



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L CASE NO. 88 OF 2017

DANIEL SIMATWA CHEMORIK.....PLAINTIFF

VS

THOMAS NAIBEL.....1ST DEFENDANT

AGRICS DEVELOPMENT CORPORATION.....2ND DEFENDANT

JUDGMENT

By a plaint dated 1st March 2017 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a) A declaration that the plaintiff is the rightful and lawful owner of land parcel known as Plot no.94 Kokwo Co-operative Society Chorlim(66) and a compulsory order directing rectify of register to exclusiveness reflect the plaintiff's name and a further order that he is entitled to quiet, peaceful, uninterrupted and unencumbered ownership, occupation and possession as a matter of exclusive appurtenant right thereof.
- b) A permanent injunction against the defendant and/or his agents, restraining them from interfering with the plaintiff's exercise of quiet possession, occupation and ownership of the suit land known as Plot no.94 Kokwo Co-operative Society Chorlim(66).
- c) Costs and interest.

Plaintiff's case

PW1 Daniel Simatwa testified and stated that he bought the suit land through the Co-operative Society in 1998 by paying the whole amount of ksh 21,000/ on 29th July 2004 and was allocated the land. He stated that payment was done through ADC Lands. It was further PW1's evidence that the 1st defendant had leased the suit land from 2009 and that he did not sell the land to him.

On cross-examination PW 1 stated that he did not have any lease agreement for the suit land to the 1st defendant as he had claimed in his evidence in chief. PW1 also confirmed that the signature and the ID number on the sale agreement was his and that the original copy of allotment was with the defendant. PW1 further stated that the 2nd defendant was demanding ksh 75,000/= from him, which the 1st defendant paid.

PW1 also stated that the 1st defendant is the one in occupation of the suit land and has developed the land. He also stated that he wanted the 1st defendant out of his land in 2015 and reported the case to the Assistant-chief. PW1 further admitted that he has not reported to the police that his documents were forged or stolen.

On re-examination he testified that the lease agreement was verbal and that he did not agree with the chief's deliberation that he takes 11/2 and the 1st defendant takes 31/2 acres.

PW2 Patrick Chemiso testified that the 1st defendant had leased land from the plaintiff and that he was not aware that the land was sold. On cross-examination he stated that the plaintiff had asked him to show the land to the 1st defendant for purposes of leasing. He was not aware if the plaintiff had entered into a sale agreement with the 1st defendant.

PW3 Mary Chepchirchir testified and stated that she was not a party to the sale agreement and that the ID number on the agreement was hers but she never appended her signature. She also stated that the land belonged to her husband who bought the same from ADC.

On cross-examination she stated that her husband had leased the same to the 1st defendant which lease was verbal. It was further her evidence that the 1st defendant had a copy of her I.D since she was looking for a job.

PW4 Jonathan Mutai testified and stated that he had been cultivating the suit land since 2003 till 2008 when the plaintiff informed him to stop since he was leasing the same a person he was working with for 4 years. That was the close of the plaintiff's case.

Defence Case

DW1 Thomas Kitiyo Naibei testified that he entered into an agreement with the plaintiff dated 12th October 2007 of which he produced the agreement and various receipts that had been given to him by the plaintiff. DW1 also produced the allotment letter and demand letters that were written to the plaintiff requesting for payment of the loan from the 2nd defendant,

On cross-examination he agreed the receipts were in the name of the plaintiff issued by the clerk to the 2nd defendant. He confirmed that the agreement had alterations which were not countersigned or attested to and that he paid the amount by instalments of which he had a balance of Ksh 175,000/ and paid Ksh 75,000/ to ADC. It was his testimony that the land was transferred to him when the 2nd defendant transferred land to the Co-operative. On re-examination he said the records at ADC had not been changed.

DW2 Ezekiel Mulongo Webi adopted his statement and on cross-examination he testified that he was the one who drafted the agreement and took it to a cyber for typing which agreement was for sale of land. He stated that the alteration on the agreement was done in the presence of the plaintiff, his wife, 1st defendant and himself.

