REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&L NO. 299 OF 2012

Formerly HCC 9 of 2007

JOHN MWANGI WAITHAKA.....PLAINTIFF

VS

JACKSON K. CHEROP.....1ST DEFENDANT

JOHN KIBIWOT KIBOWEN.....2ND DEFENDANT

(Suit for recovery of land; defendant claiming to have purchased the suit land; plaintiffs only conceding to some acreage; other acreage allegedly sold by a third party; such sale disputed; whether such sale can bind the owner of suit land; such sale not binding for want of privity of contract; decision of land disputes tribunal; decision of tribunal heard without jurisdiction; whether a person can seek such decision to be declared null and void through plaint; held no bar to such declaration; plaintiff's suit succeeds with costs)

JUDGMENT

A. INTRODUCTION AND PLEADINGS

1. This suit was commenced by John Mwangi Waithaka (now deceased) by way of plaint filed on 24 January 2007. In the plaint, John Mwangi Waithaka pleaded that he was the registered owner of the land parcel Karuna/Sosiani Block 2 (Progressive)/289 (the suit land) . He pleaded that on 14 February 1997, he sold 4 acres of the suit land Jackson Cherop (who was named as 1st defendant) and on 4 March 1999, he sold 1 acre to the 2nd defendant. He pleaded that in January 2005, the defendants without lawful excuse laid claim to a total of 6 acres of the suit land and proceeded to file a suit before the Land Disputes Tribunal. The Tribunal found in favour of the defendants. The plaintiff pleaded that the Tribunal did not have jurisdiction to hear the dispute. Through this suit, John wanted a declaration that the defendants are only entitled to a total of 5 acres of the suit land, a declaration that the decision of the Tribunal is null and void, and a permanent injunction to restrain the defendants from interfering with the suit land.

2. The defendants filed a joint Statement of Defence in which they averred that the plaintiff sold a total of 6 acres which they paid for.

3. On 7 September 2009, John Mwangi Waithaka died. His two sons, Eliud Njuguna Mwangi and Michael Kamau Mwangi, sought and obtained a Limited Grant of Letters of Administration ad Litem, limited for purposes of continuing this suit. They filed the appropriate application for substitution, which was allowed. They are now the present plaintiffs.

4. On 28 January 2013, the plaintiffs applied to withdraw the case against the Jackson Cherop, the original 1st defendant. It was said that the 1st defendant would be a witness of the plaintiff. This application was allowed. I ordered the plaintiff to amend the plaint to reflect this change and this was duly done through the Amended Plaint filed on 4 February 2013.

5. In the Amended Plaint, it is pleaded that John Mwangi Waithaka (the deceased), sold 4 acres of the suit land to Jackson Cherop (the original 1st defendant) on 14 February 1997. The said Jackson Cherop later sold his interest to John Kibiwot Kibowen (the now sole defendant). On 4 March 1999, the deceased sold 1.5 acres to the defendant. It is pleaded that the defendant is now illegally laying claim to 6 acres, alleging that he had purchased 4.5 acres, and not 4 acres, from Jackson Cherop. The plaintiffs now want a declaration that the defendant is entitled to 5.5 acres, and not 6 acres, of the suit land, in addition to seeking orders to declare the decision of the Tribunal as null and void.

B. EVIDENCE OF THE PARTIES.

(i) Evidence of the Plaintiffs

6. Eliud Njuguna Mwangi testified as PW-1. As stated earlier, he is the son of John Mwangi Waithaka (deceased). He testified that the deceased sold 4 acres of the suit land to Jackson Cherop through an agreement dated 4 February 1997. PW-1 was a witness to that agreement and he produced the same as an exhibit. He further testified that in 1999, the deceased sold 1 acre of land to John Kibowen (the defendant) and late in the year 2000, another 0.5 acre was sold to the defendant. He testified that Jackson Cherop later sold his 4 acres to the defendant. According to PW-1, the defendant is thus entitled to 5.5 acres yet he is laying claim to 6 acres. He testified that the defendant referred the dispute to the Land Disputes Tribunal which awarded him 6 acres. He stated that his father was never heard by the Tribunal and he asked that this decision be revoked. In cross-examination, PW-1 was categorical that save for the initial 4 acres sold to Cherop, his father never sold an extra 0.5 acres to him. Some mutation forms were put to him but he denied that his father had signed them. He also denied that the deceased gave consent to the Land Control Board for the transfer of 6 acres to the defendant.

