



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MILIMANI

ELC CASE NO. 996 OF 2014

JOSEPH KAHURA KANIARU

KMR BALLAST LIMITED.....PLAINTIFFS

=VERSUS=

SAMUEL KIMONDO THEURI.....DEFENDANT

JUDGEMENT

INTRODUCTION

1. The first Plaintiff is a director of the second Plaintiff Company. The defendant was owner of a 50 acre land comprised in title No.8914/12 belonging to Ngelani Ranching Unity. The defendant had entered into a sale agreement with the second plaintiff for the sale of 50 acres but the parties later agreed to reduce the acreage to 25 acres for which the second defendant fully paid the purchase price which was agreed at Kshs.23,750,000/=.
2. The defendant asked the surveyor of Ngelana Ranching Unity to sub-divide the 50 acre land into two portions of 25 acres each. One portion was for the second plaintiff and the other was for the defendant. The surveyor sent a proposed subdivision sketch to both the first plaintiff and the defendant. The second plaintiff took possession of its portion as titles for the sub division were being processed.
3. In 2004, the first plaintiff learnt that the defendant had processed a certificate of title both in his name and that of the defendant for the entire parcel of 50 acres. The first Plaintiff further learnt that the defendant had sold his portion to a third party who attempted to fence off part of the portion which had been shown to the first plaintiff as the second plaintiff's portion as per the sub-division proposal. This is what prompted the plaintiffs to file this suit against the defendant in which they seek a permanent injunction against the defendant or his agents or servants from interfering with original sub-division plan to LR No. 8914/2A now currently registered as LR No. 8914/6. The Plaintiffs also seek an order for specific performance directing the defendant to transfer 25 acres out of LR No. 8914/6 to the Plaintiffs based on the earlier proposed subdivision plan.
4. The defendant filed a defence and counter claim in which he sought an order directing the first plaintiff to join him in complying with section 94 of the Land Registration Act 2012 so as to affect partition of the suitland in accordance with the law. The defendant also seeks an order of injunction restraining both Plaintiffs from interfering in any manner with his peaceful occupation and use of his share of the suitland.

PLAINTIFF'S CASE

5. The Plaintiff case is that after the initial intention of the second plaintiff's to purchase the entire 50 acres from the defendant did not go through, a deed of variation was signed in which it was agreed that the second plaintiff was to be given 25 acres. The defendant commissioned a surveyor who went to the ground and subdivided the land into two portions of 25 acres each. The surveyor prepared a sketch showing the portion of each party. The Plaintiff then took possession of the portion earmarked for the second plaintiff.

6. The second plaintiff was in the business of mining stones for extraction of ballast. The second plaintiff was therefore allocated a portion which was rocky. Unknown to the plaintiffs, the defendant went and processed title for the 50 acres in the name of the first plaintiff and his name instead of the name of the second plaintiff which had purchased the 25 acres. The defendant has since reneged on the proposed subdivision and wants the plaintiffs to take the portion which has no stones and dispose of the portion with stones to a third party.

DEFENDANTS'S CASE

7. The defendant's case is that it is the second plaintiff which breached the initial agreement prompting a deed of variation to be registered reducing the acreage to 25 acres. That it was not defined in the agreement as to which portion was to be taken up by either the Plaintiffs and the defendant and that since the suitland is now registered in the name of the first plaintiff and that of the defendant as tenants in common, the suitland can only be partitioned in accordance with section 94 of the Land Registration Act of 2012.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

8. There is no contention that there was a sale agreement between the defendant and the second plaintiff made on 21st September 2011. The agreement was for sale of 50 acres. There is also no contention that there was a deed of variation made on 27th February 2012 reducing the acreage to 25. The second plaintiff had paid the full purchase price and it was agreed that the defendant was to transfer the 25 acres to the second plaintiff.

9. It is not clear how the defendant went ahead to have the 50 acres registered in both his name and that of the first Plaintiff yet the agreement was clear that the purchaser was the second Plaintiff. The first plaintiff's evidence is that the second Plaintiff was purchasing the land for purposes of making ballast. The first Plaintiff was shown the portion he was to take. This is after the defendant asked a surveyor to carry out sub-division plans. The first issue which emerges for determination is whether the first plaintiff was shown the portion which the second plaintiff was to take. The second issue is whether in the circumstances of this case, the provisions of section 94 of the land Registration Act of 2012 can be invoked.

