



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 539 OF 2015**

**OLELIMPASO SAITOTI PETER NKOLOPE ..... PLAINTIFF**

**VERSUS**

**EMMANUEL LEKAKENY KAYO ..... DEFENDANT**

**RULING**

1. The plaintiff herein Olelimpaso Saitoti Peter Nkolope filed a suit in this court on 7<sup>th</sup> December 2015 seeking various remedies against the defendant arising out of a claim that the defendant herein Emmanuel Lekakeny Kayo by a written agreement dated 29<sup>th</sup> October 2013, sold a portion of **LR No. Transmara/Olomismis Group Ranch/769** (hereinafter referred to as the suit land). According to the plaintiff, the suit land was erroneously indicated as **LR No. Transmara/Olomismis Group Ranch 491** in the agreement for sale. It is the plaintiff's contention that upon making partial payment for the suit land, the defendant granted him vacant possession of a portion of the 10 acres that he had purchased whereupon the plaintiff has established his homestead but avers that the defendant has refused to facilitate the transfer of the 10 acres the plaintiff purchased in terms of the agreement of sale.
2. Simultaneously with the plaint, the plaintiff filed a Notice of Motion application under Order 40 rule 1, 2, 3 and 4 of the Civil Procedure Rules and seeks the following order of injunction:-

**Pending the final determination of the suit there be issued an order of injunction restraining the defendant either by himself, agents, employees and/or whosoever claiming through him from alienating, offering for sale advertising for sale, selling, subdividing and in any way dealing with LR No. Transmara/Olomismis Group Ranch/769 measuring approximately 10 acres.**

3. The plaintiff's application was premised on the grounds set out on the face of the application notably that the plaintiff was the bonafide purchaser for value of a portion measuring approximately 10 acres out of land parcel 769 which the defendant had acknowledged but was now issuing him with a notice to vacate the 1/8 acre portion of the suit land he now occupies through a letter by Kassamani & Company Advocates dated 30<sup>th</sup> December 2015. Letter annexed and marked "**OSPNI**". The plaintiff contends that he paid the bulk of the purchase of Kshs. 750,000/= leaving only a balance of Kshs. 63,170/= which was payable against the processing of the transfer in his favour.
4. The plaintiff further contends that despite honouring his part of the bargain in regard to the sale transaction the defendant has failed neglected and/or refused to facilitate the completion of the sale transaction by causing the subdivision and transfer of the plaintiff's portion of land in accordance with the sale agreement. The plaintiff avers that the defendant has instead resorted to threatening and intimidating the plaintiff with violence with a view of getting the plaintiff to



erroneously indicated as parcel number **Transamara/Olomismis Group Ranch/491** in the agreement. The defendant does not acknowledge the error and one is concerned how such a fundamental error would occur right from inception and be repeated at least on two other occasions when the acknowledgements were done. The agreement that has been exhibited by the plaintiff as “**OSP2**” (at least the copy furnished to the court) is incomplete as it does not contain the execution page and the court cannot as it were confirm it was indeed executed. As a document it is worthless if it is not executed. The agreement and the acknowledgements appear to have been prepared at a lawyer’s office and it is unclear what title documents, if any, may have been availed to the lawyer to prepare the agreement for sale. Did the documents relate to title of parcel 491 or 769? Had the plaintiff verified the ownership and particulars of the land he wished to purchase?

13. From the terms and the conditions of sale that appear at clause 4 of the agreement for sale at page 1, it is clear that the parties envisaged that the consent of the land control board would be required for the transaction that they were entering into. The land being agricultural land within the meaning ascribed to agricultural land under the provisions of the Land Control Act, Cap 302 Laws of Kenya there is no doubt that the provisions of the Act were applicable to the sale transaction. There is no evidence that the consent of the Land Control Board was sought or obtained for the transaction. The plaintiff is clear that the defendant declined or refused to take him to the Land Control Board.

14. Section 6 (1) (a) of the Land Control Act provides:-

**6(1) Each of the following transactions:**

a. **The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;**

**is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.**

Section 8 (1) of the Act requires that the application be made to the board in a prescribed form and the consent be obtained within six months of the making of the agreement by any of the parties. In the present matter no application has been made to the land control board and neither has any consent been granted as required. The transaction between the plaintiff and the defendant has therefore become void for all purposes in terms of section 6 (1) of the Land Control Act. The court cannot enforce a void contract and in the premises an order of specific performance would in my view not be available to the plaintiff. It does appear that the remedy available to the plaintiff would be to seek recovery of the consideration paid pursuant to the contract that has become void.

15. In the circumstances of this case, I cannot say that the plaintiff has established a prima facie case with a probability of success to warrant the grant of an interlocutory injunction. To the extent that the plaintiff has not demonstrated that he would be entitled to an order of specific performance at the trial there would be no basis to grant an injunction. If the plaintiff’s remedy would be to recover the consideration paid, then damages would be adequate compensation and no irreparable harm would be suffered.

16. This is yet another illustration of the casualness that parties approach land transactions when there are stringent legal requirements to be satisfied before a land transaction is concluded successfully particularly where the provisions of the Land Control Act have application. Lawyers advising parties should endeavour to have parties appreciate the legal requirements otherwise the parties risk to fall foul of the law. The court’s duty is to interpret and implement the law that the legislature has enacted notwithstanding the undesired implications at times.

17. The net result in the matter is that I find the plaintiff’s application dated 7<sup>th</sup> December 2015 to be without merit and I order the same dismissed. The interim order granted herein is vacated. I order that each party bears their own costs.

**Ruling dated, signed and delivered at Kisii this 13<sup>th</sup> day of May, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff

..... for the defendant

..... Court assistant

**J. M. MUTUNGI**

**JUDGE**