



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 528 OF 2013

PHILIP K. VARGHESE.....PLAINTIFF

VERSUS

FRANCIS PIUS OMWERI NYABERI

T/A STIR-LAND ENTERPRISE.....DEFENDANT

RULING

The plaintiff's claim is that the defendant has at all material times been the lawful owner of the two parcels of land known as sub plot T(46),KIPLOMBE/KIPLOMBE BLOCK6 and (CHEMALAL)/51 all measuring 0.2 Hectares. By an agreement dated 11th September 2009 between the plaintiff and the defendant the defendant agreed to sell his interest in the property aforementioned to the plaintiff at a consideration of Kenya shillings two hundred and ten thousand (Kshs. 210,000.00) and that it was upon the completion of the payment of the whole consideration by the plaintiff to the defendant that the plaintiff would take possession of the suit property. It was a term in the aforesaid agreement that the plaintiff would pay consideration to the defendant as follows:

a. The sum of Kenya shillings one hundred and five thousand (Kshs. 105,000.00) had been deposited at the making of an agreement referenced to on 31st January 2007 and expressly signed on 11th September 2009.

b. The sum of Kenya shillings One hundred and five thousand (Kshs. 105,000.00) had been furnished as a balance to complete total consideration acknowledged by signing the agreement dated 11th September 2009.

The parties agreed that the defendant would give vacant possession of the property to the plaintiff and the plaintiff to take possession upon completion of full payment and that the defendant was to execute all the conveyancing documents so as to transfer the suit land to the plaintiff. In spite of the plaintiff performing his part of the bargain, the defendant has refused and or ignored to perform his part occasioning a breach on his part in due performance of the sale agreement.

The plaintiff has enumerated the Particulars of breach on the part of the defendant as **Failing to give vacant possession to the plaintiff even though full purchase price has been paid. Moreover failing to execute all conveyancing documents to benefit the plaintiff and to surrender title to the suit land and also to procure title deed in the name of the plaintiff.** As a result of the aforesaid breach of contract by the defendant the plaintiff has suffered loss and therefore prays for judgment against the defendant.

In an application accompanying the plaint, the plaintiff prays for a temporary injunction restraining the

defendant his servant or agent from trespassing into, fencing, construction upon and or further construction upon, selling transferring , encumbering, and or otherwise interfering with the two suit parcels of land aforesaid.

The application is grounded on allegations that the plaintiff is the bonafide purchasers for value of the two subject suit parcel known as sub plot T(46),KIPLOMBE/KIPLOMBE BLOCK 6 and (CHEMALAL)/51 each measuring 0.20 hectares. Despite a binding sale agreement and the plaintiff having fulfilled his part of the agreement, the defendant has adamantly refused, neglected and/or failed to effect a transfer in favour of the plaintiff. Though the plaintiff possesses a valid sale agreement over the subject suit parcels and a certificate of completion thereto, the defendant in disregard of the binding sale agreement has commenced construction of a building on the subject suit parcels without any colour of right whatsoever. The plaintiff is apprehensive that the defendant may encumber, sell, transfer or enter into further dealings over the subject suit parcels thereby depriving him of his legally entitled interest over the subject suit parcels. The plaintiff believes that he has a prima-facie cause with a high probability of success. The plaintiff prays for an injunction on the basis that he cannot be adequately compensated by an award of damages if the intended interference shall take off and or continue since he has his own plans of carrying out developments thereon.

In the supporting affidavit, the applicant states that he is the bonafide purchaser for the two (2) suit parcels known as sub plot T(46)KIPLOMBE/KIPLOMBE BLOCK 6 and (CHEMALAL)/51 each measuring 0.20 Hectares having obtained the interest over the suit parcels vide a sale agreement entered into between himself and the defendant herein. Upon purchase and satisfaction of his obligations in the agreement he was offered a certificate of completion of purchase. However, despite the sale agreement being completed in the year 2009, four (4) years later the defendant is yet to effect a transfer in his favour despite many attempts, calls and demands. That the defendant has in recent times commenced construction upon the suit parcels contrary to the express sale agreement without any authority, permission or consent from the plaintiff.

In the replying affidavit sworn by the defendant on 30/5/2014 and filed on 3/6/2014 the defendant states that he has no legally recognized interest on the suit land and has never in anyway interfered with the plaintiff's possession and or use of the suit land and has no intention to move into and or in anyway deal with the suit land as the land does not belong to him. He mis categorical that the land belongs to a 3rd party who had given him the portion sold to the plaintiff. That after he sold a portion of the land to the plaintiff the owner and his sons started disturbing the plaintiff.

That the land is agricultural land and governed by the Land Control Act and therefore the land sale between the defendant and the plaintiff became null and void by operation of law 6 months after it was executed. He claims that after he sold the land to the plaintiff he moved away and has never desired to go back nor dealt with it. That they have had several meetings to sort out the issue at and outside the police station in the presence of the owner and his family to no avail. That it is not possible for the defendant to encumber the suit land as he has no right and or interest thereon. He believes that the plaintiff's only remedy the which is quantifiable lies in a refund of Kshs. 210,000/-.

