



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 290 OF 2013**

**PATRICK KIMUTAI KIPRONO.....PLAINTIFF**

**VERSUS**

**ERICK KIPKURGAT KIPRONO.....DEFENDANT**

**JUDGMENT**

**Patrick Kimutai Kiprono (*hereinafter referred to as the plaintiff*)** has come to court against **Erick Kipkurgat Kiprono (*hereinafter referred to as the defendant*)** claiming that they are brothers and that in or about the year 2000, LONRHO AGRIBUSINESS (EAST AFRICA) LIMITED put up for sale its large/huge tracts of land within the then Uasin Gishu District (now Uasin Gishu County).

The plaintiff states that towards the end of the year 2000, he and the defendant, after some discussions, agreed to join hands in purchasing 10 acres of land from the said LONRHO AGRIBUSINESS (EAST AFRICA) LIMITED.

That the plaintiff avers that he and his said brother, the defendant herein, agreed that upon them purchasing the said 10 acres of land, they were to share the same in equal share, that is, him taking 5 acres of the said land and the defendant taking the remaining 5 acres thereof. The plaintiff states that the total purchase price/consideration for the said 10 acres of land was Kshs.350,000.

The plaintiff avers that he and his said brother, the defendant herein, mutually agreed that because of the plaintiff's then demanding job in Nairobi (by then the plaintiff was working with Kenya Pipeline Company Ltd as a Chemist), the plaintiff would give the defendant part of the purchase price and that the defendant was going to purchase the said 10 acres of land for and on behalf of the plaintiff and for and on his own behalf and in equal share.

That the plaintiff further avers that the defendant was going to act in the transaction on his own behalf and as an agent of the plaintiff and that the transfer was to be effected in favour of the defendant and the plaintiff according to their respective shares.

That pursuant to the aforesaid agreement, the plaintiff gave his said brother, the defendant herein, Kshs.200,000 as his contribution and the same was meant to cater for part of the purchase price and the incidental expenses thereof on his part and that the defendant was to top up the balance of the remaining purchase price.

That the defendant received the said sums of money from the plaintiff and undertook and committed himself to purchase the said 10 acres of land and that they were to share the same in equal shares, that is, 5 acres each.

That the plaintiff avers that they did everything in good faith and that this was not the first time for him to entrust his said brother, the defendant, with his own money in order to purchase properties for his own good and/or for their own good.

That pursuant to the aforesaid agreement between the plaintiff and the defendant and not otherwise, the defendant purchased that parcel/piece of land known as "PROVISIONAL PLOT NUMBER F 295" measuring 10 acres of land from the said LONRHO AGRIBUSINESS (EAST AFRICA) LIMITED at the total purchase price of Kshs. 350,000/=, the said parcel/piece of land later became and/or was designated as TITLE NO., PIONEER/NGERIA/BLOCK 1 (EATEC) 1426 vide the agreement of sale dated 21.12.2000. The purchase price was paid in full at that time.

That one of the special conditions of the said agreement of sale is that the purchaser (the defendant) was acting on his own behalf and as an agent for the persons listed in the schedule (that is the plaintiff) and that the transfer shall to be effected in favour of the said purchaser (the defendant) and the persons appearing in the schedule (the plaintiff).

That the name of the plaintiff and that of the defendant appear in the said schedule as the owners of their respective 5 acres of land.

That the plaintiff avers that during conveyancing process, the whole of the said 10 acres of land was registered in the name of the defendant

hence the defendant held and continues to hold the said 5 acres of land comprised in the said TITLE NO. PIONEER/NGERIA/BLOCK 1 (EATEC) 1426 in trust for the plaintiff and the remaining 5 acres of land for himself.

The defendant shared the plaintiff his portion of land in 2000, however, in 2005, he frustrated the plaintiff's effort to construct on the land and that the defendant has refused to allow him take possession of the land save family meetings.

The plaintiff avers that the suit land belongs to the plaintiff and defendant in equal shares.

The plaintiff prays for a declaration that:

### **DEFENDANT'S CASE**

The defendant states that LONRHO AGRIBUSINESS (EAST AFRICA) LIMITED offered land for sale sometime in the late 1990s or the year, 2000.

The defendant denies any agreement and or arrangement whereby any land was to be purchased from Lonrho Agribusiness (East Africa) Ltd jointly between him and the brother, the plaintiff to be shared equally. He purchased the land but denies contribution by the brother. He denies receiving Kshs. 200,000 from the brother. The defendant denies the particulars of trust and states that the plaintiff is not entitled to half share of the land.

The defendant states that the claim is statute barred. In the counterclaim, the defendant states that the plaintiff has illegally and or wrongfully placed a caution on the defendant's title deed the land reference No. Pioneer/Ngeria Block 1(EATEC) 1426 without any justification and therefore, prays that the caution be removed. Otherwise, he prays for the dismissal of the suit.

