



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 551'A' OF 2012

PAUL KIPSANG KOSGEI.....1ST PLAINTIFF

ESTHER JEPCHUMBA MUTAI.....2ND PLAINTIFF

JAPHETH KOSGEI KIPKORIR.....3RD PLAINTIFF

VS

THOMAS KPRONO MAGUT.....1ST DEFENDANT

JOSEPH KIPNGENO TANUI.....2ND DEFENDANT

(Suit land initially having been sold to defendants; agreement being subject to statutory consent; suit land needing to be sub-divided; consent to sub-divide not being granted; vendor finding it impossible to complete the sale; vendor offers refund and resells the land to other parties; whether second sale was fraudulent in the circumstances; defendants coercing vendor to sign a commitment to convey the land to them when already the land had been transferred to the second buyers; whether such commitment to convey can be enforced; initial contract declared frustrated; second sale valid; remedy of first purchasers lay in refund as contract was impossible to perform)

JUDGMENT

A. INTRODUCTION AND PLEADINGS

This judgment is in respect of two consolidated suits. The first suit was initially filed as Eldoret HCCC No. 132 of 2009. It is a case in which Japheth Kosgei Kipkorir is plaintiff and Thomas Kiprono Magut and Joseph Kipngeno Tonui are named as defendants. The second suit was originally filed as Eldoret HCCC No. 148 of 2009. The plaintiffs in the said case are Paul Kipsang Kosgei and Esther Jepchumba Mutai, whereas the defendants are Thomas Kiprono Magut and Joseph Kipngeno Tonui. The parties agreed to consolidate the two suits and have them heard as one since the matters raised therein are related. I will therefore consider Paul Kipsang Kosgei and Esther Jepchumba Mutai as the 1st and 2nd plaintiffs respectively, with Japheth Kosgei Kipkorir as the 3rd plaintiff. Thomas Kiprono Magut and Joseph Kipngeno Tonui, remain the 1st and 2nd defendants respectively.

This contest revolves around the ownership of the land parcel Eldoret Municipality Block 14/215, which land measures 0.4047 Ha (approximately one acre), situated in Elgon View Estate, a prime residential area in Eldoret Town. The land is held under a leasehold title. That land was initially owned by Japheth Kosgei Kipkorir (3rd plaintiff). Through an agreement dated 8 March 2008, Japheth Kosgei sold 1/4 of an acre of the suit land to Thomas Magut (1st defendant) at a consideration of Kshs. 950,000/=. On 14th March 2008, Japhet Kosgei sold another 1/4 of an acre to Joseph Kipngeno Tonui (2nd defendant) at a consideration of Kshs. 1, 100,000/=. Both agreements were drawn by the law firm of M/s Chemitei &

Company Advocates. On 19 March 2009, Japheth sold the remaining 1/2 acre to Paul Kipsang and Esther Mutai (the 1st and 2nd plaintiffs).

The land was to be sub-divided so that the first two purchasers obtain title to their 1/4 plots, and the 1st and 2nd plaintiffs obtain their 1/2 acre share. But a hitch arose, since in the Elgon View area, planning was then only allowed for sub-divisions that will not lead to plots that are smaller than 1/2 acre. The 3rd plaintiff then decided to sell the two quarters, that he had earlier sold to the defendants, to the plaintiffs so that the plaintiffs hold the whole of the 1 acre comprised in the suit land. A written agreement was made on 17 March 2009. The same sold the whole 1 acre of the suit land to the 1st and 2nd plaintiffs at a consideration of Kshs. 4, 350,000/=. On the transactions with the 1st and 2nd defendants, the 3rd party had received Kshs. 700,000/= from the 1st defendant and Kshs. 900,000/= from the 2nd defendant. He deposited this money with his advocates M/s Chemitei & Company Advocates, so that the same may be collected by the defendants as refund. The suit land was then conveyed to the 1st and 2nd plaintiffs on 15 May 2009 and the 1st and 2nd plaintiffs now hold title to the whole of the land.

