



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 227 OF 2015

RASHID KIPKURGAT TOO.....PLAINTIFF

VERSUS

ZIBORA SAINA SERONEY.....DEFENDANT

JUDGMENT

By a plaint dated 12th August 2015, the plaintiff herein sued the defendant seeking for the following reliefs:-

a. Eviction of the defendant herself, her servants and/or agents coupled with a perpetual injunction restraining the trespass and continued construction on land parcel designated as plot no. 21 Sigowet within Chemalal Two Farm in Uasin-Gishu County.

b. Costs and interests.

The defendant was served with summons to enter appearance and a plaint and subsequently she entered appearance and filed a defence and counterclaim on 3rd September, 2015. In the defence and counter claim the defendant sought for the following reliefs:-

a. That the plaintiff's suit be dismissed with costs and the prayers in the counter claim herein be granted.

b. She be declared the owner of one acre of the demarcated suit land parcel known as plot no. 21 Sigowet/ Chemalal Two Farm in Uasin Gishu County.

c. Costs and interest.

Plaintiff's case

It was the plaintiff's evidence that he was a shareholder and a member of Chemalal (Two) Farm Company Limited which was a land buying company where he bought 75 acres of land within Uasin - Gishu County. He produced a letter dated 3/8/15 from Chemalal Farm, an extract of the register of members showing his shareholding and a map.

PW1 also stated that he had given the defendant one acre in exchange of a plot in west within Eldoret town and they entered into an exchange agreement which he produced in court. PW1 further gave evidence that he had shown the defendant the 1 acre portion with a surveyor and she took possession, fenced and constructed a house on the suit land. He urged the court to evict the defendant as she did not give her the plot in exchange of the suit land.

On cross-examination the plaintiff confirmed that the defendant is in occupation of the suit land and that she did not pay her any money. The plaintiff admitted to knowing David Seroney who is the defendant's son and that he had a bank account at Kenya Commercial Bank Limited Eldoret Branch. He however denied having been given ksh. 450,000/-. The name in the deposit slip was Rashid Kipkurgat Too. The depositor of the money was David Kipkemboi Seroney from the deposit slips dated 29/8/2006 which were produced in court.

PW1 stated that he did not know Fredrick Lemiso and Florence Lagat but admitted that he knew the Chief William Koros as the Area Chief who had written to him a letter dated 28/8/15 summoning him.

PW1 further admitted that the defendant had constructed on the land and had buried two of her children on the suit land. It was his evidence that he is the one who allowed the defendant to bury her children on the suit land and that one of the children died in 1998.

The plaintiff called one witness who stated that he surveyed the Chemalal Farm but did not know about the dispute between the plaintiff and the defendant.

Defendant's Case

The defendant gave evidence and testified that the plaintiff was a friend of her late husband and that 2 of her children got an accident in 1998 and died . The defendant stated she went to the plaintiff and asked him to give her a place to bury her children of which the plaintiff showed her the suit land.

It was the defendant's further evidence that they agreed with the plaintiff that she was to give the plaintiff 1 acre in Eldoret town in exchange of 10 acres from his land at Baharini which is the suit land. She stated that she showed him the 1 acre that was surveyed.

She stated that her son David sold the land to pay rates and gave the plaintiff Ksh.500, 000/ as they had agreed at Ksh.500,000/ in lieu of the one acre Eldoret West plot.

DW1 stated that when he asked the plaintiff for the 10 acres , he asked her to exhume the graves of her children and move out of the land. She stated that this prompted her to report the matter to the area chief but they did not agree as the plaintiff asked her to pay an additional Ksh. 12million as there was a ready buyer for the plot.

The defendant produced a chief's letter, bankers cheques for payment of Kshs 350,000/, 100,000/ and 50,000/ respectively into the plaintiff's account. The defendant stated that she has two graves for Elizabeth Chebet Seroney and Samson Seroney which names were in the Chief's letter produced as an exhibit in court. Further that she has constructed a wooden house, planted trees and sunk a borehole on the suit land. It was also her evidence that she had started constructing a permanent house valued at Kshs. 1, 500,000/ which made the plaintiff chase her away. She produced receipts for the building materials.

The defendant denied being a trespasser as she has lived on the suit land for a period of over 18 years. She prayed for costs of the suit, ten acres and an order of injunction.

