



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 418 OF 2012**

**CELINE GEORGE.....  
PLAINTIFF**

**VERSUS**

**JONAH CHIROCH.....1<sup>ST</sup> DEFENDANT**

**VERONICAH SUM (the Administratrix of the Estate of the**

**Late ERNEST SUM) .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Celine George (hereinafter referred to as the plaintiff)** has come by way of **plaint**, amended on 29.5.2008 against **Jonah Chiroch**, and **Veronica Sum**, the Administratrix of the Estate of the late Ernest Sum stating that the plaintiff is the owner of 100 acres parcel of land situate at **L. R. No. 2226** within Moiben Location having purchased it from the late Ernest Kipngetich Sum and obtained consent to transfer on 14.3.1984 and since then, she has been residing thereon. The plaintiff avers that sometimes in the year 1983, she entered into a sale agreement with the late Ernest Sum wherein she purchased a total of 100 acres from the said Vendor for a total purchase consideration of Kshs. 200,000/= which she paid in full. That subsequently and on 14.3.1984, the said Mr. Sum did attend the Uasin Gishu Land Control Board and granted consent for the aforesaid 100 acres piece of land.

The plaintiff immediately after purchase went ahead and fully occupied the parcel of land by building a 4-bedroomed permanent house and carrying on extensive agricultural activities since then with full knowledge of the 2<sup>nd</sup> defendant. That sometimes in early March, 2008, she ploughed her parcel of land for purposes of planting crops during the season. The plaintiff further avers that between 2<sup>nd</sup> and 5<sup>th</sup> April, 2008, the defendant without any color of right or permission did trespass on the said parcel of land and reploughed the same despite several protests from the plaintiff.

The plaintiff is therefore apprehensive that the defendant may proceed to plant maize or any other crops and therefore the plaintiff prays for a permanent order of injunction to restrain the defendant, his servants and/or agents from ever trespassing on the suit land. The plaintiff is further praying for a permanent order of injunction to restrain the defendants jointly and severally from entering into her portion of land in any way or carrying any other activities that may prejudice her occupation of the suit land. The plaintiff further states that she has no privity of contract with the 1<sup>st</sup> defendant and for him to come and replough the portion of her land is provocative and illegal.

The plaintiff substantively prays for Specific performance of the agreement between herself and the 2<sup>nd</sup> defendant by having the said 2<sup>nd</sup> defendant signing transfer documents in favour of the plaintiff for the

said 100 acres and/or alternatively the Deputy Registrar, High Court do execute the same. Further and without prejudice to the foregoing, the plaintiff prays for a declaratory order of this Honourable Court that by virtue of her stay on the said parcel of land for over 25 years uninterrupted by the 2<sup>nd</sup> defendant, she has acquired the proprietorship of the said 100 acres by the operation of law namely prescription and/or adverse possession.

Jonah Chiroch and Veronica Sum (hereinafter referred to as the defendants) filed amended defense and counterclaim denying the claim in the plaint. They specifically state that the area cultivated by the 1<sup>st</sup> defendant was leased to him by the 2<sup>nd</sup> defendant being part of the land belonging to the said 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant denies that the plaintiff is entitled to specific performance and a declaration of ownership by prescription and/or adverse possession.

The 2<sup>nd</sup> defendant states that in or about 1984, the late Ernest Sum entered a land sale agreement with the plaintiff in the original action and now the defendant in the counterclaim vide which the late Ernest Sum was to sell one hundred (100) acres of the suit land to the plaintiff in the original action and now the defendant in the counterclaim at a consideration of Kshs.8,000/= per acre particulars whereof are well within the knowledge of the plaintiff in the original action and now the defendant in the counterclaim. That the plaintiff in the original action and now the defendant in the counterclaim only paid Kshs.140,000/= being the value for seventeen and a half (17½) acres and never paid for the balance of the land.

According to the defendants, the plaintiff fraudulently procured the consent of the Land Control Board of the transfer of 100 acres from the suit land without having paid the purchase price for it in full. Particulars of fraud are obtaining a consent to transfer on the basis of a purported application dated 23.9.1984 when there was no such application. Deliberately misstating the consideration for the transfer as Kshs. 100,000/= when it was Kshs. 800,000/= and attempting to obtain a transfer without paying the full purchase price. The defendants further state that as a result of the matters aforesaid, the plaintiff never obtained good title or at all of the 100 acres she set out to purchase and is therefore a trespasser on the suit land. The 2<sup>nd</sup> defendant has always cultivated the portion of the land in dispute and in 2008 leased out the said area to the 1<sup>st</sup> defendant for a period of one year. The 1<sup>st</sup> defendant cultivated the area of the suit land in dispute on the basis of the lease agreement aforesaid. The plaintiff without any colour of right, purported to stop the 1<sup>st</sup> Defendant from the utilizing the suit land.

