



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 441 OF 2012

Formerly HCC 85/2008

JOSEPH TIREITI.....PLAINTIFF

VS

JACOB KIPSUGOT ARAP LAGAT & ANOTHER.....DEFENDANTS

(Suit by plaintiff seeking restraining orders against the defendants; plaintiff having purchased ¼ share owned by 1st defendant; 1st defendant later claiming that he was not paid; original land sub-divided while proceedings ongoing; contention as to what constituted ¼ share; part of land sold to 2nd defendant; ordered that plaintiff be registered as owner of the new titles part of which is to be removed from title of 2nd defendant).

JUDGMENT

A. THE PLEADINGS

This is an old case instituted on 3 June 1999 by way of plaint. Originally there was only one defendant sued, but the plaint was later amended on 4 September 2001 to introduce the 2nd defendant. In his amended plaint, the plaintiff has pleaded that sometimes in May 1971, he purchased the 1st defendant's share in the land parcel LR No. 779/339 at a consideration of Kshs. 12,000/= . This share is stated to be one quarter of the undivided share in the said land parcel, which share according to the plaintiff's pleadings, measures 26.5 acres. It is pleaded that the plaintiff and 1st defendant attended the Land Control Board and consent for the transaction was duly issued. It is further pleaded that the plaintiff then took possession of the land and the 1st defendant migrated to Kitale. The plaintiff further averred that he remained in quiet possession until May 1999 when the two defendants trespassed onto his land with an intention of claiming 2.5 acres out of the 26.5 acres entitled to the plaintiff. The plaintiff contended that this was unlawful . He also claimed that the defendants had felled trees worth kshs. 40,000/= and sought their value. The prayers in the plaint are for :-

(a) A permanent injunction to restrain the defendants from dealing with the plaintiff's quarter undivided share in the land parcel L.R No. 779/339 measuring 26.5 acres.

(b) The sum of Kshs. 40,000/= being value of trees damaged and damages for trespass.

The plaintiff also claimed costs and interest and any other relief that the court deems fit to grant.

The 1st defendant in his Statement of Defence agreed to having entered into an agreement with the

plaintiff for the sale of 24 acres for the sum of Kshs. 12,000/=. He pleaded that the plaintiff only paid him Kshs. 6,000/= leaving a balance of Kshs. 6,000/= which he has failed to pay. He denied having attended any Land Control Board as the full purchase price had not been paid. He denied laying a claim for 2.5 acres as alleged by the plaintiff and asserted that he only sold 24 acres and that since the plaintiff only paid Kshs. 6,000/=: he is only entitled to 12 acres. He denied having cut any trees from the land and asked that the plaintiff's suit be dismissed with costs.

The 2nd defendant on her part, in her Statement of Defence, denied having entered the suit land with an intention to claim 2.5 acres out of it. She denied having interfered with the plaintiff's quiet possession of the land and further denied having cut any trees, and that if any were cut, they were not on the plaintiff's portion. The 2nd defendant claimed that the plaintiff has persistently objected to the sub-division of the land, and also contended that the plaintiff has been in illegal occupation of a house which was sold to her by the 1st defendant, and which she claimed was on her portion of the land. She asked that the plaintiff's suit be dismissed and that the plaintiff be enjoined from occupying the house.

In the course of the proceedings the parties entered into a consent which settled part of the plaintiff's claim. It was agreed by consent that judgment be entered for the plaintiff for the undisputed 12 acres out of the suit land L.R No. 779/359 which now forms part of the land parcel Eldoret Municipality Block 25 (Luliet)/1. It was left for the plaintiff to pursue his other claims.

It will be noted that the land was sub-divided while the proceedings were ongoing. I will canvass this point later.

B. THE EVIDENCE

The plaintiff in support of his case testified and called one witness.

