



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 210 OF 2017

TERERE OLE MALOI.....PLAINTIFF

VERSUS

JOSEPH NJOROGE.....1ST DEFENDANT

RATETI OLE SALASH.....2ND DEFENDANT

JUDGEMENT

The Plaintiff had commenced the suit herein by way of a plaint dated 3rd August, 2005 seeking interalia the following orders: -

- (a) A mandatory injunction directing the 1st Defendant to sign all the necessary documents to effect transfer of L.R. NO.1172 within Kipise Land Adjudication Section, Narok to the Plaintiff.
- (b) That alternatively, this court do authorize the Deputy Registrar to sign transfer documents on behalf of the 1st Defendant to effect transfer of L.R. No. 1172 within Kipise Land Adjudication Section in favour of the Plaintiff.
- (c) That a permanent injunction restraining the 1st and 2nd Defendants be issued restraining the 1st and 2nd Defendants from interfering, trespassing, transacting and/or dealing with or in any manner howsoever with respect to LR NO. 1172 within Kipise Land Adjudication Section.
- (d) Costs of this suit.

It is the Plaintiff's case that on or about 6th January, 1986 the Plaintiff entered into a sale agreement with the 1st Defendant whereof the 1st Defendant agreed to buy land parcel No. 1172 within Kipise Adjudication Section in which the Defendant received the sum of kshs. 24,000 in consideration.

However, on or about the 4th August, 1999 the agreement was mutually canceled and it was agreed that the 1st Defendant was to refund the Plaintiff the purchase price and profit totaling to kshs. 34,000/-. That pursuant to the above the 1st Defendant had paid the sum of kshs. 25,550/- leaving a balance of kshs. 8,450/- which the Defendant had refused to pay.

That the 1st Defendant later transferred the plot to the 2nd defendant and consequently refused to transfer the suit parcel to the plaintiff and thus necessitating the suit herein.

The 1st and the 2nd Defendants filed a joint statement of defence to the Plaint and the 1st Defendant admitted that he approached the Plaintiff with a view to sale the suit land and that later the agreement was mutually cancelled at their own instance and has refunded the Plaintiff part of the purchase price but refused to collect the balance thereof and he further admitted that he received a letter advising him to collect the balance of the purchase price but he refused to collect the same as the agreement was by then cancelled.

The Plaintiff filed a statement which he adopted during the hearing of the matter and he produced a sale agreement dated 6th January, 1986 between the Plaintiff and the 1st Defendant and another sale agreement dated 2nd July, 1999 between the 1st and 2nd Defendants and an acknowledgment letter for the sum of kshs. 1,500/-which were marked as Plaintiff's Exhibit 1 to 7. The Plaintiff also called Joseph Kamau Njoroge a witness who also adopted a statement he filed on 20th September, 2018 as his testimony.

The 2nd Defendant testified and recalled having recorded a statement that he wished to adopt as his testimony. On cross examination he stated that he was sold the land by the 1st Defendant and that he has been in possession of the suit land since.

At the close of their respective case both parties filed their respective submissions. The Plaintiff in his submissions stated that he is the rightful owner of the suit land since he was not a party to the latter agreement between the 1st and 2nd Defendant.

The Plaintiff further submitted that the 1st Defendant had also no capacity to transfer the suit land to the 2nd Defendant as he was not the rightful owner of the suit land.

The Defendant submitted that the Plaintiff has no right of claim of the suit land having breached the sale agreement and hence he relinquished his rights over the land. They further stated that the Plaintiff had admitted that he signed a sale agreement with the 1st Defendant.

I have carefully considered the pleadings in the matter and the witness testimony together with the submissions filed by the parties and I find the issues for determination are as follows: -

- (i) Whether the 1st Defendant had capacity to transfer the suit land
- (ii) Whether the sale agreement dated 2nd July, 1999 between the 1st and 2nd Defendant is valid.
- (iii) Whether the Plaintiff has satisfied the conditions to grant of orders of injunction.

On whether the 1st Defendant had capacity to transfer the suit, it is the Plaintiff's contention that the 1st Defendant was not the rightful owner of the land at the time he sold and transferred the same and thus he lacked the capacity to transact any transfer. The 2nd Defendant on his part contends that at the time the suit land was transferred the previous contract was mutually cancelled. From the pleadings and the testimony of witnesses it is not disputed that there were two agreements of sale involving the parcel of land first signed by the Plaintiff and the 1st Defendant and the second agreement between the 1st Defendant and the 2nd Defendant since both agreements were voluntarily entered into and the first transaction mutually cancelled, I find that the first contract was violated. Furthermore, the Plaintiff had refunded part of the purchase price and therefore the 2nd agreement of sale was valid and hence the 1st Defendant had capacity to transfer the suit land and consequently its validity was settled.

On whether the Plaintiff has satisfied the conditions for grant of orders of injunction, the conditions for the grant of the order which are discretionally as settled in the case of **GEILLA –VERSUS- CASSMAN BROWN (1973)EA** the Plaintiff failed to establish lack of the 1st Defendant's capacity to transfer the suit and effectively challenged the validity of the sale agreement means he has failed to satisfy the condition for the grant of orders of injunction.

Having determined the above issues, I find that the Plaintiff has failed to proof his case on a balance of probabilities and I thus dismiss the suit with costs to the Defendants.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **26th** day of **July, 2019**

Mohammed Kullov

Judge

26/7/19

In the presence of:

Parties-present

CA:Chuma