



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L CASE NO. 186 OF 2014

DANIEL CHEPCHIENG CHELAGAT.....PLAINTIFF

VERSUS

KIPKOSGEI BIRGEN.....DEFENDANT

RULING

Daniel Chepchieng Chelagat (hereinafter referred to as the Plaintiff) has come this this court against ***Kipkosgei Birgen (hereinafter referred to as the defendant)*** claiming that the Plaintiff and the Defendant entered into sale of land Agreement on 6th July 2005 wherein the Plaintiff bought 7 acres of that piece of land known as CHEPTIRE/CHEPLASKEI BLOCK 3 (SERTWET)/19 at the total consideration of Kshs. 1,280,000/= which amount was duly received and acknowledge by the Defendant. The defendant proceeded to excise the 7 acres for conveying the same to the Plaintiff in June 2005 and the Defendant duly executed all consents, mutation and the transfer instrument in favor of the Plaintiff. On 14th May 2013, the Plaintiff was issued with a Title Deed for parcel number CHEPTIRET/CHEPLASKEI BLOCK 3 (SERTWET)/152 MEARUING 2.83 Ha in keeping with the Sale of Land Agreement and Mutation dated 13.6.2005.

The plaintiff on taking possession of the parcel of land discovered that new mutation was fraudulently prepared for purposes of registration of additional parcel form the Plaintiffs parcel number CHEPTIRET/CHEPLASKEI BLOCK 3 (SERTWET)/152 thus reducing the Plaintiffs land by 1 acre. The Plaintiff confirmed that indeed the Defendant had later fraudulently and secretly resurveyed the land number CHEPTIRET/CHEPLASKEI BLOCK 3 (SERTWET)/19 fraudulently and executed a different mutation map wherein the Plaintiff's land was unlawfully diminished by more than 1 acre and new parcels created and sold/transferred by the Defendant to third parties. The particulars of fraud are that the Defendant knowingly and dishonestly resurveyed the land and presented a mutation other than the one presented for the consent of the Land Control Board and that the defendant knowingly executed a mutation authorizing creation of an additional plot. The defendant is accused of knowingly manipulating the land records with intention of depriving the Plaintiff of part of his land and Selling and or transferring 1 acre of Plaintiffs land to third parties and lastly knowingly annexing the plaintiff's land. Though the Plaintiff's title indicates that he has 7 acres (2.83) Ha, the parcel of land is only 5.8 acres on the ground, which fact has been confirmed by Lands Registrar Uasin Gishu and also within the knowledge of the Defendant.

The Defendant has fraudulently and illegally annexed the Plaintiff's one acre of the Plaintiff land and he prays that the Defendant be ordered to restitute the one acre of land to the Plaintiff and the mutation be amended to reflect the correct acreage of 7 acres in the Title Deed. In the alternative, the Plaintiff be ordered to refund the value of the one together with the interest thereon. He also prays for costs of the suit.

DEFENDANT CASE.

The defendant filed a defence admitting having entered into a Sale Agreement dated the 6th July, 2005 with the Plaintiff for the sale of 7 acres of Land Parcel namely CHEPTIRET/CHEPLASKEI/3 (SERTWET) 19 at a consideration of the sum of Kshs 1,280,000/= curved or excised from. The defendant avers that pursuant to the said agreement, the Plaintiff personally engaged his own surveyors demarcated the land and excised the 7 acres and thereafter the Defendant executed all the documents of transfer instruments in favor of the Plaintiff. The defendant contends that on the 11th June, 2005 the Plaintiff together with his surveyor prepared the mutation forms and has now settled on suit land since 2005 till 2014 when the plaintiff has raised the shortage of acreage or loss of one (1) acre.

The defendant avers that on the 14th May, 2013 the Plaintiff was fully issued with a Title Deed for parcel No. CHEPTERIT/CHEPLASKEI/3 (SERTWET)19 measuring 2.83 Ha as per the terms of the agreement and mutation dated 13th June, 2005. The defendant further contends that the instant suit is brought at the instigation of (3rd parties) who purchased the entire parcel of land from the Plaintiff who might have discovered that on the ground the acreage is not in consonance with the acreage indicated on the title document whereas the Plaintiff has been in occupation for over ten (10) acres without any hitch/complaint. The defendant contends that the Plaintiff has no locus standi to institute the suit against the defendant as the complainant or aggrieved party is Mr.Limo who is the bonafide purchase for value and already taken possession.