In their suit, the 1st and 2nd plaintiffs want orders to restrain the 1st and 2nd defendants from the suit land. It is claimed that 1st and 2nd defendants have continuously interfered with their possession of the suit land. In the suit originally filed as Eldoret HCCC No. 132 of 2009, Japheth Kosgei, as plaintiff, pleaded that the 1st defendant out of the purchase price of Kshs. 950,000/= failed to pay a balance of Kshs. 250,000/= while the 2nd defendant, out of the purchase price of Kshs. 1, 150,000/= failed to pay a balance of Kshs. 200,000/=. It is also pleaded that the sale to the two defendants was subject to statutory consent being secured. It is pleaded that the 3rd party submitted plans proposing to sub-divide the land into portions of 1/4, 1/4 and 1/2 which was rejected by the District Physical Planner. Consent to transfer was therefore never obtained. It is pleaded that owing to the frustration in having the land sub-divided, the 3rd party sold the whole land to the plaintiffs, and wrote to the 1st and 2nd defendants advising them to collect their refund from the offices of M/s Chemitei & Company Advocates. It is further pleaded that on 13 July 2009, the defendants accompanied by police officers, threatened the 3rd plaintiff and coerced him into signing a "commitment to convey" 1/2 acre of the suit land to the defendants. This he claims he signed out of duress, and he has pleaded that the same is in any event invalid, as he had no capacity to sign it, since the land at this time had already been conveyed to the plaintiffs. In his suit, the 3rd plaintiff has asked that the "commitment to convey" instrument be declared unenforceable, null and void. He has also sought orders to have the sale agreements of 8 March 2008 and 14 March 2008 declared void for want of consent to sub-divide and for want of payment of full consideration. He has also sought orders to have the defendants collect their refund from M/s Chemitei & Company Advocates.

In their defence to the two suits, the defendants have pleaded that they bought 1/4 of an acre each from the 3rd plaintiff and they took possession. They have pleaded that the sale to the 1st and 2nd plaintiffs is subject to their overriding interest, and that their transaction ranks prior to that of the 1st and 2nd plaintiffs. They filed a counterclaim in which they sought declarations that the suit land belongs to them and have sought orders to have the title of the 1st and 2nd plaintiffs cancelled. They have asked for an order of specific performance of the agreements dated 8 March 2008 and 14 March 2008. In the alternative, they have asked for a refund of the amounts paid of Kshs. 700,000/= and Kshs. 900,000/= respectively together with interest at commercial rates from the date of payment. In the alternative they have asked for an adjacent parcel of the same acreage. They have also asked for costs of developments and construction design of Kshs. 45, 000/=.

PART B : EVIDENCE OF THE PARTIES

The parties gave evidence in support of their respective positions. Paul Kipsang Kosgei, testified that he and his wife, the 2nd plaintiff, entered into an agreement on 19 March 2008 for 1/2 of the suit land at a consideration of Kshs. 2, 300,000/= which they paid. In 2009, the other half was offered to them and they entered into another agreement on 17 March 2009. This agreement is for 1 acre at a consideration of Kshs. 4, 600,000/=. They paid Kshs. 2, 300,000/= as they had already paid an equivalent sum on the first agreement for 1/2 acre. A transfer was prepared and they became registered as proprietors on 15 May 2009. They had already taken possession of their first 1/2 acre and they moved to take possession of the second half. It is then that the defendants emerged claiming that half acre. He was not aware that the

second 1/2 acre had previously been sold, and as far as he was concerned, the same was still in possession of the 3rd plaintiff, who had planted napier grass on it. He did not know the defendants before.

Japheth Kosgei, the 3rd plaintiff, on his part testified that he sold 1/4 acre each to the defendants vide the agreements of 8 March 2008 and 14 March 2008. He produced the two agreements as exhibits. He testified that the agreement was subject to consents being obtained, but which were not obtained, as the District Physical Planner declined to approve a sub-division into 1/4 acre plots. He produced plans for the proposed sub-division and a letter from the District Physical Planner rejecting the proposed plans. He advised the defendants of the rejection and proposed to them that the two defendants agree amongst themselves to have one person sell to the other his portion of 1/4 acre, so that one person can own 1/2 an acre, for which approval to sub-divide could be obtained. The defendants could not however agree, and neither could they agree to have the 1/2 acre registered in their joint names. His advocate then advised him to refund the money received. He had no money and it is then that he opted to sell that 1/2 portion to the plaintiffs.