The defendants pray that a declaration that the purported sale of 100 acres to the plaintiff in the original action and now the defendant in the counterclaim has been rendered null and void for failure to pay the consideration thereof and a declaration that the plaintiff in the original action and now the defendant in the counterclaim is a trespasser on the area of the suit land outside 17.5 acres which she paid for. The defendants further pray for a declaration that the plaintiff in the original action and now the defendant in the counterclaim can only claim 17.5 acres being equal to the part payment she made. Furthermore, an order of injunction to restrain the plaintiff in the original action and now the defendant in the counterclaim from alienating, cultivating or laying claim on or in any other manner interfering with the suit land outside the 17.5 acres she paid for. Last but not least, costs of the suit.

The plaintiff in reply to the counterclaim avers that she entered into an agreement with the late Sum for a purchase of 100 acres and she paid the entire purchase consideration in full contrary to the defendant's claim. The allegation in paragraph 12 and 13 of the counterclaim and in particular the allegation of fraud is vehemently denied and the defendant put to strict proof thereof. That in response to paragraph 14 of the said counterclaim, the plaintiff states that she has been on the land for the last 25 years uninterrupted by any party and therefore, the issue of trespass is denied and the defendant is put to strict proof thereof. The plaintiff states that it is the defendant who trespassed and reploughed the plaintiff's portion hence the suit for injunction filed by her. The plaintiff avers that the defendant is not entitled to the orders prayed for in paragraph 18 of the counterclaim and she is put to strict proof. The plaintiff shall at the earliest opportunity pray that the said counterclaim be struck out for being frivolous, vexatious and a total abuse of the court process and that the same be dismissed with costs.

When the matter came up for hearing, PW1 Celine Gakuru George testified that she lives at Eldoret at Elgon View and in Nairobi. She is a business lady and retiree and used to work with World Bank for 35 years. She knows Ernest Kiprotich Sum as a good family friend and also knows Veronica Sum, wife to Ernest Sum. She purchased 100 acres from Mr. Sum on 13.3.1982 when the Sums were in a problem with Agricultural Finance Corporation for failure to pay a loan. She agreed to pay the loan which was about Kshs. 1,000,000/=. Mrs. Sum approached her because she had the money. She gave them Kshs. 140,000/=. They went to the lawyer, A. G. N. Kamau with Mr. Ernest Sum. The agreement was done on 13.3.1982. Mr. Ernest was selling to the plaintiff 100 acres in his farm at Moiben. She produced the agreement as P.Ex.1.

Mr. Kamau arranged for the Land Board. She has an application for consent of the Land Control Board. The application for consent was signed on 8.8.1983. The Land Control Board sat on 14.3.1984. The consent was allotted in Minute No. 99/84. The consideration in the Minutes reads Kshs. 100,000/=. Both parties were present. She produced the application for consent as P.Ex.2. She produced the Minutes and consent as P.Ex.3. The consent was issued on 14.3.1984. She produced it as P.Ex.4. She received a letter from Veronica acknowledging purchase of the land. The letter is dated 26.7.1982. The letter is addressed to the District Commission, Uasin Gishu, Eldoret. She acknowledged the 100 acres sold to her. She produced the letter as P.Ex.5.

She had given the Sums KShs.140,000/= even before the agreement. She was not in the business of buying land but she gave Shs.140,000/= before the agreement. They agreed that she could take another 100 acres. Mr. Sum passed on before she could purchase the extra land. She has an agreement dated 2.7.1984 produced as P.Ex.6. It was executed by Birech & Company Advocate. The plaintiff did not appear before Mr. Birech. The purpose of the agreement was to enable her get the 100 acres. She is the second purchaser in the agreement and was purchasing a further portion comprising 100 acres. She did not purchase the further 100 acres because she went out of the country and was not interested. She went to cultivate the land and found that Mrs. Sum sent somebody to harrow and plant in her land. She prays for her 100 acres. She prays for orders on the plaint.

**Mr. Mathai learned counsel for the plaintiff, submits** that the plaintiff and the late Ernest Sum entered into a sale agreement for the sale of the suit property. The plaintiff paid Kshs.140,000/= as the purchase price and the 2<sup>nd</sup> defendant acknowledge payment. The plaintiff was given possession of the suit property upon completion of the transaction. Consent of the Land Control Board was obtained but transfer could not be done due to an encumbrance, on the land being a charge by Agricultural Finance Corporation. The plaintiff argues that the parties are bound by the terms of the consent.

The plaintiff argues that he is entitled to an order of specific performance as he has come to court with clean hands and has fulfilled his obligation under the said sale agreement. The agreement for sale was valid on enforceable and as such being the basis of obtaining the consent of the Land Control Board. The plaintiff further argues that the suit is not time barred as at the time of filing the suit, the property was still under charge. The overriding interest is still in existence hence the property could not be transferred.

