



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L CASE NO. 396 OF 2015

MILKAH SONGOL.....PLAINTIFF

Suing as the Legal Administrator of the Estate

of CHEPSONGOL CHEPKEITANY (DCD)

VERSUS

STANLEY SUMUKWO.....DEFENDANT

JUDGMENT

By a plaint dated 23rd October 2015 the Plaintiff herein sued the defendant seeking for:

- a. An order that the contract dated 14th January 2008 has been frustrated by operation of law.
- b. In alternative, an order holding that the contract dated 14th January 2008 was void ab initio in that the execution of the same would be in breach of a statutory provision.
- c. An order holding that the Defendant's forceful encroachment of the portion of land parcel BARINGO/KAPROPITA/859 that was not sold to him and the demolition of the deceased estate's shops that stood thereon was illegal.
- d. An order holding that the shops built by the Defendant on the suit land are illegal.
- e. An order of eviction of the Defendant from the suit land.
- f. An order for demolition of the illegal structures put up by the Defendant.
- g. An order for permanent injunction restraining the Defendant and his agents from intermeddling with land parcel BARINGO/KAPROPITA/859.
- h. Special damages as follows:
 - i. Loss of 2 shops valued at Kshs. 418,800/
 - ii. Loss of income at the rate of Kshs. 10,000/ per month from January 2015 till settlement of this suit.

This matter came up for hearing on 27th July 2017 when the plaintiff testified in support of her case. The court adopted her statement as evidence before the court and she further highlighted the points in her testimony.

Plaintiff's case

The plaintiff stated that she is the administrator of the estate of her deceased father CHEPSONGOL CHEPKEITANY who was the registered

owner of the suit land known as BARINGO/KAPROPITA/859. It was her evidence that in 2008 the Defendant purchased a portion of the suit land measuring 25ft x 50ft. which portion was located between the shops on the upper side of the suit land and a dwelling house on the lower end.

PW1 further testified that despite the defendant having been shown the appropriate location of the purchased portion of the suit land, the Defendant went ahead in early 2015 and demolished the shops that stood on the upper side of the suit land fronting Kabarnet - Kabartonjo road. It was her testimony that the area that the demolished shops stood on was not sold to the Defendant. The plaintiff stated that the Defendant then went ahead to illegally build permanent shops of his own.

It was the plaintiff's evidence that in the process of illegally demolishing the shops, the Defendant damaged goods in the form of stock in trade and that the shops had been let to traders who were paying the estate Kshs. 5,000/= each as monthly rent. She further stated that the cost of reconstructing the demolished shops would be Kshs. 418,800/-. She further told the court that contrary to the Defendant's claim that the portion purchased is 25ft x 50ft, a surveyor had established that the same measures only 28ft x 35.8ft. and that as per the Physical Planning Rules the purchased portion is such a small unit that it cannot be carved out of the main title which measures about 28.2ft x 111.6ft.

The plaintiff further produced a letter from the Town Administrator, Kabarnet of town, Baringo County which states that any subdivision of land below that measuring 50ft x 100 ft is unlawful.

The plaintiff therefore prayed for judgement be entered in her favour as prayed in the plaint against the defendant together with cost of the suit.

On cross-examination by defence Counsel, the plaintiff stated that they are two administrators to the estate of her deceased father but they are not part of this case. The plaintiff admitted that she was supporting her late father in the case where her siblings had sued their father and the defendant in a Kabarnet court. She also admitted that it is true that her father entered into a sale agreement with the defendant for the sale of the suit plot but she did not know whether the defendant paid the purchase price.

The plaintiff further stated that her late father did not complain that he wanted to refund the purchase price to the defendant. She further admitted that she did not produce any receipts to show that she had been receiving Kshs. 10,000/ per month.

Defence Case

The defendant gave evidence and stated that he entered into a land sale agreement with the plaintiff's late father on 14th January 2008 for the suit land measuring 25ft x 50ft. He produced the agreement as defence exhibit No. 1. He stated that he paid the full purchase price of Kshs. 40,000/ thereafter started construction on the suit land. He produced the court proceedings from Kabarnet court where he had been sued by the family members who had objected to the sale of the plot to him.

The defendant testified that the Kabarnet Civil Suit NO.41 of 2008 was dismissed with costs and that the aggrieved parties filed an appeal vide Nakuru High Court Civil Appeal No. 198 of 2009 which was also dismissed. The defendant produced the order dismissing the appeal as defence exhibit No. 3. It was further the defendant's evidence that the plaintiff also sued him vide Kabarnet civil case no. 3 of 2015 which was struck out.

