



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 998 OF 2012

Formerly HCC 195 OF 2012

DAVID RANDICH.....PLAINTIFF/APPLICANT

VS

JOEL TIROP BUSIENEI.....DEFENDANT/RESPONDENT

(Suit by plaintiff seeking eviction and permanent injunction; defendant asserting that he purchased the suit land; no consent issued by the land control board; agreement cannot be enforced; agreement nullified but plaintiff ordered to refund purchase money; orders of eviction and permanent injunction issued)

JUDGMENT

PART A : INTRODUCTION AND PLEADINGS

This suit was commenced by way of a plaint filed on 24 September 2012. In his plaint, the plaintiff pleaded that he is the registered owner of the land parcel Nandi/Kamoiywo/1114 (the suit land) which land measures about 2.4 hectares. He stated that at some point, he entered into an agreement to sell the said land to the defendant under which agreement the defendant paid some part payment leaving a balance of Kshs. 200,000/=. The plaintiff has pleaded that the defendant never completed payment of the purchase price and neither was consent of the Land Control Board obtained. He has thus sought the following orders :-

- (a) That the contract to sell the suit land be rescinded and a refund of the part purchase price be made to the defendant.
- (b) An order of eviction to remove the defendant from the suit land.
- (c) Costs of the suit.
- (d) Any other or further orders as the court may deem fit to make.

Upon service, the defendant filed appearance and defence. In his defence he has admitted the sale but has pleaded that the defendant has refused to hand over the title despite receiving the purchase price. He has contended that the land now belongs to him. He has also pleaded that this suit is res judicata as a determination was already made in Kapsabet LDT Case No. 59 of 2011

PART B : EVIDENCE OF THE PARTIES

(i) The plaintiff's Evidence

The plaintiff testified as the sole witness. He testified that the suit land belongs to him and he produced the title deed to prove this. He testified that he sold a portion of 4 acres of the suit land (which measures 6 acres in total) to the defendant but the defendant remained with a balance of Kshs. 200,000/= which he failed to pay. Neither did they attend the Land Control Board. He stated that he is ready to refund the money paid which is Kshs. 480,000/=. He testified that the matter had been referred to the Land Disputes Tribunal which decided that the defendant pays the balance of the purchase price but the same was not paid. In cross-examination, the plaintiff denied having sold the other 2 acres to one Chesang Barngetuny for a sum of Kshs. 120,000/=. He also denied having entered into any agreement with a person called Joel Kibor Keino.

(ii) The defendant's evidence

The defendant testified and called one witness. In his evidence, the defendant testified that he first entered the suit land pursuant to a lease in 1980. In 1988, the plaintiff sold to him 1.5 acres of the original land which at that time was registered as Nandi/Kamoiyo/29. The land was then sub-divided into two parcels, Nandi/Kamoiyo/1114 and Nandi/Kamoiyo/1115. The parcel No. 1115 was transferred to the defendant. On 14 October 2007, he testified that he bought 4 acres out of the land parcel No. 1114 which is the suit land. The agreement was produced as an exhibit. He testified that later on 14 February 2011, he bought another 0.5 acre and on 11 September 2010, he bought another 0.5 acres. He stated that in total, he purchased 5 acres from the plaintiff. He stated that he also purchased one acre of the suit land from one Chesang Barngetuny, who had bought it from the plaintiff. It was his evidence that he has therefore purchased the whole of the suit land. He produced agreements demonstrating the transactions. He stated that in total he paid Kshs. 938,000/= for the land and added Kshs. 65,000/= for an existing house.

In cross-examination, the defendant alluded to the purchase transactions and asserted that he owns the whole land. He stated that they did go to the Land Control Board on 22 February 2011 but he did not have any document to demonstrate this. He stated that no consent was issued. He had a problem with receiving a refund as the cost of land has gone up.

DW-2 was Ernest Kipkemboi, the Assistant Chief of Kamoiyo Sub-Location. He testified that he witnessed an agreement between the plaintiff and defendant. He also witnessed an agreement between Mary Chesang and the defendant. It was his evidence that Chesang had bought the land from the plaintiff.

With that evidence, the parties closed their respective cases.

