



**REPUBLIC OF KENYA**

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

**E&L 298 OF 2014**

**MACHUNCHIRO WISITSA.....PLAINTIFF**

**VERSUS**

**LABAN MMBONO MBINWA.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

By a plaint dated 1<sup>st</sup> October 2014 the plaintiff sued the defendant for:

- a) Eviction of the said Defendant whether by Himself, his agents, servants, nominees or whomsoever acting or claiming through them from the Plaintiff's suit property.
- b) Injunction restraining the defendants whether by himself, his/her agents, servants, nominees or whomsoever acting or claiming through them from moving back to the suit property on granting the prayer of eviction above.
- c) Costs of the suit.
- d) Any other or further orders that the honourable court may deem fit and just to make.

The defendant was served with the summons to enter appearance but neither filed a memorandum of appearance nor a defence in this case. The matter was therefore fixed for hearing with an order that the defendant be served with a hearing Notice. The defendant was further served with a hearing notice but did not attend court therefore the matter proceeded ex parte.

**The Plaintiff's case**

It was the plaintiff's case that he stays in Molo but has two parcels of land in Nandi County known as Nandi/ Kapkangani 437 and 1295 which are registered in his name. He stated that he bought parcel No. Nandi/Kapkangani 1295 in 2006 which is approximately one acre and sold part of it to the defendant herein.

The plaintiff testified that he has sued the defendant because he occupied his parcel of land known as Nandi/Kapkangani/437 which had not been sold to the defendant. The plaintiff adopted his witness statement filed in court on 2/10/14 as evidence before the court. The plaintiff produced copies of titles of the above-mentioned plots, sale agreement and official searches for both plots as exhibits before the court. He stated that from the search there were no restrictions or cautions lodged on the titles. He therefore urged the court to grant an order for eviction and an injunction against the defendant plus the costs of the

suit. The plaintiff then closed his case.

### **Plaintiff's Counsel's Submission**

Counsel for the plaintiff filed submissions in support of the plaintiff's case and reiterated his evidence. He further submitted that a contract entered into and required to be performed within a specific period is discharged when time lapses. He stated that the obligation of parties to perform a contract is extinguished after 6 months under the land Control Act in respect of Agricultural land. It was submitted that the land in question was Agricultural land which falls under a controlled transaction thereby requiring the consent of the Land Control Board as stipulated under the law. Counsel submitted that the current transaction falls in this category and therefore its performance would be null and void. He cited the case of KARIUKI VS KARIUKI civil appeal no 26 of 1979 where it was held that

*'When a transaction is clearly stated by the express terms of an Act of Parliament to be void for all purposes for want of the necessary consent, a party to the transaction which has become void cannot be guilty of fraud if he relies on the Act and contends that the transaction is void. That is what the Act provides, and the statute must be enforced if its terms are invoked.'*

Counsel submitted that the transaction is therefore a nullity due to the operation of the law. He therefore urged the court to find that the plaintiff had proved his case on a balance of probabilities

### **Analysis and Determination**

It is not in dispute that the plaintiff and the defendant entered into a sale agreement for sale of land. This was manifested by the sale agreement dated 6<sup>th</sup> February 2006 and produced in court as exhibit 3. It is also not in dispute that the plaintiff is the registered owner of the two parcels of land mentioned in the suit.

This suit was not defended and had it been so, then the issues would have been whether the transaction herein is null and void due to the operation of the law as stipulated by the Land Control Act which states that transactions involving agricultural land require the consent of the Land Control Board. The failure of such renders the transaction a nullity and unenforceable. This transaction falls under this category as no such consent was sought to subdivide the parcel of land or transfer to the defendant. The only remedy would be for a refund of the purchase price. The defendant would have to recover the amount paid as a debt keeping in mind that the limitation period for recovery of debts is 6 years as stipulated under the law.

I am also alive to the varied Court of Appeal decisions that have held that lack of Land Control Board consent does not invalidate an agreement. In the case of **Wamukota vs. Donati 1998, eKLR** the court considered the question whether equity could allow a statute to be used as an engine of fraud. The Court of Appeal in **Macharia & 87 others vs. Davidson Mwangi Kagiri 2014 e KLR** while quoting **Steadman vs. Steadman [1976] AC 536, 540** stated as follows;

*"If one party to an agreement stands by and let the other incur expenses or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable."*

Secondly, the other issue is whether the plaintiff is entitled to the orders sought for, being eviction and an injunction against the defendant. The plaintiff has clearly stated that he is the registered owner of the two parcels of land and that he sold part of the land in Nandi/Kap Kangani/1295. The defendant decided to move and occupy the parcel No. 437 which was not sold to him.

I have considered the evidence, the pleadings, counsel's submissions and the relevant authorities cited. I find that the plaintiff has proved his case on a balance of convenience and therefore entitled to the orders sought.

I accordingly make the following orders:

1) That the defendant do vacate the suit land within 30 days upon service of this judgment or decree. In default of so vacating, an eviction order be issued permitting the plaintiff to evict the defendant from the suit land.

2) That a permanent injunction is hereby issued restraining the defendant whether by himself, his/her agents, servants, nominees or whomsoever acting or claiming through them from moving back to the plaintiff's parcel of land known as NANDI/KAPKANGANI No 437

3) Costs of the suit to the plaintiff.

Dated and delivered at Eldoret on this 20<sup>th</sup> day of June, 2017.

**M.A ODENY**

**JUDGE**