



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L NO. 361 OF 2014

KIBUSIA ARAP KONGA.....PLAINTIFF

VERSUS

EVANS OBONYO OBIERO & ANOTHER.....DEFENDANTS

JUDGMENT

Kibusia Arap Kong'a (*herein after referred to as the defendant*) has come to court against Evans Obonyo Obiero (*herein after referred to as the Defendant*) claiming that he is the bonafide registered owner of all that parcel of land Known *as TURBO EAST/LESERU BLOCK 2 (AINAPNGETIK) 44 measuring 3.85 Ha*. The plaintiff further avers that he legally obtained the title thereof on 9th December, 1992 and that he has been in peaceful occupation of the same until March, 2014. It is the Plaintiff's case that sometimes in March, 2014 or thereabouts, to his utter shock and consternation the Defendant herein sent people to a portion of the suit property to fence off the same. The Plaintiff further avers that being apprehensive of the above happenings; he rushed to the relevant Lands Registry and lodged a restriction on the 29th day of April, 2014 to prevent any adverse dealings with his property without his knowledge and/or consent.

The Plaintiff avers further that despite having lodged the aforesaid restriction, the Defendant herein brought building materials onto the disputed portion sometimes in August, 2014 or thereabouts and actually began putting up an illegal temporary structure albeit illegally. It is the Plaintiff's case that on or about the 30th day of October, 2014, he sent one of his sons one FREDRICK CHIRCHIR to inquire as to why the defendant herein continued with his illegal actions and that was when the defendant herein wanted to attack him with a panga, an offence he reported at Soy Police Station on the same date vide OB No. 18/30/10/2014 and is still pending investigation.

The Plaintiff avers that the actions of the defendant are not only unlawful but illegal. It is the Plaintiff's contention that the Defendant has started interfering with his interest of ownership and without any colour of right and claims an interest over his said parcel of land and has even put up illegal structures thereon which act is inconsistent to his proprietary rights as the legally registered owner.

The Plaintiff emphasizes the fact that he obtained the legal title to the suit property legally after following the due process of the law. It is the Plaintiff's further contention that the Defendant has persisted with his illegal actions hence rendering the filing of this suit necessary. It is the Plaintiff's case that the Defendant does not have any legal right and/or justification to occupy his property or at all hence he should be ordered to vacate and allow him to enjoy peaceful possession and use as per the law provided.

The Plaintiff's claim as against the Defendant is for vacant possession and/or peaceful use of the suit property as the bonafide purchaser for valued and/or legal registered owner of the same. The plaintiff

prays for a declaration that land parcel known as TURBO EAST/LESERU BLOCK 2 (AINAPNGETIK) 44 measuring 3.85 Ha. Belongs to the plaintiff and that the defendant should be ordered to give him vacant possession and a permanent injunction restraining the defendant, his servants, agents and/or assigns from in any way dealing and/or interfering with the Plaintiff's quiet possession, use and/or enjoyment and to stop unlawfully threatening to alienate, constructing, dealing, selling and/or illegally transferring TURBO EAST/LESERU BLOCK 2 (AINAPNGETIK) 44 measuring 3.85 Ha. Costs of this suit and interest thereof at court rates. Despite Demand and Notice of Intention to sue having been issued to the defendants, the defendants have with impunity continued with their illegal actions to the detriment of the plaintiff thus necessitating the filing of this suit. The plaintiff avers that there is no other suit pending and there have been no previous proceedings in any court between the parties herein over the same cause of action.

The defendant filed statement of defence and counter claim averring that on or about 29.12.2007 the Plaintiff sold a portion of the suit land measuring one acre to one Susan Cheptum Saina who has been in occupation ever since and has been cultivating on the same. The Defendant avers that he purchased the one acre portion of the suit parcel on the 30th October, 2013 from the above-mentioned Susan Cheptum Saina for a consideration of Kshs. 600,000/= and took possession of the same. The Defendant reiterates that he purchased the one acre portion of the suit land for a considerable amount and that he was in the process of settling on the same when the Plaintiff started complaining that the same should not have been sold to the Defendant. Further, the Defendant avers that it is the area chief that attempted to resolve the dispute and that following the adamancy of the Plaintiff, the chief put a restriction on the suit parcel.

