REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

APPEAL NO. 31 OF 2013

WILLIAM KIPSOI SIGEI.....APPELLANT

VERSUS

KIPKOECH ARUSEI.....1ST RESPONDENT

JOHN TUNGE.....2ND RESPONDENT

JUDGMENT

William Kipsoi Sigei ***(hereinafter referred to the appellant)*** was sued in the Lower Court by **Kipkoech Arusei** and **John Tunge** ***(hereinafter referred to the respondents)***. The 1st Respondents commenced suit in the lower court by plaint which was amended on 27.4.2007 alleging that the the 1st Respondent was the owner of all those plots in Kesses township known as plot numbers 172,173,174,and 175 whilst the 2nd respondent was the owner of that piece of land in Kesses Township known as Plot Number 171 having acquired it from the 1st respondent. It was the 1st respondent's case that he had purchased the five plots from the appellant vide an agreement entered into between them on 19.3.1991.

Upon paying the amount in consideration of the plots, the 1st respondent took possession and ownership of the said plots (171, 172, 173, 174 and 175) and had quiet enjoyment of his rights and sold Plot No. 171 to the second respondent at later stage. On or about 25.7.2003, the appellant without any colour of right interfered with the 1st and 2nd respondent's plots by blocking developments carried on by the 2nd respondent in plot number 171. As a result of the appellant's illegal action, the 1st and 2nd respondent's have suffered damages, the building materials on the site have been wasted and/or stolen resulting to loss.

The appellants filed defence to amended plaint and counterclaim denying the contents of the amended plaint and assented that plot No. 171, Kesses Township did not belong to the 2nd respondent and that Kesses Trading Centre is not a township.

The appellant claimed that he is the owner of the parcels of land the 1st respondent allegedly bought although plots number 171, 172, 173, 174 and 175 at Kesses Township did not exist on the ground.

The appellant further claimed that the plots that the 1st plaintiff bought from the appellant were amalgamated into Number 41 at Kesses Township measuring approximately 0.5 acres and that the court could not issue an injunction preventing the defendant from interfering with non existent parcels of land or plots. According to the appellant he had no dealings and or relationship with the 2nd respondent and any suit filed against himself by the 2nd respondent was misconceived, ill advised and unsustainable in law. The ownership of plot number 41 at Kesses Township has not changed hands and or transferred from the defendant to the respondents. The 1st respondent did not have title to the parcel of land allegedly sold

to the 2nd respondent and he could not therefore pass any title to the 2nd respondent. The appellant further claimed that the matter in dispute had already been adjudicated upon pursuant to the land disputes tribunal's Act and a decision has already been adopted as a judgment of this court in Eldoret Chief Magistrate's Court award No. 101 of 2002. The respondents being dissatisfied with the decision of the tribunal as adopted filed the aforestated proceedings in the High Court to challenge the tribunal's verdict. That the respondents therefore lied to this court by stating in the plaint that there was no suit and or proceedings pending in any court on the same subject matter.

The respondents trespassed into the appellant's parcel of land known as Plot No. 1 at Kesses Kelchin Farm instead of confirming themselves into plot No. 4 at Kesses Kelchin Farm. The appellant prayed for an eviction order against the respondents and an order for an injunction against plaintiff's preventing them from trespassing into his parcel of land known as Plot NO. 1 at Kesses Kelchin and carrying any developments thereon. Last but not least the appellant claimed that the plots in issue are within a Land Control Area and the requisite consent of the Land Control Board had not been given and therefore the transaction was null and void as per the requirements of the Land Control Act Cap. 302, Laws of Kenya. The appellant counterclaimed that respondents had trespassed into Plot No. 1 at Kesses Kelchin Farm and commenced developments thereon upon obtaining an order of injunction from the court.

This being a first appeal, I am reminded of my primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212* wherein the Court of Appeal held inter alia that:-

> *"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence*"

The evidence on record is that the appellant subdivided his land into five plots and sold each at Kshs.30,000/=. The 1st respondent claims to have paid Kshs.150,000/= to his advocate and made a final agreement was selling his land when he. He entered the plots and fenced and developed them. In 2003, he sold plot No. 171 to the 2nd respondent and owed nothing to the defendant. He occupied the plots since 1991 to the date of hearing.

According to the 2nd respondent, he entered into a sale agreement with the 1st respondent in May, 2003 for sale of a plot of 50 by 100. He paid the 1st respondent Kshs.150,000/=, he took possession and built a structure and as he was digging foundation to put up a permanent structure, the appellant ordered him to stop building as he had not sold the land. When he met the 1st respondent and he informed him of the issue, the 1st respondent decided to file a suit in the Lower Court which is the subject of this appeal.

The respondents called ***James Kipkemboi Arap Koech***, a resident of Kesses Kelchin Farm who testified that the appellant sold the 1st respondent's five plots. David Ngala an advocate of the High Court of Kenya, currently practicing as Ngala & Company Advocates testified that In 1991, he had just been admitted and he had been employed to work at Birech and Company Advocates. In the cause of his duties, on the 19.03,91, clients who were not known to him came and requested that he prepares an agreement for them. The agreement was between the appellant who was the vendor and the 1st respondent who was the purchaser. He prepared the agreement and they signed. It was in respect of 5 plots identified as numbers 171, 172, 173, 174 and 175 and surveyed to form part of L. R. 2691 situated at Kesses township. The agreed purchase price was Kshs.150,000/= for all the plots. The purchase price was paid to the appellant on signing the agreement by the 1st respondent. He enquired whether there were titles to the land but there were none. There was a clause that the vendor was to introduce the purchase to Kesses Trading Centre Committee. He witnessed the agreement and wishes to produce agreement as PEx No. 1.

