REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 170 OF 2012

Formerly 95 of 2004

DANSON MUNIU NJERU.....PLAINTIFF

VS

WILLIAM KIPTARBEI KORIR & 6 OTHERS.....DEFENDANTS

(Suit by plaintiff seeking eviction of defendants from land; defendants making counterclaim for specific performance; sale agreement made in 1994; no consent of land control board; whether requirement for consent is a technicality; whether agreement enforceable; only remedy refund; whether prayer for refund caught up by limitation of time; plaintiff's suit succeeds; counterclaim dismissed).

JUDGMENT

A. INTRODUCTION AND PLEADINGS

The plaintiff instituted this suit on 29 July 2004 in respect of the land parcel Cheptiret/Cheplaskei Block 3/Sertwet/103 measuring approximately 3.5 hectares. He is seeking the following orders against the defendants :-

(a) A permanent injunction.

(b) Eviction.

(c) Mesne profits.

(d) Costs.

In the plaint, it is pleaded that the plaintiff is the personal representative of the estate of the late James Gachore Njeru. It is stated that the deceased is the registered owner of the land parcel Cheptiret/ Cheplaskei Block 3/ Sertwet/103 (the suit land) and that the defendants have trespassed into the said land without the consent of the plaintiff or any legal basis. It is further pleaded that the defendants have been in illegal occupation since the year 1994 and that they therefore ought to pay mesne profits from 1st January 1995 till they move out of the land.

The seven defendants filed a joint statement of defence. They denied that the deceased is the registered owner of the suit land. They also denied that they are trespassers and stated that they are rightfully on the land. It is pleaded that through an agreement entered on 12 May 1994, the deceased agreed to sell his land to the 1st and 2nd defendants plus one Solomon Chepgimis, for a consideration of Kshs. 279,000/= to be

shared as follows:-

(a) 3.0 acres to William Korir the 1st defendant.

(b) 1.0 acre to Solomon Chepgimis.

(c) 5.0 acres to Peter Kipsat Leleithe 2nd defendant.

The 3rd, 4th, 5th and 7th defendants averred that they are strangers to this suit. All defendants asked that the suit be dismissed with costs.

The original defence was later amended to include a counterclaim. In the amended defence and counterclaim, it is contended that the plaintiff, as administrator, has a duty to effect the agreement of 12 May 1994 as the vendor died before effecting the transfer. They have pleaded that after the agreement, the 1st and 2nd defendants settled their families on the suit land and have asked for a declaration that they are entitled to 3 and 5 acres respectively in line with the agreement. In the alternative, they have sought a refund of the purchase price at the current market value of Kshs. 300,000/= per acre and costs of development of Kshs. 800,000/= for the 1st defendant and Kshs.500,000/= for the 2nd defendant. They have also asked for damages for breach of contract and exemplary damages. The plaintiff filed a reply to defence in which he joined issue with the defendants and contested all the issues in the counterclaim.

B. THE EVIDENCE

The plaintiff testified as the sole witness. He testified that he is the administrator of the Estate of James Gachobe Njeru (the deceased) who was his father. A grant of letters of administration dated 21/6/2004was produced. The same was confirmed on 16 August 2008. The deceased died on 3 August 1995. The plaintiff produced a certificate of title deed and a search certificate to demonstrate that the suit land is registered in the name of the deceased. The plaintiff stated that the defendants use the land but have no right to do so and that if he were to use it, he would have reserved one acre for a residence and the farm maize on the rest. He stated that an acre would yield about 20 bags of maize and would sell for Kshs. 2,000/=. He estimated overheads at kshs. 1,000/= for each bag and thus he would make a profit of kshs. 1,000/= per bag. He also testified that there were 102 pine and cypress trees which were felled by the defendants. He estimated the value at Kshs. 5,000/= per tree. He further testified that when the succession cause was filed, the 1st and 2nd defendants filed objection proceedings which were dismissed. The plaintiff testified that he has no knowledge of the agreement to sell the land alluded to by the defendants. He stated that if indeed they purchased the land, then the consent of the land control board needed to be issued as the land was agricultural land.