The defendant totally denies fraudulently preparing new mutation for the purposes of registration thus reducing the Plaintiff's parcel of land by 1 acre and avers that the suit is incompetent abinitio and further to the aforementioned contentions the defendant shall raise a preliminary objection to have the Plaintiff's suit struck out at the earliest time possible.

REPLY TO DEFENCE

The plaintiff filed a reply to defence denying having engaged his own surveyor in the demarcation of the land parcel CHEPTERIT/CHEPLASKEI/3 (SERTWET)19. The plaintiff admits settling on the said piece of land since 2005 till 2013, he further admits the fact that he was issued with a title deed for the said piece of land on the 14th May, 2013. However, the plaintiff reiterates that on taking possession of the parcel of land, he discovered that the defendant had secretly and fraudulently executed a 2nd mutation form wherein his piece of land was unlawfully diminished by more than 1 acre after an official mutation map had issued and new parcels created and sold/transferred by the defendant to 3rd parties.

THE APPLICATION

The Plaintiff has filed an application dated 30.3.2016 requesting that the defence be struck out and that summary judgment be entered for the Plaintiff as against the defendant as prayed for in the plaint. The application is based on grounds that the Plaintiffs claim is for recovery of land whilst the defence is a mere denial and does not raise any triable issues and is an abuse of the process of the court.

The application is supported by the affidavit of David Chepchieng Chelagat who states that he filed a suit against the Defendant on 6.6.2014 claiming restriction of land measuring 1 acre and mutation be amended to reflect the correct acreage. The Plaintiff and the Defendant entered into sale of land agreement on 6th July, 2005 wherein the Plaintiff bought 7 acres of that piece of land known as CHEPTIRET/CHEPLASKEI BLOCK 3 (SERTWET)/19 at the total consideration of Kshs.1,280,000/= which amount was duly received and acknowledged by the Defendant. That the Defendant proceeded to excise the 7 acres for conveying the same to the Plaintiff in June 2005 and the Defendant duly executed all consents, mutation and the transfer instrument in favour of the Plaintiff. That pursuant to the aforementioned, the Plaintiff was issued with a Title deed on 14th May, 2013 for parcel number CHEPTIRET/CHEPLASKEI BLOCK 3 (SERTWET)/ 152 where it is indicated that he conveyed seven (7) acres.

That the Plaintiff on verifying the actual acreage on the ground confirmed that indeed the Defendant had later fraudulently and secretly resurveyed the land number CHEPTIRET/CHEPLASKEI BLOCK 3 (SERTET)/19 and executed a different mutation map wherein the Plaintiff's land was unlawfully diminished by more than 1 acre and new parcels created and sold/transferred by the Defendant to third parties. That the Plaintiff's title, although indicates that he has 7 acres (2.83 Ha) has only 5.8 acres on the ground, which in fact has been confirmed by Lands Registrar Uasin Gishu and also within the knowledge of the Defendant. That the Defendant therefore has no defence herein as the same constitutes mere denials and admissions to the Plaintiff's claim and that he is informed by his advocates which information he verily believes to be true that the defendants have failed to comply hence the suit has failed to take off. His claim is for recovery of the excised one acre of land clearly proved herein and it shall be a waste of this court's time to have the matter proceed to trial.

The Defendant filed a replying affidavit stating that his defence on record raises triable issues such as misrepresentation, limitation and/or breach of contract. That he has legally been advised that the Notice of Motion or the entire suit is incompetent or defective and ought to be dismissed on the following grounds: -

- i) That Notice of Motion has been brought under wrong provisions of the law especially sticking out to pleadings or defence.***
- ii) That there's mis-joinder of the parties as the suit land is owned by Chepchieng, Chelagat and Dinah Jepkemboi Chelagat and to the party as described hereinabove.***
- iii) That the Title Deed issued on the 14th May, 2013 is jointly owned by two parties.***
- iv) That the suit is time barred by limitation as the Sale of Land Agreement was conveyed or excised on the 6th July, 2005.***
- v) That if the allegation constitutes breach of contract then the Plaintiff is guilty of laches (limitation of acts)***
- vi) That since then there is no prove of fraud as there is no criminal case preferred against the defendant since 2005 to date.***
- vii) That the land control Board act does not favour the Plaintiff in getting the alleged one (1) acres of land.***