DW3 Francis Koti adopted his statement and on cross-examination he stated that he was one of the people who attended the chief's meeting, who came up with the solution. The 1st defendant was asked to pay Ksh 1,000,000/= for the entire 5 acres, he was therefore to top up on what he had already paid. It was his evidence that the 1st defendant said that he did not have money to top up so he was asked to take 3 1/2 acres and leave the 1 1/2 acres to the plaintiff. The land was still in ADC's name.

DW4 Violet Cherotich testified that she was an Assistant- chief within Endebess, Trans Nzoia County. She produced the minutes of the meeting held at the chief's office. It was her evidence that the administration was not involved in the sale agreement and that they decided to sell the land afresh because the value had increased.

On cross-examination she stated that it was the plaintiff who had filed the complaint in their office and the 1st defendant was summoned to the office. That the original agreement was discarded and the new price fixed by the Chief in the presence of the parties whereby it was agreed that the 1st defendant to have 3 1/2 acres whereas the plaintiff to have 1 1/2 acres of the land since the 1st defendant said he could not raise the Ksh 1,000,000/=.

Plaintiff's Submissions

It was Counsel's submission that the plaintiff was the bona-fide owner having bought the same as a shareholder from the 2nd defendant. That the 1st defendant only had the documents to enable him facilitate the payment of the Ksh 75,000/= owed to him by the 2nd defendant.

Counsel submitted that if any sale was to be entered into then a consent of the Land Control Board would have been necessary to make the sale legal. Counsel cited the case of **David Sironga Ole Tukai v. Francis Arap Muge & 2 Ors** (2014) eKLR the court held that:

“the following five fundamental conclusions in our view are self-evident and flow directly from the above express provisions of the Land Control Act,

- i. All transactions involving agricultural land situate in a land control area are void for all purposes unless the land control board within that area has sanctioned them.*
- ii. Even declaration of a trust in agricultural land situated in a land control area is not spared without consent of the land control board, it is also void.*
- iii. Consent of the relevant Land Control Board must be obtained within the six months of the making of the agreement relating to agricultural land. The High court however has power, for good reason to extend the period for applying for consent.*
- iv. Where the transaction is ultimately void for lack of consent any money or consideration paid by a would be purchaser is recoverable as a debt.*
- v. It is criminal offence punishable by imprisonment or fine or both to pay or receive payment in respect of a void transaction or to take possession or remain in possession of land, which is the subject of such void transactions.*

Further that the lease agreement had ended and thus the 1st defendant was an illegal occupier and trespasser to the suit land. Counsel relied on the case of **Wamwea v. Catholic Diocese of Murang'a Registered Trustees** (2003) eKLR where the court held that when a party refuses to give vacant possession he becomes a trespasser notwithstanding the party refusing to take compensation.

Counsel cited the provision of Article 40 of the Constitution which he stated that protects the plaintiff as he has established he has proprietary interest. Counsel urged the court to grant the prayers sought in the plaint.

1st Defendant's Submission

Counsel for the 1st defendant listed 4 issues for determination by the court as follows:

- a) Whether the sale agreement entered into by the plaintiff and the 1st defendant was valid.
- b) Whether the suit herein defies the principle of privity of contract
- c) Whether the plaintiff is estopped by his conduct from claiming 11/2 acres of land the suit plot.
- d) Whether the suit land fell under controlled transaction

On the 1st issue Counsel submitted that the sale agreement entered into amounted to a contract as per Section 3(3) of the Contract Act which provides as follows:

“no suit shall be brought upon a contract for the disposition of an interest in land unless:-

- i. The contract upon which the suit is founded is in writing, signed by all parties thereto*
- ii. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.*

He submitted that there was offer, acceptance and consideration thus the essential elements of a contract existed. The sale agreement was signed by all the parties and it contained the names of parties and the purchase price. Counsel cited the case **Nelson Kivuvani v. Yuda Komora & Anor** Nairobi HCC NO. 956 of 1991

Further that the parties were bound by the sale agreement as they had entered into it voluntarily.

