



**REPUBLIC OF KENYA**

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

**E&L CASE NO. 240 OF 2015**

**ELIJAH KIPCHIRCHIR.....PLAINTIFF**

**VERSUS**

**KIPNGETICH LELMEN.....1ST DEFENDANT**

**ELPHAS KIPKEMBOI NGELECHEI.....2ND DEFENDANT**

**OLIVER JAMES GUTO.....3RD DEFENDANT**

**RULING**

Mr. Elijah Kipchirchir hereinafter referred to as the plaintiff/applicant has come to court against Kipngetch Lelmen, Elphas Kipkemboi Ngelechei and Oliver James Guto, hereinafter referred to as the defendants/respondents by way of plaint claiming that on or about 16th April, 2006, the plaintiff and the 1st defendant entered into a written land sale agreement wherein the plaintiff agreed to purchase from the 1st defendant two (2) acres of land curved out of Eldoret Municipality Block 20(Kapyemit) 179 at an agreed consideration of Kshs.460,000/= only, amount which the plaintiff paid in full upon the execution of the agreement.

That it was a term of the contract of sale that the 1st defendant acquired Eldoret Municipality Block 20(Kapyemit) 179 vide public auction conducted by M/S Joyland Auctioneers on behalf of M/s National Bank, Eldoret Branch on 8.1.2005. The 1st defendant did not have the full consideration required to purchase the said land hence entered into a land sale agreement with the plaintiff, subject to the public auction, to enable him raise the required consideration. The original registered owner and the chargor of Eldoret Municipality Block 20 (Kapyemit) 179, Joseph Tuwei Too filed a suit seeking to restrict the public auction vide Eldoret E & L Case No. 239 of 2012 in which he sued the National Bank the chargee, the 1st defendant herein and Joyland Auctioneers.

The 1st defendant swore an affidavit on 16th January, 2008 in the said suit stating that he had sold 2 acres of the suit land to Elijah Kipchirchir, the plaintiff herein and that the parties in the said suit entered into a consent which resulted into the order dated 24.7.2013 in which the 1st defendant was awarded 6 acres of land from the suit land Eldoret Municipality Block 20 (Kapyemit) 179. The 1st defendant subdivided his parcel of land into Eldoret Municipality Block 20/Kapyemit/2927 and Eldoret Municipality Block 20/Kapyemit/2928 and registered them in the names of 2nd and 3rd defendants. The plaintiff avers that the 1st defendant was under a duty pursuant to the terms of the contract of sale to perform his obligations under the contract, which obligations included to curve two (2) acres of his share of Eldoret Municipality Block 20(Kapyemit) 179 to the plaintiff.

The plaintiff's principal claim against the defendants is 2 acres out of the Eldoret Municipality Block 20 (Kapyemit) 179, currently subdivided into Eldoret Municipality Block 20/Kapyemit/2927 and Eldoret Municipality Block 20/Kapyemit/2928, off the 1st defendant's share. He prays that a permanent injunction restraining the defendants whether by themselves, agents or servants from transferring, developing or charging Eldoret Municipality Block 20/Kapyemit/2927 and Eldoret Municipality Block 20/Kapyemit/2928.

That the 2nd and 3rd defendant be ordered to surrender their title deeds with respect to Eldoret Municipality Block 20/Kapyemit/2927 and Eldoret Municipality Block 20/Kapyemit/2928 in their names respectively to Eldoret Land's Registrar in order to revert back to Eldoret Municipality Block 20 (Kapyemit) 179.

In the alternative, this Honourable court do issue a vesting order compelling the Uasin Gishu Land Registry to curve out a total of (two) 2 acres of Eldoret Municipality Block 20/Kapyemit/2927 and Eldoret Municipality Block 20/Kapyemit/2928 and the same be registered on the name of the plaintiff and an order of specific performance against the 1st defendant be issued.

That declaration that the transfer and subdivision of 1st defendant's share of Eldoret Municipality Block 20 (Kapyemit) 179 to Eldoret Municipality Block 20/Kapyemit/2927 and Eldoret Municipality Block 20/Kapyemit/2928 and subsequent issuance of title deeds be declared null and *void abinitio*. He prays for the cost of the suit.

Accompanying the plaint is an application dated 24.8.2015 where the applicant prays for an injunction restraining the defendant/respondents herein whether by themselves, agents or servants from transferring, developing or charging Eldoret Municipality Block 20/Kapyemit/2927 and Eldoret Municipality Block 20/Kapyemit/2928. Moreover, that this honourable court be pleased to issue an order compelling the 2nd and 3rd defendants/respondents to surrender original titles for land parcels Eldoret Municipality Block 20/Kapyemit/2927 and Eldoret Municipality Block 20/Kapyemit/2928 pending hearing and determination of this suit.

The application is based on grounds that on or about 16th April, 2006 the plaintiff/applicant and the 1st defendant/respondent entered into a written land sale agreement. The plaintiff/applicant agreed to purchase from the 1st defendant/respondent two (2) acres of land curved out of Eldoret Municipality Block 20 (Kapyemit) 179 at an agreed price of Kshs.460,000/= only, amount which the plaintiff paid in full upon the execution of the agreement. The 1st defendant/respondent acquired Eldoret Municipality Block 20 (Kapyemit) 179 vide public auction conducted by M/s Joyland Auctioneers on behalf of M/s National Bank, Eldoret Branch on 8.11.2005. The 1st defendant/respondent did not have the full consideration required to purchase the said land vide the said auction so he entered into a land sale agreement with the plaintiff/applicant, subject to the public auction, to enable him raise the required consideration. There was an earlier suit before this Honourable Court filed by the original owner and the charger Joseph Tuwei Too of Eldoret E & L Case No. 239 of 2012 Joseph Tuwei Too Vs National Bank of Kenya Ltd, Kipnetich Lelmen and Joyland Auctioneers. The parties in the said suit entered into a consent to compromise the suit which resulted into the order dated 24.7.2013 in which the 1st defendant was awarded 6 acres of land from the suit land Municipality Block 20 (Kapyemit) 179.

