



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 100 OF 2013

HUDSON MAJANJA LUGANO.....PLAINTIFF

VERSUS

ALBERT ASWANI MUGONDI.....DEFENDANT

JUDGMENT

Hudson Majanja Lugano (*hereinafter referred to as plaintiff*) filed the suit herein claiming that the plaintiff is the sole registered proprietor of all that parcel of land No. **ELDORET/MUNICIPALITY BLOCK 21(KING'ONG'O/2040** measuring approximately 0.101 Ha having acquired same by way of transfer by transmission. The plaintiff states that on or about the 6th January, 2001, the defendant attempted to purchase part of that land comprised in Title No. Eldoret/Municipality Block 21 (King'ong'o)/2040 at agreed purchase price of Kshs.215,000 from the plaintiff late mother Resipa Ikhuva Lukano and paid a total of Kshs.110,000 leaving balance of Kshs.105,000 outstanding to date. The plaintiff states further that on or about the 6th March, 2001, the defendant again leased a residential premise on the above land at monthly rent of Kshs.400 which sum the defendant has refused, neglected and/or ignored to pay since then upto date. The plaintiff avers that the defendant therefore failed to honour his part of the contract and he has continued to stay on the plaintiff's land illegally.

The plaintiff prays for judgment for a declaration that he is the lawful and legal owner of land comprised in title No. Eldoret/Municipality Block 21(King'ong'o)/2040 and eviction order be issued against the defendant and a Permanent injunction restraining the defendant, his servants and agents from entering, stating and/or in any other manner dealings over the said land No. Eldoret/Municipality Block 21 (King'ong'o)/2040. Lastly, a declaration that the defendant is not entitled to any refund as he is in breach of contracts and costs of this suit.

The defendant filed defence and later an amended defence stating the Plaintiff conspired and fraudulently transferred by way of transmission to himself the whole of land parcel number ELDORET MUNICIPALITY/BLOCK 21 (KING'ONG'O)/2040 notwithstanding the fact that the Defendant, ALBERT ASWANI MUGONDI was a beneficiary of the aforementioned piece of land by way of Purchase and that he has been in occupation of land parcel number ELDORET MUNICIPALITY/BLOCK 21 (KING'ONG'O)/2040 for the last ten (10) years as a purchaser and not as a Lessee and puts the Plaintiff to strict proof thereof.

The Defendant states that at no time did he refuse and/or ignored to pay the balance of the Purchase price. However, the Defendant contends that payment of the full purchase price and/or consideration was subject to the issuance of grant of letters of the administration to the estate of the late RESPA IKHUVA LUKANO. Although, the Plaintiff, HUDSON MAJANJA LUGANO, the appointed administrator of the estate of RESPA IKHUVA LUKANO failed to honor part of his obligation which requires him to register land parcel number ELDORET MUNICIPALITY/BLOCK 21 (KING'ONG'O)/2040 to himself and

thereafter transferred the same to the Purchaser, ALBERT ASWANI MUGONDI.

The Defendant avers that the residential premise on land parcel number ELDORET MUNICIPALITY/BLOCK 21 (KING'ONG'O)/2040 was only leased for eight months which sum was duly paid. The defendant avers further that the Plaintiff is not entitled any of the relief sought as he is already in occupation of land parcel number ELDORET MUNICIPALITY/BLOCK 21 (KING 'ONG'O)/2040. The jurisdiction of this Honourable court is admitted except that the defendant shall at the earliest opportunity raise a preliminary objection to this effect seeking that the plaintiff's suit be struck out with costs for being bad in law, a non-starter and devoid of any cause of action.

The plaintiff, **Hudson Majanja Lugano**, gave evidence stating that he resides in Likuyani Scheme in Soi and works for International Rescue Committee in South Sudan. He knows the defendant who is related to his mother the late Risper Ikhuba Lugano. His mother intended to sell ½ of 0.101 Hectares of land to the defendant thus King'ong'o/Block 21/2040. There was an undertaking on 6.1.2001 that the defendant was to pay Kshs.215,000. His mother wanted all the money. He paid an amount of Kshs.110,000 only and the balance of Kshs.110,000. was to be paid by August 2001. The agreement was signed and he was witness. He produced the agreement dated 6.1.2001 as P.Ex1. The defendant did not pay the balance but entered the land in good faith promising to pay the same. His mother who died on 20.6.2002 had built a toilet, a house (semi-permanent). The defendant stayed in the house for Kshs.400 per month. He signed the agreement and paid nothing and also did not paid rent. He produced the agreement of payment of rent dated 6.3.2001 as P.Ex2. No payment was made for rent on 30.9.2003. He promised to pay the balance of the rent and the land but did not.