In his evidence, the plaintiff testified that the land parcel L.R No. 779/359 (the suit land) comprised of 106 acres. He stated that he purchased 1/4 share of this land totaling 26.5 acres from the 1st defendant in the year 1971. They agreed at a purchase price of kshs. 12,000/= for the 26.5 acres, together with all improvements therein, which were 3 houses and a store. He testified that an agreement was drawn by an advocate called Ibetson but he did not produce a copy of the agreement as he stated that he was not given a copy by the advocate. He testified that he paid all the money to the 1st defendant. On 27 July 1971, they went to the Land Control Board and consent was granted for the transfer of 1/4 share of the suit land to the plaintiff. He lived on the land and the 1st defendant moved to Kitale. After about 30 years, the 1st defendant came back claiming that he was not paid for the houses. As against the 2nd defendant, he testified that she forcefully moved into 2.5 acres of his land in 1999, in which portion the houses are situated. He testified that while the proceedings were ongoing, and in defiance of an order of injunction, the defendants sub-divided the land and the 1st defendant registered himself as owner of 24 acres. He asked that he be granted the 2.5 acres occupied by the 2nd defendant and the 24 acres that the 1st defendant has registered in his name. He denied not having paid a balance of Kshs. 6,000/= on the agreement of 1971. It emerged in cross-examination, that the suit land is now divided into four portions and during survey, the portion of 2.5 acres where the houses are situated was carved out for the 2nd defendant. It emerged that the 1st defendant now has title to the land parcel described as Eldoret Municipality Block 255 (Luliet)/1 after the original land was sub-divided. The title was issued on 29 November 2005. It also emerged that the suit land was originally purchased by four partners.

PW-2 was one Antony Nabiranga an official in the Ministry of Agriculture. He produced the register of the Land Control Board, specifically an entry in 1971, which showed that consent was issued for the transfer of 1/4 undivided share of the suit land, from the 1st defendant to the plaintiff. He testified that the land comprised of 42.9 hectares as a whole.

With that evidence, the plaintiff closed his case.

The 1st defendant in his evidence, testified that the suit land was purchased by four people, from a white settler in the year 1965. These are the 1st defendant, one Paul arap Lelmengit, Jonah Magoi and Arap

Saina. Paul Lelmengit is the deceased husband of the 2nd defendant. He produced a consent of the Land Control Board that authorized them to buy the land. The 1st defendant testified that his share was 24 acres only, and that he agreed to sell this share to the plaintiff for a sum of kshs. 12,000/=. He testified that he was only paid Kshs. 6,000/= and the balance has never been paid to date. He however allowed the plaintiff to occupy the full 24 acres. He denied having gone to the Land Control Board but agreed that there was a written agreement. He stated that the dispute over the kshs. 6,000/= was presented before the District Commissioner (D.C) who ruled on 14 July 1999. He further testified that the suit land has now been sub-divided into four portions and therefore the suit land as originally described no longer exists, new titles having been issued. He confirmed that he is now registered proprietor of the land parcel Eldoret Municipality Block 25 (Luliet)/1 measuring 9.94 hectares carved out of the original parcel. He testified that there are houses which he sold to the 2nd defendant for kshs. 40,000/=.

In cross-examination, the 1st defendant stated that the original land was to be sub-divided among the four partners, not equally but according to each person's contribution. He ended up with a share of 24.5 acres. He could not recall what the other partners got, but asserted that the land was not to be sub-divided into four equal portions. He testified that Kiprotich Ngeny got half of the land, thus 53 acres. The rest was to be sub-divided equally between himself and Magoi.

The second defendant on her part, testified that she now owns the land parcel Eldoret Municipality Block 25 (Luliet)/2 where she resides. She testified that she was aware that the original land was purchased by four partners, although in the letter of consent, only three persons were indicated. She stated that the fourth person was a silent partner and her husband's portion carried the share of the 4th partner, Kwambai Saina. She stated that her husband's share after removing what was entitled to Saina, came to 29 acres, and Saina's share, was 25 acres. She testified that when the original land was sub-divided, there was a house which fell on the portion of the 1st defendant, and that the 1st defendant sold the house to her for Kshs.40,000/= on 20 May 2000. She denied conspiring with the 1st defendant to deny the plaintiff 2.5 acres of what he was entitled to. She testified that the plaintiff now lives on the portion registered in the name of the 1st defendant and claims the portion where the houses fall which is comprised in her title. She testified that the sons of the plaintiff occupy the houses and now she wants them out. She stated that the share of the 1st defendant was 24 acres and not 26.5 acres. In cross-examination, she denied that her husband was only entitled to 26 acres. She also denied having added the portion of 2.5 acres to her title.