On cross-examination she admitted that she had not tendered the certified extract of the register of the suit - land before the court and that She had come into occupation of the suit - land with the permission of the plaintiff. She had no approved building plan and a Land Control Board consent.

DW 2 - DAVID KIPKEMBOI SERONEY testified and corroborated the defendant's evidence about the suit land and the death and burial of the two children of the defendant.

DW2 stated that the defendant sent him Ksh. 100,000/ and he took Ksh. 350,000/ to the plaintiff. He purchased a banker's cheque and he deposited the money to the plaintiff's account at Kenya Commercial Bank Eldoret Branch. The defendant therefore closed her case.

Plaintiff's Submissions

Counsel for the plaintiff submitted that the defendant is a trespasser on the plaintiff's land, as it has been admitted in paragraph 3 of the defence that she entered the suit land with permission of the plaintiff therefore she qualifies under the law as a licensee of the plaintiff or a tenant at will.

On the issue as to whether the defendant is a purchaser for value of the land as raised in the defence, Counsel submitted that the defendant confirmed that no written sale agreement was entered into in - respect of the parcel of land.. For the defendant to assert such a plea she must prove the existence of a valid sale agreement based on section 3(3) of the Law of Contract Act, cap. 23.

Counsel further submitted that the defendant has not expressly pleaded that the plaintiff holds the land in trust for the defendant. The court cannot grant reliefs that are not pleaded. Counsel relied on the case of **Wilson Kenyenga v Joel Ombwori, [2001] eKLR** in which the court while dismissing the appeal observed,

*"The second ground upon which the appellant based his claim was a trust. We have carefully considered the pleadings. We are satisfied that trust was not pleaded. No particulars of the trust were pleaded and none was relied upon in compliance with order 6 rule (8) of the Civil Procedure Rules. In any event, as pointed out earlier in this judgment, the plaintiff in his own pleadings and evidence clearly claimed that he was a co-owner of the suit property. It is our view that such a claim is inconsistent with a claim under a trust. In the absence of a pleading of trust, this claim cannot be permitted to be raised or decreed. As a rule, relief not founded on pleadings will to be given and cases must be decided on the issues on record see **Captain Harey Gandy vs Casper Air Charters Ltd (EACA) 1956 VOZ 23**. The learned judge cannot be faulted for not having found that indeed the respondent held the suit land in trust for the appellant. This becomes even more necessary when the statute provides categorically as is the case with order 6 rule (8) that the particulars of trust must be pleaded. We are, therefore, entitled to also reject this limb of the appellant's case.*

For the above reasons, we find no merit in the appeal and dismiss the same with costs to the respondent. "

Counsel also submitted that the defendant has raised the plea that the suit is time barred under the Limitation of Actions Act, cap. 22 and that the evidence on record shows that the defendant sought for assistance and a place to bury her kin in 1998.

That upon burial no evidence of immediate occupation by the defendant exists. Further that there was no consent of the Land Control Board.

It was Counsel's submission that the defendant's counterclaim for adverse possession is untenable as a period of 12 years has not lapsed and that the defendant entered the suit land with the permission of the plaintiff. Further that the evidence of any negotiation on acquisition of an

interest in the land appear to have commenced in the year 2014 or 2015 and the issue of survey of the 10 acres arose around the said period.

Counsel cited the case of **Mwingi Hamis Ali —v- Attorney General and Philemon Mwaisaka Wanaka, Civil Appeal no.125 of 1997** in which it was held,

"Adverse possession does not apply where possession is by consent and in a court of law, sympathy takes a second stand as the court is governed by statutes".

Counsel also faulted the defendant for not producing a certified extract of the register of the land to the counter claim and not tendered in evidence and that the distinct portion occupied was not identified. Counsel cited the case of Titus **Mutuku Kasuve —v- Mwaani Investments Limited & 4 others, (2004) eKLR** in which the court held that,

"The burden was on the appellant to produce the certified extracts of title of the suit properties. In the absence of the extracts of the title the affidavit evidence of George Matata Ndolo that the suit lands are encumbered and therefore not free for alienation has not been refuted. Moreover, the appellant did not prove the location of the distinct portion of the land he is claiming or its acreage there is no evidence that the alleged forty acres were surveyed, demarcated and excised from the expansive ranch. In the circumstances, there was no concrete evidence that appellant was in exclusive adverse possession of any definite and distinct land ascertained to be 40 acres. "

Counsel therefore submitted that the plaintiff has proved his case against the defendant and that judgment should be entered in his favour as prayed. He urged the court to dismiss the defendant's counterclaim with costs.