After the death of his mother, he did succession and agreed that he would involve the court. He filed Succession Cause No. 364 of 2004 before the High Court of Kenya at Eldoret and was appointed administrator. Confirmation was done and he produced the Certificate of Confirmation. The suit property was distributed to the plaintiff by the High Court Judge as per the confirmation dated 5.6.2007. After confirmation, they discussed as family and processed title in his name. He produced the title as P.Ex.5. He conducted a search on 7.6.2011. He produced as copy as P.Ex.6. According to the plaintiff, the defendant is not the owner of the property. He took possession in March, 2001. He prays for judgment of the court thus the defendant should be evicted from the parcel of land. He has been paying the rates, rent, water bill. The land is comprised of a semi-permanent house, a toilet and a shallow well built by his mother. The defendant has not developed the land. They have not tried to settle the matter out of court. He cannot remember him. When his mother died, he did not see him.

Peter Obote Lugano PW2, states that the plaintiff herein is his elder brother whereas the late Resipa Ikhuva Lukano – deceased was their biological mother. That their family agreed and chose the plaintiff herein to be the administrator of the deceased's estate and same was sanctioned in the High court of Kenya at Eldoret vide Eldoret Hccc P & A No. 364 of 2004. That upon confirmation of grant and distribution of deceased's estate, land comprised in Title No. Eldoret/Municipality Block 21 (King'ong'o)/2040 was assigned to the plaintiff upon all dependants giving consent. That he knows their late mother had agreed to sell part of land No. Eldoret/Municipality Block 21 (King'ong'o)/2040 and had also rented the house thereon to the defendant but he failed to honour his part of the agreement. That the defendant has been stubborn all along and not willing to honour the contract that existed between him and their late mother even before her passing on. That he prays that the court do consider and grant the orders sought by the plaintiff.

Defendant, **Albert Aswani Mugondi** states that he is the defendant in this matter and that the plaintiff conspired and fraudulently transferred by way of transmission to himself the whole of land parcel number Eldoret Municipality/Block 21 (King'ong'o)/2040 notwithstanding the fact that was a beneficiary of the aforementioned piece of land by way of purchase. That he has been in occupation of land parcel number Eldoret Municipality/Block 21 (King'ong'o)/2040 for the last ten (10) years as a purchaser. That the plaintiff upon the demise of the deceased mother approached him and agreed to do succession upon which the land was to be transferred to him and he pays the balance of the purchase price. That he bought the land and that the plaintiff and the family have always been in the picture and therefore to allege that the plaintiff wants to evict him is wrong as he is not a trespasser.

Defendant called his wife, **Phoebe Mugondi**, as his witness who testified that that the defendant purchased the subject matter land from the plaintiff's deceased mother. The plaintiff conspired and fraudulently transferred by way of transmission to himself the whole of land parcel number Eldoret Municipality/Block 21 (Kong'ong'o)/2040 notwithstanding the fact that the defendant was a beneficiary of the aforementioned piece of land by way of purchase. The plaintiff upon the demise of the deceased mother approached the defendant and himself and agreed to do succession upon which the land was to be transferred to the defendant and they be allowed to pay the balance of the purchase price. The defendant bought the land and the plaintiff and the family have always been in the picture to allege that the plaintiff wants to evict the defendant is wrong, the defendant is not a trespasser.

The gravamen of the plaintiff's submissions is that the defendant has breached the terms of the contract as contained in the sale agreement dated 6.1.2001 without any justifiable ground or reason. The title deed issued to the plaintiff was obtained legally and has not been challenged at all by the defendant or at all in terms of section 24(a) of the Land Registration Act. Section 24 (a) provides that the registration of a person as a proprietor of land shall vest in that person absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 25(i) 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.

The defendant submits that the plaintiff knew of the defendant's interest in the estate of the deceased yet he chose to ignore him completely in his petition for letters of administration intestate through which the plaintiff acquired the land after confirmation of grant and transmission. The plaintiff also ignored the defendant completely when he applied for the confirmation of the grant. In his endeavors, he failed to be candid and completely ignored the part of the estate that was purchased by the defendant yet he was aware of the purchase as he was present when the agreement transaction was being done.

The defendant submits further that the plaintiff action was not proper when he knew very well that the deceased had obtained money in exchange of part portion of the subject land. In any event, the defendant was put in possession of the portion of the suit land by the deceased before she passed on and with the full knowledge of the plaintiff. Since then, the defendant has been in continuous and uninterrupted occupation of the suit portion which he has extensively developed over the years. The plaintiff does not dispute the defendant's occupation of the purchased portion at all.

I have considered the evidence on record and do find that the plaintiff is the registered proprietor of the suit land after transfer by way of transmission to himself the whole parcel of land. However, going back memory lane, on the 6.1.2001 an agreement of sale of the suit property was entered between Resipa Ikhuva Lugano of ID. No. [particulars withheld] and Albert Aswani Mugondi of ID. No. [particulars withheld]. The amount agreed was Kshs.215,000 only. The defendant paid Kshs. 110,000 and the balance was to be paid between January and August, 2001. The balance was not paid as agreed and on 30.9.2003, the parties agreed the remaining balance of Kshs.105,000 was to be cleared by 31.12.2003. The rent payment was to be discussed. It is not clear whether the amount was paid. On the 6.3.2001, there was another agreement whereby the deceased, Resipah Ikhuva Lukano rented the house to the defendant for a period of 8 months for consideration of Kshs.400 per month but there is no evidence that the same was paid.