The Defendant avers that he has not trespassed on the Plaintiff's Land as alleged since his occupation of the suit parcel is out of sale which makes the Defendant a bonafide purchaser and the Plaintiff cannot therefore claim a prima facie case against the Defendant the Defendant avers that the Plaintiff is not at all entitled to any of the prayers sought as against the Defendant.

In the counter claim the Defendant reiterates all and singular the contents of paragraphs 1 to 13 of the Defence that the Plaintiff sold a portion of the suit parcel measuring one acre on or about 29th December, 2007 to one Susan Cheptum Saina who has all along been cultivating and exclusively occupying the portion before she sold the same to the Defendant on the 30th October, 2013 for a consideration of Kshs. 600,000/= The defendant avers that it was when he was in the process of settling thereon that the Plaintiff started complaining about the land having been sold to the Defendant.

The Defendant avers that he has not trespassed on the parcel of land as alleged by the Plaintiff as the Defendant is a bonafide purchaser for value and the actions of the Plaintiff are only intended to prevent the Defendant from enjoying his proprietary rights hence making this claim necessary. The Defendant claims that he is the legal owner of the once acre portion of the suit land having lawfully purchased the same thus becoming a bonafide purchaser for value. The defendant further avers that he is the legal owner of the suit parcel and his proprietary rights are landed as he is the bonafide purchaser for value.

The Defendant prays in his counter claim that the Plaintiff's suit be dismissed with costs and that judgment be entered for the Defendant as against the Plaintiff for a declaration that the Defendant is the legal owner of the one acre portion of the suit land and that the Plaintiff should allow the Defendant peaceful use of the parcel as the bonafide purchaser for value and a permanent injunction restraining the Plaintiff, his servants, agents and/or assigns from in any way dealing and/or interfering with the Defendant's quiet and peaceful possession, use and/or enjoyment of the suit land. An order directing the Plaintiff to transfer the suit land to the Defendant being a bonafide purchaser and that in the alternative and without prejudice to the forgoing an order that the Plaintiff do refund the Defendant the equivalent of the value of the land purchased by the Defendant. Costs of the suit and counter claim. The Plaintiff filed a reply to the defence and defence to Counter Claim denying having sold any part of the suit property and particularly one acre thereof as alleged and prays that the suit be allowed and the counter claim be dismissed with costs.

When the matter came for hearing, **the Plaintiff** testified that he is the legal registered owner of all parcel of land known as Turbo East/Leseru Block 2(AINAPNGETICH)/44 having purchased the same from a

white settler in the year 1965. he moved into the said parcel of land the same year, 1965 and has resided thereon to date. That he has been in peaceful occupation, use and possession of the aforementioned parcel of land from the year 1965 and was later issued with title deed thereto in 1992. That in 2007, two ladies by the names SUSANA CHEPTUM SAINA and ROSA CHEPBOR CHUMO went to his home one afternoon and found him asleep having just arrived from hospital and told him that there was a form which was being signed by all the residents of Kamagut, especially land owners and that he too was required to sign. They went ahead to tell him that everybody else in the area had signed and that he was the only one remaining. Being illiterate, he signed the said document on the strength of what the said ladies had explained to him.

That he was shocked in 2009 when the said Susan Cheptum Saina told him that they had entered into an agreement for sale of land in 2007 and that she wanted to take possession of her portion. It is then that he remembered about the alleged "form being signed by the Kamagut residents He went to the firm of Tom Mutei and Co. Advocates who wrote her a demand letter to desist from any further illegal interference. After the letter was served upon her, she stopped her illegal interference hence giving him back peaceful possession and use. However, in early 2014, he was at home when some strangers came to his suit parcel of land with building material and started constructing a semi- permanent structure thereon. That on inquiry from the fundis, led by one JOHN CHAKAYA who is a neighbor and personally known to him, they informed him that the portion on which they were constructing belonged to EVANS OBONYO OBIERO, who had had purchased the same from one SUSANA CHEPTUM SAINA also known as SUSAN KAPKILUGU

