



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KERICHO**

**CIVIL SUIT NO. 28 OF 2013**

**JUSTUS CHERUIYOT KIRUI.....PLAINTIFF**

**VERSUS**

**HILLARY KIPLANGAT LANGAT.....1<sup>ST</sup> DEFENDANT**

**SIMION KIMIBEI A. BII.....2<sup>ND</sup> DEFENDANT**

**PAUL KIPRONOH BII.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

*(Plaintiff purchasing land from an alleged son of the owner of the land; plaintiff now seeking specific performance; owner of the land not being privy to the agreement; plaintiff cannot seek an order of specific performance as the seller had no authority to sell from the registered owner; in any event, no consent of the Land Control Board given; the agreement cannot be enforced; plaintiff's case dismissed with costs)*

This case was commenced by way of plaint filed on **7 May 2013**. The case of the plaintiff is that on **26 August 2009**, he entered into an agreement with the 1<sup>st</sup> defendant for the sale of 0.6 acres of the **land parcel Kericho/Kipsonoi/119** at a consideration of Kshs. 225,000/=. He avers that he paid the full purchase price but that he was never issued with a title deed. He however took possession and lived peacefully on the land until February 2012 when the 3<sup>rd</sup> defendant entered the land and claimed ownership of it. He pleaded that if at all the 3<sup>rd</sup> defendant has title, then this was acquired by way of fraud. In the suit, he essentially asked for orders to have the title of the 3<sup>rd</sup> defendant cancelled and for specific performance ordering the 1<sup>st</sup> and 2<sup>nd</sup> defendants to execute a transfer to the plaintiff of the **land parcel Kericho/Kipsonoi/119**.

The 1<sup>st</sup> defendant filed defence vide which he pleaded that judgment should be entered in favour of the plaintiff. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants however contested the suit. It was pleaded in their joint defence that the 2<sup>nd</sup> defendant was at all material times the registered owner of the **land parcel Kericho/Kipsonoi/119**. It was pleaded that he subdivided this land and sold one portion, namely the **land parcel Kericho/Kipsonoi/2419** to the 3<sup>rd</sup> defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> defendant averred that they are strangers to any sale of the **land parcel Kericho/Kipsonoi/119** to the plaintiff. The 2<sup>nd</sup> defendant denied having sold any land to the plaintiff or having being privy to any agreement to sell land to the 2<sup>nd</sup> defendant.

In his evidence, the plaintiff testified that the 1<sup>st</sup> defendant is the last born son of the 2<sup>nd</sup> defendant. He

acknowledged that at the material time, the 2<sup>nd</sup> defendant was the registered proprietor of the **land parcel Kericho/Kipsonoi/119**. He averred that the 1<sup>st</sup> defendant informed him that he was selling his share of inheritance in the said land. He testified that he went to the home of the 2<sup>nd</sup> defendant who informed him that he has distributed his land and it was up to the 1<sup>st</sup> defendant to deal with it as he wished. It is then that he entered into the agreement of sale with the 1<sup>st</sup> defendant. He stated that the 2<sup>nd</sup> defendant then brought a surveyor and appointed the 3<sup>rd</sup> defendant, who he stated was a son of the 2<sup>nd</sup> defendant, to be in charge of the survey. He stated that his portion was surveyed and he took possession after the 3<sup>rd</sup> defendant had helped in fencing it. He testified that he used the land for two and a half years. After a while he found another fence which carved out 0.5 acres of what he had purchased. He reported to the Chief and later the District Officer who resolved that he should be given the land. A search that he did revealed that the portion of land that he purchased was now under the name of the 3<sup>rd</sup> defendant and registered as **Kericho/Kipsonoi/2419**. He stated that the 3<sup>rd</sup> defendant could not have got a good title as he was all along aware of his interest. In cross-examination, he conceded that none of the witnesses to the agreement were members of the family of the 2<sup>nd</sup> defendant. Neither did the 2<sup>nd</sup> defendant sign the agreement. At the time that he purchased the land, he did a search which showed that the registered owner was the 2<sup>nd</sup> defendant but he never drew any agreement with the 2<sup>nd</sup> defendant.

**PW- 2** was Ezekiel Chebioset, a village elder. He is the one who witnessed the payments to the 1<sup>st</sup> defendant. He also believed that the land sold belonged to the 1<sup>st</sup> defendant after being given to him by his father who was said to be the 2<sup>nd</sup> defendant. **PW - 3** was one Charles Kipkirui Soi, a retired Senior Chief. He testified that he was present when the agreement between the plaintiff and 1<sup>st</sup> defendant was drawn. The agreement was done in the home of the plaintiff. He stated that the 3<sup>rd</sup> defendant purchased the same portion from one of his brothers. He was aware that the plaintiff took possession of the land before he was dispossessed by the 3<sup>rd</sup> defendant.

No further evidence was tendered by the plaintiff despite me allowing him an adjournment to avail two more witnesses.