PART C : SUBMISSIONS OF COUNSEL

In his submissions, Mr. Kipkoske Choge, learned counsel for the plaintiff, submitted that the defendant purchased 4 acres of the suit land for Kshs. 680,000/= of which he only paid Kshs. 480,000/= leaving a balance of Kshs. 200,000/= . He submitted that the defendant had appeared before the Kapsabet Division Land Disputes Tribunal which ordered the defendant to pay the balance of Kshs. 200,000/= which was never paid. He submitted that there was a breach of contract. He also submitted that no consent of the Land Control Board was ever issued yet the land is agricultural land. It was his view that the transaction between the plaintiff and defendant is therefore void and that the only remedy of the defendant is a refund. He relied on the case of *Kariuki v Kariuki (1983) KLR 225*.

M/s Rotuk & Co, counsels for the defendant on other hand submitted that the plaintiff had not proved that he was owed any balance. They submitted that the evidence showed that the defendant had purchased the whole land, since two acres, in addition to the 4 acres sold directly by the plaintiff, were bought from one Mary Chesang Barngetuny, who in turn had bought the two acres from the plaintiff. They submitted that all money was paid and that there was no balance. They asked that the plaintiff's case be dismissed. They did not rely on any authorities and neither did they address the point that the transactions were void for want of consent of the Land Control Board.

D. DECISION

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

The main issue is whether the defendant properly purchased the whole of the suit land so as to be entitled to it. The case of the plaintiff is that he only sold 4 acres to the defendant and that he received Kshs. 480,000/= leaving a balance of Kshs. 200,000/= that was never paid. His view is that the defendant breached the contract by not paying the balance and further that the transaction is void for want of consent of the Land Control Board. He is willing to refund the Kshs. 480,000/= which he received. The defendant on the other hand asserts that he bought the whole land and paid in full for it.

The defendant produced a total of five agreements. They are all home-made; none was prepared by an advocate. The first in time is that dated 14 October 2007. It is between David Randich (plaintiff) and Joel Tirop Busienei (defendant). The land being sold is Plot No. 1114, which I assume to be the suit land. The purchase price is Kshs. 480,000/=. It is said that Kshs. 465,000/= has been paid leaving a balance of Kshs. 15,000/=. There is no indication that the balance was ever paid.

The second agreement is dated 11 September 2010. It is between David Randich (plaintiff) and Joel Tirop Busienei (defendant). The land being sold is 0.5 acres of Plot No. 1114. The consideration is Kshs. 85,000/= of which Kshs. 50,000/= is said to have been paid. The balance was to be cleared by 17 December 2010. There are some latter payments indicated being Kshs. 5,000/= on 10 October 2010; Kshs. 20,000/= on 17 November 2010; and Kshs. 10,000/= on 17 December 2010. So presumably, the Kshs. 85,000/= was paid in full.

The third agreement is dated 14 February 2011. It is between David Randich (plaintiff) and Joel Tirop Busienei (defendant). The land being sold is 0.5 acres of Plot No. 1114. The consideration is Kshs. 90,000/= of which Kshs. 5,000/= is said to have been paid. There is nothing to show that the balance of kshs. 85,000/= was paid.

The fourth agreement is between Chesang Barngetuny as seller (not a party to this suit) and Joel Tirop Busienei (defendant) as purchaser. The land being sold is 0.1 acres out of Plot No. 1114. The consideration is Kshs. 25,000/=. Kshs. 20,000/= is said to have been paid and I can see an endorsement for payment of Kshs. 5,000/= on 7 June 2011.

The fifth agreement is between Mary Barngetuny Chesang, as seller (not a party to this suit) and Joel Tirop Busienei (defendant) as purchaser. The land being sold is 0.2 acres out of plot No. 1114. The consideration is Kshs. 48,000/=. Kshs. 46,000/= is said to have been paid leaving a balance of Kshs. 2,000/= and there is no indication that this was paid.