It was further the defendant's evidence that in the case at Kabarnet the plaintiff herein supported him in the case but after the father died she changed. The defendant further stated that he has developed the plot but he does not have the title as there is a pending succession cause. He prayed that the plaintiff's suit be dismissed with costs.

On cross-examination by the plaintiff's Counsel, the defendant stated that he bought the suit land in 2008, took possession and started construction. That he stopped when there were family wrangles and court cases but resumed in 2014. The defendant further stated that he bought 25ft by 50ft and that the place where he was shown had kiosks and that he did not have any documents to show the exact measurements. The defendant admitted in cross-examination that he did not buy the land where the kiosks are.

On re-examination the defendant confirmed that the plaintiff was present when he bought the land. He therefore closed his case.

Plaintiff's Counsel's submission

The plaintiff's counsel reiterated the plaintiff's evidence and listed the issues for determination by the court. Counsel submitted that the plaintiff had proved her case against the defendant. He listed the exhibits that the plaintiff produced to fortify her case. Counsel submitted that a surveyor confirmed that the suit plot was not 25ft by 50ft as claimed by the defendant and that according to planning laws the purchased portion is such a small unit which cannot be carved out of the main title which measures 28.2ft by 111ft.

Counsel further submitted that no consent from the land Control Board was obtained to subdivide the plot, no approved development plan and no title has been gotten by the defendant. Having enumerated the wrongs by the defendant, Counsel submitted that the contract has been frustrated by the operation of the law. He therefore prayed that judgement be entered in favour of the plaintiff as prayed.

Defendant's Counsel's Submissions

The defendant's Counsel reiterated the defendant's evidence and submitted that the defendant entered into a land sale agreement with the plaintiff's father CHEPSONGOL CHEPKAITANY (Deceased) on 14th January, 2008 whereby the defendant bought 25ft x 50ft excised from land parcel NO. BARINGO/KAPROPITA/859 measuring 0.03Ha approximately.

Counsel submitted that the defendant duly paid the deceased the entire purchase price of Kshs. 40,000/ as had been agreed between a willing seller and buyer and thereafter took possession of the purchased portion of land immediately and has been in occupation since then to date.

Counsel also stated that the defendant was sued together with the plaintiff's late father by the plaintiff's siblings namely: Lilian Cheptai, Daniel Songol Peninah Argut, Evans Kipkorir, Amos Kibet, Esther Songol and Joseph Kibet. That the siblings objected to the sale of part of the suit parcel of land herein to the defendant vide Kabarnet Civil Suit NO.41 of 2008.

Mr. Okara Counsel for the defendant submitted that during the hearing of the said suit, the plaintiff herein MILKA SONGOL testified as defence witness number 4 and in her sworn evidence as captured on page 13 of the proceedings in Kabarnet Senior Resident Magistrate's Court Civil Suit NO.41 of 2008 she stated under oath that she did not object to the sale of 25ft x 50ft excised from the suit parcel of land herein to the defendant. Counsel further submitted that the Kabarnet suit was dismissed on grounds that the then plaintiffs did not show sufficient interest to give them locus standi to block the sale of the subject parcel of land to the defendant who was by then sued as the 2nd defendant.

Mr. Okara submitted that even though the plaintiff in this current suit was not a plaintiff in the Kabarnet suit as above mentioned, she actively participated in the proceedings by

tendering her testimony in favour of the defence as defence witness number 4 where she duly supported the current defendant herein for the purchase of a portion of the suit parcel of land.

Counsel referred the court to the judgement delivered by Hon. H. Nyaga in Kabarnet SR MCC NO.41 of 2008 at page 18 paragraph 6 which indicated that the Court visited the scene and indeed established that the defendant's parcel of land as sold to him existed and there was a right to access the same contrary to the plaintiff's allegations.

Counsel therefore submitted that it is clear that the defendant has not encroached on any portion of land not sold to him by the deceased. The defendant has occupied and developed what was lawfully sold to him that a portion measuring 25 ft x 50ft as indicated in the land sale agreement.

Counsel prayed that the plaintiff's suit be dismissed with costs to the defendant as it is an abuse of the court process.

Analysis and determination

The issues for determination in this case are as to whether the defendant bought the suit land from the plaintiff's late father measuring 25ft by 50ft and the location of the disputed land. Whether the agreement dated 14/1/08 between the plaintiff's deceased father and the defendant has been frustrated by operation of the law. Whether the agreement dated 14/1/08 was void ab initio as its execution would be in breach of statutory provision and lastly whether the plaintiff is entitled to the orders sought in the plaint.

