



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L NO. 157 OF 2015

SAID KOSGEY CHEBII.....PLAINTIFF

VERSUS

PAUL KIMUTAI CHEMWENO.....1ST DEFENDANT

THOMAS CHEROTICH.....2ND DEFENDANT

JUDGMENT

Said Kosgey Chebii (*hereinafter referred to as the plaintiff*) states that at all material times relevant to this suit, the 1st defendant is the beneficial owner of 5 acres of land curved from all that parcel of land forming part of the estate of his late father, Chemweno Sawe. On or about the 24th January, 2005, the 1st defendant voluntarily entered into a Sale of Land Agreement whereby he sold the plaintiff his 5 acres of land curved from LR No. Kapkoi Forest/43 at an agreed consideration of the sum of Kshs.850,000/=.

The plaintiff made a down payment of the sum of Kshs.300,000/= on the date of signing the Agreement and subsequently made a further payment in liquidation of the balance totaling to Kshs.235,000/= as particularized as follows thus on 3rd June, 2005-Kshs.100,000.00 and on 10th August, 2005-Kshs.50,000.00 and on 6th July, 2011-Kshs.85,000.00 ***Totaling to -Kshs.235,000.00.*** That it was an express term of the foresaid sale agreement between the plaintiff and the 1st defendant that the balance of the purchase price amounting to Kshs.315,000/= was to be cleared upon successful transfer of the land to the plaintiff and the plaintiff obtaining the title document to the land. That the plaintiff has on several occasions requested the 1st defendant to effect transfer of the land to him as per the sale agreement but to-date he has ignored, refused and/or neglected to do so.

The plaintiff to his utter shock and consternation has discovered that the 1st defendant has without the consent of the plaintiff and knowledge resold the plaintiff's land to a third party, the 2nd defendant herein. The plaintiff avers that the sale of land by the 1st defendant to the 2nd defendant is fraudulent and intended to deprive the plaintiff of his lawfully acquired parcel of land as the same was bought in good faith and at a valuable consideration. The particulars of fraud by the 1st and 2nd defendants are as follows:-

(a) Executing a Sale Agreement over land that he had already sold.

(b) Receiving consideration for sale of land that is not his.

(c) Failing to transfer the land to the plaintiff as agreed.

(d) Colluding with the 2nd defendant to deprive the plaintiff of his proprietary interest.

(e) Obtaining money by false pretence from the plaintiff.

That the plaintiff's claim against the defendants jointly and severally is for specific performance of the sale agreement or in the alternative refund of the purchase price paid plus interest at court rates already paid by the plaintiff for the purchase of 5 acres of land curved from LR No. Kapkoi Forest/43.

Ultimately, the plaintiff prays for judgment against the defendants for specific performance of the Sale Agreement dated 24th January, 2015 or in the alternative a refund of the purchase price plus interest till payment in full, Mesne profits and/or damages incurred and costs and interest of the suit and any other relief that this Honourable court may deem fit to grant in the circumstances.

The 1st defendant filed a statement of defence stating that it is not true that he is the beneficial owner of 5 acres curved from all that parcel of land forming part of the estate of his late father Chemweno and states further that he never entered into sale agreement with the plaintiff for sale of 5 acres in respected of parcel No. LR No. Kapkoi Forest/43 at a consideration of Kshs.850,000/=.

The 1st defendant states that he never received the sum of Kshs.100,000/= on 3rd June 2005, Kshs.50,000/= on 10th August, 2005 and Kshs.85,000/= on 6th July, 2011 totalling Kshs.235,000/= as alleged by the plaintiff. The 1st defendant states that it is not true the balance of Kshs.315,000/= was to be cleared upon successful transfer of the land to the Plaintiff.

The 1st defendant states further that he is not fraudulent and has no intentions to deny the plaintiff his parcel of land he acquired lawfully and purchased in good faith and for a valuable consideration which allegation is denied and denies the particulars of fraud on paragraph 10(a)-(e) of the Plaint and states that the plaintiff is not entitled for specific performance of the alleged sale agreement because there was no consent sought and obtained from the relevant Land Control Board as required by the law. The 1st defendant further states that the plaintiff did not purchase 5 acres of land from parcel No. LR No. Kapkoi Forest/43 as alleged and puts the plaintiff to strict proof at the hearing thereof. The 1st defendant denies any notice of intention to sue him having ever been issued to him by the plaintiff and shall put the plaintiff to strict proof at the hearing thereof.