Defendant's Submission

Counsel for the defendant filed written submissions and stated that the issues for determination by the court are as to whether the defendant lawfully owns the suit land as a bona fide purchaser for consideration, whether the land transaction was ever void and/or rescinded at all, and finally whether the laws of limitation of action act applies to the defendant who had taken possession, occupation and utilization of the suit land thereof.

On the first issue Counsel submitted that the basis for the defendant's ownership and claim of the suit land parcel is clearly stated in her defence statement and in her evidence and exhibits. That there was a contract and/or valid agreement between the plaintiff and the defendant for the sale of 1 acre of the suit land known as plot No. Sigowet within Chemalal Two Farm in Uasin Gishu County. That the defendant performed her part of the contractual obligations under the agreement by paying the purchase price of the 1 acre piece of land in full and final consideration thereof as had mutually been agreed and even making an additional ksh. 350, 000/= the defendant went ahead and took possession of the 1 acre piece/portion of land.

Counsel submitted that the oral agreement between plaintiff and the defendant was valid and that it did not in any way violate Section 3 (3) of the Law of Contract Act as the same was entered into in the year 1998. He relied on the case of **John Mbiri Michuki Vs. Samuel Mugo Michuki (Nveri) CA.No.22 of 2013 (2104) Eklr**, where the Court of Appeal held that;

We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the plaintiff/respondent had to satisfy the trial court that he either, took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence we concur with the finding of the learned judge that the plaintiff/respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous till the filing of the Originating Summons by the Plaintiff in 1991. It is our view that Section 3 (7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3 (3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force. The proviso to Section 3 (3) of the Law of Contract Act applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the Law of Contract Act.

Counsel referred the court to paragraph 8 of the defence statement where the defendant states that she issued demand to the plaintiff seeking the transfer of the 1 acre from the suit parcel of land in her favor which the plaintiff totally failed to do so prompting the defendant to file a counter claim for the portion that she is in occupation of.

On the issue of consent of the Land Control Board, Counsel submitted that the consent of the Land Control Board was not obtained but the defendant's occupation and possession of the said parcel of land resulted in constructive trust. This is for the reason that the defendant purchased the 1 acre piece of land from the plaintiff in the year 1998, upon which she took possession and has been in lawful use, possession and occupation of the same since then. The defendant has been in both actual and physical occupation and possession of the suit land from 1998.

Further that the defendant took possession of the said parcel of land with the full knowledge of the plaintiff, she thereafter built a permanent structure being a dwelling house on the suit property and even interred the remains of her late daughter Elizabeth Jebet in August 1998 and her late son Samson Marie Seroney in November 1998. These acts of the defendant on the suit parcel of land do not only prove actual possession but also constitute constructive possession.

Counsel cited the case of **Willy Kimutai Kitilit Vs. Michael Kibet (Eldoret), CA No. 51/2015 (2018)Eklr**, in paragraph 27 where the court held that;

"As we have held in essence that, the lack of consent of Land Control Board does not preclude the court from giving effect to

equitable principles, in particular the doctrine of constructive trust..."

Counsel urged the court to give effect to the doctrine of constructive trust as the same, and/or as proved from the facts above applies to the defendant herein. He also submitted that the time started running in the year 1998 when the defendant purchased the said parcel of land and immediately entered into occupation and possession of the same. He cited the case of **Public Trustee vs. Wanduru Ndegwa (1984) CA 73 of 1982 (Nairobi) eKLR**, where the court held that:-

"The appellants' claim was, therefore, founded on adverse possession and not contract of sale. A transaction as envisaged under section 6 of the Land Control Act (cap 302) is a voluntary act, which adverse possession is not. The Land Control Act did not, in my view, apply to Beatrice Muthoni's claim and so it was irrelevant whether or not the consent of the land control board was sought and/or obtained. Time started running the day the appellant and her late husband took possession of the suit land and that was March 16, 1967 for that was the date the respondent's possession was discontinued. Twelve years had expired by the time this suit was filed in April 1979. The learned judge erred by calculating the time of limitation subject to the provisions of the Land Control Act especially as to when the contract of sale became null and void under the Act. The twelve years' period under section 7 of the Limitation of Actions Act is not whittled by the Land Control Act."