DW-3 was a technician surveyor working with the Survey of Kenya. He testified that he did the survey work that sub-divided the suit land between 1994 and 1995. Four portions came forth being Eldoret Municipality Block 25 (Luliet)/1, 2, 3 and 4. He stated that the registry index map (RIM) was registered in the year 1996. In cross-examination, it emerged that the four parcels are unequal. Parcel No.1 measures 24 acres; parcel No. 2, 29 acres; parcel No.3, 25 acres; and parcel No. 4, 29.5 acres.

With the above evidence, the defendants closed their case.

C. SUBMISSIONS OF COUNSEL

I invited counsels to submit and they filed written submissions. In his submissions, Mr. Chebii for the plaintiff asserted that the plaintiff has proved his case. He submitted that it has been proved that there was an agreement between the plaintiff and 1st defendant for the sale of 1/4 share of the original parcel, and that this comprised of 26.5 acres. He submitted that the 1st defendant is talking of 24 acres so as to "hide" the 2.5 acres. He submitted that the contents of the contract are contained in the register of the Land Control Board and the Letter of Consent that were produced by the plaintiff as exhibits. He asked that the titles of the defendants be cancelled as they were obtained while litigation was ongoing, and that title be issued to the plaintiff for 26.5 acres.

Mr. Mitei for the defendants, submitted that it has not been proved that the plaintiff bought 1/4 of the undivided share of the original land, equivalent to 26.5 acres. He submitted that information on what each partner was entitled to was scanty, but that the 1st defendant was only entitled to 24 acres. He pointed out that no sale agreement was produced to prove the acreage. He referred to Section 3 of the law of Contract Act and Section 38 of the Land Act, Act No. 6 of 2012, and submitted that the plaintiff cannot found a

suit in absence of a written agreement. He further submitted that no case had been proved against the 2nd defendant and that the issues herein lay squarely between the plaintiff and 1st defendant. He further submitted that the plaintiff was aware of the new titles from 1995 and that he needed to amend the pleadings to reflect the new status. He further submitted that the plaintiff has not been in quiet possession and that the defendants are absolute owners of their new titles which are now indefeasible. He submitted that only the consent judgment for 12 acres ought to be approved.

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

D. DETERMINATION

(a) I will frame the following issues for determination.

Whether there was a sale agreement between the plaintiff and 1st defendant over the suit land in 1971 and if so what were the terms thereof ?

(b) Whether the 1st defendant sold to the plaintiff 1/4 share of the original land parcel in 1971.

(c) What did this 1/4 share constitute in terms of acreage ?

(d) What is the share of the 2nd defendant in the original parcel ?

(e) Whether the plaintiff is entitled to ownership of 26.5 acres of the original parcel ?

(f) If the answer to (e) above is in the affirmative, what should happen to the new titles held by the defendants ?

I will deal with the first and second issues together. It is my view that there was a sale agreement between the plaintiff and 1st defendant. In fact, the 1st defendant does not deny the existence of a sale agreement. The purchase price is also not in dispute; the same was agreed to have been kshs. 12,000/=. The only points of departure are whether the agreement was for 24 acres or 26.5 acres, and whether the plaintiff paid the full purchase price. Although no sale agreement was produced, I think the terms of the agreement, or at least part of the terms of the agreement, are discernible from the uncontested facts and the consent to the transaction issued by the Land Control Board. I have looked at the register of the Land Control Board and the Letter of Consent issued. The register shows an entry made on 4 June 1971. The nature of the transaction is "sale of 1/4 undivided share" of LR No. 779/359. The whole land is noted to be 42.9 hectares. The purchase price is noted to be Shs. 12,000/=. The register shows that the transaction was approved. Although the 1st defendant denied having attended any land control board, the facts show otherwise, and I have seen no reason to doubt the register of the land control board. The other related issue, is what exactly this 1/4 share translated to, in terms of acreage. Again, the consent of the land control board comes into assistance. The transaction was for 1/4 undivided share. This means nothing less than 1/4 of 42.9 hectares which in my rough calculation, is equivalent to about 10.725 hectares which is very slightly above 26.5 acres.

