



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 29 OF 2017**

**SAMWEL KIPKEMOI RONO.....PLAINTIFF**

**VERSUS**

**CHARLES KIPRONO BETT.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff filed suit against the defendant seeking the following prayers:

- a. A declaration that the Plaintiff is the lawful owner of the 0.8 acres comprised in land parcel no KERICHO/KEBENETI/2120.
- b. The defendant be compelled to facilitate the completion of the transfer of the 0.8 acres to the Plaintiff by surrendering the original title deed to land parcel number KERICHO/KEBENETI/2120.
- c. Costs of this suit.
- d. Any other relief that this Honourable court may deem fit to grant.

2. In his Pleint the Plaintiff pleads that he purchased the suit property from the defendant pursuant to an agreement dated 1<sup>st</sup> January 2011. He further pleads that after the sale, the plaintiff and defendant applied for consent of the Land Control Board but the transfer could not be completed as the Defendant refused to hand over the original title deed to the land Registrar. He however alleges that the original parcel of land was sub-divided and he obtained a new number that is KERICHO/KEBENETI/2997. The defendant then trespassed onto the plaintiff's land, destroyed his fence and constructed a temporary structure thereon.

3. In his defence and counterclaim the defendant denies that he sold his land to the plaintiff and states that the agreement alluded to by the plaintiff was obtained through coercion and duress as the plaintiff had the defendant arrested on 16<sup>th</sup> April 2014, locked up in the cells and he was forced to sign a back-dated sale agreement, application for consent forms and mutation forms.

4. In his counterclaim the defendant pleads that in 2010 he entered into a verbal agreement with the plaintiff for the sale of 0.5 acres of the suit land for an agreed purchase price of Kshs. 400,000 but the plaintiff only paid a total of Kshs. 115,000. In the meantime, the defendant put the plaintiff in possession of the suit land but he never paid the balance and became hostile to the defendant and resorted to the use of security agents and Provincial Administration to harass the defendant. He pleads that as a result of the plaintiff's actions, the contract was frustrated by operation of the law. He therefore prays that the plaintiff be evicted from the suit property as he is a trespasser.

5. The suit was set down for hearing and the plaintiff testified and called two witnesses.

6. In his testimony the plaintiff who testified as PW1 recounted what is stated in the Pleint and produced a sale agreement, certificate of official search, application for consent of the Land Control board and transfer forms. He also produced minutes of the Land Control Board meeting and a demand letter from the plaintiff's advocates.

7. Upon cross-examination, the plaintiff stated that he is claiming land parcel number 2997 measuring 0.8 acres. Asked about the sale agreement, he stated that the defendant had signed in some places and thumb-printed in others. He admitted that the first part of the agreement does not indicate the parcel number. He admitted that the Transfer form indicated that the land to be transferred was no. 2997. He also admitted that the application for Land Control Board consent did not bear a date nor indicate that the consent had been granted. He stated that the defendant's wife did not witness the sale agreement.

8. PW2 Joshua Kipchirchir Korir who is a village elder testified that he witnessed the signing of the sale agreement though he did not witness

any payment of money by the plaintiff. He corroborated the plaintiff's evidence that the defendant signed and thumb-printed the sale agreement in different parts. He stated that the plaintiff's son stays on the suit property.

9. PW3 Daniel Cheruiyot who is a neighbour of the parties testified that he was present when the sale agreement was signed but did not witness the exchange of money. He stated that the purchase price was 45,000 per 0.1 of an acre.

10. The defendant was the only defence witness. He testified that he entered into an oral agreement for the sale of 0.5 of an acre to the defendant for an agreed price of Kshs. 80,000 per 0.1 of an acre but the plaintiff only paid Kshs. 115,000 after which he started harassing the defendant using the Provincial Administration and Administration Police. He denied having attended a meeting of the Land Control Board. He stated that he signed transfer forms and other documents including the sale agreement and mutation forms while he had been arrested and locked up in the cells in April 2014. He stated that he was willing to refund the amount paid by the plaintiff.

11. Upon cross-examination, he stated that he signed a number of forms under duress while in the cells. He denied having obtained consent of the Land Control Board in respect of the sale of the suit property. He stated that the plaintiff had had him arrested and charged with the offence of arson.

12. In this submissions, learned counsel for the plaintiff summarized the evidence and submitted that the plaintiff's case meets the requirements of section 3(3) of the Law of Contract Act which requires that an agreement for the sale of land be evidenced in writing and signed by both parties in the presence of witnesses. He has further submitted that even though the transfer was not completed, the court ought to rely on the equitable doctrine that equity deems as done that which ought to have been done and order that the plaintiff be issued with a title deed in respect of the portion of the suit property that he bought from the defendant. He relied on the case of **John Simiyu Ndalila V Francis Soita (2014) eKLR and Solomon Amiani V Salome Mutenyo Otunga (2016) eKLR**.

