



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO 38 OF 2018

DANIEL KIPRUGUT MAIYWA.....PLAINTIFF

VERSUS

REBECCA CHEPKURGAT MAINA.....DEFENDANT

JUDGMENT

INTRODUCTION

1. By a plaint dated the 10th May 2018 the Plaintiff filed suit against the defendant claiming a portion of land parcel no. KERICHO/KAPSUSER/4923 measuring 1.18 acres which he bought from the defendant's two sons. It is the plaintiff's case that after he bought the suit property the defendant's sons put him in possession but to date the plaintiff has refused to transfer the same to him. The plaintiff seeks the following reliefs:

- a) A declaration that a total of 1.18 acres of land which is to be excised from land parcel no. L.R KERICHO/KAPSUSER/4923 belongs to the Plaintiff
- b) A permanent injunction restraining the defendant either by herself, her servants, agents, children and/or anyone acting on her behalf or with her consent and/or authority from using the title deed for L.R NO KERICHO/KAPSUSER/4923 as collateral in any financial institution or interfering with the plaintiff's occupation of 1.18 acres of land in any manner whatsoever.
- c) An order directing the defendant to sign all mutation forms, application for consent and transfer forms in favour of the plaintiff or IN THE ALTERATIVE: The Deputy Registrar of this Honourable court be mandated to do so on behalf of the defendant.
- d) An eviction order evicting the Defendant from the portion bought by the Plaintiffs which she is illegally cultivating.
- e) Any other suitable relief that this honourable court may deem fit and just to grant

2. Despite being served with Summons to enter appearance, the defendant neither entered appearance nor filed a defence. The case therefore proceeded ex parte.

PLAINTIFF'S CASE

3. The plaintiff testified and called two witnesses. It was his testimony that on the 3.7.2009 he entered into a sale agreement with one of the defendant's sons Daniel Kipsigei for the sale of a portion of land measuring 0.65 of an acre to be excised from L.R No. KERICHO/KAPSUSER/4923. He produced a copy of the said sale agreement as an exhibit. Later on 12.3.2016 he purchased an additional portion measuring 0.53 of an acre from another of the defendant's sons, Patrick Tonui. He produced the sale agreement as Plaintiff's exhibit 3. At the time of the sale the suit property was and is still registered in the defendant's name as per the certificate of official search which he produced as plaintiff's exhibit 1.

4. He testified that he paid the purchase price in full after which he took possession of the 2 portions of land totaling 1.18 acres. The defendant has however refused to transfer the suit property to her as she is upset that the plaintiff instituted a criminal case against one of her sons, Moses Kipchirchir Kipchumba, who was subsequently charged and sentenced to imprisonment.

5. The plaintiff further testified that he reported the matter to the Assistant County Commissioner and even though both parties were summoned and the matter was adjudicated by the said Assistant County Commissioner, he recommended that the dispute be resolved by the court. He produced the minutes of the Dispute resolution meeting chaired by the Assistant County Commissioner dated 14.2.2018 as plaintiff's exhibit 4.

6. The plaintiff called three witnesses. Two of the defendants' sons Daniel Kipsigei Kering and Peter Kering who testified as PW1 and PW2 respectively. PW1 corroborated the plaintiff's testimony and confirmed that he sold a portion of land to the plaintiff though the same was still registered in the name of the defendant who had refused to transfer it to the plaintiff.

7. He said he had given the plaintiff vacant possession but his mother (defendant) had refused to transfer the same to the plaintiff even though they had no problem with the plaintiff. PW3 stated that he had sold his portion of land measuring 0.53 to PW4 who in turn sold it to the plaintiff. PW4 in turn corroborated PW3's testimony thereby closing the plaintiff's case.

ISSUES FOR DETERMINATION

8. Having considered the pleadings, evidence on record and plaintiff's submissions, the following issues arise for determination:

- i. Whether the contracts between the plaintiff and the defendant's two sons in respect of L.R No. KERICHO/KAPSUSER/4923 is valid.
- ii. Whether the defendant ought to transfer a portion of L.R No. KERICHO/KAPSUSER/4923 measuring 1.18 acres to the plaintiff
- iii. Whether the plaintiff is entitled to an order of injunction as prayed.
- iv. Who should bear the costs of this suit.

ANALYSIS AND DETERMINATION

9. With regard to the first issue, there are two main challenges. The first one being that there is no privity of contact between the plaintiff and the defendant. The plaintiff's claim is based on a contract between him and the defendant's sons and even though he claims a portion of land owned by the defendant, the contract cannot be enforced against her. The suit against the defendant therefore cannot stand.

10. The second challenge is that the principle of *nemo dat quod non habet* comes into play. The said principle is embodied in section 23 of the Sale of Goods Act which stipulates as follows:

23 (1) Subject to the provisions of this Act where goods were sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

11. The *nemo dat* principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing.

12. However, the law provides some exceptions to this rule in the following certain circumstances; For example where a person buys the property in good faith believing that the person who sold it to him was the owner or authorized agent of the owner; where the property is sold by a mercantile agent who is in possession of the goods or documents of title; sale by a joint owner who sells the property with the permission of the co-owner or sale by a person in possession of goods or property under a voidable contract. This principle was applied in the case of **Haul Mart Kenya limited v Tata Africa Kenya limited (2017) e KLR and Katana Kalume V Municipal Council of Mombasa (2019) eKLR.**

13. In the instant case the plaintiff claims that he bought the suit property from the defendant's sons. He admits that at the time of sale the property was registered in the name of the defendant. There is no indication that the defendant consented to the sale. Even though the plaintiff claims to have been put in possession, it is clear that the defendant did not consent to or approve of the sale as the defendant refused to transfer the suit property to the plaintiff prompting the plaintiff to institute a complaint with the Assistant County Commissioner. This did not resolve the dispute.

14. From the evidence on record, the plaintiff has not attempted to bring himself within the exceptions to the *Nemo dat* rule. In the circumstances, it is my finding that the contract between the plaintiff and the defendant's sons was not valid. Unfortunately, the plaintiff has not enjoined the persons who sold him the land for refund of the purchase price as this would have been his best fall-back.

15. Flowing from my finding on the first issue, the defendant cannot transfer the suit property to the plaintiff. Similarly, the plaintiff is not entitled to an injunction or any of the other reliefs sought.

16. The upshot is that the plaintiff has failed to prove his case on a balance of probabilities. The plaintiff's suit is therefore dismissed with no order as to costs

Dated, signed and delivered at Kericho this 8th day of November, 2019.

J.M. ONYANGO

JUDGE