Mr. Mitei in his submissions, stated that the information on the acreage was very scanty, in essence, meaning that it was not proved that the 1st defendant had a share of 26.5 acres instead of 24 acres. I do not agree. Apart from the consent of the land control board, I think there is additional evidence of the 1st defendant's acreage. In his evidence, the 1st defendant testified that the husband to the 2nd defendant got 53 acres and the other two partners shared the rest in equal parts. This is exactly what he stated in his evidence in cross-examination. It is not disputed that the original land in terms of acreage was about 106 acres, give or take. If the husband to the 2nd defendant got 53 acres this left 53 acres. Simple arithmetic will show that if you sub-divide 53 acres equally into two, you get 26.5 acres. Moreover, if the claim of the 1st defendant is that he only had 24 acres, and his title now reads 24 acres, where then did he get the additional land, which had the houses, to sell to the 2nd defendant ? The 2nd defendant testified that her title comprises of what her husband was entitled to and the addition that the 1st defendant sold to her. The only logical conclusion is that this extra land is the 2.5 acres that the plaintiff is complaining of, and

which is now comprised in the new title issued to the 2nd defendant.

An issue of limitation was addressed by counsels. There is no doubt that the transaction took place in the year 1971. But there was no dispute between the parties. The dispute arose in the year 1999 when the matter was referred to the DC for determination. This suit was filed in the year 1999 and I do not see how it can be said to have been caught up by limitation of time. The transaction between the plaintiff and 1st defendant was complete for all intents and purposes, the only matter left being the formal sub-division of the land and issuance of title. This dispute did not arise in the year 1971, but in the year 1999. This suit is well within time. In fact, it is the 1st defendant who is barred by limitation from claiming the alleged debt of Kshs. 6,000/=, for if at all there was such debt, the same fell due in the year 1971 and ought to have been claimed within 6 years pursuant to the provisions of Section 7 of the Limitation of Actions Act Cap 22. Further, if the case of the 1st defendant is that he is entitled to reclaim the land since he was not paid the balance of Kshs. 6,000/=, that claim ought to have been lodged within 6 years of 1971 pursuant to Section 4 of CAP 22. The 1st defendant could not in the year 1995 and beyond, which is more than 20 years after the transaction, attempt to assert title over the suit land. His claim, if any, was barred by limitation. That said, I am in fact not convinced that any balance was owed to the 1st defendant by the plaintiff. The conduct of the 1st defendant after the sale was to move away to Kitale. He never claimed the balance of kshs. 6,000/= from the plaintiff. I have seen the minutes of the meeting held by the DC and I can see that the complainant was the plaintiff herein and not the defendants. No demand, and no suit has ever been filed by the 1st defendant for the alleged claim of kshs. 6,000/=. It is only when the plaintiff started asserting his rights over the land, that the 1st defendant shot up to claim that a balance of Kshs. 6,000/= was owing. This to me, from the evidence tendered, appears to have been an afterthought by the 1st defendant, in his attempts to unfairly deny the plaintiff of his entitlement to the land.