The first issue the court is to consider is whether the sale agreement is enforceable and whether it was breached.

The Land Control Act was assented to on 11/12/1967 and commenced the following day on 12/12/1967. The **preamble** describes it as an act of parliament to provide for controlling transactions in agricultural land. Under the Act, controlled transaction means one of the transaction specified in **Section 6 (1) of the Act** other than those specified in 6(3). **Section 6 (1) (a) and b** of the Act provides that transactions affecting agricultural land that is to say:- **sale, transfer, lease, mortgage, exchange partition or other disposal of or dealing with any agricultural land** which is situated within a **land control area**, and the subdivision of any such agricultural land into two or more parcels to be held under separate title other

than the division of an area of less than 20 acres into plots in an area to which the development and use of land (planning) Regulation 1961 (LW 516/1961) for the time being apply is void for all purposes unless the land control board for the area or division in which the land is situated has given consent in respect of the transaction in accordance with the Act.

It is worth noting that **Section 8(1)** provides that the application for consent in respect of a controlled transaction shall be made within six months of the making of the agreement for the controlled transaction by any party thereto.

This court notes the use of **mandatory** and **directory** words and holds that the language used in a statute alone is not decisive as to whether the word is mandatory or directory, regard must be had to the context, subject matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. There is no universal rule as to whether mandatory enactments shall be considered **directory** only or **obligatory**. It is the duty of the court to get the real intention of the legislature, by carefully attending to the whole scope of the statute considered. However, when it comes to formalities prescribed for making contracts or transfers the use of the word **shall** is **imperative**.

This court holds that the use of the word shall in section **8(1)** of the **Land Control Act cap 302** laws of Kenya is **mandatory** and **imperative** and therefore failure to make the application within 6 months is a serious breach of the provision of the law and therefore any transaction undertaken under the said provision will be a nullity. It is clear from the record that no application for consent from the Land Control Board by either the plaintiff or 1st Defendant was made within six months after the execution of the sale agreement. The court finds this to have been in breach of the mandatory and imperative provision of Section 8 (1) of the Act. The plaintiff slept on his rights by failing to move the court for extension of time pursuant to the proviso to Section 8(1) of the said Act. Moreover, the agreement was breached by the defendant when he failed to pay full purchase price.

The second issue is whether the rent agreement conferred rights of the property to the defendant. I do find that the agreement was for 8 months from the 6.3.2001 and therefore, it expired on the 6.11.2011 and the same does not confer any rights of ownership to the defendant.

Section 24 (a) of Land Registration (Act No.3 of 2012) provides that: - *“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.”*

The registration of the plaintiff as proprietors of the suit land, gives the plaintiffs absolute proprietorship for those parcels. Such absolute proprietorship can only be subject to certain rights and privileges as are known to law. That is why Section 25 of the Act provides as follows;

S.25 (i) “The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by 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, subject;

(a) to 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.

The defendant has not filed any claim on the suit land and yet the plaintiff’s complaint is that the defendant is occupying his land illegally. That is in violation of the plaintiff’s rights and privileges over the parcel of land as envisaged in Section 24 of the Act. The plaintiff has produced the title deed and certificate of official search as evidence of ownership and in terms of Section 26 (1) of the Act;

“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 and endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or miss-representation to which the person is proved to be a party to;
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The plaintiff is the registered owner of the suit land and therefore has an indefeasible right over the property. The plaintiff's rights as proprietor of the land are clearly protected in law and the defendant has no reason to trespass thereon. Despite the fact that the law allows the Defendant to challenge the plaintiffs' ownership on grounds of illegality, unprocedural acquisition or corrupt scheme, the defendant did not do that in this suit.

I do find that the plaintiff has satisfied the court that he was duly registered as proprietor of the suit land and that the defendant having failed to obtain consent of the Land Control Board as required by law is a trespasser. I do enter judgment in terms of a declaration that the plaintiff is the lawful and legal owner of land comprised in title No. Eldoret/Municipality Block 21(King'ong'o)/2040 and do hereby order the defendant to vacate within 30 days failure of which I do issue order of eviction. The court further issues a Permanent injunction restraining the defendant, his servants and agents from entering, stating and/or in any other manner dealings over the said land No. Eldoret/Municipality Block 21 (King'ong'o)/2040. Lastly, I do issue a declaration that the defendant is not entitled to any refund as he is in breach of contract. Costs of this suit to the plaintiff. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF OCTOBER, 2017.

A. OMBWAYO

JUDGE