In reply, the plaintiff reiterates the plaint and states that the agreement dated 21.12.2000 is binding between the plaintiff and defendant and therefore he had the right to lodge a caution. That removal of caution will defeat the interest of justice.

### **PLAINTIFF'S EVIDENCE**

**PW1, Patrick Kimutai Kiprono** testified that he is a resident of Kimumu Estate within Uasin Gishu County. Currently, he is a businessman. Before the year, 2007, he was a working with Kenya Pipeline Company Ltd based in Nairobi. He is a brother to the defendant. Their family was a close knit one and therefore, he trusted his brother. In 1990, they jointly bought a plot in Kimumu area each contributing Kshs. 100,000. On the 31.12.2001, the brother surrendered his share in exchange for Kshs. 100,000.

In respect of the suit land originally Provisional Plot Number F2/95 and now Title Number Pioneer/Ngeria Block 1(EATEC) 1426, they agreed to purchase the land measuring 10 acres jointly and share equally. The purchase price for 10 acres was Kshs. 380,000. The plaintiff paid Kshs. 200,000 as his contribution. They entered into agreement dated 21.12.2000. The purchase price was paid in full. One of the condition was that the purchaser was acting on his behalf. His names appear in the schedule attached to the agreement. However, his brother registered the whole land in his name and refused to deliver the half share to the plaintiff. The defendant has acted in breach of trust and has registered the whole parcel of land in his name and has refused to recognize the plaintiff's interest.

**PW2, Mr. Simon Kitur**, an advocate of the High Court of Kenya testified that he has a law firm in Kapsabet. Before opening his law firm, he used to work with Nyaundi Tuiyot & Company Advocates. He was shown the agreement of sale between Lonrho Agribusiness (EA) Ltd and Erick Kipkurgat Kiprono dated 21.12.2000. He confirmed that the defendant signed the agreement in his presence. He attested the agreement in his capacity as an associate with the law firm of Nyaundi Tuiyot & Company advocates.

**PW3, Mr. Joseph Songok** states that he is an advocate of the High Court of Kenya and a resident of Uasin Gishu County. He produced the agreement of sale in respect of the suit land dated 21.12.2000. The firm of Nyaundi Tuiyot & Company Advocates were the purchaser Advocate whilst Dally and Figis Advocate were for Lonrho Agribusiness (EA) Ltd. He states that Simon Kitur was the attesting advocate for the purchase.

According to Mr. Songok, one of the condition was that the purchaser was acting on his own behalf and as an agent for the person listed in the schedule appearing thereunder and the transfer was to be effected in favour of the purchaser and the persons appearing in the said schedules. The person appearing in the schedules were Patrick Kimutai Kiprono 5 acres and Erick Kipkurgat Kiprono 5 acres.

**PW4, David Korir** states that he worked then with the Lonrho Agribusiness (EA) Ltd as a consultant. In the year 2000, he worked with EATEC, a company related to Lonrho Agribusiness (EA) Ltd as a public relations manager. He states that the agreement dated 21.12.2000 was in respect of the suit land and confirmed the special consideration indicating that the defendant was acting for himself and the plaintiff. The plaintiff closed his case and the defendant was called upon to testify.

**The defendant, DW1**, states that he resides at Chepkerio. That he is the registered owner of L. R. Pioneer/Ngeria Block 1(EATEC) 1426. The plaintiff is his younger brother and has no claim on the land. They never entered into the agreement with the plaintiff. The suit land is governed by the Land Control Act and no consent of the Land Control Board was obtained to create a trust. He has never received any money from the plaintiff. He is entitled to exclusive use and enjoyment of the land. The plaintiff's suit should be dismissed and the caution removed.

### **RIVAL SUBMISSIONS**

The plaintiff submits that the evidence on record demonstrate the existence of a trust over the suit land. The defendant holds 5 acres in trust for the plaintiff. The plaintiff has an overriding interest in the suit property.

The plaintiff further submits that there is a valid agreement between the plaintiff and the defendant as the same is in writing, signed by the parties, describes the land for sale and the parties are bound by it.

The plaintiff submits that the consent of the Land Control Board was not necessary and required in the circumstances of this case.

On the argument that the suit is time barred, the plaintiff argues that the defendant was registered on 6.9.2002 and therefore time stopped running on 6.9.2014 whilst the suit was filed in 2013. Moreover, that time was not of essence.

The plaintiff argues that the defendant was in breach of the trust bestowed on him. The plaintiff prays for the reliefs in the amended plaint.

The defendant on his part submits that the defendant was the sole purchaser of the land and there exists no trust in favour of the plaintiff. The defendant submits that the plaintiff did not produce any evidence of contribution towards purchase of the land.

The defendant submits that the Land Control Act was not complied with. The suit land was complied with and yet there is no consent of the Land Control Act, Cap. 302, Laws of Kenya.