In cross-examination, it emerged that in the confirmed grant, the land was distributed to the plaintiff and his three brothers, each to get 2 acres. One acre was distributed to Solomon Chepgimis (not a party to this case). He stated that the defendants moved into the land in the year 2003-2004. He insisted that he has no knowledge of the alleged sale by his father. He stated that he was only aware of a sale of 1 acre to Chepgimis. An agreement bearing the names of Chepgimis and the 1st and 2nd defendant was put to him, but he denied any knowledge of it and stated that the agreement with Chepgimis was handwritten. He also denied knowledge that the deceased had applied to the Land Control Board for sub-division of the land into 3 portions. He had no knowledge of a letter of consent dated 14 June 1994 and of mutation forms that were put to him. It also emerged that the plaintiff entered into an agreement on 19 September 2002 with the 1st defendant for an additional payment of Kshs. 30,000/= for the land but the plaintiff stated that at that time, he did not hold letters of administration. He contended that the Kshs. 30,000/= was refunded through his advocates. He testified that an order of injunction was issued in 2004 but the defendants continued to be on the land.

The 1st defendant on his part testified that he lives in the suit land. He testified that the plaintiff's father sold the land to 3 purchasers; himself, the 2nd defendant and Solomon Chepgimis. They purchased 3, 5 , and 1 acre respectively. An agreement was drawn on 12 May 1994 by the office of M/s Birech & Company Advocates. On the said date, the three purchasers paid Kshs. 183,000/= out of the total of

Kshs. 279,000/=. The balance was to be paid by 14 June 1994 and the deceased was to allow them possession after payment of the full purchase price. On his part, the 1st defendant entered into possession in January 1995.

The 1st defendant testified that the deceased then applied for consent to sub-divide the parcel into three portions. Mutation forms were drawn but the land was never formally sub-divided. In 2002, the plaintiff asked the defendants to vacate unless they paid an addition of Kshs. 10,000/= per acre. Chepgimis paid kshs.10,000/= and the 1st defendant paid Kshs.30,000/=. They wrote an agreement on 19 September 2002. He testified that he is entitled to the land and he has made significant developments. He stated that the 4th and 7th defendants are his son and wife respectively. In cross-examination, the 1st defendant conceded that he is aware that the land is agricultural land and that consent to transfer has not been issued. He stated that he does not claim any money for the developments and does not want a refund, but wants the land. He stated that out of the amount of Kshs. 183,000/= paid in the first instance, he contributed Kshs. 25,000/=. In his view an acre of land would at best produce 15 bags of maize.

The 2nd defendant on his part stated that he bought 5 acres of the land. The total purchase price was Kshs. 279,000/= for the 9 acres and that the three purchasers collectively paid kshs. 183,000/=. He stated that his contribution was Kshs. 102,000/=, whereas the 1st defendant contributed Kshs. 57,000/=, and Chepkimis Kshs. 24,000/=. The balance was to be paid by installments made to the advocate M/s Birech & Co Advocates. He stated that he paid Kshs. 15,000/= on 14 June 1994, and Kshs. 20,000/= on 17 August 1994. On this latter date, Chepgimis and the 1st defendant paid Kshs. 6,500/=. He remained with a balance of Kshs. 18,000/= which the deceased asked him to deposit with AFC, as he had a loan, and the title was with AFC. When he went to AFC, he found that the balance due was not Kshs. 18,000/= but Kshs.22,000/=. He paid the money and cleared the loan that the deceased had with AFC. The deceased promised to refund him the extra Kshs. 4,000/=.

He also testified that there were trees on the land which the deceased sold to him separately for Kshs. 7,000/= which he paid. He stated that the deceased acknowledged that he had been paid all the money by all purchasers and that he then moved to sub-divide the land. Consent to sub-divide was given and mutation forms drawn. On his part, he took possession of the land in the year 1995 and allowed his mother in law to use it. He was at a loss why Chepgimis was allowed to keep the 1 acre, yet the plaintiff wants the other purchasers evicted. He asked for the present value of the land in the event that he is evicted. In cross-examination, PW-2 conceded that the mutation forms have not been registered. He also conceded that he had not produced any document to show payments to AFC. It also emerged that the deceased died about 15 months after the agreement. He affirmed that his counterclaim was filed in 2008 in which he claimed kshs. 500,000/=.

With that evidence, the defendants closed their respective cases.