After being paid, he deposited Kshs. 1.6 Million with his advocates, being the money that he had received from the defendants, and informed them to collect the same as a refund. His advocate, Mr. Chemitei wrote to the advocate of the defendants, through a letter dated 11 June 2009, advising him that the defendants could come and collect their refund.

He was cross-examined on the commitment that he wrote on 13 July 2009, which is what prompted him to file suit against the defendants. He gave an elaborate encounter of how he was threatened to sign it. They had gone to the offices of Mr. Chemitei advocate so that it can be explained that the transaction cannot go through and so that the defendants can collect their money. While in the offices of Mr. Chemitei, and when it was put to the defendants that the transaction cannot be finalized, the 1st defendant lost his temper and tore up the proposed plans that the 3rd plaintiff had made to sub-divide the land and which were not approved. Fed up with their behavior, Mr. Chemitei threw them out of his office.

The 1st defendant then proposed that they go to the offices of his advocate, Mr. Ngala. It was late in the evening at around 7pm when they saw Mr. Ngala. It was then that Japheth was told to either sign the commitment note or he loses his life. He was also threatened by two mean looking men while at the offices of Mr. Ngala. He felt that his life was in danger and he signed the commitment note. The following day, he reported the incident at Eldoret Police Station. The commitment note obligated him to transfer 1/2 acre jointly to the two defendants within 30 days. It is before the lapse of the 30 days that he opted to file suit, which he did on 17 July 2009.

He agreed that he owns a neighbouring parcel No. 214 which is 1 acre. He stated that the remedy of the defendants lies in them receiving their refund. He was of the view that they are not entitled to interest on the same, since he refunded the money and never did business with it.

The defendants did not adduce any oral evidence but the parties agreed that they could rely on various documents to support their case. These documents included the sale agreements of 8 March 2008, and 14 March 2008, a document said to be a water bill, several letters from the Law Society of Kenya, the commitment to convey dated 13 July 2009 and building plans. I have had a close look at these documents.

The parties further agreed to have an independent witness testify. This was Mr. Andrew Kiboi, an advocate of the High Court of Kenya practicing in the name and style of Kiboi Tuwai & Company Advocates. He was previously an associate in the law firm of M/s Chemitei & Company Advocates. He testified that the said firm was wound up after its proprietor, Mr. Hillary Chemitei, was appointed a Judge of the High Court in the year 2012. The assets and liabilities of the firm were shared out among Mr. Kiboi and a Mr. Kathili Advocate. The liability of the sum of the sum of Kshs. 1, 600,000/= that was deposited by the 3rd party, was taken up by Mr. Kiboi with instructions to release the said sum as may be ordered by the court. Mr. Kiboi is currently the custodian of the said sum.

PART C : SUBMISSIONS OF COUNSEL

In his submissions, Mr. Yego for all the plaintiffs, reviewed the evidence and submitted that the agreements of 8 March 2008 and 14 March 2008 became void for want of consent to sub-divide. He further submitted that the "commitment to convey", signed by the 3rd plaintiff, cannot be enforced, as the property had already changed ownership, and in any event that the same was procured through coercion, duress and undue influence. He submitted that the remedy of the defendants lies in a refund and that no interest should be payable.

Mr. Sirtuy for the defendants submitted that the act of the 3rd plaintiff in entering into the agreement of 15 May 2009 was an act of fraud, aimed at depriving the defendants the right to own the suit land. He submitted that the 3rd plaintiff readily entered into a "commitment to convey" which is enforceable. He further submitted that there was no evidence that the amount of Kshs. 1.6 Million is available.

