



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 703” B” OF 2012**

**JUDITH WAHU GACHUKIA.....PLAINTIFF**

**VERSUS**

**RICHARD KIMUTAI.....DEFENDANT**

**JUDGMENT**

**Richard Kimutai, (hereinafter referred to as the defendant)** filed Eldoret Hccc No. 109 of 2010 against **Judith Wahu Gachukia (hereinafter referred to as the plaintiff)** which later was converted to Environment & Land Court Case No. 634 of 2012. On her part, Judith Wahu Gachukia filed suit No. Eldoret Hccc No. 57 of 2011 against Richard Kimutai which was converted to Suit No. 703B of 2012 on the 14.11.2013. The two suits were consolidated and Suit No. 703B was made the lead file. The plaint in ELC Case No. 634 of 2012 were deemed collectively as defence and counterclaim.

In the amended plaint filed on 21.5.2013, the plaintiff claims to be the registered proprietor of parcel No. **Uasin Gishu/Tapsagoi/950**. The defendant has illegally trespassed on the land and occupied it. The plaintiff claims to have lived on the suit parcel since 1982 and was uprooted by the post-election violence which occurred in 2007-2008. She took refuge at Turbo Police Station and later relocated to Nakuru. During this period, she did not know the defendant but the defendant took possession of her parcel of land. Later, they agreed that the plaintiff sells the defendant the property at Kshs. 600,000. They signed the sale agreement and the defendant paid the plaintiff Kshs.100,000. The balance of Kshs.500,000 was to be paid on or before 28.2.2010.

As a sign of good gesture, the plaintiff allowed the defendant to take possession of the suit parcel. However, the defendant has defaulted in paying the balance and has become violent. The defendant has been charged in court for the said violence. The plaintiff states that the defendant has destroyed her house and has been leasing the land to 3<sup>rd</sup> parties.

The plaintiff prays that the defendant be evicted together with his agents and a declaration that the agreement made on 20.11.2009 is void for want of consent of the Land Control Board. Moreover, the plaintiff prays for an order that the sale agreement dated 9.6.2010 was fraudulent, a forgery, null and void ab initio. Moreover, the plaintiff prays for general and aggravated damages.

The defendant claims to be the legal owner of 0.09 Ha of Plot known as Uasin Gishu/Tapsagoi/950 situated at Tapsagoi area near Turbo Township. He avers that on or about 20.11.2009, he agreed with the defendant for the purchase of 0.09 Ha of land parcel NO. Uasin Gishu/Tapsagoi/950 at a consideration of Kshs. 600,000. On the same date, the defendant paid the plaintiff Kshs. 100,000 leaving a balance of Kshs. 500, 000 which the defendant later paid to the plaintiff on 9.6.2010.

The defendant claims that on 13.8.2010, while at home situated on the said land, the plaintiff went to the said land and demanded to repossess the subject land on allegation that the defendant had not completed paying the balance of Kshs.500,000. That the plaintiff continued threatening the defendant, his workers, his servants and agents and or family members using area administration police officers. The defendant prays for a declaration that the plaintiff's acts are unlawful and or illegal and prays for a permanent order of injunction restraining the plaintiff or her servants and or agents from interfering or threatening the defendant from peaceful developing and staying on to subject plot.

The plaintiff in reply to defense denies that the defendant is the legal owner of the suit property and states that he is not aware of the existence of the suit property. She admits entering into agreement with the defendant but in respect of Uasin Gishu/Tapsagoi/305 and not Uasin Gishu/Tapsagoi/950. The defendant paid Kshs.100,000 but refused or neglected to pay Kshs. 500,000 hence the parcel of land reverted back to the plaintiff. The defendant has now encroached on her piece of land known as Uasin Gishu/Tapsagoi/305 without her authority, or any color of right and the suit now is meant to embarrass her and frustrate her efforts to have the defendant vacate.

She avers that the agreement dated 20.11.2009 is null and void for lack of the consent of the Land Control Board.