The Plaintiff/Applicant personally engaged his own surveyors, demarcated the land and excised the 7 acres and he has stayed on the suit land peacefully since 2005 to date and opposes the Notice of Motion before court and prays that the same should proceed to full trial and the entire suit be dismissed with costs to him. The plaintiff filed a further affidavit stating that misjoinder cannot afford the Defendants any Defense at all. The 2nd registered owner is his wife and her joinder would not add value to the Defendants Defense. The issue of limitation is a misconception as the suit was filed in 2014 and the acts complained of were discovered on 14.5.2013 when the Title Deed was issued.

That a report to the police is no proof of fraud. The complaint of fraud has been placed before a competent court tasked to handle all matters touching on land including fraudulent dealings on land. The Defendant does not deny that he signed a second mutation where the layout of the parcels on the ground were materially and substantially altered without knowledge, thus reducing his land by 1/8 acres. The issue for determination is whether or not the Plaintiff has his 7 acres of land on the ground or not. This question has been consistently avoided by the Defendant.

SUBMISSIONS

1. PLAINTIFF'S SUBMISSIONS.

The Plaintiff argues that non-joinder of the other parties does not defeat the suit. Moreover, the Plaintiff argues that he is the registered owner of the parcel of land and that absence of the 2nd owner can't defeat the suit. The plaintiff further argues that the statement does not raise the issue of limitation of time and does not raise the issue of breach of contract. The Plaintiff further contends that absence of a criminal case preferred against the defendant is not basis for the finding that fraud is not proved.

The Defendant argues that the defense raises triable issues as the Plaintiff purchased land way back in 2005, took possession without a complaint complete until 2014. He argues that the orders sought are draconian as there are triable issues. The defendant further argues that the parcel of land is owned by the parties and that the other parcel of land has been transferred to a 3rd party, a MR. Limo, moreover that the sale was done in 2005 and consent to transfer obtained.

DETERMINATION

The application before court is for summary judgment. The law is clearly settled that if the defense raises no triable issue then it should be struck out. However, if it raises a single issue that can go on trial then the defendant must be given leave to defend the suit.

The defendant argues that the defense raises issues that the Plaintiff procured the land in 2008, took possession without complaining till 2014 thus 10 years thereafter and therefore the claim is time barred. On this issue, I do find that this is not a matter that shall go for hearing as the Plaintiff has clearly stated that he discovered the fraudulent activities in respect of his parcel of land in 2013 and therefore his suit was filed within time as time begins running in 2013. The court further finds that the Plaintiff and Dinah Jepkemboi Chelagat are joint owners of the property hence it cannot be said that there is mis-joinder of parties.

However, I do find that though the disputed parcel of land has been allegedly transferred to the 3rd party, there is no evidence that it is necessary to enjoin the said party to the proceedings as the decision of the court will not affect his rights to property if any.

The defendant has not demonstrated that the court through the pleadings or affidavit, that the said Limo a 3rd party or a purchaser is a necessary party in these proceedings. The sale agreement indicates that the plaintiff bought 2.83 Ha (7) acres and that there is no dispute that the consent of the Land Control Board was obtained, there is no issue as appertains to contract, it follows that the defence raises no issue that can go for trial. Thus, it is hereby found that the Defendant knowingly and dishonestly resurveyed the land and presented a mutation other than the one presented for the consent of the Land Control Board. The defendant knowingly executed a mutation authorizing creation of an additional plot. The defendant Knowingly manipulated the land records with intention of depriving the Plaintiff of part of his land. The defense herein is struck out and judgment is entered for the plaintiff in terms that the Defendant is hereby ordered to restitute the one acre of land to the Plaintiff and the mutation be amended to reflect the correct acreage of 7 acres in the Title Deed. In the alternative, the Plaintiff be ordered to refund the value of the one acre of the disputed land together with the interest thereon. Costs of the suit are awarded to the plaintiff.

DATED AND DELIVERED AT ELDORET THIS 28TH FEBRUARY DAY OF 2017.

A.OMBWAYO

JUDGE