None of the parties relied on any authorities.

D. DECISION

It is with the above pleadings, evidence, and submissions of counsel that I need to make a decision in this matter.

There is no question that the 3rd plaintiff had an agreement to sell 1/4 acre each to the 1st and 2nd defendants. These are the agreements of 8 March 2008 and 14 March 2008. I have seen the agreements. The first agreement is between the 3rd plaintiff and the 1st defendant. The land being sold is 1/4 acre at a consideration of Kshs. 950,000/=. The sum of Kshs. 500,000/= was paid on execution of the agreement. A further sum of Kshs. 250,000/= was to be paid on or before 30 April 2008. The balance of Kshs. 200,000/= was to be paid "after sub-division has been effected." Clause 6 of the agreement is significant to the facts of this case. It states : *"This agreement is subject to the land control board being procured and any other relevant statutory consent."*

The second agreement of 14 March 2008 is drawn in similar terms to the first agreement only that the purchase price for the 1/4 acre is Kshs. 1, 150,000/= of which Kshs. 500,000/= was paid on execution. A sum of Kshs. 400,000/= was to be paid on or before 14 April 2008, and the balance of Kshs. 200,000/= was to be paid "after transfer has been effected."

On 19 March 2008, the 3rd plaintiff sold the remaining half to the 1st and 2nd plaintiffs.

It seems to me that the vendor had every intention of ensuring that these three agreements are completed. He applied to sub-divide the land into three portions, two of 1/4 acre and one 1/2 acre. The proposed sub-division was however rejected by the District Physical Planner on 25 July 2008. The reasons given were as follows :- *"Rejected since the minimum plot sizes allowed in the area is 1/2 acre."*

The vendor testified that he passed this information to the two 1/4 acre buyers but they could not agree on whether one person can purchase the other's share, or whether they can be registered as joint proprietor for the 1/2 acre. I have no reason to doubt this evidence. To me the 3rd plaintiff looked honest and truthful. He had noble intentions, seeing that he had even tabled the plans for the proposed sub-division. If the sub-division had been approved, I have no doubt in my mind that the sale to the defendants could have been perfected. But it could not owing to planning regulations. I cannot see how the 3rd plaintiff could have effected the transfer to the defendants without planning permission. I do fail to fathom why the defendants could not understand that the transaction could not be completed for want of statutory approval. The failure to obtain approval was not caused by the vendor but by planning regulations. He cannot be faulted for not obtaining consent to transfer the 1/4 portions to the defendants. However much the defendants harangued the 3rd plaintiff, it was impossible for the 3rd plaintiff to perform the contract. The parties had in their agreement provided for this contingency and put the clause that the sale was subject to statutory consent. The contract could not be performed owing to lack of consent and became frustrated. When a contract is frustrated, the parties are released from their obligations and having been released from his obligations, the 3rd plaintiff was vested with every right to enter into a fresh transaction with the 1st and 2nd plaintiffs.

I cannot fault the 3rd plaintiff for re-selling the 1/2 portion to the 1st and 2nd plaintiffs. What was he supposed to do? He was obviously selling because he needed money. He indeed needed money to refund the defendants. Once he got money, he immediately offered the defendants a refund which they refused. He took the best next course of action and deposited the money with his advocate with instructions to pay it to the defendants. In my considered view, there was nothing more that he could do.

I have seen the letter of 11 June 2009 written by Mr. Chemitei to M/s Ngala & Company Advocates who were the counsels to the defendants. It states clearly that the law firm of M/s Chemitei is holding the purchase consideration and further states that the defendants have been offered the money which they have refused. In the letter, Mr. Chemitei offered to send over the cheques to M/s Ngala & Company Advocates. Mr. Ngala replied through a letter dated 19 June 2009 in which he stated that his clients are not agreeable to a refund. He stated that his instructions were that the half acre be registered in the joint names of the defendants. Obviously, this offer to have the two quarter acres registered jointly as one half, was coming too late in the day after the land had already been sold to the 1st and 2nd plaintiffs. In any event, the 3rd plaintiff, barring a further written agreement, could not be bound to transfer the 1/2 jointly to the names of the defendants. The registration into the joint names of the defendants would have been a new clause, not contemplated by the parties in the initial agreements. Any alteration of the terms of the contract, unless clearly waived, needed to be put down in writing, just as any other contract for a transaction touching on land needs to be put down in writing. The need for writing is founded upon the provisions of Section 3 (3) of the Law of Contract Act, CAP 23, Laws of Kenya.

Without the arrangement to register the 1/2 into the joint names of the defendants being put down in writing, the defendants could not unilaterally impose such a clause and import it into their initial agreement.

On my part, I see absolutely no fault on the part of the 3rd plaintiff. He did not commit any fraud in selling the land to the 1st and 2nd plaintiffs. Neither have I been convinced that the 1st and 2nd plaintiffs committed any fraud in purchasing the suit land. They stated that they did not know of the defendants' interest, but even if they knew, this could not have changed anything as the contract between the vendor and the defendants had already been frustrated. There was nothing to stop the 1st and 2nd plaintiffs from entering into the second sale and having the land transferred into their names.

In my view, the defendants took the frustration of their contract painfully, which was completely unnecessary. They needed to calm down and understand that their contract could not be completed, for no fault of the 3rd plaintiff, through a contingency that was provided in their agreement. It was needless to coerce the vendor into committing to transfer the half-acre into their joint names. The vendor explained the circumstances under which the "commitment to transfer" was entered into, and I have no doubt in my mind that the same was signed under coercion and duress. What is disturbing me most, is that the execution thereof was overseen by an advocate, who ought to have advised his clients accordingly, and ought not to have allowed himself to oversee the execution of a document that was obviously been done under intimidation. In any event, how was the vendor supposed to perform that "commitment" given that the land was already in the name of the 1st and 2nd plaintiffs? It was an impossible document to complete. That document is not worth the paper that it is written on, and I do not hesitate to have it declared null and void.

The remedy in a frustrated contract is to place the parties, to the extent possible, back to the positions that they were prior to the contract. The only entitlement that the defendants can have is a refund and no more. I note that this money was offered to them way back in the year 2009. For no justifiable reason, they refused to collect it. They could even have collected it without prejudice to their rights to enforce the contract, and proceed to file suit to enforce the contract, if at all they felt that they have a good case. I cannot burden the 3rd plaintiff with interest when all along the money was available for collection. It has already been shown where the money is. It is safe and sound with the law firm of M/s Kiboi Tuwai & Company Advocate and can be collected at any time.

I have no reason to order the cancellation of the title of the 1st and 2nd plaintiffs. I declare them as the rightful proprietors of the suit land and they are entitled to an order of permanent injunction against the

defendants.

In the same vein the counterclaim by the defendants cannot succeed.

In my considered opinion, this litigation was uncalled for and could have been avoided if the defendants took time to understand that their contract had been frustrated. They will therefore shoulder the costs of this suit.

I think I have dealt with all issues in this case. I therefore make the following final orders :-

(1) That the 1st and 2nd plaintiffs, Paul Kipsang Kosgei and Esther Jepchumba Mutai, are hereby declared to be the lawful proprietors of the land parcel Eldoret Municipality/Block 14/215 as against the defendants.

(2) That the contracts of 8 March 2008 and 14 March 2008 are hereby declared as frustrated. The parties thereto are hereby discharged from their obligations and the only remedy of the defendants is a refund of what was paid under the contract and no more.

(3) That the defendants do contact Mr. Andrew Tuwai Kiboi the proprietor of M/s Kiboi Tuwai & Company Advocates, and make arrangements to collect their respective refunds of Kshs. 700,000/= and Kshs. 900,000/=.

(4) The defendants shall bear the costs of this suit.

It is hereby declared and ordered.

DATED AND DELIVERED AT ELDORET THIS 31ST DAY OF JULY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. Z.K. Yego for the plaintiffs.

N/A for M/s Cheluget & Co for the defendants.