



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 205 OF 2016

ANN JEBICHII CHIRCHIR:.....:PLAINTIFF

VERSUS

KENNEDY KIPTOO SAMOEI:.....:DEFENDANT

JUDGMENT

By a plaint dated 15th July 2016 the plaintiff herein sued the defendant for orders that:

1. The plaintiff is an absolute proprietor of the entire Parcel of land known as MOI'S BRIDGE/MOI'S BRIDGE BLOCK 3(MOGOON)/165.
2. A permanent injunction do issue against the defendant restraining him from trespassing and ploughing on the suit property and eviction orders.
3. Costs of the suit plus interest.

This matter came up for hearing on 27/9/17 when the plaintiff and the defendant testified and closed their cases.

Plaintiff's Case

It was the plaintiff's case that she is the registered owner of all that parcel of land known as MOI'S BRIDGE/MOI'S BRIDGE BLOCK 3(MOGOON)/165. She stated that they were working together with the defendant in a company known as Maji Mazuri Flowers in Moi's Bridge Uasin Gishu County. She testified that when she left the company in 2011 the defendant asked her if he could take care of her suit plot of which she agreed.

The plaintiff further stated that she had fenced her said plot and the defendant told her that he wanted to graze his animals on her plot. The defendant later asked her if he could buy the plot and they agreed verbally at a consideration of Kshs. 280,000/ of which the defendant paid kshs. 100,000/ by instalment leaving a balance of Kshs. 180,000/. She stated that she told the defendant that since he had taken a long time without clearing the balance she would refund the money to the defendant to enable her sell to someone else of which suggestion the defendant refused to accept. She further testified that when she visited her plot, she found when the defendant had constructed a house on it and refused to move out prompting the current suit. She instructed her lawyers who wrote a demand letter to the defendant dated 23/6/16 which she produced as exhibit No.1

The plaintiff also testified that she had bought this land from one Kirwa Tot Tireito of which she produced the agreement which was marked as exhibit No.2 She further produced a copy of the title to the

suit land which is registered in her name and a copy of official search. She therefore urged the court to grant her the orders as prayed for in the plaint.

On cross examination by the defendant she stated that she did not owe the defendant any money and that they were just working together in the company.

On re-examination the plaintiff stated that the amount that the defendant had paid would be treated as a lease payment as he had stayed on her plot for over 5 years. The plaintiff therefore closed her case.

Defendant's Case

It was the defendant's case that the plaintiff agreed to sell to him the suit land for Kshs. 180,000/ but if she was selling to another person it would be at Kshs. 200,000/. He stated that he told the plaintiff that he did not have the full amount but would pay by instalments of which he paid two instalments of Kshs. 70,000/ and 30,000/ respectively. He further stated that the plaintiff told him that he could pay the balance within a period of 5 years and if he delayed she would charge him Kshs. 20,000/

It was the defendant's evidence that in March 2015 the plaintiff came with village elders and told him that she had processed her title and was no longer selling the land. He stated that he asked her to refund him the money and the cost of development but she never came back to him. He urged the court to order that the plaintiff refunds his money.

On cross examination by counsel for the plaintiff he admitted that they never wrote a sale agreement and that they never went to the land Control Board to obtain a consent as required by law.

Analysis and Determination

The court directed that the plaintiff's counsel do file submissions within 14 days but the same were not filed. The court therefore proceeded to write the judgement from the evidence on record and relied on the law and authorities that were relevant to the case. The issues for determination in this case are very clear. The first one is as to whether the plaintiff is the registered owner of the suit parcel of land, whether there was valid agreement for sale between the defendant and the plaintiff and whether the plaintiff has met the threshold for grant of an injunction.

It is not in dispute that the plaintiff is the registered owner of the suit land having produced a copy of the title registered in her name. The defendant did not dispute her ownership. The issue as to whether the plaintiff has met the threshold for grant of an injunction, the principles as laid down in the Giella Cassman Brown case are very clear. The plaintiff having established that she is the registered owner of the suit land is prima facie evidence that she has a case with a probability of success against the defendant. It was the plaintiff's evidence that the defendant has been grazing his animals on the suit land and built illegal structures on the suit land without her consent thereby denying her an opportunity to utilize her land. The refusal of the defendant to surrender and vacate the land has caused the plaintiff substantial loss. I find that she has met the threshold for grant of injunction.

On the issue whether there was a valid sale agreement between the plaintiff and the defendant, it is admitted by both the plaintiff and the defendant that they did not have a written agreement in respect of the sale of the suit land.

Section 3(3) of the Law of Contract Act, as amended vide Act No. 2 of 2002 which came into effect in June, 2003 provides as follows:

“No suit brought for the disposition of an interest in land unless:

(a) *The contract upon the suit is founded:*

(i) *is in writing;*

(ii) is signed by all parties thereto and

(b) The signatures of each party signing has been attested by a witness who is present when the contract was signed by such party.

The requirement of signing an agreement for sale of land by all parties is absolute. There is no room for courts to consider either unwritten agreements or agreements which are not duly signed and witnessed. The parties never entered into a written agreement therefore their fate is sealed by operation of the law.

The defendant would have benefited had this transaction been carried out before the amendment of the Law of Contract Act in 2003. The provision that could have applied would have been as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon the suit is founded, or some memorandum or note thereof, is in writing and signed by the party to be charged or some person authorized by him to sign it.

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of contract.

i. has in part performance of the contract taken possession of the property or any part thereof.”

The above provision recognized the equitable doctrine of part performance which permitted the party who had performed the act of part performance, to bring an action under an unwritten agreement. This is now water under the bridge for the defendant. He also did not file a counterclaim for the refund of the amount that he had paid as part performance of the unwritten sale agreement. The plaintiff stated that the amount that the defendant paid should be treated as lease of her suit land as he had utilized it for a period of more than 5 years. As much as the court would sympathize with the defendant’s predicament there is nothing that the court can do to remedy his plight.

Having considered the pleadings, the evidence and the relevant applicable law I find that the plaintiff has established a case against the defendant on a balance of convenience and accordingly enter judgement for the plaintiff on the following terms:

1. That the plaintiff is an absolute proprietor of the entire Parcel of land known as MOI’S BRIDGE/MOI’S BRIDGE BLOCK 3(MOGOON)/165.
2. A permanent injunction do issue against the defendant restraining him from trespassing and ploughing on the suit property.
3. That the defendant do give the plaintiff vacate possession of the suit land within 45 days upon service of this judgment or decree, in default of so vacating, an order of eviction be issued against the defendant from parcel of land No. MOI’S BRIDGE/MOI’S BRIDGE BLOCK 3(MOGOON)/165.
4. The defendant to pay costs of this suit.

Dated and delivered at Eldoret on this 19th day of October, 2017.

M.A ODENY

JUDGE

Read in open court in the presence of:

Mr. Mutei for the Plaintiff.

Mr. Koech: Court Assistant