



**REPUBLIC OF KENYA**

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

**AT ELDORET**

**E & L CASE NO. 50 OF 2012**

**JOSEPH KIPRONO SANG (suing as the legal**

**representative of the late AUGUSTINE KIPSANG KIPTOO).....PLAINTIFF**

**VERSUS**

**CHERUIYOT ARAP SAWE.....DEFENDANT**

**JUDGMENT**

**Introduction**

Augustine Kipsang Kiprono filed an amended plaint in court on 5<sup>th</sup> May 2000 seeking a declaration that the defendant is not entitled to enter, possess and use the suit land. He sought an injunction restraining the defendants from interfering with the suit land and further sought damages for general trespass. Unfortunately, he passed on before the suit could be concluded and was substituted by Joseph Kiprono Sang (hereinafter referred to as the plaintiff).

The plaintiff did come to court vide plaint amended on the 6<sup>th</sup> day of June 2016 claiming that his deceased father was the registered owner of the parcel of land number **Eldoret Municipality Block 23 (Kingongo) 249** however the defendant entered the parcel of land without any colour of right and erected structures thereon in the year 2000 and has refused to vacate or remove the structures upon demand.

The plaintiff prays for a declaration that the late Augustine Kipsang Kiptoo was the sole registered owner and entitled to of all that parcel of land known as Eldoret **Municipality Block 23 (Kingongo) 249**. Moreover, that the defendant is not entitled to enter, possess and use the suit land.

Furthermore, a permanent injunction restraining the defendant whether by himself his servant's agents and or employees or otherwise whomsoever from entering upon, taking possession using erecting maintaining thee erections or otherwise howsoever interfering with the suit parcel. The plaintiff prays for general damages for trespass, special damages of kshS.10,000 plus costs and interest.

The defendant filed defence and counterclaim whose gist is that the plaintiff holds 15 acres of the land in trust for the defendant as he never paid for the entire land. That the plaintiff never paid the entire purchase price as he remained with a balance of kshs. 4000.

The defendant filed a defence and counterclaim on 17<sup>th</sup> October 2000 seeking the suit land and a declaration of trust over 15 acres or ½ share of the suit title. Further, a declaration that the defendant is a legal owner of ½ of the suit land on account of unpaid share. He also pleaded for the cancellation of the title to the suit land issued to the plaintiff and his registration of ½ share of the suit land.

The plaintiff filed a reply to defence and defence to counterclaim denying the allegations in the defence and counterclaim.

**PW1 Joseph Kiprono Sawe** testified that he is the son of Augustine Kipsang Kiptoo who died in 2012. He did succession in respect of his father's estate and became the legal representative of his father's estate. He prays that his father's case be considered. On cross examination, he states that his father was in occupation of the land when he died but he does not know the details of the dispute. He states that he was 8 years old during the transaction.

**Dw1 Cheruyot Arap Sawe** states he sold the deceased land, they entered into an agreement and Nyairo Advocate was the witness. The deceased paid kshs.5000 but the balance of Kshs. 4000 was not paid. On cross examination by M/s Odwa he states that the plaintiff stated utilising the land long ago. The defendant further states on cross examination that he did not file any case to claim the land.

I have considered the pleadings, evidence on record and submissions and do find that on the 4<sup>th</sup> of August 1975 the defendant entered into agreement with the plaintiff's father for the sale of the defendant's one share in the Kig'ong'o farm measuring approximately 40 acres. The price was Kshs.9000 out of which Kshs. 5,000 was paid at the signing of the agreement and the balance of Kshs.4,000 was to be paid by the purchaser on or before the 1<sup>st</sup> of September, 1975.

The defendant produced an addendum to the agreement which is undated and therefore unreliable.

The defendant submitted that the plaintiff had to pay the consideration before requesting for the transfer of full share from seller to buyer. The defendant only acknowledged part payment and there was no intention to part with his entire share of Kingongo farm Ltd. The plaintiff has to discharge the evidential burden placed on him.

The defendant submitted that to the extent of the unacquired portion of the plaintiff's share, the plaintiff is a trustee in a continuous trust created but unregistered and subsisting. That section 28 of the Registered Land Act recognizes overriding interests as those which are created by operation of law but are not noted in the register. They include trusts and customary trusts.

It is the defendant's case that he has established that he did not sell his entire share in 1975 and therefore he seeks ½ share in the suit land in respect to the unsold portion which he prays the court order hived off the suit property and that the court should order the title cancelled and in its place 2 parcels created.

In order for the plaintiff to be the owner of the suit land he needs to prove that he completed the process of the purchase of the suit land, the only proof of the balance having been paid is an annexure to the affidavit marked as AKN2 in support of the chamber summons filed in May 2000. It is an agreement that the purchase price had been paid in full. As per the title the plaintiff is the registered owner but the process that led up to the acquisition of the title is marred with a dispute over ownership.

In Munyu Maina Vs. Hiram Gathiha Maina, Civil Appeal No.239 of 2009, the Appeal Court held that: -

***“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”***

The Plaintiff is the registered owner of the suit land but in light of the above that is not sufficient proof of ownership.

The defendant invoked the doctrine of trust in support of his counterclaim for the unsold share. The purchase of the land was not direct. The share of land arose from a share of the farm that was purchased. The defendant still had his original subscription receipts which was the basis of the sale of land as the shares were equivalent to portions of the land.

The Plaintiff was to pay the full consideration and appear before the management of Kingongo Farm Ltd and request for a full transfer of shares from the seller and the buyer. In the absence of proof of full payment, the plaintiff could not have acquired all the shares in the farm and consequently the whole parcel of land.

The defendant has established that the plaintiff indeed purchased or paid for a portion of the shares and not the full shares. This would then translate to payment for a portion of the land and not the whole piece of land. In the absence of proof that the plaintiff completed payment of consideration it would not be sufficient to extinguish the interests of the defendant in the land on the basis that he holds the title.

The plaintiff only succeeded in proving that he acquired land from the defendant or share equivalent to the part payment he made at the point of signing the contract. He cannot claim to have bought full share when he cannot show when he paid the balance to make the full share spelt out in the contract.

In Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR, the court pronounced itself on trusts as follows;

***“A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175).***

***Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see. Snell's Equity at p.177) (supra).”***

The Plaintiff advanced only a portion of the purchase money therefore the defendant was entitled to the share of land equivalent to the unpurchased portion of shares. The plaintiff was holding it in trust for the defendant as it was not the transferors' intention to transfer the whole share of the suit land in the absence of the balance of the purchase price.

The plaintiff has failed to prove that he is entitled to all of the suit land as he has not proven that he completed paying the purchase price. It would be in the interests of justice to apportion the suit land in between the two parties with regards to the shares of the land as submitted by

the defendant. The counterclaim succeeds.

No evidence was led to prove trespass and further, given that the plaintiff was holding the suit land in trust for the defendant it would not amount to trespass if the defendant was indeed on the suit land.

In conclusion, I do find that the plaintiff Is only entitled to the paid share of the suitland equivalent to kshs.5000 as at 1975 whilst the defendant is entitled to the remainder share. I do award the plaintiff 25 acres of the land and the defendant is entitled to 15 acres. Each party to bear own costs. No evidence was led to prove the trespass nor the special claim of kshs.10,000/- accordingly.

**DATED and DELIVERED AT ELDORET THIS 3<sup>RD</sup> DAY OF JUNE, 2019.**

**ANTONY OMBWAYO**

**JUDGE**