



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 288 OF 2014

MATHEW KIBET ARUSEI.....PLAINTIFF

VERSUS

DAVID KIMELI LETING.....DEFENDANT

JUDGMENT

1. By plaint amended at Eldoret on the 16th day of October, 2014, pursuant to the provision of Order 18, Rule 1 of the Civil Procedure Rules, the plaintiff states that on or about 2.2.2010, the plaintiff and the defendant entered into a land sale agreement pursuant to which the defendant sold to the plaintiff land reference Eldoret Municipality Block 5/563 at an agreed total purchase price of Kshs.400,000. The plaintiff has paid the total purchase price Kshs.400,000 to the defendant. That immediately after the sale agreement was executed, the plaintiff moved into the land, took possession and commenced developments by constructing a structure thereon. That the sale agreement has to date not been cancelled and or revoked.

2. On or about 12.9.2014, the plaintiff was surprised to learn that on 12.9.2014, the defendant moved into the land and started putting up structures thereon. The plaintiff on getting the information regarding the defendant's conduct and activities on land reference Eldoret Municipality Block 5/563 went into the parcel of land on 13.9.2014 and 15.9.2014 to enquire why the defendant was building on the land but the defendant became violent and threatened to physically assault the plaintiff and went on with the construction. The defendants' activities and conduct is legally untenable and unacceptable in a civilized society. According to the plaintiff, the defendant's conduct is illegal and it is calculated at injuring the plaintiff and/or causing him irreparable harm. The plaintiff by virtue of the purchase agreement is entitled to peaceful and exclusive occupation and use of the land. The defendant ought to transfer the suit land Eldoret Municipality Block 5/563 to the plaintiff. The plaintiff believes that the defendant's conduct is unconscionable.

3. The plaintiff states in the plaint that in the event, the defendant is not able to transfer the land to the plaintiff, the land ought to be valued and a sum equivalent to its current market value paid to the plaintiff as compensation by the defendant.

4. The plaintiff ultimately prays for transfer of land reference Eldoret Municipality Block 5/563 to the plaintiff. A declaration that the defendant's conduct is legally untenable and a restraining order to prevent the defendant from in anyway dealing with the land except by effecting transfer of the same to the plaintiff. In the alternative, if land reference Eldoret Municipality Block 5/563 cannot be transferred to the plaintiff by the defendant, the land be valued and its monetary value be paid by the defendant to the plaintiff as compensation and finally costs of the suit.

5. The defendant on his part states that he did not receive the entire purchase price and therefore, the plaintiff did not complete his obligation. Moreover, that the sale agreement has been cancelled. He further states that he is not aware of any development on the site and that if any, the same have been cancelled. The defendant avers that the plaintiff is entitled to peaceful and quiet possession only during the subsistence of the contract and that he is not entitled to honour the contract as the plaintiff is in breach. Moreover, that the suit property is in possession of the registered proprietor and that the defendant has no good title. When the matter came up for hearing, the plaintiff stated that he bought the suit land from David Kimeli Leting and produced the agreement. He paid Kshs. 200,000 and was to pay the balance on 30.5.2010 after the processing of title in his name. However, he states that he has paid the balance and that he has no debt. He has constructed rental houses on the land. He states that the property is now registered in the names Sofia Cherop, the daughter of the defendant. He did valuation and found the property worth Kshs. 3,700,000. He prays for the suit property be transferred in his name or he be paid the value of the property.

6. On cross examination, he states that he entered into the agreement on 2.2.2010. When he bought land, he did not do a search. He could have done search but he knew the land was not registered in the name of defendant. The search shows that the land was registered on 1.10.2010. Title was issued on the same date. When he bought the land, the land was not registered. They entered into the agreement on 2.2. 2010.. There was no evidence that the defendant was the owner but he knew he was the owner.

7. The deadline for the payment depended on the issuance of the certificate of lease but he was to act before 30.5.2010. The defendant was not active in seeking consent. He told him to wait but transferred the land to someone else. He did not do anything in respect of the sale as he was to get the consent. He paid all the money before the advocate. He refused to take the money. He entered the land in 2011 after the

first agreement in March, 2010. He was constructing rentals using metal stores. He did not know that the matter would go to court. He knew the defendant about 4 to 5 months before the agreement but used to hear his name. After the agreement, he knew him very well.

8. The Search shows that the land is in the name of Sofia Cherop and it is charged. He came to court on 17.9.2014. He had done search on a later date after filing case. However, before, he thought that the land was registered in the defendant's name. He sued the defendant because the defendant sold the land to him. He has no claim against the current proprietor. When he bought the land, it was not registered. PW2, Edwin Kipchumba Metto, a Valuer at Highlands prepared a valuation report dated 16.3.2016 for the suit property and found the property to the value of Kshs. 3,700,000.