When the matter came up for hearing the plaintiff's statement was adopted wherein he states that the 1st defendant is the beneficial owner of 5 acres of land curved from all that parcel of land forming part of the Estate of his late father Chemweno Sawe and that on/or about the 24th January 2005, the 1st defendant voluntarily entered into a sale of land agreement whereby he sold to the plaintiff his 5 acres of land curved from LR No. KAPKOI FOREST/43 at an agreed consideration of the sum of Kshs.850,000/=.

That he made a down payment of the sum of Kshs.300,000/= on the date of signing the agreement and subsequently made a further payment in liquidation of the balance totalling to Kshs.235,000/= as particularized hereunder:

- i. 3rd June, 2005 - Kshs.100,000.00
- ii. 10th August, 2005 - Kshs. 50,000.00
- iii. 6th July, 2011 - Kshs. 85,000.00

Total - Kshs.235,000.00

That it was an express term of the foresaid Sale Agreement that the balance of the purchase price amounting to Kshs.315,000/= was to be cleared upon successful transfer of the land to him and him obtaining the title documents to the land. That on several occasion, he has requested the 1st defendant to effect transfer of the land to him as per the Sale Agreement but he has ignored, refused and/or neglected to do so. That to his utter shock and consternation, he has discovered that the 1st defendant has without his consent and knowledge resold his land to a third party, the 2nd defendant herein.

According to the plaintiff, the sale of land by the 1st defendant to the 2nd defendant is fraudulent and intended to deprive him of his lawfully acquired parcel of land as the same was brought in good faith and

at a valuable consideration.

That his claim against the 1st defendant is for specific performance of the sale agreement or in the alternative refund of the purchase price paid plus interest at court rates paid by him for the purchase of 5 acres of land curved from LR No. Kapkoi Forest/43. He produced the agreement as PEx1. The balance was Kshs.550,000/=. On 3.6.2005, he paid Kshs.100,000/= and produced acknowledgement as PEx2 dated 3.6.2005. On 10.8.2005, he paid Kshs.50,000/= and produced acknowledgement. He paid Kshs.85,000/= on 6.7.2011 and he signed on the acknowledgment of 10.8.2005 and produced the acknowledgment as produced as PEx3. He paid the total of Kshs.535,000/=. He was to be given the title by the 1st defendant after succession as the land belonged to the 1st defendant's father however after Succession was done and the grant was confirmed the first defendant sold to someone else. The plaintiff went to Chepkonga Advocates, did demand letter but the 1st defendant did not respond. He prays for judgment as in the plaint, a refund of his money with interest. He prays for the current market price.

The 1st defendant was served, entered appearance, filed defence but never turned up on the hearing despite being served with a hearing notice. The plaintiff's evidence is not controverted thus that he entered into a valid agreement with the 1st defendant on the 24th day of January 2005 for the sale of 5 acres of land forming the estate of Chemweno Sawe the 1st defendant's father. The consideration for the purchase was Ksh.170,000/= per acre thus Ksh.850,000/=. The 1st defendant undertook to obtain the consent of the land control board for the transaction however the 1st defendant ultimately sold and transferred the property to someone else being the 2nd defendant in breach of the agreement. I do find the plaintiff has proved his on balance of probabilities and therefore the suit herein succeeds. However, amongst the orders sought this court cannot grant the order of specific performance as the property has been transferred to the 2nd defendant who appears to be an innocent purchaser for value.

There is no evidence that **Section 6 of the Land Control Act, Chapter 302** of the Laws of Kenya has been complied with, which provides that no contract for the sale of agricultural land can be valid without the Land Control Board Consent being applied for and obtained within 6 months of making of the sale agreement, unless, of course, that period is extended. The remedy of specific performance cannot be granted as the sale agreement became a nullity upon expiration of six months upon execution. **Section 7 of the Act** provides for the recovery of consideration thus if any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid.

The upshot of the above is that the plaintiff fails on the prayer for specific performance but succeeds on the prayer for refund of the purchase price and it is hereby ordered that the 1st defendant refunds the plaintiff the purchase price of Ksh.535,000/= plus costs and interest from the date of filing at court rates. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF JULY, 2016.

ANTONY OMBWAYO

JUDGE