



**REPUBLIC OF KENYA**

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

**ELC NO.16 OF 2016**

**STEPHEN BARTONJO ROTICH.....PLAINTIFF**

**VERSUS**

**BALIAT.....1<sup>ST</sup> DEFENDANT**

**FRANCIS BII.....2<sup>ND</sup> DEFENDANT**

**MAJOR MAINA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

By a plaint dated 27<sup>th</sup> January 2016 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a) A declaration that the plaintiff is the absolute and the registered owner of all the parcel of land owner as LR. NO. 9471 and 8337.
- b) An order for eviction of the defendants.
- c) Costs and interest of this suit.

The defendants filed a defence and counter-claim dated 21<sup>st</sup> December 2016 seeking for the following orders:

- a) A declaration that the defendants are in lawful occupation of part of L.R No. SOY/KIPSOMBA BLOCK 1(TARAKWA)/111 measuring about 29 acres excised from the 70 acres.
- b) Costs of the suit.
- c) Any other relief at the discretion of the Honorable Court.
- d) Conclusion of sub-division for purposes of issuance of the Title Deeds.

**Plaintiff's Case**

PW1 Stephen Bartonjo adopted his statement dated 7<sup>th</sup> November 2017 and stated that the defendants had trespassed onto his land and that he had never sold to them any land. He produced a copy of the official search and demand letters to the defendants asking them to vacate the suit land.

On cross-examination he agreed to have signed the document titled authority to sell the land and denied that the signature in the verifying affidavit was his. He admitted to having an account at with Co-operative Bank but denied ever receiving any money in his account in respect of the purported sale of his land. The plaintiff further denied ever signing an agreement for sale and that he was not aware of the valuation report.

PW2 Antony Kulei Bartonjo also adopted his statement dated 24<sup>th</sup> October 2017 and stated that his mother called to inform him that their land was being sold by Baliat, who claimed to have had authority to sell. PW2 stated that the 1<sup>st</sup> defendant did not have a power of attorney to sell the land. On cross-examination he stated that he had registered a caution on the suit parcel of land. The plaintiff therefore closed his case and urged the court to grant orders as prayed in the plaint.

## Defence Case

DW1 Silas Baliat testified that he had conducted two transactions for sale of land on behalf of the plaintiff. It was his evidence that the plaintiff wanted his land to be subdivided since there was land he had sold to Komen Arap Chumba and Michael Rotich Maina.

DW1 stated that the plaintiff requested the Surveyor to get him some one who could help him with the subdivision and that the plaintiff gave him authority to sell the land dated 21<sup>st</sup> May 2013. It was further his testimony that he identified a purchaser and called the plaintiff to meet the 2<sup>nd</sup> defendant who purchased 10 acres at a consideration of Ksh 3,000,000/=.

DW1 stated that he paid the plaintiff through electronic transfer to the plaintiff's Co-operative Bank account 01109442323600 and that he paid the surveyor Ksh 142,000/ and still had Ksh 800,000/= and the 2<sup>nd</sup> defendant was yet to give him Ksh 750,000/=.

On cross-examination he testified that he was given authority to sell the land by the plaintiff and had transferred a total of Ksh 1,100,000/ to the plaintiff. Further that the defendant are yet to go to the Land Control Board to obtain consent to transfer. On reexamination he DW1 stated that they could not proceed to the Land Control Board as there was a caution lodged on the suit parcel and that he still had Ksh 1.200.000/= belonging to the plaintiff.

DW2 Francis Kipsang Bii adopted his statement and stated that he bought the land after meeting with the plaintiff and entered into an sale agreement with the 1<sup>st</sup> defendant who did so on behalf of the plaintiff. He stated that paid a deposit of Ksh 1.500.000/= to the 1<sup>st</sup> defendant and the balance was to be paid into two equal installments of Ksh 750,000 each which he did.

It was DW2's evidence that he has made developments on the suit land by construction of an orphanage. On cross-examination he testified that he did not witness the plaintiff sign the authority to sell and that he never paid the money directly to the plaintiff.