When the matter came for hearing, the plaintiff testified that the defendant is occupying her plot No. Uasin Gishu/Tapsagoi/950. The land is in her name. She produced the title deed. She testified that she wanted to sell the land to the defendant at Kshs.600,000 but the defendant

paid Kshs.100,000 only. She produced the agreement. She was selling the land because of land clashes. Her house was burnt due to post election violence. They did not apply for consent to the Land Control Board as required by law. The defendant has been committed and sentenced for attempting to kill her with an axe. She has demanded that the defendant vacates but has been unsuccessful.

The defendant neither testified nor called witnesses and therefore the plaintiffs evidence is not controverted.

### **ANALYSIS AND DETERMINATION**

I have considered the pleadings, evidence and submissions of both parties and I do find that the plaintiff is the registered owner of the suit property. **Section 24 of Land Registration Act No 3 of 2012** states 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. **Section 25 of the said Act** provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—to encumbrances charges or leases shown on the register and the overriding interests as stated in section 28 of the Act. Section **26 (1) provides** that the certificate of title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except-

1. On the grounds of fraud or misrepresentation to which the person is proved to be a party, or
2. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The import of the above sections is that once a proprietor is registered as absolute owner, he has all privileges and rights appointed to the property. From a foregoing, it is clear that the plaintiff is entitled to all rights and privileges appertaining to the property.

The agreement entered into between the plaintiff and the defendant is void for failure by the plaintiff to apply for consent of the Land Control Board.

The transactions affecting agricultural land which are controlled are specified in **Section 6(1)** of the Land Control Act and include, **sale, transfer, lease, mortgage, partition, sub-division and sale of shares** in a private company or co-operative society which owns land. **Section 6 (1)** further provides that such a transaction:

**“is void for all purposes unless the Land Control Board for the land control board area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”**

**Section 6 (2)** of the Land Control Act provides:

**“For avoidance of doubt, it is declared that the declaration of trust of agricultural land situated within a Land Control Board area is a dealing in land for purposes of subsection (1)”.**

Further, **Section 6 (3) (b)** states that **Section 6** of the Land Control Act does not apply to:

**“a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.”**

**Section 8 (1)** requires that an application for consent should be made in the prescribed form within six months of the making of the agreement but the proviso thereto gives the High Court power to extend the period if it considers that there are sufficient reasons to do so upon such conditions, if any, as it may think fit. **Section 8 (2)** requires the Land Control Board either to give or refuse its consent and **Section 9 (1)** specifies the matters that the Land Control Board should consider and the principles it should apply in making its decision whether to grant or refuse consent.

**Section 11 (1)** of the Act provides for appeals from the decision of the Land Control Board to the Provincial Land Control Appeals Board for each Province chaired by a Provincial Commissioner. Further appeal is provided under **Section 13 (1)** to Land Control Appeal Board chaired by the Minister.

[9] Under **Section 7** of the Land Control Act, consideration paid for a transaction which becomes void is recoverable as a debt subject to **Section 22** which provides:

**“Where a controlled transaction; or an agreement to be a party to a controlled transaction, is avoided by Section 6 and any person –**

**(a) pays or receives any money; or**

**(b) enters into or remains in possession of the land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to**

**imprisonment for a term not exceeding three months or to both such fine and imprisonment.”**

The defendant did not produce any evidence that the consent of the land control board was obtained as required by law and therefore this court concludes that that the same was not obtained contrary to section 8 of the Land Control Act Cap 302 Laws of Kenya. The transaction of sale between the plaintiff and the defendant is therefore declared a nullity.

The upshot of the above is that the suit succeeds and the court orders that the defendant vacates the suit property within 30 days, failure of which he be evicted but be given one month's notice. I do decline to order a refund of Kshs. 100,000 as the defendant has benefited from the suit property. Orders accordingly.

**Dated, signed and delivered at Eldoret this 26<sup>th</sup> day of July, 2018.**

**A. OMBWAYO**

**JUDGE**