



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&L A 2 OF 2014

SAMUEL NYABIBA NYAKERI.....APPELLANT/APPLICANT

VS

PETER OKIABERA OMWENGA.....RESPONDENT/RESPONDENT

JUDGMENT

Samuel Nyabiba Nyakeri hereinafter referred to as appellant moved the Chief Magistrates court Eldoret hereinafter referred to as the trial court against Peter Okiabera Omwenga hereinafter referred to as the appellant claiming that by a matter aforementioned made

By a written agreement made between the plaintiff and the defendant on 13/02/1994, the plaintiff agreed to exchange his commercial plot measuring 15 by 100 situated at Langas within Eldoret Municipality with the defendant's plot measuring 25' by 100' situated at Matunda Township.

Upon signing the said agreement the plaintiff took immediate possession of the Defendant's plot at Matunda Township while the Defendant took possession and occupied the plaintiff's plot at Langas and developed the same.

The parties herein occupied and enjoyed uses of exchanged plots until March 1998 when the Defendant made a complain before the village elders at Langas over the said plots upon deliberation, the parties agreed that the plaintiff purchase an alternative plot for the Defendant measuring 25' 100ft at Matunda centre.

In January 1999, the defendant lodged a complain with the then D.O. Kapsabet Division who arbitrated over the issue and resolved that the plaintiff be given three (3) months within which to purchase and hand over a plot measuring 25ft by 100' to the defendant.

Pursuant to the ruling by the D.O. The plaintiff purchased a plot measuring 1/8 of an acre at Langas-Kasarani area within Eldoret Municipality together with a four-roomed residential structure, bore hole and toilet standing therein in favour of the Defendant.

The defendant again took the issue before office of the District Commissioner Lugari who further ordered the plaintiff to purchase a plot at Block 10 Eldoret Municipality measuring 1/8 of an acre in favour of the Defendant which property the plaintiff has already purchased.

Notwithstanding the exchange agreement made on 13/2/1994 and the ruling made by the elders, the District Officer Kapsabet and the office of the District Commissioner Lugari, the Defendant now claims

entitlement to the plaintiff's commercial plot at Matunda Township.

The plaintiff avers that the Defendant's right of ownership in respect of the plot at Matunda centre was extinguished on the strength of the exchange agreement.

The appellant prayed for a declaration that he is the sole owner of a commercial plot measuring 25' by 100 ft at Matunda Township on the strength of the exchange agreement and a permanent injunction do issue restraining the Defendant from interfering with the said plot.

The Respondent filed defence on the 12/1/2005 which was later amended on 10/2/2006, pursuant to a consent order made on 3/2/2006. The gist of the defence and counterclaim is that

The defendant admits having entered into an agreement on 13th February, 1994 or thereabouts whereby the plaintiff and the defendant were to exchange the plot in Matunda with the plot in Racecourse/Langas Estate, Eldoret.

The defendant admits having taken possession of the plaintiff's plot in Langas/Racecourse, Eldoret and having carried out extensive developments thereon.

The defendant is still in possession of the plot at Langas/Racecourse estate, Eldoret although the plaintiff has without his consent and or permission encroached into portion of the plot and let and occupied portions thereof.

The plaintiff's conduct and or act of moving into and occupying and letting portion of the plot at Langas/Racecourse estate, Eldoret is in total violation of the arrangement and or agreement reached between the defendant and the plaintiff.

The defendant avers that the plaintiff pursuant to the exchange agreement was required by law to relinquish all interests proprietary or otherwise he had on the plot in Langas/Racecourse estate, Eldoret.

That the plaintiff is not legally allowed to retain both the plot at Langas/Racecourse estate, Eldoret and while at the same time retaining the plot at Matunda Township.

The defendant further avers that the complaint filed before the village elders and or the provincial administration and the decisions arrived at are inconsequential, null and void ab initio and thereafter unenforceable in law.

Paragraphs 5,6,7 and 8 of the plaint are denied and the plaintiff is put to strict proof thereof.

The defendant denies the averments in paragraphs 9,10,11, 12 and 13 of the plaint and puts the plaintiff to strict proof thereof.

Without prejudice to the defence in paragraph 11 herein and in the alternative the defendant avers that:-

- i. that in the absence of the exchange of the plots there is no legally enforceable contract.
- ii. In the event that the plaintiff does not want to relinquish his plot at Racecourse/Langas estate Eldoret he has no basis for retaining the defendant's plot at Matunda (currently known as Nzoia Sisal/Moisbridge Block 1/3406.
- iii. the exchange agreement is fatally defective and unenforceable.
- iv. the consideration for the defendant's plot at Matunda township is the plot at Racecourse/Langas, Eldoret.
- v. The exchange agreement has been frustrated by the plaintiffs conduct.

vi. The plaintiff has to elect to either have the exchange agreement enforced to the letter or have the same rescinded and the parties revert to the position they will have occupied in the absence of the agreement.

vii. The defendant is not bound by the decision of the village elders and the provincial administration.

viii. There is no decision of a competent tribunal and or court capable of enforcement.

ix. The remedies being sought are unavailable.

x. The plaintiff is seeking unjust enrichment.

Demand and notice to sue has not been received.

The suit is incompetent and lacks in merit.

Jurisdiction is denied

The suit offends the mandatory provisions of law.

The verifying affidavit is incompetent.

The defendant will raise preliminary objections on points of law at the earliest opportunity.

COUNTERCLAIM

The defendant reiterates each and every averment of his defence and counter claims for the Matunda plot (currently known as Nzoia Sisal/Moisbridge Block 1/3406).

