



**REPUBLIC OF KENYA**

**IN THE LAND AND ENVIRONMENT COURT AT KERICHO**

**ELC CASE NO 27 OF 2016**

**GEORGE N. LABOSO ..... PLAINTIFF**

**VERSUS**

**DANIEL KIPKORIR NGERECHI ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS MWANGI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a Plaintiff dated 12<sup>th</sup> May, 2016 the Plaintiff filed suit against the defendant seeking the following reliefs:

*a) An order of permanent injunction restraining the defendants by themselves, their agents, servants, employees or otherwise from trespassing onto, erecting permanent structures or interfering with the Plaintiff's proprietary interest in L.R No. KERICHO/KIPCHIMCHIM/4505*

*b) Costs and interest*

*c) Any other relief that the court may deem fit to grant.*

2. In his Plaintiff the plaintiff pleads that he bought the suit land from the 1<sup>st</sup> defendant on 8<sup>th</sup> August 2012 and he has been in continuous occupation thereof until May 2016 when the 2<sup>nd</sup> defendant trespassed onto his land and constructed permanent structures thereon.

3. The 2<sup>nd</sup> defendant filed a defence dated 13<sup>th</sup> June, 2016 in which he denies that he has trespassed onto the plaintiff's land. He states that he purchased the suit land from the 1<sup>st</sup> defendant in 2016 and has been registered as the proprietor thereof.

4. The 1<sup>st</sup> defendant did not file any defence.

5. The suit was set down for hearing on the 19<sup>th</sup> February 2018 and both the plaintiff and the 2<sup>nd</sup> defendant testified. None of them called any witnesses.

6. The plaintiff who is a banker in Nairobi testified that he bought the suit land from the 1<sup>st</sup> defendant through a land sale agreement dated 8<sup>th</sup> August 2012. Soon after he paid the purchase price of 750,000, the 1<sup>st</sup> defendant gave him vacant possession of the land. He also surrendered to him the original title deed and signed an application form for Consent of the Land Control Board. He produced the sale agreement, original title deed in the 1<sup>st</sup> defendant's name and certificate of official search as exhibits.

7. Secure in his ownership of the suit land, the plaintiff took possession thereof until May 2016 when the 2<sup>nd</sup> defendant moved into the land and started constructing some permanent structures. Upon enquiry, he was informed that the 2<sup>nd</sup> defendant was claiming ownership of the same parcel of land.

8. In cross-examination he stated that even though he had the forms for application for Land Control Board Consent Transfer Forms signed by the 1<sup>st</sup> defendant and the original title deed, he did not present them to the Land Control Board.

9. On his part the 2<sup>nd</sup> defendant testified that he purchased the suit land from the 1<sup>st</sup> defendant in 2016. He further testified that after he finished paying the purchase price the defendant transferred the land to him and he produced both the sale agreement and title deed. He

However admitted that he never attended any meeting of the Land Control Board as he was purchasing land for the first time and the did not understand the procedures involved in land transfer. I can't help wondering how the 1<sup>st</sup> defendant managed to transfer the land to the 2<sup>nd</sup> defendant without the consent of Land Control Board and without the original title deed which had been surrendered to the plaintiff. The 2<sup>nd</sup> defendant admitted that he was surprised that the plaintiff had an original title deed to the suit land.

### **Issues for Determination**

10. Having evaluated the pleadings, evidence and rival submissions, the following issues emerge for determination:

- i. Whether the Plaintiff is a bona fide purchaser of land parcel number KERICHO/KIPCHIMCHIM/4505
- ii. Whether the 2<sup>nd</sup> defendant has a good title to the suit land
- iii. Whether the plaintiff is entitled to the reliefs sought
- iv. Who should bear the costs of this suit

### **Analysis and Determination**

11. It is common ground that the 1<sup>st</sup> defendant sold land to the plaintiff in 2012. The said sale was pursuant to an agreement dated 8.8.2012. It is also common ground that even though the 1<sup>st</sup> defendant put the plaintiff in possession of the suit property soon after the sale, he did not obtain consent of the Land Control Board within the requisite period of 6 months with the result that the sale became null and void in terms of section 6(1) of the Land Control Act. The said section provides as follows:

12. Each of the following transactions

- a. The sale, transfer, lease, mortgage, exchange partition or other disposal of or dealing with any agricultural land which is situated within a land controlled area;
- b. The division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;
- c. The use, sale, transfer lease, mortgage exchange, partition or other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act

13. In the case of **David Sironga Ole Tukai V Francis Arap Muge and 2 Others (2014) eKLR** the Court of Appeal held as follows:

*“The Land Control Act remains one of the most litigated statutes in Kenya, as a consequence, a consistent line of case law has emerged, both from this Court and the High Court on the interpretation and application of various provisions of that statute. Those authorities cover a span of 47 years from the date of enactment of the Act in 1967 to this day. From the outset it is clear to us from the decision of the High Court that precipitated that this appeal together with the recent decision of the court in **Macharia Mwangi Maina & 87 Others V Davidson Mwangi CA No 26 &27 of 2011 (Nyeri)** are a departure from the previous decisions of the courts as we shall shortly demonstrate. The real question is whether that departure is based on sound legal foundation.....In our opinion, the learned judge did not give any serious reasons for departing from such consistent decisions, many of which were binding on him. All that we see is the taking of refuge in unclearly articulated notions of inequality, injustice, equity and natural justice.*

*To begin with it is difficult to comprehend the legal basis of the view that the court has power to ignore clear and express provisions of a statute under the guise of equity. We have already pointed out that in **Karuri V Gitura, Simiyu V Watambamala (1985) KLR 852 and Wamukota V Donati (1987) KLR 280** this Court held that the provisions of the Land Control Act were clear enough to leave no room for application of the principles of equity”*

14. Similarly, in the instant suit the transaction is void for all purposes and cannot form the basis of a claim for injunction.

15. If any money or other valuable consideration has been paid in the course of the controlled transaction, that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid but without prejudice to section 22 of the Act.

16. On the second issue concerning the legality of the 2<sup>nd</sup> defendant's title. It is clear from his own testimony that the manner in which he obtained the said title is suspect to say the least. As the plaintiff neither pleaded nor proved fraud against him, I do not wish to say more on this issue. It is trite law that a party is bound by his own pleadings. I have looked at the Plaintiff and the only prayer sought is an injunction to restrain the defendants from interfering with the suit property. In my view, nothing prevented the plaintiff from pleading fraud against the defendants and in the absence of such a prayer, the court cannot issue orders *in vacuo*. See the case of **Upward Scale Investments Co. Ltd & 7 Others V Mwangi Keng'ara & Co. Advocates (2017) eKLR** where the Court of Appeal observed that:

*“The issues for determination in a suit flowed from the pleadings and the trial Court could only pronounce judgment on the issues arising from such issues as the parties framed for determination.”*

17. Arising from my findings above, the plaintiff has failed to prove his case on a balance of probabilities and I therefore dismiss it with costs to the 2<sup>nd</sup> defendant.

**Dated, signed and delivered at Kericho this 23<sup>rd</sup> day of May, 2018.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of**

1. Mr. Langat for Mr. Orina for the Plaintiff
2. Mr. Koech for the 2<sup>nd</sup> Defendant
3. Court assistant - Rotich