



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

ELC NO 202 OF 2015

KIBWALEI CHEMJORPLAINTIFF

VERSUS

ROTICH CHEMJOR & 4 OTHERSDEFENDANTS

RULING

(Application for injunction; plaintiff claiming to have purchased land through oral contract in 1973; plaintiff alleging fraud in the way title was issued to defendant in 1989; oral contract not enforceable; no evidence of fraud tendered; doubt as to whether the plaintiff's case is within the prescribed limitation period of 12 years; application dismissed)

1. The plaintiff commenced this case on 16 July 2015 by way of plaint. The original plaint had Rotich Chemjor as 1st defendant, and the Nakuru District Land Registrar and the Attorney General as 2nd and 3rd defendants. Together with the plaint, the plaintiff filed an application for injunction seeking to restrain Rotich Chemjor from the land parcel Rongai/ Lengenet Block 3/200 which was at that time registered in the name of the 1st defendant. On 15 October 2015, the plaint and the original motion were amended. The amendments introduced two persons, Veronica Terigi Lukorito and Rebecca Cheron Rotich as defendants. This is because the plaintiff realized that the suit land has now been transferred from the 1st defendant to these two persons, who were now named as 2nd and 3rd defendants. The latter two are daughters of the 1st defendant.

2. The case of the plaintiff as pleaded in the amended plaint is that the 1st defendant purchased from a land buying group called Kiplombe Sasurwa Kapsetek Farm shares of Kshs. 1,000/= which entitled him to 7 acres of land. It is averred that by an oral agreement in 1973, the 1st defendant sold the share of 7 acres to the plaintiff and the 1st defendant surrendered to the plaintiff the ownership of the land. The plaintiff then cleared what had remained unpaid by the 1st defendant being a bank loan balance, survey fees, cattle dip fees and land rates, but using the name of the 1st defendant since the records of the group still reflected his name. It is pleaded that these additional payments made by the plaintiff were converted into shares equivalent to 4 acres which were then merged to the initial 7 acres making a total of 11 acres which now comprises of the suit land. It is the plaintiff's case that despite the foregoing, the 1st defendant fraudulently obtained title to the suit land and he later transferred it to the 2nd and 3rd defendants. Inter alia it is averred that he obtained title without making full disclosure that the land belonged to the plaintiff. On the part of the 2nd and 3rd defendants, it is averred inter alia that they also knew that the land belonged to the plaintiff when they obtained title.

3. It is pleaded that on in February 2015, the 1st defendant came to the suit land and claimed it as his own. A dispute arose, which was presented before the Chief of the area together with village elders, who made a decision in favour of the plaintiff. The plaintiff has averred that hitherto, the 1st defendant did not even know the geographical location of the land nor its physical appearance and has never lived on the land. So

too the 2nd and 3rd defendants.

4. In the suit, the plaintiff has asked for orders that he be declared the lawful owner of the suit land; transfer of the land to himself; a permanent injunction to restrain the 1st, 2nd and 3rd defendants from the land; and costs.

5. In the application for injunction, the plaintiff wishes to have the 1st, 2nd and 3rd defendants restrained from the land pending hearing and determination of the suit. To the supporting affidavit, he annexed photographs of the land to demonstrate his possession of it; some receipts showing payment for survey fees dated 10 August 1986 and 21 July 1985 (but which are in the name of the 1st defendant) ; the copy of the register of the suit land; and the minutes of the sitting of the Chief and village elders.

6. The 1st - 3rd defendants filed a replying affidavit to oppose the motion. They also filed an application of their own to have the plaintiff restrained from the suit property and further restrained from interring a body of one of his servants on the suit land. The replying affidavit and supporting affidavit to their application are sworn by Veronica Terigi Lukorito, the 3rd defendant. She has averred that her father, the 1st defendant, was the registered proprietor of the suit land and that he later transferred the same to herself and the 2nd defendant, who is her sister, for them to hold in trust for the whole family. She has averred that the plaintiff and 1st defendant were both members of the Kiplombe Sasurwa Kapsatek Farm and they acquired separate property. She annexed copies of the 1st defendant's share certificate issued on 29 December 1981 and some payment receipts for a water project issued in 1989. She deposed that her father retained his portion of land whereas the plaintiff sold his. In 1976, the 1st defendant acquired a property in Kitale and moved there, leaving his brother, the plaintiff, as an agent to cultivate on the suit land and graze his cattle as they had a cordial relationship. It is averred that when the parents of the plaintiff and 1st defendant died, they left some cattle which the 1st defendant allowed to be grazed by the plaintiff on the suit land. She has denied that the plaintiff ever paid the purchase price for the 1st defendant. She deposed that it emerged to the 1st defendant that the plaintiff has sold all the cattle and aggrieved by his misappropriation, he called for several meetings at family level. He could no longer trust the plaintiff and he then transferred the land to the 2nd and 3rd defendants. She has stated that they were coerced to sign that they would compensate the plaintiff with Kshs. 600,00/= for four acres at the Chief's office. They later approached the District Officer who held for the 1st defendant. She has denied that the plaintiff has ever been resident on the suit land but had allowed a third party to build a structure on the land. She has averred that the plaintiff intends to bury this person on the land.