C. SUBMISSIONS OF COUNSEL

In his submissions, Mr. E.M. Momanyi, learned counsel for the plaintiff, inter alia submitted that the success or failure of the case, depends on whether consent of the land control board, to transfer the land to the defendants was issued. He submitted that none was issued and therefore the transaction of the parties became null and void. He submitted that the estate of the deceased is entitled to the eviction sought. As to the claims of the defendants, he submitted that they are only entitled to the money paid. He further submitted that in any event, the counterclaim was filed out of time. On the supplementary agreement signed in 2002, he submitted that the same was null and void as the plaintiff at that time had no capacity. He relied on the cases of ***Kariuki v Kariuki (1983) KLR 225, Wasike v Swala (1985) KLR 425, and Simiyu v Watambala (1985) KLR 852***.

In her submissions, Ms. L.J.Kipseei, learned counsel for the defendants, submitted that the land was bought jointly by three persons and there was no reason why the plaintiff was treating the first two purchasers differently from Chepgimis. She submitted that this was discriminatory, and against the constitution, and that it denied the defendants the constitutional right to own property. She submitted that if the plaintiff acknowledged the rights of Chepgimis, he must also recognize the rights of the 1st and 2nd

defendants as the transactions were done jointly. She submitted that the plaintiff must execute his duties as required by law. She further submitted that the plaintiff recognized the original agreement, as he later solicited for further consideration, whereupon the 1st plaintiff paid him kshs. 30,000/=. She stated that it would be unjust to have the plaintiff have his cake and eat it. She submitted that the provisions of the Constitution against discrimination and the right to own property are above the provisions of the Land Control Act. She submitted that this is a technicality that the plaintiff is relying on, but that the Constitution demands that justice be done without undue regard to technicalities. She also submitted that the plaintiff has no capacity to file suit as his duties as administrator ended when the land was distributed and that it is the duty of the beneficiaries to pursue their own interests. She submitted that the plaintiff needed to file a representative suit to do so, and at most, that the plaintiff is entitled only to claim his share of 2 acres. She further submitted that the pleadings claim 9 acres yet the plaintiff admitted that Chepgimis owns 1 acre. She submitted that there was no attempt at amendment to reflect that the plaintiff is claiming 8 acres. She further submitted that to claim mesne profits, one must plead the exact amount, but that this was not done so. She submitted that the deceased intended to transfer the property to the defendants, but died before doing so, and that the defendants are innocent purchasers. No authorities were relied upon by counsel for the defendants.

It is with the above pleadings, evidence and submissions that I need to determine this case.

D. DETERMINATION

It is not in dispute that the suit land is agricultural land and the provisions of the Land Control Act (CAP 302 (LCA) therefore apply. For our purposes, Section 6, 7and 8 are important and I will therefore set them out in full. They provide 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.

7. *If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.*

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.

(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.

The contest in this case is clearly between the plaintiff and the 1st and 2nd defendants. The other defendants appear to be on the land, as assigns of the 1st and 2nd defendants. Their fate therefore lies with how the case of the 1st and 2nd defendants will go. The 1st and 2nd defendants base their case on an agreement for sale which they produced as an exhibit. I have seen the agreement. It is an agreement made between the deceased as vendor, and the 1st and 2nd defendants and Solomon Chepgimis, as joint purchasers. The purchase price is stated as Kshs. 279,000/=. Nowhere in the agreement does it say what the price per acre was, and nowhere in the agreement does it say what each party was to contribute. It seems to be a joint purchase, in which case, the obligation to pay was joint, and I cannot impute a several obligation on either party obligating either, to pay a specific amount of money.

The amount of Kshs. 183,000/= is acknowledged in the agreement as having been paid. The balance of Kshs. 96,000/= was to be paid on 14th June 1994. It is also stated that the vendor shall seek the consent of the land control board on 14th June 1994. It was agreed that the parties will transfer the land upon payment of the balance of the purchase price. Within this sale agreement, the buyers undertook to partition the land between themselves, with the 1st defendant having 3 acres, the 2nd defendant 5 acres, and Solomon Chepgimis, 1 acre. The agreement is typed and was drawn by Birech & Co Advocates. There are several handwritten endorsements. The first is dated 14th June 1994 and is stated to be an acknowledgment of kshs. 15,000/= being further payment from the purchasers. The second is dated 6 July 1994 and is an acknowledgement of Kshs. 15,500/= from the 1st defendant being further payment of the purchase price. The last is an acknowledgment of Kshs. 26,500/= from the three purchasers being further payment. It will appear therefore that the purchasers made a further payment of Kshs. 57,000/=. That left a balance of Kshs. 43,000/=. The defendants have not produced any evidence that this balance was paid. The 2nd defendant averred that he deposited Kshs. 22,000/= with AFC, but no document was produced to show this payment. The only amount that I can ascertain as having been paid jointly by the three purchasers is Kshs. 140,000/=.