The other issue, is the question, what exactly is the 2nd defendant entitled to ? It came out in evidence that the plaintiff has been in occupation of the whole of 26.5 acres, and I have already held that the sale transaction involved 26.5 acres. It is the claim of the plaintiff that 2.5 acres of this land, is now comprised in the title issued to the 2nd defendant in Eldoret Municipality Block 25 (Luliet)/2. The claim of the 2nd defendant is for vacant possession of certain houses which are occupied by the plaintiff's sons. It emerged in evidence that the plaintiff has been in occupation of these two houses since he purchased the suit land. The 2nd defendant claimed to have purchased the two houses from the 1st defendant. It is my considered view that the houses fall within the 2.5 acres claimed by the plaintiff, but which are now comprised in the title of the 2nd defendant. I do not have evidence as to what exactly the husband to the 2nd defendant, of whom the 2nd defendant is successor and the silent partner had agreed, and what each was entitled to keep out of their arrangement. That said, I am not in doubt that the title of the 2nd defendant as is now comprised, includes 2.5 acres of land that properly belongs to the plaintiff. The 2nd defendant is therefore entitled to 2.5 acres less of what is comprised in her title. The title of the 1st defendant which is now Eldoret Municipality Block 25 (Luliet)/1 is 24 acres, which is less by 2.5 acres that was sold to the plaintiff. This 2.5 acres is in the title Eldoret Municipality Block 25/2 owned by the 2nd defendant. The 2nd defendant's title thus needs to be altered and reduced by 2.5 acres. I am further of the view that this 2.5 acres comprises what is currently occupied by the plaintiff and it is where the disputed houses are located.

The next issue is whether the plaintiff is entitled to 26.5 acres. I need not reproduce my reasoning above. I am not in doubt that the plaintiff is entitled to 26.5 acres of land. This 26.5 acres is comprised in the 24 acres of the title Eldoret Municipality Block 25 (Luliet)/1 and in 2.5 acres of the land parcel Eldoret Municipality Block 25 (Luliet)/2 which belongs to the 2nd defendant. What then should happen to the titles held by the defendants ? The answer is that these titles must be cancelled. The 1st defendant has no right whatsoever to own the title Eldoret Municipality Block 25 (Luliet)/1. That title should be transferred to the plaintiff. As to the title Eldoret Municipality Block 25 (Luliet)/2, that title should be reduced by 2.5 acres which has been in occupation by the plaintiff and where the disputed houses are situated, and the same should be added to the title Eldoret Municipality Block 25 (Luliet)/1 so as to make that title add up to 26.5 acres.

I think on the whole I have held in favour of the plaintiff as concerns his entitlement to 26.5 acres. No conclusive evidence was however led on his claim for kshs. 40,000/= for the value of felled trees and I am

unable to grant him this prayer. Save for that, the plaintiff's suit no doubt must succeed. The 2nd defendant had a counterclaim for eviction of the plaintiff from the portion of land that is comprised in her title. I have already held that that portion rightfully belongs to the plaintiff. The counterclaim thus fails and is dismissed with costs.

On the whole, I make the following final orders.

(a) I declare the plaintiff as the rightful owner of 26.5 acres originally comprised in the land L.R No. 779/359 and which land is now comprised in the title Eldoret Municipality Block 25 (Luliet)/1 and in 2.5 acres of the land parcel Eldoret Municipality Block 25 (Luliet)/2.

(b) I hereby cancel the title of the 1st defendant in Eldoret Municipality Block 25 (Luliet)/1.

(c) I hereby order that the land parcel Eldoret Municipality Block 25 (Luliet)/2 be reduced by an acreage of 2.5 acres.

(d) I direct the District Land Registrar, Uasin Gishu, and the District Land Surveyor, Uasin Gishu, and/or any other personnel to proceed to excise 2.5 acres of the land parcel Eldoret Municipality Block 25 (Luliet)/2 and include it in the title Eldoret Municipality Block 25 (Luliet)/1 and a new title for 26.5 acres be issued to the plaintiff for the Land parcel Eldoret Municipality Block 25 (Luliet)/1.

(e) I direct that this judgment and/or decree be served upon the District Land Registrar, Uasin Gishu, so that he can execute the above order.

(f) I issue an order of permanent injunction restraining the defendants and/or their servants/agents and/or assigns from being upon, or utilizing, or in any other way dealing or interfering with the plaintiff's occupation and possession of his 26.5 acres.

(g) The consent order of the parties is hereby disregarded owing to the judgment herein.

(h) I dismiss the claim for kshs. 40,000/= and the claim for damages for trespass.

(i) I grant the plaintiff costs of the suit to be borne jointly and/or severally by the defendants.

(j) I dismiss the counterclaim of the 2nd defendant with costs.

It is so ordered.

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

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

Mr. E.M. Balongo for plaintiff

Mr. Arap Mitei for defendants