This matter has a long history of cases filed in the lower court and on appeal on the same subject matter. The 1st one being Kabarnet Senior Resident Magistrate's Court Civil Suit No. 41 of 2008 whereby the plaintiff's siblings sued their father and the defendant herein in respect of the sale of the suit plot. The matter proceeded for hearing and a judgement was delivered dismissing the case. The plaintiff herein gave evidence as PW4 in that case and supported the father testifying that the father had a right to sell the suit land as the siblings were not taking care of him and yet they had been given plots which they sold. The proceedings of the case were produced in court.

The plaintiffs in the SRM CC No 41 of 2008 were aggrieved by the court's Judgement and proceeded to file an appeal Vide Nakuru HCCC No. 198 of 2009 which was also dismissed for want of prosecution. There is no evidence that the plaintiff's tried to reinstate the dismissed appeal.

Further the current plaintiff in this case filed another suit in Kabarnet being PMCC No. 3 of 2015 which was also dismissed and the defendant was awarded costs. The plaintiff therefore filed the current suit in this court seeking for orders that the agreement between the defendant and her late father has been frustrated by the operation of the law.

It is not disputed that the Defendant purchased a portion of land measuring 25ftx50ft excised from the suit parcel of land, however what is disputed is the portion the defendant occupies. The defendant averred that the portion of land he purchased from the deceased is distinct from the plaintiff's parcel of land and it measures 25ft x 50ft and the same is not in the middle of the plaintiff's portion as alleged.

It is evident from the evidence on record that the court in Kabarnet civil suit No.41 of 2008 visited the ground and observed that the defendant's plot was distinct and had an access road to it. It further made an observation that the defendant herein had only constructed on the parcel which duly belongs to him and had not in any way trespassed and/or encroached onto the now plaintiff's portion.

The plaintiff called a surveyor as a witness and from his evidence he stated that he carried out the survey with the instructions from Kipnyekwei and Company Advocates and the purpose was to ascertain the size of the plot. This survey was done without the involvement of the defendant but in the presence of the plaintiff. He stated that the suit land is 28.2 ft by 35.8 ft. The question is why did the surveyor not involve both parties to the suit land?

The issue of the letter from the Town Administrator on subdivision of plots below 50ft by 100, I notice that the letter is copied to the plaintiff and not the defendant. It is not a general letter to all the residents of Baringo County to inform them that they should adhere to town zoning rules. The fact that it is copied to the plaintiff alone seems to suggest that she had a hand in it having made a complaint to the County

government on the issue that she has with the defendant. I notice that the letter was written after the plaintiff had filed several cases in court.

On the issue of the consent to the land Control Board, the land in question is not agricultural land but a town plot. Consents of LCB are required where land is agricultural land. The plaintiff further claimed that the defendant demolished structures without authority, demolition of structures is a criminal offence which is malicious damage to property. There was no evidence that the defendant was charged in a court of law with the said offence. The plaintiff further produced bills of quantities indicating a figure of Kshs 418,800/ for the value of the demolished structures. This is a special damage which has to be specifically pleaded and proved. The bills of quantities are not enough to prove the value of the structures. Further the plaintiff claimed for loss of income in the sum of Kshs. 10,000/ per month from January 2015 till the settlement of the suit. The plaintiff did not adduce any evidence to prove that she was getting the said rent claimed. She did not produce a bank statement or a rent book showing the same. This claim also fails as it is a special damage which has to be specifically proved.

I have considered the evidence by the parties together with their witnesses and counsel's submission and come to the conclusion that the plaintiff has failed to prove her case on a balance of probabilities. The plaintiff did not prove that the agreement for the sale of the suit plot was frustrated by the operation of the law. I wondered what law frustrated that agreement. The defendant proved that they entered into an agreement with the plaintiff's father and this was affirmed in the previous cases that were filed against him by the plaintiff and her siblings.

Litigation must come to an end and parties must not be allowed to take the courts in circles when they think they have not gotten a favorable ruling. The law is clear that if a party is aggrieved they have a right of appeal which is a legal option not filing similar cases in different courts.

The upshot is that the plaintiff's case fails and is dismissed with costs to the defendant.

Dated and delivered at Eldoret this 15th day of February, 2018

M.A ODENY

JUDGE

Judgment read in open court in the presence of Mr. Mogambi holding brief for Mr. Kipnyekwei for Plaintiff and in the presence of the Defendant.

Mr. Koech: Court Assistant.