



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 29 OF 2012

PATRICK KIMELI CHEPNGOK PLAINTIFF

VERSUS

JOHN KIRWA ROTICH DEFENDANT

JUDGEMENT

INTRODUCTION

1. The plaintiff is the registered owner of LR No. Kaplamai/Sirende Block 2/Ngonyek/310 (suitland). The plaintiff had intended to sell six acres out of the suitland to the defendant but the sale was later rescinded. The plaintiff brought this suit against the defendant seeking a declaration that the agreements entered into in 1998 and 14/5/2008 are null and void for want of consent of the Land Control Board.

2. The defendant filed a defence in which he contends that he purchased six acres from the plaintiff, took possession and has since acquired the six acres by way of adverse possession and as such the issue of consent of the Land Control Board does not arise.

PLAINTIFF'S CASE

3. The plaintiff testified that in 1988, the defendant who is now a retired teacher approached him to give him two acres so that he could be able to stand as a member of Parliament for Cherengany constituency. He gave the defendant the two acres. The defendant later agreed to purchase land from the plaintiff. The plaintiff gave him three more acres. The defendant wrote a cheque of Kshs 26,000/=.

4. The defendant made further payments totalling to Kshs 180,000/=. He never took the defendant before the Land Control Board for consent and that in the year 2012 he refunded Kshs 42,000/= being refund of part of the purchase price signalling rescission of the agreements.

DEFENDANT'S CASE

5. The defendant testified that between 1990 and 2008, he bought a total of six acres at a consideration of kshs 180,000/- which was duly acknowledged by the plaintiff who is related to him. He was put in possession. The plaintiff applied for consent of the land control board but which consent was not given as the Plaintiff declined to appear before the Board. Mutations were prepared showing how the plaintiff's land was to be subdivided. That the plaintiff has since been giving him problems by destroying his crops and fence. He denies ever receiving refund to the tune of Kshs 42,000/-. He stated that he only received Kshs 36,000/- from Isaac Bungei which he returned back.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

6. There is no contention that, the plaintiff had intended to sell six acres to the defendant. There is also no contention that the total purchase price paid to the plaintiff was Kshs 180,000/=. Though the plaintiff acknowledged that he entered into agreements with the defendant, he did not have the said agreements. The said agreements were however produced by the defendant.

7. On 27/9/1990 the defendant sold four acres to the defendant at Kshs 30,000/- per acre making a total of kshs 120,000/-. Receipt of this sum was acknowledged on execution of the agreement which was produced as defence exhibit 1. Again on 3/3/1995, the defendant purchased an additional one acre at a consideration of kshs 50,000/=. Receipt of the purchase price was acknowledged on execution of the agreement which was produced as defence exhibit 4. On 14/5/2008 an agreement was entered into between the plaintiff and the defendant in which the two previous agreements were incorporated. The total acres purchased were six and the amount was shown as Kshs 180,000/-. This agreement of 14/5/2008 was produced as defence exhibit 5.

8. The issues which emerge for determination are firstly whether consent of the Land Control Board was obtained or not and if so what is its effect on the whole transaction. The second issue for determination is whether the plaintiff rescinded the agreement entered into by him and the defendant. Lastly, whether the defendant has acquired the six acres through adverse possession.

Whether consent of the Land Control Board was obtained and if so what is its effect on the transactions

9. The Plaintiff contended that he did not take the defendant before the land Control Board for consent. On the other hand, the defendant contended that an application for consent was made but consent of the Board was not obtained because the plaintiff failed to appear before the board. The defendant produced an application for consent dated 1/3//1993 [Defence exhibit 2]. It is clear therefore that no consent of the Land control board was obtained. The Land Control Act provides that consent of the Land Board has to be obtained within six months from the date of the consent. No consent was obtained within the six months and no extension of time was sought from the High Court as required. This therefore means that the transaction became null and void for want of the consent of the board.

Whether the Plaintiff rescinded the agreement entered into with the defendant

10. Though the defendant denied that the plaintiff did not rescind or seek to refund him part of the purchase price, there is evidence that the plaintiff sent Kshs 42,200/- to the defendant in 2012 via M-Pesa. A statement of the plaintiff's M-Pesa account was produced as exhibit 3. It is clear that kshs 42,000/- was sent to the mobile phone of the defendant. The plaintiff explained that the Kshs 200/= over and above Kshs 42,000/= was meant to cover withdrawal charges, It is clear that the defendant declined to receive the money but instead sent it back to the plaintiff. The plaintiff's action signified rescission of the agreement. It is therefore not true for the defendant to claim that the only amount which he received was from Isaac Bungei which money he returned back.

Whether the defendant has acquired the six acres by adverse possession

11. Though the defendant had raised the defence of adverse possession in the defence, he never pursued the same in his evidence. In any case adverse possession cannot be raised in a defence. If one has to raise a claim for adverse possession, the same has to be brought through originating summons as provided for under the relevant statutes. Even if it were possible for one to raise a defence of adverse possession, the defendant would have not had the six acres through adverse possession. The last of the six acres was bought on 14/5/2008. The present case was filed on 6/3/2012. The defendant had therefore had the one acre for slightly over four years and he would not therefore qualify to have it under the doctrine of adverse possession. Besides this, the defendant's own evidence is that he has not been in peaceful occupation of the six acres. In 1995 the plaintiff destroyed his fence and at some time sprayed his (Defendant's) maize. The defendant said that he has even obtained judgement in his favour against the plaintiff for the damage. I do not see if he would have succeeded in a claim for adverse possession without any evidence in support of it and in view of the fact that he has not been enjoying the land

peacefully. I therefore find that he has not acquired the six acres by way of adverse possession.

DECISION

12. Having found that there was no consent of the Land Control Board obtained, I find that the plaintiff's claim against the defendant is well founded. A declaration is given that the agreements between the plaintiff and the defendant more particularly the one of 14/5/2008 is null and void for want of the consent of the Land Control Board. A permanent injunction is hereby issued against the defendant, his agents or authorised persons from claiming, entering, ploughing or in an manner interfering with **LR No Kaplamai/Sirende Block 2/Ngonyek/310**. The defendant shall pay costs of this suit to the plaintiff.

Dated, signed and delivered at Kitale on this 27th day of October 2016.

E. OBAGA

JUDGE

In the presence of Mr Ingosi for plaintiff and the defendant

Court Assistant – Isabellah

E. OBAGA

JUDGE

27/10/16