Counsel therefore submitted that the defendant has been in occupation from 1998 and thus in excess of 12 years as required by law. Counsel urged the court to order the registration of the defendant as the lawful proprietor of the 1 acre in plot no. 21 Sigowet/Chemalal, as provided for under Section 38 of the Limitation of Actions Act and as prayed for by the defendant in her counter-claim and dismiss the plaintiff's suit with costs.

Analysis and determination.

The plaintiff in this case sued the defendant for an order of eviction from the suit parcel of land. The issues for determination are as to whether the plaintiff entered into an exchange of land agreement with the defendant and whether he allowed the defendant to take possession of 1 acre of the suit land to bury her deceased children. The other issue is as to whether plaintiff was paid money in lieu of the exchange of the town plot.

From the evidence on record it is clear that the plaintiff and the deceased husband of the defendant were friends and when the children of the defendant died in an accident the defendant approached the plaintiff to exchange with him land for purposes of burying her children of which the plaintiff agreed to give her one acre. The plaintiff produced an agreement for the exchange as Pex. No. 4. The issue of the exchange of one acre is not in dispute.

The defendant also gave evidence that they had agreed that DW2 sells the plot in town to pay land rates and pay the plaintiff Kshs. 500,000/ in lieu of the exchange with the plot in Eldoret West of which money was paid into the plaintiff's Kenya Commercial Bank account, Eldoret branch. The defendant produced the pay in slips which confirmed that the money was paid into the plaintiff's account.

The plaintiff confirmed that he had an account with KCB but he did not confirm or deny that he had received the amount deposited in his account. The production of the slips is prima facie evidence that the plaintiff received the monies as there is no proof that he returned the monies to the sender or depositor.

The defendant claimed that she is a bona fide purchaser for value and this she managed to prove by the pay in slips into the plaintiff's account which the plaintiff confirmed that he was a holder of account at KCB Eldoret branch and never returned the money that was deposited. Why was the defendant depositing the money in the plaintiff's account and yet she is not a charitable institution or a donor.

It is also on record that the plaintiff has admitted that the defendant is in occupation and has constructed a permanent house, a bore hole, a toilet and planted trees on the suit land. This was confirmed by the production of receipts for construction materials and photographs of the house that has been constructed on the suit land. I do not see why the plaintiff would want to retain the defendant's money and the land where she has been in occupation for a period of more than 17 years. Would this be a case of greed where the plaintiff wants to sell the suit land to a highest bidder as he had indicated to the defendant to pay him an additional Kshs. 12 million or remove the graves of her children? The plaintiff should be aware that at the time he received Kshs. 500,000/ it was also good money which might be equivalent to the amount he is asking for at that time.

The defendant being in possession and occupation of the suit land has a right to stay and be registered as an owner having proved the same. The plaintiff has therefore been holding the suit land in trust for the defendant. The issues raised on the requirement of a written contract do not apply in this case as the transaction was entered into before the amendment of the law of Contract Act in 2003. The submissions by the plaintiff are meant to defeat justice and clothe the plaintiff's claim for eviction with legality. The court would not allow impunity and illegality to take the center stage to deny rights of the vulnerable who have been in occupation for a long period on the suit land.

I have previously rendered my voice on the issue of parties selling land and failing to obtain a Land Control Board consent within the stipulated period of six months then running to court for refund of the purchase price. The provision for the consent of the Land Control board is sound but it is time to relook the provision with a view of tweaking it to serve Kenyans better without occasioning hardship and injustice in certain situations. This does not mean that the law need not be adhered to, but the principles of equity must also be applied where applicable and just to do so.

I have considered the pleadings, the evidence, submissions by Counsel and judicial authorities cited and come to the conclusion that the plaintiff has failed to prove his case on a balance of probabilities against the defendant and the same is dismissed. I find that the defendant has proved the counter claim against the defendant and find that she is entitled to be registered as owner of one acre of the demarcated parcel of land known as Plot No. 21 Sigowet/ Chemalal Two Farm in Uasin Gishu. The plaintiff to take necessary steps to ensure that the order is implemented.

I also order that each party to bear their own costs of the suit.

DATED and DELIVERED at ELDORET this 13TH DAY OF DECEMBER, 2018

M.A ODENY

JUDGE

Judgment read in open court in the presence of Mr. Mogambi for the Plaintiff and Mr. Kisenbe holding brief for Mr. Omusundi for the defendant.

Mr. Koech: Court Assistant.