**M/s Adhiambo learned counsel for the defendant,** on his part, argues that the plaintiff has not proved that he paid the purchase price as agreed and therefore, there is no evidence that consideration was paid. Without proof that consideration was paid, a contract cannot be enforced. The defendant further argues that the consent of the Land Control Board was not properly obtained. There is no evidence that consent for partitioning was obtained and therefore that the consent for transfer was irregular. On the issue of adverse possession, the defendant argues that the claim for adverse possession ought to be commenced by way of originating summons. Ultimately, the defendant offers the transfer 17.5 acres to the plaintiff or a refund of Kshs.140,000/= paid under the failed transaction.

I have considered the pleadings, evidence on record and submissions by counsel and do find the following issues ripe for determination:

**1. Whether the agreement between the plaintiff and deceased was legal.**

**2. Was consideration paid?**

**3. What is the effect of failure to pay consideration?**

**4. Whether consent for participatory was obtained.**

**5. Whether consent for transfer was obtained.**

The facts of the matter are that on the 10.2.1982, the suit property was transferred to Ernest Kipngetich Sum of the undivided half share right title and interest of Isabella Iris Abura and charged to Agricultural Finance Corporation. On the 18.3.1982, before his demise, Ernest Sum entered into an agreement with Celine George, the plaintiff herein selling 100 acres of the land, thereof to the said plaintiff. The deceased undertook to do the process of excision and subdivision of the said parcel of land and obtaining the consent of the Land Control Board. The deceased further undertook to give the plaintiff vacant possession of the said 100 acres which would be quiet and uninterrupted. It is not clear whether the property was subdivided and/or partitioned. There is no consent to subdivide or partition. Nonetheless, the parties went ahead to obtain the consent to sell 100 acres of the suit property by the deceased to Celine George.

By Minute No. 99/84 of the 17<sup>th</sup>, Moiben Divisional Land Control Board Meeting held on 14.3.1984 in the District Commissioner's office in respect of L. R. 2226 measuring 40.5 ha, the proposed sale by the deceased Ernest Kipngetich Sum to Celine George at a consideration of Kshs.100,000 was approved in the presence of both parties. This consent was approved pursuant to an application dated 8.8.1983 signed by both the purchaser and vendor. The letter of consent was given on 14.3.1984 in respect of an application made on 23.9.1984. It appears that the letter of consent contradicts the Minutes of the Meeting held on 14.3.1984. However, I am satisfied that there was a meeting of the Board on 14.3.1984 which approved the issuance of consent for the sale of the 100 acres to the plaintiff. I am satisfied that there was consent of the Board for the sale of 100 acres to the plaintiff.

However, there is clearly no consent for subdivision and partitioning of the land. It is assumed that the deceased was to partition the land and transfer 100 acres to the plaintiff but this cannot be done without the consent of the Land Control Board and therefore the orders sought cannot be granted. Moreover, the property is still charged to Agricultural Finance Corporation. Surprisingly, Agricultural Finance Corporation is not a party to the suit and yet it has a beneficial interest in the property.

On the purchase price, I do find that the pleadings indicate that the purchase price was Kshs.200,000/=. The plaintiff's written statement indicates that the consideration was Kshs.1000 per acre hence a total of Kshs.100,000/= was paid. In the sworn statement, the plaintiff claims to have paid Kshs.140,000/=. The three statements are inconsistent.

There is the second sale agreement dated 2.7.1984 produced as P.Ex.6 wherein the consideration was Kshs.800,000/=. In view of the two agreements and the inconsistencies by the plaintiff, I do find that the plaintiff has not demonstrated that she paid full consideration. The property under dispute is still charged to Agricultural Finance Corporation and therefore, the property is encumbered. There is no consent by the chargee to transfer the land to the plaintiff.

Section 87 of the Land Act provides that if a charge contains a condition express or implied that chargee prohibits the chargor from transferring, assigning, leasing or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the charge is produced by the registrar. In this case, I am unable to ascertain the terms of the charge as Agricultural Finance Corporation is not a party. Section 88(1)(g) of the Land Act No 6 of 2012 provides for implied consent by the chargor thus that the chargor shall not transfer or assign the land or lease part of it, without the consent of the chargee in writing when consent shall not be unreasonably withheld. Such consent has not been produced in court. Ultimately, the plaintiff's suit fails for reasons that the property is still charged to Agricultural Finance Corporation and that there is no discharge of charge.

On the counterclaim, I do find that the defendants have satisfied the court that the plaintiff and the deceased entered into agreement with the plaintiff for sale of 100 acres of land for Kshs. 800,000/=. This agreement was entered into on 2.7.1984. However, the same was entered into without the consent of the chargee (Agricultural Finance Corporation) and therefore, the same is not enforceable. The 1<sup>st</sup> defendant Jonah Chiroch is also utilizing the land on the basis of a lease agreement in contravention of section 87 of the Land Act No 6 of 2012 and 88(1)(g) of the Land Act No 6 of 2012 and therefore, the counterclaim fails as the Agricultural Finance Corporation has not given the relevant consent for the 2<sup>nd</sup> defendant to lease the property. Ultimately, both the plaintiff's claim and the counterclaim are dismissed with costs.

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

**A. OMBWAYO**

**JUDGE**