13. On the other hand learned counsel for the defendant has submitted that the alleged agreement produced by plaintiff cannot be relied on as it contains contradictions regarding the parcel number, acreage of land sold and the signatures.

14. He further submitted that the parties did not obtain consent of the Land Control Board as the form that was produced by the plaintiff did not indicate that consent was issued. He submitted that the plaintiff's documents were obtained through coercion, a fact which was not controverted by the plaintiff, and that the plaintiff had not discharged the burden of proof placed on him by section 107 of the Evidence Act.

15. Regarding the defendant's counterclaim counsel submitted that the defendant had entered into an oral agreement with the plaintiff for the sale of 0.5 of an acre of the suit property for an agreed purchase price of Kshs. 400,000 whereby the plaintiff only paid a sum of Kshs. 115,000 after which he defaulted in payment of the balance.

16. Counsel further submitted that by failing to pay the balance of the purchase price the contract between the plaintiff and the defendant was repudiated. Moreover no consent of the Land Control Board was obtained within a period of six months as required by the mandatory provisions of section 6 of the Land Control Act agreement Cap 302 of the Laws of Kenya. Consequently the sale agreement is void for all purposes. He relied on the case of **Silas Bartonjo Kiptala V James Kipkemboi Murei (2013) eKLR**. He submitted that in the circumstances, the plaintiff is the sole registered owner of the suit property and in terms of section 24 of the Land Registration Act, he is protected by the law.

### **ISSUES FOR DETERMINATION**

17. The following issues arise for determination:

- i. Whether the agreement dated 1<sup>st</sup> January, 2011 is valid
- ii. Whether the consent of the Land Control Board was obtained
- iii. Whether the plaintiff is entitled to the reliefs sought in the plaint
- iv. Whether the oral agreement made between the defendant and the plaintiff is valid
- v. Whether the defendant is entitled to the reliefs sought in the counterclaim.
- vi. Who should bear the costs of this suit

### **ANALYSIS AND DETERMINATION**

#### **Whether the agreement dated 1<sup>st</sup> January, 2011 is valid.**

18. The evidence regarding the agreement dated 1<sup>st</sup> January, 2011 is full of contradictions. Whereas the agreement indicates that the purchase price for 0.5 acres is Kshs. 230,000 the defendant alleges to have paid Kshs. 45,000 per acre. It is not clear why the defendant has signed in some places and affixed his thumb print in others. The different figures stated on the agreement as having been paid by the plaintiff on different dates do not add up to the alleged purchase price of Kshs. 360,000 at a rate of Kshs. 45,000 per 0.1 of an acre. To make matters worse, none of the plaintiff's witnesses testified that they had seen him pay the defendant.

19. To compound the problem further, there is no consent of the Land Control Board as what was produced is merely an application form

which is undated and whose authenticity is in doubt. The said application form indicates that the parcel to be transferred is land parcel no. KERICHO/KEBENETI/2997 which is non-existent. Likewise, the transfer form allegedly signed by the defendant is not certified nor does it indicate the land parcel number. In the face of all these unexplained contradictions and the defendant's evidence that he was coerced into signing documents while under the custody of Administration Police, I must say that the plaintiff's evidence is not credible.

20. Arising from my finding above, it is quite evident that no consent of the Land Control Board was obtained. I therefore agree with counsel for the defendant that since the transaction contravenes the mandatory provisions of section 6 of the Land Control Act, it is void for all purposes. The case of Silas Bartonjo Kiptala is instructive.

21. Consequently the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

22. Regarding the counterclaim, section 38 of the land Act, 2012 provides as follows:

“Other than as provided by this Act or any other written law

No suit shall be brought upon a contract for a disposition of an interest in land unless

a. The contract upon which the suit is founded

I. is in writing

II. is signed by all the parties thereto; and

b. the signature of each party signing has been attested to by a witness who was present when the contract was signed.”

23. The above provision means that this court cannot entertain the defendant's counterclaim as it is based on an oral agreement.

24. Accordingly, the counterclaim is dismissed with costs to the plaintiff.

25. In the final analysis both the suit and the counterclaim are dismissed with costs.

**Dated, signed and delivered at Kericho this 16<sup>th</sup> day of May, 2018.**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of :**

1. Mr. Terer for Mr. Mutai for the Plaintiff

2. N/A for the Defendant

3. Court assistant - Abdi