DW3 Robert Kiprof testified that he is a surveyor who carried out subdivision on the suit land in 2013, he went to the ground with the plaintiff and Michael Rotich. He stated that the plaintiff showed them how he wanted the land to be subdivided and that he knew the 1<sup>st</sup> defendant who had been given authority to sell the land. He further stated that the family of Chumba was to get 5 acres, Michael Rotich 10 acres and the rest of the land was to be subdivided into 5 acres each. It was his testimony that he never completed the survey.

On cross-examination he testified that he had been given authority to survey by the plaintiff but one of the plaintiff's family members interfered with the survey process and was not able to complete the survey. He also stated that he never registered the sketch map of the parcel and that he never consulted the plaintiff. He also admitted that his fees was paid by the 1<sup>st</sup> defendant. That was the close of the defence case.

## Plaintiff's Submission.

Counsel for the plaintiff submitted that the plaintiff was issued with title to the parcel number Soy/Kipsomba Block 1 (Tarakwa) 111 on 19<sup>th</sup> May 1992 and that the plaintiff never authorized the defendant to sell. Counsel further submitted that since ownership of the land is not in question, the defendant could not purport to sell what he did not have, as was held in **John Waitthaka v. Jackson K. Cherop & Anor (2014)** eKLR. See also **Cecilia Nyandarua Mwangi v. John Ndung'u Maina (2018)** eKLR.

Further that payment made by the 2<sup>nd</sup> defendant was made directly to the 1<sup>st</sup> defendant's account and that the plaintiff was never involved in the transaction. Counsel submitted that this was a scheme to defraud the plaintiff of his land and no consent was obtained to validate the transaction. Counsel cited the case of **Rosebella Iranmwanya Mirieh v. Mwangi Nguji [2017]** eKLR, Kemei J. where it was held that:

*“failure to obtain the necessary land control board consent automatically vitiates a sale of land which is subject to a controlled transaction like this one. I find the transaction in this case as void, invalid and therefore the remedy of specific performance is not available to the plaintiff.”*

He therefore urged the court to allow the plaintiff's claim as prayed in the plaint and dismiss the defendant's counterclaim.

## Defendants Submission

Counsel submitted that the plaintiff denied his own pleadings, which was served upon the defendants and that the witnesses were his sons who had no contractual relationship with the defendants. He further stated that the plaintiff has never paid back or returned the money he received from the defendants. Further that the defendants have been in possession of the purchased land for not less than 6 years.

Counsel submitted that a constructive trust had been created over the suit parcel of land in favor of the defendants as was held in the Court of Appeal case in **Macharia Mwangi Maina & 87 Ors v. Davidson Mwangi Kagirir [2014]** eKLR.

He therefore stated that the defendants are entitled to specific performance as it arose from the plaintiff's conduct and that the defendants have made improvements of permanent buildings and thus their counterclaim should be allowed with costs.

## ANALYSIS AND DETERMINATION

The issues that arise from this case are:

- a) Whether or not the plaintiff authorized the 1<sup>st</sup> defendant to sell land on his behalf.
- b) Whether or not the 2<sup>nd</sup> and 3<sup>rd</sup> defendants bought land from the plaintiff.
- c) Whether there was privity of contract between the plaintiff and the defendants.
- d) If so, is the plaintiff entitled to the reliefs sought.

On the issue as to whether the plaintiff authorized the 1<sup>st</sup> defendant to sell land on his behalf, the plaintiff admitted that the signature on the authority to sell was his but denied selling the land to the defendants.

The plaintiff and defendants do not dispute that the land in question is L.R NO.SOY/KIPSOMBA BLOCK 1(TARAKWA)/111 measuring 70 acres. The acreage in question is the 20 acres that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants claim to have bought from the plaintiff.

The 1<sup>st</sup> defendant indicates that the plaintiff met with the 2<sup>nd</sup> defendant before he bought the 10 acres, the defence witness DW 3 also testified that he was with the plaintiff on his land to show them how he wanted the land to be subdivided. This was never disputed by the plaintiff.