10. In order to answer the above issues, the intention of the parties has to be ascertained from the agreement and the conduct of the parties. The sale agreement was made between the defendant and the second plaintiff on 21st September 2011. A deed of variation to the agreement was made on 27th February 2012. According to clause 4 of the deed of variation, the defendant was to transfer the 25 acres to the second Plaintiff. There is evidence that the defendant commissioned a surveyor to sub divide the land. The surveyor went to the land and made a proposed sub-division plan where he indicated the portion where the Plaintiff were to take and the portion for the defendant. The defendant did not dispute the proposed sub-division plan.

11. There is evidence which is not denied that one portion of the 50 acre plot had stones and this is the portion earmarked for the second plaintiff. The intention of the second plaintiff was to mine stones for making ballast. Even the name of the second plaintiff attests to this. Instead of the defendant carrying through the process of subdivision and transfer of the 25 acres as per the agreement, he went ahead to have the 50 acres registered in his name and that of the first plaintiff as tenants in common. This was a clear breach of the agreement. The defendant cannot be heard to claim that it was the plaintiffs who breached the agreement of 21st September 2011.

12. The registration of the 50 acres in the name of the defendant and first plaintiff was effected on 27th march 2014. There was no agreement that this was to be the case. The defendant cannot therefore seek to have the land partitioned in accordance with the provisions of section 94 of the Land Registration Act. It is trite law that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party as that would be inequitable. See **Ripples Limited Vs Kamau Mucuha Nrb HCCC No. 4522 of 1992.**

13. The defendant is seeking to restrain the Plaintiffs from interfering with his peaceful possession of the land. It is the defendant who is in breach of the agreement. He has not transferred the land as per the agreement. There is evidence that he is attempting to sell the portion already shown to the plaintiffs to a third party. This cannot be allowed. The defendant acknowledges that he commissioned a surveyor to subdivide the land and that the surveyor made proposals on where each party was to take. The Defendant is now arguing that he did not approve that subdivision plan and that it is therefore not binding on him. The intention of the parties is clear from the agreement and their conduct. The purpose for which the land was being purchased was to extract ballast and one could not have bought a portion with no stones for that would not have achieved the intended purpose.

14. The defendant conceded in cross-examination that the portion with stones is more valuable. This is perhaps the reason why he wants to take that portion and sell it at a higher price. He cannot do this on the ground that the plaintiffs allegedly breached the agreement of 21st September 2011. There was no evidence adduced to show that the deed of variation was signed because of the second plaintiff's inability to purchase the 50 acres.

15. I agree with justice Mabeya's reasoning in the case of **Eldo City Limited Vs Corn Products Kenya Ltd & another(2013) eKLR** where the judge stated that it is trite law that in deciding disputes, it is the court's duty to give effect to the intention of the parties. The parties' intention is discernible from the documents and conduct of the parties. However, onerous a document or contract may be the court's duty is to give effect to it. In the case of **Storer Vs Manchester City Council (1974) 1 W.L.R 1403, Lord Denning M.R** stated as follows:-

16. ***“ In contracts you do not look into the actual intent in a man's mind, you look at what he said and did. A contract is found when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying “ I had no intend to contract” if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough”.***

17. The intention of the parties to the contract in this matter was not to own the 50 acres jointly as tenants in common. The clear intention of the contract was to transfer 25 acres to the second plaintiff. The defendant cannot therefore seek to invoke the provisions of section 94 of the Land Registration Act of 2012, to take the Plaintiffs back to square one. The surveyor had shown the portion for each party to the contract. The intention for the purchase is clear. It was for extraction of ballast.

CONCLUSION

From the above analysis, it is clear that the plaintiffs have proved their case on a balance of probabilities. The same is allowed in terms of prayers (b) and (c). The defendant on the other hand has failed to prove his counter claim which is hereby dismissed with costs to the plaintiffs.

Dated, Signed and delivered at **Nairobi** on this 27th day of **September, 2017.**

E.O.OBAGA

JUDGE

In the presence of;-

Mr F.M. Mulwa for the defendant

Mr Wabuge for Mr Nduati for Plaintiffs

Court Assistant: Hilda

E.O.OBAGA

JUDGE