REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 676 OF 2012

DAVID ONJILI OMBELE.....1ST PLAINTIFF

ELZEBA MUINDE.....2ND PLAINTIFF

VS

LILIAN ISIGI MUYESHI.....1ST DEFENDANT

MUGESI MISHEBA NEBERT.....2ND DEFENDANT

ISAAC ALUDA SONGORE.....3RD DEFENDANT

ELDOLAND PROPERTIES.....4TH DEFENDANT

(Suit land sold to two different persons; first sale alleged by vendor not to have been completed for non-payment of balance; second sale to applicants; applicants paying full purchase price but denied possession by first buyer; whether full purchase price on 1st transaction paid; vendor receiving money for conveyance and transfer; vendor not making any effort to refund; conduct indicating that he had been fully paid; responsibilities of estate agents; second sale nullified but purchasers to be paid full site value; first sale upheld).

JUDGMENT

PART A. INTRODUCTION AND PLEADINGS

This suit was instituted on 4 October 2010 by way of Originating Summons taken out pursuant to the provisions of the then Order XXXVI Rule 3 of the Civil Rules. The orders sought in the Originating Summons are as follows :-

(a) That a declaration be issued declaring that land parcel Pioneer/Langas Block 1/319 measuring 0.085 Ha belongs to the applicants having lawfully and legally purchased the same for value from the 3rd and 4th respondents and a permanent injunction be issued against the respondents jointly and severally.

(b) That a declaration be issued that the 1st and 2nd respondents are not entitled to the suit land given the fact that they breached the terms of the sale agreement thereof.

(c) A declaration be issued declaring that the 1st and 2nd respondents are entitled to the refund of purchase price of the suit land of Kshs. 400,000/= less 20% for damages from 3rd and 4th respondents.

(d) That subject to (b) and (c) above, a declaration be issued declaring that the applicants are entitled to mesne profits from the 1st and 2nd respondents.

(e) That in the alternative to (a), (b), and (c) above, an order be issued declaring that the applicants be refunded the purchase price of Kshs. 560,000/= plus interest thereof by the 3rd and 4th respondents.

(f) That upon grant of the foregoing prayers (a), (b), and (c) above, a permanent injunction be issued restraining the respondents from interfering with the applicant's lawful enjoyment and quiet possession of the suit land.

(g) That such other orders be granted as the court may deem fair and just in the circumstances.

(h) That costs be awarded to the applicants.

The Originating Summons is supported by the affidavit of David Onjili Ombele, the 1st applicant. The same sets out the case of the applicants . They say that on 16 April 2009 they purchased the land parcel Pioneer/Langas Block 1/319 measuring 0.085 Ha from the 3rd and 4th defendants. At the time of the agreement, the applicants were not aware of an agreement to sell the same land that was entered between the 1st and 2nd respondents jointly, and the 3rd and 4th respondents. In March 2010, the 1st and 2nd respondents entered the suit land, constructed a gate, a temporary shelter and embarked on constructing a permanent house. They also filed a case Eldoret SPMCC No. 414 of 2010 before the Magistrate's Court at Eldoret against the 3rd and 4th respondents and obtained an injunction. In their case before the Magistrate's Court, the 1st and 2nd respondents (as plaintiffs) sought orders of permanent injunction, to restrain the 3rd and 4th respondents (who were the defendants in that case) from offering the suit land for sale to any other person. They also sought orders to have the 3rd and 4th respondents herein barred from interfering with their possession of the suit land. The applicants herein later learnt of the existence of that suit and applied to be enjoined as interested parties, which application was allowed, and they then filed a Statement of Claim. In the meantime, armed with the orders of injunction, the 1st and 2nd respondents proceeded to develop a permanent house on the suit land. The applicants herein felt aggrieved by the actions of the 1st and 2nd respondents and filed an application for injunction to stop them from continuing with developments over the suit land. That application was dismissed as the court was of the view that as interested parties, they cannot be allowed to vary the previous orders of injunction granted in favour of the 1st and 2nd respondents (as plaintiffs), and that they cannot agitate any claim as interested parties. Frustrated by the unfolding events in the Magistrate's Court, the applicants then filed this suit.

The 1st and 2nd respondents had an agreement with the 3rd and 4th respondents to purchase the same land. That agreement was entered into on 22 September 2006. It is the position of the applicants, that the 1st and 2nd respondents breached the terms of that agreement and that the 3rd and 4th respondents were within their rights in selling the land to the applicants. The 3rd and 4th respondents are the vendors of the suit land. The applicants in reliance upon the agreement of 22 September 2006, have pointed out to a term thereof which provides that in case of breach, there will be a refund of the purchase price less 20% damages. They say that the only remedy that the 1st and 2nd respondents have is for that refund, less 20% of the purchase price as damages for breach.