The 1st defendant subdivided his parcel of land into Eldoret Municipality Block 20/Kapyemit/2927 and Eldoret Municipality Block 20/Kapyemit/2928 and registered them in the names of 2nd and 3rd defendants/respondents without the plaintiff/applicant's consent. The 1st defendant swore an affidavit of 16th January, 2008 in the said suit stating in his deponents that he had sold 2 acres of the suit land to Elijah Kipchirchir, the plaintiff/applicant herein. The 1st defendant/respondent was and is under a duty pursuant to the terms of the contract of sale to perform his obligations under the contract, which obligations included to curve two (2) acres of his share of Eldoret Municipality Block 20 (Kapyemit) 179 to the plaintiff/applicant. The subdivision and registration was done fraudulently by the 1st defendant/respondent herein in view of suppressing the rights and the justice of the plaintiff/Applicant.

The 1st defendant swore an affidavit which was filed on 21.9.2015 whose gist is that he entered into the

sale agreement with the plaintiff/applicant for the purchase of 2 acres at Kshs.460,000 at Maili Nne being part of land registration No. Eldoret Municipality Block 20 (Kapyemit) 179 however, after purchasing the suit land through auction, he never took physical possession of the land immediately as there were court cases which took long as there was a court case which was settled out of court and after the parties settling the matter out of the court, he was only given 6 acres. He contends that he is not the one who subdivided land parcel No. Eldoret Municipality Block 179 into 20/Kapyemit 179 into 2927 and 2928 to the 2nd and 3rd respondents respectively as he had been given an alternative piece of land at Baharini instead of the one at Maili Nne and the applicant is aware of this. He further avers that after the court case No. 30 of 2006, it was ordered that he gets 6 acres instead of 12.108 acres which he declined and requested for an alternative land which he was given at Baharini and the applicant is very well aware of this. That he further states that after getting 12.108 acres at Baharini, he informed the applicant to go and get his 2 acres there but he has refused only to take him to court.

He denies ever having any dealings with the 2nd and 3rd defendants/respondents over the issue of land at Maili Nne namely Eldoret Municipality Block 20 (Kapyemit) 179. His dealings over the same was curtailed by the ruling of the court which nullified the auction. He is ready and willing to give the plaintiff/applicant 2 acres at Baharini or refund him his Kshs.460,000/=. He has no interest in land Eldoret Municipality Block 20 (Kapyemit) as he was given another alternative land at Baharini from which he is ready to give the plaintiff 2 acres. He denies having any interest in the suit land and asserts that the annexed agreement is null and void as there was no Land Control Board and he could not have sold land which was not his.

The principles for grant of interlocutory injunction were set in the locus classic case of **Giella v Cassman Brown & Co Ltd [1973] EA 358. The applicant must show a prima facie case with a probability of success or that if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award or damages. If in doubt the court shall decide the application on the balance of convenience.**

In the case before me, the applicant has established that he entered into an agreement with the 1st defendant for the sale of 2 acres of Eldoret Municipality Block 20 (Kapyemit) 179 at an agreed price of Kshs.460,000/=. He paid the amount in full upon execution of the agreement. This amount of money was to be used by the 1st defendant to pay a purchase price of the property as a result of a public auction conducted by Joyland Auctioneers on behalf of National Bank – Eldoret Branch as the 1st defendant did not have full consideration required.

Unknown to the plaintiff, suit No. Eldoret Environment and Land No. 239 of 2012 between Joseph Tuwei and National Bank of Kenya and Kipngetch Lelmen (1st defendant) and Joyland Auctioneers was compromised and an order issued on 24.7.2013 in which the 1st defendant was awarded 6 acres of the land from the suit land.

The 1st defendant's share of the suit land was subdivided into two parcels, thus Eldoret Municipality Block 20/Kapyemit/2927 and Eldoret Municipality Block 20/Kapyemit/2928 and registered in the names of the 2nd and 3rd defendants. However, the 1st defendant opted for an alternative land which he was given at Baharini.

This court finds that the land sale agreement dated 16.4.2006 is legal and binding and enforceable as it is in writing and signed by both parties. Moreover, the signature of each party to the agreement has been attested. However, there is doubt as to whether the claim by the plaintiff is filed within time as the claim herein is for specific performance and not recovery of land as the plaintiff has never been the proprietor of the land he claims. However, this issue will be addressed at the appropriate time.

Moreover, the fact that the suit land has been subdivided upon a valid order of court by consent, which consent is not sought to be set aside presupposes that the plaintiff has not demonstrated a *prima facie* case with probability of success. There is no evidence on record or even a claim by the plaintiff that the consent was registered fraudulently.

This is a case where the plaintiff can be compensated with damages and a refund of the money already paid and therefore, the court declines to grant an injunction. Even if the court has to determine the application on a balance of convenience, it will tilt towards not granting an injunction as the resultant parcels of land thus 2927 and 2928 are registered in the names of the 2nd and 3rd defendants. The upshot of the above is that the application is dismissed with costs.

**DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF APRIL, 2016.**

**ANTONY OMBWAYO**

**JUDGE**