That when construction proceeded, he then approached the area chief one Mr. D.K CHERUIYOTT who wrote him a letter that facilitated him to lodge a caution on the suit property to prevent any illegal transfers without his knowledge. That when the illegal construction proceeded under the supervision of the said JOHN AMBAZA CHAKAYA, he approached the firm of Mwakio Kirwa & Co. who wrote the said CHAKAYA a demand letter to stop the illegal construction. That it therefore became prudent for him to move this Honourable vide the instant suit to seek legal redress when the illegal construction proceeded. That he has never sold any portion of his said land to anybody; including SUSAN CHEPTUM SAINA. That he can authoritatively confirm that if at all any alleged sale document between SUSANA CHEPTUM SAINA and him has been produced as a proof of a sale agreement, the same is based on misrepresentation of facts and was thus obtained by fraud. He has never received any monies from anybody as purchase price for his land including the alleged SUSANA CHEPTUM SAINA. THAT he prays that this honourable court to order the Defendant to vacate his parcel of land and leave him in peaceful occupation and use as he has always had till 2014 when he illegally trespassed thereto.

The Defendant testified that Kibusia Arap Kong'a, the plaintiff herein is the registered owner of TURBO EAST/LESERU BLOCK 2 (AINAPNGETIK) 44, the suit land herein. On or about 29th December, 2007 the plaintiff sold one acre of the suit land to one, SUSAN CHEPTUM SAINA who has been in occupation and cultivating it since then.

Subsequently, the defendant purchased that same parcel of land from Susan Cheptum Saina on 30th October 2013 for a consideration of Kenya shillings Six Hundred Thousand only (Kshs.600,000). The agreement was entered into and was witnessed by John Ambaza Chakaya, Kennedy Cheruiyot Mutai and Michael Mutai. He then took possession and was in the process of settling when the Plaintiff started complaining that the suit parcel of land should not have been sold to him. The area Chief attempted to resolve the dispute but the Plaintiff was adamant and that is why he placed a restriction on the said parcel of land. He prays that this Honourable court dismiss the Plaintiff's suit as he has not trespassed on the Plaintiff's land since his occupation of the land is out of a sale which made him a bonafide.

Lastly, **Susan Cheptum Saina** testified that **Kibusia Arap Kong'a** the Plaintiff herein is the registered owner of TURBO EAST/LESERU BLOCK 2 (AINAPNGETIK) 44. On 29th day of December, 2007, he sold her one acre of the suit land for a consideration of Kenya Shillings Two Hundred Thousand (Kshs 200,000/=) being payment in full of the purchase price. The agreement to sell and to buy the said parcel of land was entered into and witnessed by Philip Kemboi, Joseph Kipketer Busio, Malakwen Chuma Ruto, Rosa Chebor Chumo, Edward Mengich and Esther Chelagat. Since then she has been in occupation

and cultivating it.

Subsequently, on 30th October 2013, she decided to sell the same parcel of land to one Evans Obonyo Obiero, the Defendant herein for a consideration of Kenya Shillings Six Hundred Thousand (Kshs 600,000/=). The agreement to sell and buy the suit parcel of land was entered into and witnessed by John Ambaza Chakaya, Kennedy Cheruiyot Mutai and Michael Mutai. The Defendant was in the process of settling in that parcel of land when the plaintiff started complaining that it should not have been sold to him. The futile efforts to resolve the dispute by the area chief has led the Plaintiff to file this suit against the Defendant for trespass to his land. She prays that this Honourable court dismiss the Plaintiff's suit and judgment be entered for the Defendant as against the Plaintiff to enable the defendant enjoy his proprietary rights to that parcel of land being a bonafide purchaser for value and in good faith.

The **gravamen** of the plaitiffs submissions is that Fredrick Chirchir did not have the capacity to sell the property to Wilson Chumo and that Wilson Chumo did not have the capacity to sell the property to Susan Cheptum Saina who did not have the capacity to sell the property to the defendant and therefore all the transactions are null and void ab-initio. Moreover, that the Plaintiff did not receive the consideration in the alleged transaction. The Plaintiff argues further that the consent of the land Control Board was not obtained hence the whole transaction was a nullity. On the issue of refund the plaintiff submits that there is no money to be refunded as no consideration was paid. The **gist** of the defendant's submission is that the Plaintiff has not proved his case on a balance of probabilities and that there is no evidence of fraud as he admits having signed the papers placed before him by Susan.

