



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 197 OF 2014

FRANCIS KIPROP CHERUTICH..... PLAINTIFF

VERSUS

VINCENT KIPCHOGE KWAMBAL..... DEFENDANT

RULING

Francis Kiprop Cherutich (hereinafter referred to as the plaintiff) came to court against Vincent Kipchoge Kwambai claiming that in land sale agreement dated 20.11.2005 and/or sale agreement dated 19.4.2006, the defendant sold two (2) acres of that land known as KIBIGOS/CHERANGANY/28 and/or CHERANGANY/KIBIGOS/28 to the plaintiff at a consideration which the defendant received and acknowledged receipt in full and final settlement from the plaintiff the other particulars of which are well within the defendant's knowledge.

That in a letter dated 29.5.2013, the Chebiemit Division District officer wrote that letter to the defendant in vain through the Koisungur location chief on the complaint of the plaintiff a resident of Kuserwo location and land dispute arising from the said sale agreement and land sale agreement from which the defendant distanced himself as ,the defendant allowed nephew or someone known to the defendant and with the defendant's full knowledge to trespass upon and cultivate the land the defendant sold to the plaintiff in breach of contract.

That the Chebiemit Division District Officer wrote a letter dated 4.6.2013, to the defendant in vain through the Koisungur location chief on the defendant's failure to turn up on 5.6.2013 to show signs of co-operation and the defendant's production before the D. O.'s office on 13.6.2013 for the land sale agreement and the sale agreement dated 20.11.2005 and 19.4.2006 respectively which were, and still are, serious matters that needed amicable solution.

The certificate of official search dated 17.9.2013 revealed the description of the land as title No. CHERANGANY/KIBIGOS/28 and that the registered proprietor effective from 5.12.1972 was/is Mokicho W/O Kwambai Barmase whose certificate of title was on 4.9.1973 issued to the owner accordingly meaning that the defendant is never the registered proprietor of the said parcel of land.

That the defendant by himself, his nephew, agents or servants or whomsoever entered into the land and used force to cultivate or to plant and harvest crops (potatoes). The plaintiff reported the matter to the Koisungur location chief whose jurisdiction covers Kibigos sublocation where the land is, the defendant and the defendant's nephew defied the area chief's directives for the illegal or unlawful activities to be stopped forthwith, the defendant and the defendant's nephew kept on trespassing upon and planting crops before and even after the plaintiff made his complaint to the area District officer who convened meetings which the defendant did not attend in defiance and before the plaintiff initiated or instituted proceedings accordingly.

That the plaintiff obtained a valuation report on the land the defendant sold to the plaintiff and the improvements together with the fencing/site works/trees worth Kshs. 865,300/= made thereon by the plaintiff as at 16.5.2013 from when onwards the value appreciates and after the plaintiff settled on, took possession, occupied, developed and used the land ever since 2005 and/or 2006 until the dispute arose in 2013 and 2014.

The plaintiff's claim against the defendants is that the plaintiff is no longer interested in the land and demands for the recovery of the current market purchase price and improvements plus costs and interests at the current market rates in respect of the two (2) acres of the land namely CHERANGANY/KIBIGOS/28 due to the bad relationships arising from the dispute, the fraudulent acts of the defendant in the said sale agreements and in view of the plaintiffs averments contained in the plaint. He prays for costs, interests at current market rates.

The defendant in his defence states that the plaintiff could not claim to be the lawful owner of the land in issue and that the defendant had no title to land hence could pass title to a third party. However, he admits that the 3rd party, one Mokicho Kwambai Barmase held the title and was registered proprietor. The defendant denies having cultivated the land and denies particulars of fraud. The defendant specifically pleads that by virtue of section 4 of the Limitation of Actions Act, Cap. 22, Laws of Kenya, the suit in statute barred.

The defendant has filed a notice of preliminary objection dated 26.10.2016 stating that the suit is statute barred by virtue of section 4 of the Limitation of Actions Act. That this matter is in breach of the Land Control Act, Cap. 302, Laws of Kenya and that the plaintiff lacks

statutory.

The plaintiff submits that the action herein is founded on contract and that the plaintiff has not sought extension of time. The Limitation period for actions founded on contract is six years and therefore, the suit herein is time barred having been commenced after lapse of 8 years.

On the consent of the Land Control Board, the plaintiff submits that after the lapse of six months, an agreement becomes null and void if consent of the Land Control Board is not obtained.

The plaintiff submits that this is an action to recover land which may be brought within a period of 12 years from the date on which the right of action accrued to same person through whom he claims. According to the plaintiff, the cause of action accrued on 20.11.2014 and therefore, 12 years had not lapsed when the suit was filed.

On consent of the Land Control Board, the plaintiff submits that the plaintiff and defendant cannot make any application to the Land Control Board because the defendant is not the proprietor of the land. On locus standi, the plaintiff submits that he has locus standi to sue.

To begin with, I do find that the plaintiff and defendant entered into agreement for sale of 2 acres of Cherangany/Kibigos/28. The defendant received full consideration. This land is registered in the names of Mokicho w/o Kwambai. It is admitted that the defendant is not the registered owner of the land but it is claimed that he sold land that was not registered in his name to the plaintiff. In these circumstances, the plaintiff has the locus standi to sue the defendant for breach of agreement, fraud and misrepresentation.

However, the plaintiff would have had no cause of action against Mokicho w/o Kwambai, the registered owner because she had no agreement of sale of land with the plaintiff.

Furthermore, the cause of action is time barred by virtue of Section 4 of the Limitation of Actions Act, Cap. 22, Laws of Kenya provides:

(4) Actions of contract and tort and certain other actions

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

I do find the argument by Mr. Cheptarus that this is an action to recover land based on a misconception as the prayer is for recovery of current market value of the land and developments and not land.

The claim is based on contract and precisely on the agreements dated 20.5.2005 and 19.4.2006. The limitation period as provided by law is 6 years. In this case, the claim was commenced after the expiry of the limitation period. I do find the suit to be statute barred.

On the consent of the Land Control Board, I do find that the same could not be obtained and was not obtained because the defendant was not and is not the registered owner.

The upshot of the above is that the suit is dismissed for being time barred and based on a null and void agreement. Costs to the defendant.

Dated, signed and delivered at Eldoret this 30th day of July, 2018.

A. OMBWAYO

JUDGE