The 2<sup>nd</sup> defendant testified as **DW-1**. He testified that he does not know the plaintiff and has never sold any land to him. He testified that what he sold is a half acre of his land to the 3<sup>rd</sup> defendant through a written agreement signed on **15 August 2011**. He stated that he does not know the 1<sup>st</sup> defendant as he is not his son. He denied having given authority to any of his sons to sell his land.

**DW- 2** was the 3<sup>rd</sup> defendant. He testified that he is a neighbor of the 2<sup>nd</sup> defendant. He stated that he does not know the plaintiff nor the 1<sup>st</sup> defendant. He affirmed that he purchased a half acre portion of the **land parcel Kericho/Kipsonoi/119** from the 2<sup>nd</sup> defendant. His portion was subdivided and he obtained title to the same, which became registered as **Kericho/Kipsonoi/2419**. He then took over the land which was then vacant and has been on it to date. He stated that he has been on the land since **August 2011**. He testified that he has never encountered the plaintiff and he is surprised that he was sued.

The 1<sup>st</sup> defendant never tendered any evidence.

Both counsels filed written submissions which I have considered in my judgment.

I have carefully considered the pleadings and the evidence tendered. I must at the outset say that I do not see how the plaintiff can succeed in his claim. The plaintiff entered into a written agreement with a person who was not the owner of the land that he was purchasing. Neither was it shown to me that the 1<sup>st</sup> defendant had any authority from the registered owner, the 2<sup>nd</sup> defendant, to sell the 2<sup>nd</sup> defendant's land, or any portion of it, to the plaintiff. The only person who had authority to sell the property was the 2<sup>nd</sup> defendant, as registered owner, or a person who had his authority. The sale agreement between the plaintiff and the 1<sup>st</sup> defendant is therefore not worth the paper that it was written on.

There is doubt whether the 1<sup>st</sup> defendant is son to the 2<sup>nd</sup> defendant, but to me, it does not matter whether or not he is son to the 2<sup>nd</sup> defendant. What is important is that the 1<sup>st</sup> defendant did not have title to the land and did not have the authority of the 2<sup>nd</sup> defendant to sell the land. That legal position is not affected by whether or not the 1<sup>st</sup> defendant is son of the 2<sup>nd</sup> defendant. The biological relationship, if any, between the 1<sup>st</sup> and 2<sup>nd</sup> defendant is therefore immaterial. I am indeed surprised that the plaintiff, despite undertaking a search of the property which clearly showed that the land was owned by the 2<sup>nd</sup> defendant, never bothered to enter into any agreement with the 2<sup>nd</sup> defendant. What then, was the point of doing the search? It is only the owner of the property, or his authorized agent, who could sell land to the plaintiff. The 1<sup>st</sup> defendant, not having been owner or authorized agent, could not pass any good title to the plaintiff. In the circumstances, there is no way that the plaintiff can be entitled to an order of specific performance against any of the defendants.

The above aside, it is also apparent that the sale entered into by the plaintiff, even assuming that the 1<sup>st</sup> defendant had authority to sell, would still be null and void for want of consent of the Land Control Board. The land in question is agricultural land and pursuant to **Section 6 (1) of the Land Control Act, Cap 302, Laws of Kenya**, the consent of the Land Control Board was required, which under **Section 8(1)** of the same statute, was to be given within 6 months of the agreement. The said law is drawn as follows :-

**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;*

*(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;*

*(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land 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.*

**8. (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:**

*Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.*

Consent of the Land Control Board was never sought by the plaintiff and therefore the agreement between the plaintiff and 1<sup>st</sup> defendant became null and void after 6 months. The question that consent of the Land Control Board is required for transactions over agricultural land was affirmed by the Court of Appeal in the fairly recent case of **David Sironga Ole Tukai vs Francis arap Muge & 2 Others, Nairobi Civil Appeal No. 76 of 2014 (2014) eKLR**.

The only remedy available to the plaintiff is a refund of the purchase price from the 1<sup>st</sup> defendant as provided under **Section 7 of the Land Control Act**, which he is free to seek in separate proceedings as he never asked for any such orders in this case.

There was contention as to whether or not the plaintiff ever took possession of the suit land. But again to me, this is immaterial. If at all the plaintiff ever took possession, he took possession on the basis of an

agreement that cannot be enforced for the reasons that I have enumerated above. I have seen nothing wrong with the sale to the 3<sup>rd</sup> defendant and I cannot vitiate it.

I really do not see the point of saying any more. The case of the plaintiff has no legs upon which to stand. I have little option but to dismiss it with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant. The 1<sup>st</sup> defendant did not oppose the case and is therefore not entitled to any costs.

It is so ordered.

**Dated, Signed and delivered on this 1<sup>st</sup> day of July, 2016**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**PRESENT:**

Mr. Joshua Mutai holding brief for M/s Motanya and Company Advocates for plaintiff.

Mr. Caleb Koech holding brief for M/s Tengekyon and Koske Advocates for 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

1<sup>st</sup> defendant acting in person absent.