There is also the second agreement, which is dated 19th September 2002. It is between the plaintiff and the 1st defendant. It refers to the agreement of 1994 and acknowledges that the 1st defendant purchased 3 acres at a consideration for Kshs. 93,000/=. It is stated that the parties have reached an agreement that the purchaser (1st defendant) will pay an additional Kshs. 30,000/=. It is stated that a sum of Kshs. 20,000/= shall be paid on execution of the agreement and the balance of Kshs. 10,000/= shall be paid on or before 26.9.2002. No payments are acknowledged. I will come to the aspect of these payments later as the defendants in their counterclaim, have in the alternative, sought a refund of the purchase price.

The vendor died on 3rd August 1995. By that time, he had applied and obtained consent to subdivide the land into three portions of 3 acres, 5 acres, and 1 acre. It seems that he had every intention to sub-divide the land, and probably even transfer it, but he died before doing so. No application for consent to transfer was ever made to the Land Control Board, and non was issued. Pursuant to the provisions of Section 6 of the LCA, there must be consent to transfer. Since no consent was obtained, the agreement of the parties became null and void after 6 months, pursuant to Section 8(1) of the LCA. That agreement cannot be enforced. The only remedy for a transaction that has become null and void is for a refund , recoverable as a debt, as provided by Section 7 of the LCA.

Ms. Kipseei argued that the requirement for consent is a technicality. This is not so. It is the requirement of the law. It is not a technical rule of procedure. Neither can it be said that the provisions of the LCA have denied the defendants the constitutional right to own property. The right to own property is not taken away by the Land Control Act. What the Act provides is the process that needs to be followed before one can own agricultural land. The purpose of the law is to guide the process, it does not take away the right to own property. If one follows the process, he will get his property. The LCA deals with agricultural

land, but there are many statutes that guide other processes. For example, the Limitation of Actions Act (CAP 22), provides that one must file a suit for recovery of land within a period of 12 years. The Law of Contract Act (CAP 23), provides that an agreement for purchase of land needs to be in writing for it to be enforced. There are underlying policy considerations behind these laws. There must be law to guide how one can acquire property, and if one intends to own property, then he must follow the prescribed law. One cannot complain that the law is unfair, when it is he himself who has neglected to follow it.

It cannot also be argued that the fact that the plaintiff acknowledged only one purchaser out of the three is discriminatory, in the sense addressed by the Constitution. This was a contract that became void. I do not know why the plaintiff decided to acknowledge Chepgimis as being the only purcheser entitled to land. The basis of the case of the defendants is based on contract. There is freedom of contract, and if one enters into a contract jointly with others, it is within his right if he choses only to perform one and leave out the rest. The remedy for the rest will be as provided by the law. In our case, the remedy is refund.

I have also considered the argument that the plaintiff ought not to have filed this suit, for his role as administrator ended when the grant was confirmed. I do not agree. The role of the administrator does not end with confirmation. He has to ensure that each beneficiary gets his/her entitlement according to the distribution. He has to sign mutation forms for land, sign any relevant transfers and generally see that every beneficiary has got his share. The filing of this suit by the plaintiff is a manifestation of his role as administrator. Neither can I fault him for suing for the whole 9 acres instead of 8. Chepgimis is a beneficiary according to the confirmed grant. The plaintiff is entitled to also sue to ensure that the share of Chepgimis is handed to him. The position of Chepgimis, with that of the brothers of the plaintiff, is the same. They are all beneficiaries of the estate of the deceased and the plaintiff as administrator is perfectly entitled to sue any person who comes in the way of the distribution of the estate.

For the above reasons, I declare the agreement between the deceased and the 1st and 2nd defendants null and void and the same cannot be enforced. I further declare that the remedy of the 1st and 2nd defendants lies in getting a refund of what they paid under the transaction. It follows therefore that the plaintiff cannot be denied the remedies that he has prayed for. The defendants have not demonstrated any legal right that would entitle them to remain in possession of the land. They must vacate and if they do not, the plaintiff has every right to evict them at their own cost. The plaintiff is also entitled to an order of permanent injunction to bar the defendants from remaining on the suit land.