The defendant further submits that the agreement does not meet the condition of the section 3(3) of the Law of Contract Act.

Moreover, that the agreement was made on 21.12.2000 and therefore, the suit ought to have been made on 21.12.2012. The current suit having been filed in 2013 was filed out of time. There is no evidence of fraud or breach of trust.

The defendant argues that there was no possession of the land by the plaintiff as he was repulsed by the defendant when he attempted to enter the land.

The defendant prays that the counterclaim should succeed.

### **ANALYSIS AND DETERMINATION**

I have considered the pleadings, evidence on record and the submissions of the counsel on record and do find that the plaintiff and his witnesses stated that the plaintiff and the defendant entered into the agreement of sale dated 21.12.2000. The subject matter of the agreement as sale of land provisional number F295 which later became Title Number Pioneer/Ngeria/Block 1(EATEC) 1426. Mr. Kitur the attesting advocate and Mr. Songok the advocate for the defendant gave evidence that the land was bought for the benefit of the plaintiff and the defendant. This evidence was not challenged on cross examination. I do find that it is crystal clear that the defendant was acting on his own behalf and on behalf of the plaintiff.

The doctrine of equitable trust is as old as law itself. Equity abhors unjust enrichment. In the law of contract, **unjust enrichment** occurs when one person is enriched at the expense of another in circumstances that the law sees as unjust. Where an individual is unjustly enriched, the law imposes an obligation upon the recipient to make restitution, subject to defences such as change of position. Liability for an unjust (or unjustified) enrichment arises irrespective of wrongdoing on the part of the recipient. The concept of unjust enrichment can be traced to Roman law and the maxim that "no one should be benefited at another's expense": **nemo locupletari potest aliena iactura or nemo locupletari debet cum aliena iactura.**

The law of unjust enrichment is closely related to, but not co-extensive with, the law of restitution. The law of restitution is the law of gain-based recovery. It is wider than the law of unjust enrichment. Restitution for unjust enrichment is a subset of the law of restitution in the same way that compensation for breach of contract is a subset of the law relating to compensation.

I do find that the plaintiff has established that there exists a trust between himself and the defendant.

The court further finds that the contract dated 21.12.2000 was a valid contract between the parties having been executed by both parties and is in writing. The same was attested by an advocate of the High Court of Kenya.

This court finds that the consent of the Land Control Board was not necessary as between the plaintiff and the defendant but between the defendant and Lonrho Agribusiness (EA) Ltd. The issue as to whether the consent of the Land Control Board was obtained before transfer of the land from Lonrho Agribusiness (EA) Ltd to the defendant is not before court, the issue is whether the defendant is holding half of the land in trust for the plaintiff.

On the issue, as to whether the plaintiff's claim is time barred, I do find that the defendant was registered as the proprietor of the land on 6.9.2002 and the suit was filed on 20.5.2013, twelve (12) years had not lapsed. Moreover, time starts running when the defendant refused to give the plaintiff his share and this was in mid-2005 when the plaintiff deposited the building materials and the defendant became hostile. I do find that the suit is not time barred.

Ultimately, I do find that the plaintiff has proved his case on a balance of probabilities and do grant prayers:

- (a) An order of a declaration that the defendant holds 5 acres of land comprised in Title No. PIONEER/NGERIA/BLOCK 1 (EATEC) 1426 on trust for the plaintiff and the remaining 5 acres of land on trust for himself.

(b) An order of a declaration that by virtue of the special conditions of the agreement of sale dated 21.12.2000, 5 acres of land comprised in Title No. PIONEER/NGERIA/BLOCK 1 (EATEC) 1426 belongs to the plaintiff and the defendant do convey and or transfer the same to the plaintiff.

(c) An order of a declaration that the said trust be brought to an end.

(d) An order directing the surveyor, Uasin Gishu County to do all that is required so as to subdivide and actually subdivide that land comprised in Title No. PIONEER/NGERIA/BLOCK 1 (EATEC) 1426 and in this place issue fresh Title Deeds of land measuring approximately 5 acres each in the name of the plaintiff and the defendant respectively.

(e) An order directing the County Land Registrar, Uasin Gishu County rectify the concerned register to reflect the new acreage and/or changes.

(f) An order directing and/or compelling the defendant to sign/execute all the conveyancing documents/applications to effect transfer of 5 acres of land comprised in Title No. PIONEER/NGERIA/BLOCK 1 (EATEC) 1426 into the name of the plaintiff and in default, the Deputy Registrar of this Honourable court do sign the requisite conveyancing documents so as to transfer the said 5 acres of land into the name of the plaintiff.

No order as to costs as the parties are brothers.

Orders accordingly.

**Dated and delivered at Eldoret this 30<sup>th</sup> May, 2019.**

**A. OMBWAYO**

**JUDGE**