Having evaluated the evidence on record and having read submissions filed, the lower court heard that the suit parcel of land was registered as L. R. 2691 for the entire farm whose ownership belonged to the members of Kesses Farm. The farm has not been subdivided and titles issued due to disputes. The court found that the respondent had not proved their case on a balance of probabilities and also found that the appellant likewise had not satisfied the court on balance of probabilities that he had a case of action on counterclaim.

The appellant was dissatisfied with the decision of the court and appealed to this court. The grounds of appeal are:

1. ***The Honourable Magistrate erred in law and fact in holding that the defendant has failed to prove the counterclaim against the plaintiffs.***
2. ***The Honourable Magistrate having found that the plaintiffs had not acquired title from the defendant/appellant on the portion of land they currently occupy which forms part of the defendant's share on Kesses Kelchin/Keljin Farm then he ought to have allowed the counterclaim.***
3. ***The Honourable Magistrate erred in law and fact in failing to find that the defendant had an equitable right to have the plaintiffs vacate the piece of land they currently occupy.***
4. ***The honourable court's judgment is as a whole legally untenable and it ought to be set aside.***
5. ***He Honourable Magistrate erred in law and fact in failing to hold that it was conceded that the portion of land the plaintiffs claimed had been allocated to the defendant/appellant and the very basis of the respondents' claim was the purchase from the defendant in the absence of which the respondents could not continue to occupy the land.***
6. ***The Honourable Magistrate erred in law and fact in failing to make a determination on the import and effect of the Land Control Act on the transaction.***
7. ***The Honourable Magistrate's decision is likely to precipitate anarchy.***

The appellant prays that the judgment be set aside and judgment be entered on counterclaim. Costs of the appeal, the suit and counterclaim.

The respondents filed filed a cross-appeal on 21.7.2014 on grounds that:

1. ***the trial Magistrate erred in law and fact in holding that the respondents had failed to adduce sufficient evidence to prove their claims when they had proved their case on a balance of probability.***
2. ***The trial magistrate misdirected himself against the weight of evidence by failing to appreciate the evidence adduced by the respondent and thereby arriving at a conclusion that is in itself and absurdity.***
3. ***The trial magistrate erred in law and fact in failing to hold that the respondents had equitable interests in the plots as the appellant is a co-owner or partner of Kesses Kelchin Farm and having sold plots alloted to him to the respondents.***

Mr. Momanyi, learned counsel for appellant submits that the defendant has established that he is the equitable owner of the land and has also proved hat no consent of the Land Control Board was given to have the land subdivided and sold to the 1st respondent and that the 1st respondent was only entitled to a refund. He argues that the cross-appeal was filed more than 2 years after judgment hence out of time and no leave was obtained to extend time.

The respondents submit that there was no need of the Land Control Board's consent as the land did not fall within the context of the Land Control Act Cap. 302, Laws of Kenya.

Section 79(c) of the civil procedure Act provides that every appeal from a subordinate court to High Court shall be filed within a period of thirty days from the date of the decree or order appealed from excluding from such period and time which the Lower Court may certify as having been requisite for the preparation of delay to the appellant a copy of the decree or order.

The proviso thereof is that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

The decree herein was given on the 2.3.2011 hence the appeal was filed on the 15.3.2011 within the stipulated 30 days. The cross-appeal was filed on 8.7.2013 more than two years after the decree was given and the appeal was filed. I have not een any certificate of delay in issuance of the decree and I have not seen any leave granted by the court for filing the cross-appeal out of time. The cross appeal ought to have been filed either within the time produced for in the Act or with the leave of the court, out of the time provided for. I do find that the cross-appeal was filed out of time and should be dismissed with costs.

It is trite that the ***Land Control Act is an Act*** of Parliament that provides for controlling of transactions in agricultural land. The Act interprets agricultural land as;

> ***(a) land that is not within-***
>
> 1. ***a municipality or a township; or***
> 2. ***an area which was, on or at any time after the 1st July, 1952, a township under the Townships Ordinance (now repealed); or***
> 3. ***an area which was, on or at any time after the 1st July, 1952, a trading centre under the Trading Centres Ordinance (now repealed); or***
> 4. ***a market;***
>
> ***(b) land in the Nairobi Area or in any municipality, township or urban centre that is declared by the Minister, by notice in the Gazette, to be agricultural land for the purposes of this Act.***
>
> ***other than land which, by reason of any condition or covenant in the title thereto or any limitation imposed by law, is subject to the restriction that it may not be used for agriculture or to the requirement that it shall be used for a non- agricultural purpose".***

Section 3 provides that the Minister may, by notice in the Gazette, apply this Act to any area, if he considers it expedient to do so.

Section 6 provides**;**

> ***(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 then 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."***

I have considered the evidence and the law on record and do find that the appellant did not prove on a balance of probabilities that the disputed plot falls within a Land Control Area and that the same is Agricultural land. But even if the land was within a Land Control area, the fact that the appellant received money and gave the 1st respondent possession of the land and that the 1st respondent has been in possession to date and has even improved the plots in issue created an ***implied trust*** in favour of the 1st

respondent hence the sale of the property to the 1st respondent to the 2nd respondent also created a ***resultant trust*** in favour of the 2nd respondent that could not be defeated by the appellant. I do find that the appellant is not acting in good faith when he receives the money and gives possession but now intends to take advantage of the provisions of the Land Control Act to pay back without interest the money he received in 1991 and receive back the parcel of land he gave possession in exchange for the money. I do find that the learned magistrate did not err in his findings and decision as the parties did not prove their claims in the Lower Court on a balance of probabilities hence the appeal and cross-appeal are dismissed with costs to the respondents and appellants respectively. Orders accordingly.

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

ANTONY OMBWAYO

JUDGE