The 3rd and 4th respondents filed a Replying Affidavit to this Summons sworn by the 3rd respondent. The 3rd respondent, Isaac Aluda is the proprietor of the 4th respondent company, Eldoland Properties Limited. Their position is that the 4th respondent as owner of the suit land, on 22 September 2006, entered into an agreement to sell the said land to the 1st and 2nd respondents. The purchasers paid Kshs. 300,000/= on execution of the agreement and the balance of Kshs. 100,000/= was to be paid on or before 30 October 2006, time being of essence. Their position is that this balance has never been paid. They state that there was a clause in the agreement, vide which the 3rd and 4th respondents were at liberty to sell the suit land to any other willing buyer, in the event of default, in which event, they would refund the purchase price less 20% as damages. They issued a Notice of Rescission of contract after which they re-sold the property to the applicants.

Initially, the 1st and 2nd respondents did not file a replying affidavit to this Summons. Instead they raised a Preliminary Objection as to the competence of this suit. Inter alia, they contended that since there was already an existing suit before the Magistrate's Court where the applicants were enjoined as Interested Parties, they could not file this suit. That Preliminary Objection was heard and dismissed by Azangalala J

(as he then was) vide a ruling delivered on 19 January 2011. Thereafter the 1st and 2nd respondents filed a replying affidavit on 11 May 2011. The Replying Affidavit is sworn by the 2nd respondent, who is resident in London in the United Kingdom. The case of the 1st and 2nd respondents from their replying affidavit, is that through an agreement of 22nd September 2006, they bought the suit land. They state to have paid Kshs. 406,000/= in total as follows :-

(i) Kshs. 300,000/= on 22 September 2006.

(ii) Kshs. 20,000/= on 5 October 2006.

(iii) Kshs. 50,000/= on 16 November 2006.

(iv) Kshs. 16,000/= on 7 July 2008.

(v) Kshs. 20,000/= on 1 August 2008.

They have denied ever being issued with any notice or demand for performance and have averred that if there was any right to repudiate, the same was waived when the 3rd respondent subsequently received money after the 30th October 2006. It is averred that they are therefore stopped from insisting on their right to repudiate. They have contended that the 3rd and 4th respondents had no right to sell the property to the applicants. They have stated that their transaction of 22 September 2006, must be given priority, over the applicants' agreement of 16 April 2009. They have also raised issue as to the procedure followed in instituting this suit, and have argued that the applicants cannot seek the remedies herein through an Originating Summons.

PART B : EVIDENCE OF THE PARTIES

Directions were taken for the matter to proceed by way of viva voce evidence.

(i) Applicants' Evidence

David Onjili Ombele, is an ICT Consultant based in Nairobi, and the 1st applicant. He testified as PW-1. The 2nd applicant is his wife. He gave evidence that on 16 April 2009, they purchased the suit land from the 3rd and 4th respondents. The consideration was Kshs. 560,000/= which they paid. They then proceeded to the land and planted a K-apple hedge and sunk a borehole. In March 2010, he was alerted by his brother who is resident in Eldoret, that somebody had placed building materials on the land, and he came to visit the property. He found someone erecting a gate. He contacted the 3rd respondent. It is then that he discovered that the same land had been sold to the 1st respondent but the 3rd respondent assured him that the previous agreement had been vacated.

PW-1 asked to have back the property, and in the alternative, the current market value of the land. He tabled a valuation report prepared on 6 July 2011 by Keriasek Valuers, which valued the property at Kshs. 1.2 Million. When the property was purchased, it was registered in the name of a person called Malel. PW-1 stated that the 3rd respondent promised that he would arrange for a transfer to be effected into the name of the applicants.

PW-2 was the 2nd applicant who more or less reiterated the evidence of PW-1. PW-3 was Alfred Ombele, a brother to the 1st applicant. He is the one who introduced the applicants to the 3rd respondent. The agreement of 16 April 2009 was then drawn. Since the applicants were living in Nairobi, PW-3 oversaw the property.

(ii) Evidence of the 3rd and 4th respondents

The 3rd respondent testified on his behalf and on behalf of the 4th respondent. He is a director of the 4th respondent, a company that deals in buying and selling of land. He testified that on 16 April 2009, they had an agreement with the applicants over the suit land. The applicants paid the consideration of Kshs.