There is the claim of mesne profits. In my view, that claim is too loosely pleaded and the evidence too scanty and hypothetical, for me to make any award on it. I disallow this prayer. I am also unable to allow any damages for the alleged felled trees for the same reason. Indeed no proof was tendered to support the allegation that the defendants felled any trees.

Let me now turn to the counterclaim filed by the defendants. They have asked for a declaration that they are entitled to 3 and 5 acres and for an order compelling the plaintiff to execute the transfer forms. That claim cannot be sustained for the reasons that consent of the Land Control Board was required but was never issued. The alternative prayer is for refund of the purchase price at the current market value of Kshs. 300,000/= and costs of development of Kshs. 800,000/= and Kshs. 500,000/= for the 1st and 2nd defendants respectively. The only remedy as provided by Section 7 of the LCA is a refund and nothing else. Forgetting for a moment that no valuation report or other proof was tendered to show that there are developments of that value on the land, there is no remedy for compensation for developments made, probably because Section 22 of the LCA declares continued occupation to be illegal. Neither can the defendants seek damages for breach of contract, for the contract was voided by the law, and the agreement never made provision for damages. In any event the defendants themselves were in breach for failing to pay the purchase price in time. Such claim cannot succeed.

This position has been affirmed by various decisions of the Court of Appeal one of which is ***Kariuki v Kariuki*** cited by counsel for the plaintiff. In this case, it was held inter alia that no general or special damages are recoverable in respect of a transaction which is void for all purposes for want of consent from the Land Control Board and that the only remedy open to a party to such transaction is recovery of any money or consideration paid in the course of the transaction. In the said case it was also affirmed that

there can be no award for compensation for improvements. Had the Act so intended, it would have provided so.

The same position ensued in the case of ***Wasike v Swala***. The appellant filed suit in which he averred that he had paid the purchase price for a piece of land to the respondent. He sought for an order that the respondent transfer the land to him and to vacate it. The defendant raised the issue that the transaction was void for want of consent of the Land Control Board. The court of appeal asserted that the sale transaction was void for all purposes as no consent had been given by the Land Control Board.

The most that the 1st and 2nd defendants can get is a refund. The law provides that this refund is recoverable as a debt. In my view, the cause of action arises immediately the transaction is voided by the law. The limitation period for recovering a debt is 6 years pursuant to section 4 of the Liimitation of Actions Act (CAP 22). The claim for recovery of the refund came through an application filed on 15 November 2007. About 13 years had lapsed from the time the agreement became void. Mr. Momanyi for the plaintiff argued that the recovery of that money has been caught up by limitation and I incline to agree with him. Neither did the second agreement of 2002 revive the limitation period, for the plaintiff had no capacity to enter into that agreement. It is also an agreement which is void. My view therefore is that the counterclaim for refund by the defendants has been caught up by limitation of time. The issue of limitation was mentioned obiter in the case of ***Simiyu v Watambala***. In the said case Hancox JA, averred at p857, as follows on a transaction that was declared void for want of consent :-

"The appellant's remedy, <u>subject to the laws of limitation</u> (emphasis mine), was an action for damages, coupled with the right of recovery of the purchase money under Section 7 of the Act"

I appreciate that the defendants will suffer hardship. I sympathize with them, but the law is not on their side, and I am unable to twist it so as to grant them the reliefs they have sought. I can probably only allow them a reasonable period so that they can move from the land, and I do give them 6 months from the date of this judgment. For these reasons, the counterclaim cannot be sustained and it is hereby dismissed.

That leaves costs which are at the discretion of the court. Costs ordinarily follow the event and I see no reason why I should deny the plaintiff the costs of this suit. I grant him costs of both the suit and the counterclaim.

On the whole I make the following final orders :-

(1) I order the defendants to vacate the suit land and to do so no later than 6 months from today and in default the plaintiff is at liberty to apply for their eviction.

(2) Upon vacating, the defendants are hereby permanently restrained from entering or being on the suit land or utilizing the suit land.

(3) I make no award on mesne profits.

(4) The counterclaim of the defendants is hereby dismissed.

(5) The plaintiff shall have costs of both suit and counterclaim.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF FEBRUARY 2014

JUSTICE MUNYAO SILA

<u>ENVIRONMENT AND LAND COURT AT ELDORET.</u>

Delivered in the presence of:

Mr. E.M. Momanyi for the plaintiff

Mr. A.M. Kitigin holding brief for Ms Kipseei for the defendants.