I have considered the pleadings, evidence and the submissions on record and do find that the agreement dated 29.12.2007 between the Plaintiff and Susan Cheptum Saina was duly executed by the plaintiff and witnessed by six independent persons. The allegation that the Plaintiff was forced to sign the agreement are not supported by cogent evidence as the plaintiff has not demonstrated how he was forced to thumb print the agreement. He was not coerced but signed by thumbprinting voluntarily. The fact that he is illiterate does not help as he ought to have known that by signing the agreement he was indeed beginning the process of disposing his parcel of land. The claim by the Plaintiff that he is illiterate does not hold water and that the fact that he signed the agreement is enough to prove that he knew what he was doing. I have considered the evidence on record and find that there is no evidence of fraud. However, I do find that the agreement is signed by the Plaintiff and one Susan Cheptum who is not a party to the suit and therefore the doctrine of privity of contract applies. The doctrine of party of contract provides that that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In **DUNLOP, PNEUMATIC TYRE CO LTD V SELFRIDGE & CO LTD [1915] AC 847, Lord Haldane, LC** rendered the principle thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

In this jurisdiction that proposition has been affirmed in a line of decisions of the court of Appeal in **AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD, KENYA NATIONAL CAPITAL CORPORATION LTD V ALBERT MARIO CORDEIRO & ANOTHER)** and **WILLIAM MUTHEE MUTHAMI V BANK OF BARODA,**).

Thus, in **AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD (supra)**, quoting with approval from ***Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA***, as he then was, reiterated:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

There is no privity of contract between the Plaintiff and the Defendant as the contract was between the Plaintiff and Susan Cheptum whilst the second contract is between Defendant and Susan Cheptum.

In ***DARLINGTON BOUROUGH COUNCIL V WITSHIRE NORTHERN LTD*** [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms:

“The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract.”

On the issue of the consent of the Land Control Board, I do find that there was no consent of the Land Control Board as required by law. Section 6 of the Land Control Act provides that: -

Transactions affecting agricultural land

(1) Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control 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 an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

(c) the issue, sale, transfer, mortgage or any 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.

(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

(3) This section does not apply to—

(a) the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or

(b) a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a part

I do find that failure by the Defendant to acquire consent of the Land Control Board made the whole transaction a nullity in law.

The upshot of the above is that the agreement dated 29.12.2007 has no relevance as the defendant was not privy to the same whilst the Plaintiff was not privy to the agreement dated 30.10.2012.

There being no consent of the Land Control Board the court finds that the plaintiff is entitled to succeed as the suit land is registered in the plaintiff's name and therefore he is entitled to vacant possession, hence

I do make a declaration that land parcel known as TURBO EAST/LESERU BLOCK 2 (AINAPNGETIK) 44 measuring 3.85 Ha. Belongs to the plaintiff and that the defendant is hereby ordered to give him vacant possession and I do grant a permanent injunction restraining the defendant, his servants, agents and/or assigns from in any way dealing and/or interfering with the Plaintiff's quiet possession, use and/or enjoyment and to stop unlawfully threatening to alienate, constructing, dealing, selling and/or illegally transferring TURBO EAST/LESERU BLOCK 2 (AINAPNGETIK) 44 measuring 3.85 Ha. Lastly, I do grant Costs of this suit and interest thereof at court rates to the plaintiff. The consideration claimed by the defendant was not paid to the plaintiff and therefore the court cannot order the refund of the same.

Sections 24, 25 and 26 of the Land Registration Act no 3 of 2012 envisages the vesting of absolute ownership of land to the person in whose name the property is registered together with all rights and privileges appurtenant thereto and that the rights of a proprietor should be protected as evidenced by the certificate of title unless acquired fraudulently or illegally. This sections provide that: -

Subject to this Act—

(a) 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; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Rights of a proprietor

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—

(1) (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by [section 28](#) not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

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25. Rights of a proprietor

(1) 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—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

I have looked at the certified copy of the register in respect of the property in dispute which shows that the register was opened on 5.10.1992 in respect of Turbo East/Lesero Block 2(Inai Kipngetik Parcel No. 44 measuring 3.85 Ha created and registered in the name of Government of Kenya on 8.10.1992 and on 9.12.2992, it was registered in the name of Kibusia Arap Kong'a and title deed issued on the same date. It follows that the defendant has not established any proprietary interest in the property and therefore the counterclaim is dismissed with costs. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY, 2017.

A. OMBWAYO

JUDGE