The plaintiff filed a further affidavit claiming that he had privity of contract with the respondent for the sale of the suit parcels.

Mr. Aseso learned counsel for the applicant submitted that the defendant as a principal, purported to sell the land through a letter of offer. The said authority is purported to have been withdrawn but no evidence was given of withdrawal and that lack of the consent of the Land Control Board cant be relied upon to deny the plaintiff the orders sought he cited the court of **appeal case of Macharia Mwangi & others - vrs- Davidson Mwangi Kagin. CA at Nyeri Civil Appeal No. 6 of 2011.** The court of appeal in this case considered the case of **Kariuki -vrs- Kariuki.**

Mr. Momanyi learned counsel for the respondent argues that the applicant is seeking an injunction order on a particular parcel of land that does not belong to the defendant. The court cannot issue orders in the absence of the owner of the parcel of land as this will infringe on the owners right.

Moreover, Mr. Momanyi argues that this transaction involves agricultural land hence the consent of the land control board was required none was obtained. The respondent argues that the applicant is entitled to a refund which has been offered but the applicant has rejected.

For the plaintiff/ applicant to succeed he must demonstrate that he has a prima facie case with a likelihood of success and that if a temporary order of injunction is not granted, he is likely to suffer irreparable harm and lastly that if the court is in doubt then it should decide on a balance of convenience.

This court finds that the respondent by agreement made on the 11/9/2001, the respondent ***T/A Stir Land Enterprises*** agreed to sell to the applicant two plots each measuring 0.20 hectares (sub plot T(46) of land from Kiplombe/Kiplombe Block 6 and Chemalal 52 for a consideration of Kenya shillings 210,000/-. The respondent received a sum of Ksh. 105,000/- and later another sum of Kshs. 210,000/-.

The applicant was to take possession on completion of the purchase price and the respondent was to execute all conveyance documents so as to transfer the said parcel of land to the applicant and at the time of the transaction the land was free of any encumbrance.

Though the land in dispute is claimed to be legally owned by Paul Kibet Murei, no document was shown to court as proof that Mr. Paul Kiboi Murei was the legal owner of the land. However, by letter of offer for Barini plot No. 51 Chemalal B (Farm) Mr. Paul Kiboi Murei appears to have sold the suit property to the respondent and also gave permission to the respondent to sell the property to its members. The letter of offer is not addressed to anybody.

This court does find that the executed agreement between the plaintiff and the 1st defendant and the letter of offer between the defendant and Paul K. Boit constitute on a prima facie basis an agreement between the plaintiff, the defendant and not Paul K. Boit the owner of the parcels of land. The acceptance of the consideration by the respondent and the attempted refund of the same by the respondent is a clear indication that the suit herein is not frivolous against the respondent. However the parcels of land appear to be owned by a third party and therefore the court doubts that it can issue an order of specific performance against the respondent and yet the land suit properties are owned by a third party.

On the issue of lack of consent of the Land Control Board, this court finds that the respondent was to obtain consent of the land control board in liason with the plaintiff but did not do so. The only person who is seeking to benefit from the failure to obtain consent of the land control board is the respondent. However this court's hands are tied by the law on this matter.

Section 6 of the land control Act cap 302 of the laws of Kenya provides as follows:- *Transactions affecting agricultural land*

(1) Each of the following transactions that is to say—

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 (L.N. 516/1961) for the time being apply;

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.

Section 8 of the said Act provides that:-

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:

(1) 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.

(2) The land control board shall either give or refuse its consent to the controlled transaction and, subject to any right of appeal conferred by this Act, its decision shall be final and conclusive and shall not be questioned in any court.

(3) For the purposes of subsection (1), an application shall be deemed to be made when it is delivered to the authority prescribed in the manner prescribed.

(4) An application under subsection (1) shall be valid notwithstanding that the agreement for the controlled transaction is reduced to writing, or drawn up in the form of a legal document, only after the application has been made

On the issue of irreparable harm if an order for is not granted, I do find that the plaintiff has merely said that he cannot be adequately compensated by an award of damages if the intended interference shall take off and continue since he has his own plans of carrying out development thereon. The plaintiff did not exhibit any development plans on the parcel of land. No tangible evidence was shown to the court that the plaintiff was planning to use the parcel of land for any development.

On balance of convenience this court finds that the plaintiff is not in possession of the property and therefore the balance of convenience does not lie in his favour. *In Machaira Mwangi Maina & 87 others - vrs - Davidson Mwangi Kayira* the court of appeal considered the fact that the appellant had been put in possession by the respondent hence creating an overarching interest.

This case can be distinguished from the cited case as the plaintiff is not in possession.

In view of the foregoing, I find that the plaintiff has not satisfied three principles as set out *Giella -vrs- Cassman brown* and do dismiss the application with costs.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF MAY 2015.

ANTONY OMBWAYO

JUDGE