560,000/= in cash. Previously, he had another agreement for the sale of the same land to the 1st and 2nd respondents. This was the agreement of 22 September 2006. The purchase price was Kshs. 400,000/= but a balance of Kshs. 100,000/= , which was to be paid by 30 October 2006, was not paid. He testified that the agreement had a clause to resell, which he exercised, hence the second sale to the applicants. He stated that he informed the applicants of the previous sale before entering into an agreement with them. Prior to this second sale he issued a Notice of Default dated 5 December 2006 which was ignored. He admitted receiving Kshs. 20,000/= on 7 July 2008 and Kshs. 16,000/= on 1 August 2008 but stated that these were payments for conveyancing and processing of title, and according to him, did not form part of the purchase price. He denied having received Kshs. 50,000/= on 15 November 2006 nor a sum of Kshs. 20,000/= on 5 October 2006. He gave vacant possession to the applicants but later the 1st and 2nd respondents moved into the land and filed the suit before the Magistrate's Court. He testified that an injunction was issued and owing to the order, he was unable to effect transfer to the applicants. The 1st and 2nd respondents then proceeded to develop the land. He stated that he has been more than willing to refund either the applicants or the 1st and 2nd respondents but both want the land. His position however is that the applicants rightfully deserve the land.

(iii) Evidence of the 1st and 2nd respondents

The 1st and 2nd respondents who are based in UK, donated a power of attorney to Jonathan Mahugi Odera who testified on their behalf. He is a brother to the 2nd respondent. The 1st respondent is wife of the 2nd respondent. He was present when the 1st and 2nd respondents purchased the suit land from the 3rd and 4th respondents. Kshs. 300,000/= was paid leaving a balance of kshs. 100,000/=. He testified that on 5 October 2006, Kshs. 20,000/= was paid and a receipt issued which he produced as an exhibit. On 15 November 2006, his brother informed him that he had sent to the 3rd respondent a sum of Kshs. 50,000/= through Western Union. He had a letter from Western Union dated 15 February 2010 which however was not produced in evidence. He also paid Kshs. 16,000/= on 7 July 2008, and Kshs. 20,000/= on 1 August 2008. According to him, Kshs. 406,000/= was paid, which was more than the purchase price of Kshs. 400,000/=. He denied that any notice was issued that money was still owing .They moved to construct but the 3rd respondent asked them to stop construction. They then moved to file the case at the Magistrate's Court and an injunction was issued. It is then that they developed the land. He testified that there is now a house with a tenant in it.

PART C : SUBMISSIONS OF COUNSEL

Counsel for the applicants submitted that it has been proved that the applicants bought the suit land from the 3rd and 4th respondents and that they were given vacant possession. He submitted that the 1st and 2nd respondents forcefully seized the property and took advantage of the injunction issued in their favour to develop the property. He submitted that the 3rd respondent was not truthful when he testified that the applicants had knowledge of the prior sale. He further submitted that the agreement of 22 September 2006 was never honored by the 1st and 2nd respondents, as they defaulted in paying the balance. He submitted that there was no proof of the alleged payment of Kshs. 50,000/= via Western Union. He submitted that the applicants are entitled to the prayers sought. He further submitted that the suit land is not land which is subject to the Land Control Act.

The 3rd and 4th respondents in their submissions, reiterated that the first agreement was not honored. Counsel submitted that the only remedy of the 1st and 2nd respondents is a refund of what was paid, less 20% for breach of contract. As to the alternative claim for refund by the applicants, counsel submitted that the applicants are entitled to a refund of Kshs. 560,000/= and no more since the provisions of the Land Control Act were not met. He relied on ***Kariuki v Kariuki (1983) KLR 225*** and ***Wamukota v Donati (1987) KLR 280*** to support this position.

Counsel for the 1st and 2nd respondents submitted that his clients had paid the full purchase price and more. He submitted that the receipts showing that conveyance fees were being paid, was evidence that the full purchase price had been paid. He submitted that the Notice of Default of 5 December 2006, does not meet the legal threshold, inter alia, because it is not executed by a duly authorized officer of a body corporate as defined by Section 2 of the Companies Act. He also stated that there was no proof of service

of such notice. He submitted that receipt of monies outside the contract period constituted a waiver on the part of the 3rd and 4th respondents. He also submitted that the power to resell in case of breach was reserved to the vendor, who was the 4th respondent, and therefore the 3rd respondent could not purport to exercise such remedy, for the reason that the two are separate legal entities. He submitted that the agreement of 16 April 2009 is therefore a nullity. He also submitted that the agreement relates to a different property. He further argued that the applicants cannot seek relief on the agreement of 22 September 2006 owing to the doctrine of privity of contract. He also raised issue about the procedure utilized by the applicants.