7. There were further affidavits filed but they more or less simply go to buttress the positions of the parties as described above.

8. I invited counsels to make submissions which they did, save for counsel for the 4th and 5th defendants who signaled that they would not participate in the application. I have considered these in my ruling.

9. The application before me is an application for injunction. To succeed in an application of this nature, the plaintiff needs to demonstrate a prima facie case with a probability of success and further demonstrate that he stands to suffer irreparable loss if the application is not allowed. If in doubt, the court will determine the application on a balance of convenience. These principles were laid down in the case of **Giella vs Cassman Brown (1973) EA 358**. It will be discerned that the plaintiff's case is that they had an oral agreement in the year 1973 with the 1st defendant, through which the 1st defendant sold to the plaintiff his shares which comprised of 7 acres. It is claimed by the plaintiff that he then paid a bank loan balance, survey fees, cattle dip fees and land rates after taking over the land. He has also pleaded that these payments were converted into an additional 4 acres. All these have been refuted by the 1st - 3rd defendants.

10. First, the law does not recognize oral agreements for the sale of land and an oral agreement for sale of land cannot be enforced. This is contained in Section 3 of the Law of Contract Act, which provides as follows :-

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

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

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.

11. From the above, it means that if the plaintiff through this suit wishes to assert an agreement over the sale of land which was made orally, then he has very slim chances of success, for such an agreement cannot be enforced following the provisions of the law that I have set out above.

12. Apart from the foregoing, I have also not seen any document where the plaintiff paid a bank loan, or cattle dip fees, or land rates. None have been annexed. The only receipts annexed are the two receipts showing payment of survey fees, but these are in the name of the 1st defendant. I am therefore not convinced, at least at this stage of the proceedings, that the plaintiff made any payments towards this land. It was further said that these further payments entitled the plaintiff to an additional 4 acres. Leaving alone the fact that I have not seen any payment receipts tendered by the plaintiff, I would imagine that if the plaintiff was given an additional 4 acres, then these, at least in the initial stage of allocation would be given directly to him, since he would be the person acknowledged to have made payment, and one would have expected a document from the Kiplombe Sasurwo Kapsetek Farm, showing this allocation of 4 acres to the plaintiff. There is none demonstrated in this case.

13. What I can clearly see, is that there are receipts for survey made in the name of the 1st defendant. I have also seen that the 1st defendant was issued with a share certificate on 29 December 1981 by the company. If indeed the plaintiff had an oral agreement in the year 1973, you would have expected them to at least alert the company, so that the share certificate would then issue in the name of the plaintiff. But that does not appear to be the case here. There are also receipts annexed by the 1st - 3rd defendants of payments for a water project which seem to have been made in the year 1981. If the 1st defendant had no interest in the property after 1973, then it does not add up that he was still making payments in the year 1981. I have noted from the documents of title that the 1st defendant became registered as proprietor of the suit property on 7 November 1989 and a title deed was issued to him. On 17 February 2015, the 1st defendant transferred the land to the 2nd and 3rd defendants who are now the current registered proprietors. I have not seen any evidence of fraud in the manner in which the 1st defendant obtained title or in the manner in which the title was transferred to the 2nd and 3rd defendants.

14. I was referred to some deliberations by elders and the District Officer but these mean nothing to me. At most they are discussions on a mediation, which is not binding to me and is not legally enforceable. The same are disregarded.

15. I also have serious doubts as to whether the plaintiff's case is within time. The prescribed limitation period for claiming land is 12 years as provided for in Section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya. The oral contract alleged by the plaintiff is of 1973. Title was obtained by the 1st defendant in the year 1989. This suit is being filed more than 40 years after the alleged oral contract and over 25 years from the time the title was issued to the 1st defendant. If the plaintiff had a problem with this title, he had all this while to present his suit. I am not too convinced at this stage of the proceedings that the plaintiff's claim, if any, is within time.

16. The upshot of the above is that the plaintiff has failed to demonstrate a prima facie case with a probability of success. Not being in doubt, I need not consider the balance of convenience. I see no merit in the application for injunction by the plaintiff and the same is hereby dismissed with costs. That means

that the plaintiff must give up possession and occupation of the suit land to the 2nd and 3rd defendants for the duration of this case.

17. The costs of both applications will be to the 1st , 2nd and 3rd defendants.

18. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 21st day of July, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Ms. Kipruto for plaintiff.

Mrs. Bukachi for 1st-3rd defendants.

N/A on part of State Law Office for 4th & 5th defendants.

Court Assistant: Janet.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU