9th day of April, 2019.

A. OMBWAYO

JUDGE