D. DECISION

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

At the outset, it will be seen that the core issue is who is supposed to be declared the owner of the suit property, considering that the property has been sold to two sets of purchasers. It is not disputed that there was an earlier sale of the property to the 1st and 2nd respondents vide the agreement of 22 September 2006. The key question is whether there was performance of that agreement on the terms agreed by the parties. I have seen the agreement. The agreement is between Eldoland Properties Limited as vendor and the 1st and 2nd respondents as joint purchasers. The purchase price is Kshs. 400,000/=. Kshs. 300,000/= is acknowledged at the time of execution of the agreement. There is a clause that the purchasers shall take possession of the property on completion of the balance of Kshs. 100,000/= which is to be paid as follows :-

(a) Kshs. 50,000/= will be paid on or before 2nd October 2006.

(b) Kshs. 50,000/= will be paid on or before 30th October 2006.

There is a clause that *"the vendor is free to sell the parcel to other willing buyers in the event of default by the purchasers and refund them back his money (sic) less 20 % of the amount as damages."*

The 1st and 2nd respondents claim that they paid the purchase price as scheduled whereas the 3rd and 4th respondents refute this. They have asserted that the balance was not paid and that they issued the Notice of Default. I have seen the Notice of Default which is dated 5 December 2006. The Notice is written on the letterhead of Eldoland Properties Ltd and is signed by the 3rd respondent and states as follows where relevant :-

"Please take notice that you are in default of the said agreement and as such we intend to exercise the powers of the said agreement as per clause six (6) not unless you pay the remaining balance within the next 30 days."

I agree with counsel for the 1st and 2nd respondents that there is no evidence that the said notice was sent, nor received, by the 1st and 2nd respondents. However, notice or no notice, the 1st and 2nd respondents remained with the obligation to abide by the terms of the agreement, or else they stood the risk of the property being resold to another party. I have no direct evidence of payment of the balance of Kshs. 100,000/=. The receipts that were produced are dated 7 July 2008 and 1 August 2008 for processing of title, and conveyance respectively. I am however at a loss as to why the 3rd and 4th respondents were receiving money, for processing of title and for conveyance, if the balance of the purchase price had not been paid. One would have expected that the vendors will first insist on the payment of the balance before they started receiving money for conveyance and processing of title.

I also wonder why the 3rd and 4th respondents received money for processing of title and for conveyance, despite the notice of default, that is alleged to have been issued about 2 years earlier. Neither were the payments for conveyance and processing of title received without prejudice to the obligation to pay the balance. If at all the 3rd and 4th respondents considered the 1st and 2nd respondents to be in default, one would also have expected them to issue a refund of the purchase price less 20% of the same as damages, at the latest, after expiry of the alleged notice of default, for that was what was agreed by the parties. But

no refund was ever made to the 1st and 2nd respondents, and no correspondences were exchanged about the non-payment of the balance.

I may not have seen payment of the balance of the purchase price, and it is impossible to tell whether the same was paid or not, but the conduct of the 3rd and 4th defendants, was a conduct that leads one to the conclusion that either the 1st and 2nd respondents paid the balance, or that the 3rd and 4th respondents were not perturbed by the non-payment of the balance and were ready to complete the sale to the 1st and 2nd respondents. If it were otherwise, the 1st and 2nd respondents would have been refunded their money.

I also find it curious that the 3rd and 4th respondents would receive money on the 2nd transaction, without first refunding the 1st and 2nd respondents their money less the 20% damages, before entering into, or shortly after, this second sale. The 3rd respondent kept quiet. He never told the 1st and 2nd respondents that the property has been resold and that they could come for their purchase price, yet, at the same time, he received money from the applicants, for sale of the same land.

I am prepared to hold on a balance of probabilities, especially owing to his conduct which I have described above, that the 3rd respondent either received the whole of the purchase price, or waived payment of the same.

The situation cannot be condoned, where a land broker, or any other person for that matter, sells the same land to two people, without first renouncing one contract. Land matters are sensitive and emotive, and land transactions ought not to be handled casually. Parties to land transactions need certainty. There should be no room for speculation as to whether a land contract subsists or not. If one sale cannot be completed, owing to breach or any other reason, this should be made clear, before a party embarks on a second sale. To keep quiet as to whether the first transaction was still alive or rescinded, and continue keeping possession of the purchase money, yet at the same time, sell the same land to another purchaser, was deplorable conduct on the part of the 3rd respondent. The 3rd respondent is a land broker and he needed to act professionally and responsibly.