The defendant seeks a declaration that the agreement dated 13/2/94 does not satisfy the provisions of the law of contract act and is unenforceable.

The defendant further avers that there is no consideration the plaintiff has given for the defendant in exchange for the plot at Matunda and the agreement has taken apart for want of consideration as the plaintiff has refused to surrender the plot at Langas.

The defendant prays for a declaration that the agreement dated 13/2/94 is unenforceable and that there is no consideration given by the plaintiff to the defendant in exchange for the plot at Matunda and that the agreement is therefore a nullity.

A declaration that the decisions of the elders, District Officer and District Commissioner are unenforceable null and void.

The plaintiff should be evicted from the Matunda plot (currently known as Nzoia Sisal/Moisbridge Block 1/3406) and if the same has been registered in the plaintiff's name the same should be transferred to the defendant's name.

In the reply the amended defence and defence to counterclaim, the plaintiff stated that

The plaintiff admits the averments in paragraph 5 of the defence especially that the plaintiff has encroachment in a portion of the plot and let and occupied portions thereof and the defendant is invited to strict proof thereof.

Paragraphs 5 of the defence is denied and the plaintiff further states that he has never violated the arrangements and or agreement reached between him and the defendant and the plaintiff shall be put to

strict proof thereof.

The plaintiff denies the contents of paragraph 7 and 9 of the defence and shall put the defendant to strict proof thereof.

Paragraph 10 and 11 of the defence are denied and the plaintiff reiterates all the averments in paragraph 5 through 13 of the plaint.

The plaintiff denies in tot the contents of paragraph 12 of the defence and all allegations in paragraph 12 (i-ix) of the defence as same are baseless and unfounded and the defendant shall be put to strict proof thereof.

The plaintiff further denies the contents of paragraph 13 through 17 and shall put the defendant to strict proof thereof.

The plaintiff reiterates all the averments in the plaint.

The plaintiff denies that the plot at Matunda is currently known as Nzoia Sisal Moisbridge Block 1/3406.

The plaintiff will aver that the defendant amended defence and counterclaim is a nullity in law in offending the mandatory provision of the civil procedure act.

The plaintiff further avers that since it is the defendant who filed a complaint before elders he is therefore bound by the decision of elders and is estopped from alleging that the same does not satisfy provision of the law of contract act.

The plaintiff avers that since the contract bargains has been performed by the respective parties lacking possession of the exchange portions as admitted in the defence then the prayers sought in the counterclaim cannot avail in law.

The plaintiff avers that upon taking of the plot at Langas the defendant interests over the plot at Matunda was extinguished and the defendant is estopped from alleging no consideration was given.

The plaintiff avers that the defendant is not entitled to the prayers sought on the counterclaim that;

- i. The defendant has come to court with tainted hands in view of his conduct prior to filing suit.
- ii. The defendants claim is time barred and by virtue of limitation of action act.
- iii. The counter claim is a mere after thought and meant to defeat the plaintiff claim.

During hearing before trial court the appellant testified that the defendant who is his uncle agreed to exchange his plot at Matunda measuring 25 by 100 the appellants plot at Langas in Eldoret measuring 30 by 100. Both plots were plain. The respondent took possession of the plot but after a while he refused the plot. The matter was arbitrated through elders including the sub chief but the dispute was not resolved. The District Officer and District Commissioner equally failed to resolve the dispute.

On cross examination, the appellant continued that the Matunda plot did not exist as he sold it on 30/2/1999. He states that they never agreed that their exchange was subject to acceptance by the appellants sons.

The respondent on his part testified that he bought his plot in Matunda in 1977 along Kitale-Eldoret road and has put up a petrol station and a permanent house on the plot. The plot no is now Nzoia Moi's Bridge Block Nzoia Sisal 3406 in the name of the appellant.

The respondent had done a mud house and iron sheet semi-permanent house before the exchange. The

appellant showed him the plot in Racecourse Eldoret and he did a timber iron sheet house. However he never lived in the land peacefully as the appellants children interfered with his quiet possession and even uprooted beacons. The appellant constructed on the land both at front and rear leaving him sandwiched in the middle. The respondent prayed for his plot in Matunda to be returned.

The trial Magistrate heard the parties visited the parcel of land in Matunda and Racecourse and continued that the Matunda plot was in existence and that the appellant was in occupation and had developed the same. She visited the plot at Langas/Racecourse and found out that the Respondent had done a temporary house and that there were building materials on the plot. She also noticed that the appellant had constructed houses and allowed his sons to run businesses on the respondents plot at Langas/Racecourse.

In a nutshell the trial court found that the agreement dated 13/2/1994 does not satisfy the provision of the Law of Contract Act and is unenforceable.

The agreement dated 13/02/1994 is unenforceable and that there is no consideration given by the plaintiff to the defendant in exchange for the plot at Matunda and that the agreement is therefore a nullity.

The decisions of the Elders, the District Officer and District Commissioner are unenforceable null and void.

The plaintiff should be evicted from the Matunda plot currently known as Nzoia Sisal/Moi's Bridge Block 1/3406 and if the same has been registered in the plaintiff's name the same should be transferred to the defendant's name.

The plaintiff shall pay the costs of the plaint and the counterclaim to the defendant.

DATED AND DELIVERED AT ELDORET THIS 12TH DAY OF MARCH, 2015.

JUSTICE OMBWAYO ANTONY

ENVIRONMENT AND LAND COURT AT ELDORET