The 1<sup>st</sup> defendant further stated that he deposited part of the purchase price in the plaintiff's Co-operative account but the plaintiff denied ever receiving any amount in his account in respect of the purported sale. The 1<sup>st</sup> defendant also admitted that he has not paid the purchase price to the plaintiff and that the bankers cheques for Kshs. 600,000/ and 900,000/ respectively are in the name of Milway Transform Enterprises and not in the plaintiff's name. There is no evidence that this money was received by the plaintiff. There is further no evidence that these bankers' cheques were banked and cashed by the plaintiff.

The 1<sup>st</sup> defendant further admitted that he still owed the plaintiff Kshs. 800,000/ and that the 2<sup>nd</sup> defendant was yet to pay Kshs 750,000/. He also admitted that he was still holding Kshs. 1,200,000/ for the plaintiff and that they had not gone to the Land Control Board since there was a caution lodged on the suit land and the purchase price had not been paid in full.

It should be noted that DW3 the Surveyor admitted in his evidence that the survey work was never completed, that he never registered the Sketch Map, that he never consulted the plaintiff, that his fees was paid by the 1<sup>st</sup> defendant and finally that he never obtained the relevant consent for sub division.

The question is why was the 1<sup>st</sup> defendant paying the survey fees for land that did not belong to him? Further if the subdivision was not complete and the sketch map not registered, then what basis did the defendant get their portions of land? I find that there were anomalies which made the purported transaction suspect.

The defendants claimed that the plaintiff was holding the land in trust for them but from the evidence on record there was such intention as there was no privity of contract between the defendants and the plaintiff.

If the plaintiff intended to authorize the 1<sup>st</sup> defendant to sell land on his behalf then the law requires that he gives him a specific power of attorney to deal in land which must be registered. This was not the case in this matter. The monies were also not paid to the plaintiff and the 1<sup>st</sup> defendant admitted that the defendants had not completed payment of the purchase price. He further admitted that he was still holding a substantial amount of the purported purchase price.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants should seek remedy from the 1<sup>st</sup> defendant who sold to them land which he did not have authority to sell. The defendants also paid the money to the 1<sup>st</sup> defendant who is still holding their money.

The issue of constructive trust does not arise in this case as the plaintiff did not enter into an agreement with the defendants. He did not put them into possession, he also did not receive the purported purchase price as was admitted by the 1<sup>st</sup> defendant who entered into the agreement with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The evidence on record was that the plaintiff wanted someone to assist with the subdivision and not sale of the land. This was confirmed by the Surveyor who roped in the 1<sup>st</sup> defendant into the deal.

The defendants had sought for specific performance by the plaintiff. For a party to seek specific performance, Chitty on Contract, 30<sup>th</sup> edition states that

*“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract .it will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable .”*

The plaintiff denied entering into a sale agreement with the defendants and also denied giving authority to the 1<sup>st</sup> defendant to sell the land on his behalf. He further denied receiving any money as purchase price. This makes the case not suitable of an order of specific performance. If the contract was valid which not the case is, then the defendants should have fulfilled the terms of the contract by payment of the purchase price in full.

The Court of Appeal in the case of **Gurdev Singh Birdi & Anor –vs- Abubakar Madhbuti C.A. No.165 of 1996** held as follows;

*“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been under all the obtaining circumstances in the particular case, it is just and equitable to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of volume 44 of Halsbury’s Laws of England, Fourth Edition, a Plaintiff seeking the equitable remedy of specific performance of a contract: must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms 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. Where a condition or essential term ought to have been performed by the Plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance but dismisses the claim.”*

I have considered the pleadings, the evidence adduced and submissions of Counsel and find that the plaintiff has proved his case against the defendants. I therefore make the following orders:

- a) A declaration is hereby issued that the plaintiff is the absolute registered owner of all the parcel of land owner as LR. NO. 9471 and 8337.
- b) The defendants to give vacant possession of the suit land within 30 days failure of which eviction to issue.
- c) Defendants to pay costs of the suit.

**Dated and delivered at Eldoret on this 21<sup>st</sup> day of May, 2019.**

**M.A. ODENY**

**JUDGE**

**JUDGMENT READ IN OPEN COURT** in the presence of Mr.Keter holding brief for Mr.Melly for Plaintiff and Miss.Jeruto holding brief for Mr.Komen for Defendants.