If I am to follow the agreements, it seems as if the plaintiff sold to the defendant 5 acres through three agreements. The first agreement was for 4 acres and the subsequent two agreements are for 0.5 acres each. The total consideration for the three combined agreements is Kshs. 655,000/=. Out of this sum, it seems to me that a balance of Kshs. 100,000/= has not been paid (Kshs. 15,000/= for the agreement of 14 October 2007 and Kshs. 85,000/= for the agreement of 14 February 2011). Thus according to the agreements the plaintiff received Kshs. 555,000/=. I have seen no reason to doubt the authenticity of these agreements and I am persuaded that the defendant paid to the plaintiff the sum of Kshs. 555,000/= towards the purchase of the suit land. It was said that there was a decision of the Land Disputes Tribunal that a balance of kshs. 200,000/= is owed but none of the parties produced any decision of the Tribunal and I cannot assume that the same exists. There had been some reference to a decision of the Tribunal in some interlocutory applications, but at the hearing, none of the parties produced any decision or document of the Tribunal as an exhibit. I cannot therefore refer to any decision in absence of an exhibit. In the same vein I have no evidence before me that this suit is res judicata.

I cannot vouch for the other payments made to Mary Chesang Barngetuny for Mary was never a registered owner of the suit land. Neither have I seen any agreement in which Mary Chesang Barngetuny bought any portion of the suit land from the plaintiff. In absence of agreement, I cannot state that Mary

Chesang had any capacity to sell any portion of the suit land. Neither can I make any orders for or against her as she is not a party to this suit.

The other important matter is whether the agreements between the plaintiff and defendant can be enforced. It is not in doubt that the suit land is agricultural land. Being agricultural land, the land is subject to the provisions of the Land Control Act, CAP 302, Laws of Kenya.

For our purposes, Section 6, 7 and 8 of the Act 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.

It will be seen from S. 6 above, that one of the controlled transactions is a sale of agricultural land. Under S.8, an application for consent is to be made within 6 months of the agreement. In our case, the agreements between the plaintiff and defendant are dated 14 October 2007, 11 September 2010, and 14 February 2011. The defendant did not adduce any document to show that an application for consent was made within 6 months of these agreements. Neither was I shown any consent issued by the Land Control Board. The only conclusion I can reach is that there was no application for consent made, and no consent was issued on the transactions between the plaintiff and defendant. The effect of failure to have consent to a controlled transaction is that such transactions are nullified by operation of law. The only remedy is a

refund of the amount paid as noted in S. 7 of the Land Control Act. There have been numerous decisions on this point one of which is the case of **Kariuki v Kariuki** cited by Mr. Choge. In the case, the Court of Appeal upheld the provisions of the Land Control Act, and asserted that a transaction that requires the consent of the Land Control Board is null and void if no consent is issued. The court further affirmed that the only remedy is a refund of any money paid under the transaction and that no general or special damages are recoverable.

It follows that in our case, the defendant cannot attempt to enforce the agreements that he had with the plaintiff. The same are null and void. His only remedy is a refund. I have already found that from the evidence tabled, the money that the defendant paid is Kshs. 555,000/=. This is the money that he is entitled to be refunded. I also stated that I cannot make any orders for or against Mary Chesang for she is not a party to this case. If the defendant is keen to seek any remedy from her, that is his choice to make.

From the foregoing, it will be discerned that the plaintiff must succeed in his suit save that he has to refund any money proved to have been paid. As to costs, the same ordinarily follow the event and I see no reason to depart from this. The defendant will bear the costs of this suit.

I now make the following final orders :-

- (1) That the agreements entered between the plaintiff and defendant for the sale of the land parcel Nandi/Kamoiywo/1114 are hereby declared as null and void for want of consent of the Land Control Board.
- (2) That the plaintiff has received a sum Kshs. 555,000/= which I hereby order him to refund within the next 90 days and in default the defendant be at liberty to execute.
- (3) That the defendant has no right whatsoever over any part of the land parcel Nandi/Kamoiywo/1114 and if at all he or his servants/agents/assigns are in possession, then they must move out forthwith or else the plaintiff is at liberty to apply for their eviction.
- (4) That a permanent injunction is hereby issued barring the defendant his servants/agents/assigns from entering, being upon, utilizing or in any other way dealing with the land parcel Nandi/Kamoiywo/1114.
- (5) The defendant shall bear the costs of this suit.

It is so ordered and declared.

DATED AND DELIVERED AT ELDORET THIS 10TH DAY OF JULY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. Kipkoskei Choge present for plaintiff.

Mr. G.K. Cheruiyot holding brief for Mr. Melly of M/s Rotuk & Co. for defendant.