9. The defence case was opened by DW1, David Kimeli Leting who states that on 22.11.2007, he signed an agreement with Sofia Cherop in respect of the suit land. He was buying the land from the registered owner. However, he was unable to pay the purchase price and therefore called upon his friend to assist and was to pay Kshs. 400,000. He paid Kshs. 300,000 but failed to pay the balance of Kshs. 100,000. The owner of the land wanted it back. He states that he discussed later that the balance had been paid to the Post Office and that he enquired from Momanyi Advocate why the money was paid in the Post Office. He has never seen the cheque that was refund of the last payment. He is ready to repay the money, the Kshs. 300,000.

10. On cross examination by Momanyi, he states that the certificate of lease was to be processed before 30.5.2010. The certificate of lease was issued on 1.10.2010. The defendant states that he did not have title to the land. Sofia Cherop is his brother's daughter. The land belonged to Sofia Cherop. He claimed that he received the money but late. He has no land and has not done the valuation of the suit land.

11. The plaintiff submits that he has proved his case on a balance of probability, however, the only remedy available is for the defendant to pay the value of the property. He prays for Kshs. 3,700,000.

12. The defendant on his part submits that there is nothing to transfer to the plaintiff as the land is registered in the name of a 3rd party who is not party to the proceedings. Moreover, that the sale agreement was revoked for non-completion of the purchase price and therefore the plaintiff is entitled to a refund of the money.

13. I have considered the pleadings, evidence on record and do find that on 2.2.2010, the plaintiff entered into a sale agreement with one David Kimeli Leting (the defendant herein) for the sale of L.R. No. Eldoret Municipality Block 5/563 being an eighth of an acre. The terms of the agreement of sale were:

i. The total consideration for the said parcel of land is Kenya Shillings Four Hundred Thousand (Kshs. 400,000) only.

ii. The seller has received and the purchaser has paid a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000) only in each receipt of which the seller acknowledges by signing this instrument.

iii. The balance of the purchase price Kenya Shillings Two Hundred Thousand (Kshs. 200,000) only will be paid once the certificate of lease in the name of the purchaser is processed and available, subject to the deadline being 30th May, 2010.

iv. The certificate of lease in the name of the purchaser will be processed and made available within thirty (30) days from the date hereof.

v. The seller has already handed over possession of the plot to the purchaser.

vi. The rates currently outstanding will be cleared by the seller and a clearance certificate availed.

vii. The seller will obtain the requisite consent to have the certificate of lease processed in the purchaser's name.

viii. The seller warrants that he has a good title to the parcel of land.

ix. The legal fees will be shared equally between the parties.

14. The history of the parcel of land cannot be discerned from the certificate of search however, it is evident that Sofia Cherop was registered as proprietor on the 1.10.201 and the certificate of lease issued for a term of 99 years from 1.6.2006. The incumbrance section indicate that the land was charged to Equity Bank.

15. Section 24 of the Land Registration provides **Section 24 (a) of Land Registration (Act No. 3 of 2012)** provides that:

"The Registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

16. The import of the above section is that a person who is not registered as proprietor of a parcel of land has no right or privilege over the same and cannot transact on the same. The agreement dated 2.2.2010 is for all purposes a nullity as the defendant was not the proprietor of the suit land and therefore, the court cannot compel him to transfer land registration number Eldoret Municipality Block 5/563 registered in the name of Sofia Cherop to the plaintiff. The plaintiff has not demonstrated that he erected structures on the suit land. He has not produced any architectural plans, approved by the County Government, no bills of quantities and no evidence of purchase of materials. However, the plaintiff is only entitled to the amount of money paid to the defendant as purchase price. The defendant has admitted having received Kshs. 300,000.

17. The defendant argues that the final payment of Kshs. 100,000 vide cheque dated 24.07.2014 was an afterthought. However, I do not see any evidence that the same was returned. The logical conclusion is that it was paid. The letter dated 24.7.2014 by M/s Anassi Momanyi & Company Advocates did not elicit any response and therefore, the court finds that the plaintiff has proved on a balance of probability that he paid the defendant Kshs. 400,000. I do find that plaintiff is entitled to a refund of Kshs. 400,000 with interest from the date the suit was filed. I do grant costs to the plaintiff.

Dated and delivered at Eldoret this 27th day of April, 2018.

A. OMBWAYO

JUDGE