I have already held that on a balance of probabilities, the 3rd and 4th respondents either received the whole of the purchase price or waived payment of the same. The first contract was never renounced. I do not think that the applicants knew of the first sale, but even if they did, they cannot be faulted for they were assured by the 3rd respondent that that first sale has already been rescinded.

I think on the peculiar facts of this case, it is fair that I uphold the first sale and set aside the second sale. Matters would probably have been different if the second sale had been completed and the land conveyed to the applicants. In such situation, the applicants would have been protected by the law as proprietors unless their registration was tainted by fraud (See ***Chauhan v Omagwa (1985) KLR 656).*** The most justiciable decision in my view is to uphold the first transaction and compensate the applicants with damages.

Mr. Alwang'a for the 3rd and 4th respondents argued that if at all any compensation needs to be made to the applicants, then their remedy is only a refund, since the second sale did not have the consent of the Land Control Board. That issue of the Land Control Board is coming at the submissions stage. No evidence was led that the subject land was agricultural land subject to the consent of the Land Control Act (CAP 302) Laws of Kenya. The land seems to be a plot that was under a Municipality. Maybe it is within a Land Control area but again maybe it is not. One cannot tell by a mere reading of the title given the character and user of the land. It therefore behoved upon the 3rd and 4th respondents to lead evidence that the land is within a land control area, and subject to consent of the Land Control Act. If evidence had been led and it was proved that the suit land is under the Land Control Act, then I agree that the remedy of the applicants would only have been limited to a refund of the purchase price. This is by dint of Section 7 of the Land Control Act, a position that has been affirmed in various decisions, including the cases of ***Kariuki v Kariuki*** and ***Wamukota v Donati***, which were relied on by Mr. Alwang'a. Since no proof was tabled, the 3rd and 4th applicants must pay damages to the applicants for duping them into entering into a contract which cannot now be performed. In my view, the correct compensation due to the applicants is

damages, equivalent to the current market value of the plot as a vacant site. If the transaction of the applicants had gone through without any hitch, the applicants would have been the richer, with the current value of the suit property, and they need to be put into that position.

That said, I am not too happy with the conduct of the 1st and 2nd respondents in quickly developing the property when the matter was under litigation. That was very unwise of the 1st and 2nd respondents, for if they had lost the suit, then they would have lost their whole investment. If their intention was to seek sympathy of the court, or to assert their presence on the land, then they were completely mistaken. That could not have swayed the court to hold in their favour. They are only lucky that in the circumstances of this case, their transaction has been upheld.

There had been arguments raised about the manner in which this suit was instituted. I have my own misgivings. I think the best avenue was to institute a suit through plaint. Originating Summons is meant to determine fairly uncontested matters. But I do not see what prejudice any party has suffered as the suit proceeded as if it had been instituted through plaint. I am unable to bring myself to dismissing the applicants' claim merely because it was instituted by an improper procedure. That would be relying too much on technicalities. This court by dint of the provisions of Article 159 (2) (d) of the Constitution, 2010, is obliged to do justice to the parties without undue regard to technicalities.

The culpable party in the circumstances of this case is the 3rd and 4th respondents. They will therefore bear the costs of the suit to both applicants and to the 1st and 2nd respondents.

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

(1) Between the sale agreements of 22 September 2006 and 16 April 2009, the sale of 22 September 2006 is held to prevail.

(2) Subject to any other written law, I direct the 3rd and 4th respondents to complete the sale to the 1st and 2nd respondents, and convey the property to the 1st and 2nd respondents, and in default, the 1st and 2nd respondents be at liberty to institute an appropriate suit against the 3rd and 4th respondents.

(3) The sale of 16 April 2009 is hereby set aside. The 3rd and 4th respondents jointly and severally will pay damages to the applicants equivalent to the site value of the property as a vacant plot.

(4) The applicants and the 3rd and 4th respondents to agree on a reputable valuer to value the site value of the property as a vacant plot, and if the parties do agree, the site to be valued within the next 21 days. If parties fail to agree, the Government Valuer, Uasin Gishu County, to proceed and value the property within 21 days thereafter and file the report in court. In any event, the valuation fees are to be settled by the 3rd and 4th respondents.

(5) The 3rd and 4th respondents to pay the said damages to the applicants within 45 days of their ascertainment and in default, the applicants be at liberty to execute.

(6) The costs of this suit shall be shouldered by the 3rd and 4th respondents.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF JULY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. P.K. Kibii holding brief for M/s R.M. Wafula for applicants

No appearance for M/s Wambua Kigamwa & Co for 1st and 2nd respondents.

Mr. Z.K. Yego holding brief for Mr. Alwang'a for 3rd & 4th respondents