Counsel also submitted that the plaintiff was estopped by his conduct and could not aver otherwise than what was intended. Lord **Denning M.R in D& C Buildes v. Sidney Rees** (1966) 2QB 617 where he held that: *“ It is the first principle upon which all courts of equity proceeded that if terms and legal results afterwards by their own act, or with their own consent enter upon a course of negotiate which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or be kept in suspense or to be held in any event the person who otherwise*

Mr. Mathai also submitted that the plaintiff did not hold a title to the suit land as evidenced by DW3 who was the chairman of Kokwo Co-operative society who testified that they were yet to get title deeds for the members, thus the plaintiff could not get a consent to transfer the title. Counsel submitted that section 6(i) of the Land Control Act did not apply in this case. He therefore urged the court to dismiss the plaintiff's case with costs to the defendant.

ANALYSIS AND DETERMINATION

The issues for determination in this case are as to whether the plaintiff and the 1st defendant entered into an agreement for sale of the suit land and whether the plaintiff is entitled to the prayers sought.

From the evidence on record and the documents produced in court it is clear that there was a sale agreement for the sale of the suit land between the plaintiff and the 1st defendant. The agreement that was produced in court indicated the parties to the agreement, their ID Numbers, the suit parcel to be sold, the purchase price and the parties appended their signatures together with witnesses. It should be noted that one of the witnesses was the plaintiff's wife who testified as PW3. What were these people witnessing if it was not for the sale as per the agreement? There was no evidence that they were coerced into signing the agreement. It is also on record that the plaintiff and his wife admitted that the ID numbers and the signatures belong to them. Why were they appending their signatures if they were not selling the land as per the agreement?

The plaintiff had stated in his evidence that he had leased the suit land to the 1st defendant at Kshs. 6000/ per acre but he did not have any proof of such lease in terms of an agreement or payment receipts for the lease. Just the way he reduced the agreement for sale in writing, he should have done the same for the lease of the land. The heading of the agreement dated 12th October 2007 was clearly written Land Sale Agreement not a lease agreement.

It should also be noted that the defendant had the original documents in respect of the suit land including demand letters for payment of arrears and receipts. There was no valid explanation why the defendant had all these documents in his possession further that the plaintiff had not reported any loss or forgery of the documents to any investigative agencies. I find that these documents were surrendered to the defendant upon entering into the sale agreement for the suit land. The plaintiff also confirmed in his evidence that the 1st defendant paid the loan to the 2nd defendant

From the above I find that there was a valid agreement entered into between the plaintiff and the 1st defendant. When parties have entered into a contract, they are bound by the terms of the same. The sale agreement had been signed and witnessed by the plaintiff, the 1st defendant, plaintiff's wife (PW3) and DW2. See the case of **Total Kenya Ltd v. Joseph Ojiem, NRB HCC NO.1243 OF 199** where it was held that parties were bound by their terms and conditions and in this case the plaintiff can not run away from what he initiated.

The issue of a new terms of sale of the plot by the chief was illegal as the Chief had no powers to force parties to enter into new terms on the grounds that the value of the suit land had increased. Just the way the court cannot force parties to enter into fresh terms in an agreement, the chief was out of order to ask the 1st defendant to pay an additional Kshs. 1000, 000/ for the suit land failure of which he was to get 31/2 acres and surrender 11/2 acres to the plaintiff. This in essence showed that the plaintiff had sold the land but wanted to renege on the agreement and demand for more money. This further complicated his case.

On the issue of the consent of the Land Control Board, it is evident from the documents on record that the land is still registered in the name of the 2nd defendant and that the plaintiff took time before he cleared the arrears and was not issued with a title deed in his name. See the case of **David Sironga Ole Tukai v. Francis Arap Muge & 2 Ors**. Where the Court of Appeal gave the rationale for obtaining the Land Control Board consent, as illustrated above, this would not apply where the seller did not have title.

I have considered the pleadings, the evidence on record and the submissions by Counsel and come to the conclusion that the plaintiff has not proved his case on a balance of probabilities and the same is dismissed with costs.

Dated and delivered at Eldoret this 16th day of May, 2019

M.A ODENY

JUDGE

JUDGEMENT READ IN OPEN COURT in the presence of Mr.Omusundi for the Plaintiff and Mr.Mathai for Defendant.