7. Jackson Cherop testified as PW-2. He is a retired civil servant. He testified that he purchased 4 acres of the suit land from the deceased at the rate of Kshs. 60,000/= an acre. He paid Kshs. 240,000/= for the 4 acres. He grew some wheat in the year 1997 but owing to the heavy El-Nino rains he lost the whole crop. Discouraged, he made a decision to sell the land and he sold the same to the defendant. He stated that he only sold 4 acres, and not 4.5 acres, for he could not sell land that he does not have. They had a written agreement but he had lost his copy. He refuted the agreement being relied upon by the defendant and stated that the same is a forgery. He denied that the signature in that agreement was his. He testified that he was never called at the Tribunal to testify as a witness.

8. With the above evidence the plaintiffs closed their case.

(ii) Evidence of the Defence

9. The defendant testified as DW-1. He is a teacher by profession. He testified that on 14 April 1998, he purchased 4.5 acres of land from Jackson Cherop (PW-2). The price was Kshs. 60,000/= per acre for a total of Kshs. 270,000/=. He also paid Kshs. 10,000/= for a small structure. In total, he stated that he paid Kshs. 280,000/=. He produced an agreement which he said was their agreement with PW-2. He finished paying on 15 October 1998. After this agreement, he purchased another 1 acre from the deceased on 4 March 1999. He paid Kshs. 60,000/= for it and they wrote an agreement which he produced. He testified that they then went to the Land Control Board on 16 December 1999, for consent for the now 5.5 acres. After going to the Board the deceased sold to him another 0.5 acre on 17 February 2000. He produced the agreement thereof. He stated that they then went to the survey and the deceased signed mutation forms authorizing the carving out of 6 acres for the defendant. In cross-examination, he agreed that the only direct transaction with the deceased was for 1.5 acres. The 0.5 acre in dispute was purchased from PW-2.

10. DW-2 was one John Chumba Chemaringo. He stated that he knows both defendant and PW-2. He

used to work with PW-2 at the Kerio Valley Development Authority (KVDA). He testified that in the year 1997, he was called by PW-2 to come to his office at KVDA to witness an agreement between himself and the defendant. He identified the same agreement that the defendant had produced. He stated that the same was for 4.5 acres. The purchase price was Kshs. 160,000/= and all the money was paid immediately. After about 1 year, PW-2 again called DW-2 to witness an agreement which he did. Later he was informed that a dispute had arisen over 0.5 acres. In cross-examination, DW-2 stated that there was another agreement through which PW-2 bought another 0.5 acres from the deceased but that this agreement got lost.

11. DW-3 was one Kiplagat Kiptarus. He testified that he also bought 3 acres of land from the deceased although the same is yet to be transferred to him. He testified that a surveyor was called in the year 2001 to demarcate his land from that of the defendant. However, the deceased was not happy with the survey and refused to sign the survey document as there was a disagreement over 0.5 acres with the defendant.

12. DW-4 was one Philip Boit Mutai. All he said was that his brother purchased 3 acres from the deceased.

13. DW-5 was one Gideon Bor. He was the Chairman of the Land Disputes Tribunal which heard the dispute between the parties. He stated that they heard from both sides and held for the defendant. He however did not produce any minutes of the proceedings.

14. DW-6 was one Sylvester Chuonyo. He is a land surveyor. He testified that in the year 2009, he was instructed by the deceased to sub-divide the land into three portions of 7.19 Ha, 2.4 Ha and 1.21 Ha. The deceased signed the mutation forms. He stated that the deceased also had consent from the Land Control Board authorizing these sub-divisions. He however did not produce the mutation forms nor consent as exhibits.

15. With the above evidence the defendant closed his case.

C. SUBMISSIONS OF COUNSEL

16. In her submissions, counsel for the plaintiff inter alia submitted that the contested acreage is of 0.5 acres which must be acreage purchased from PW-2. She submitted that there is no better person to testify as to what was transacted between PW-2 and the deceased other than PW-2 himself. She pointed out that PW-2 refuted the alleged agreement that showed him selling 4.5 acres. She submitted that if the defendant has any claim over this 0.5 acres, he should direct it to PW-2. She also submitted that there was no evidence that the deceased ever acknowledged that the defendant deserved 6 acres of land. She further submitted that the Land Disputes Tribunal did not have jurisdiction in the matter owing to Section 3(1) of the Land Disputes Tribunal Act, Act No. 18 of 1990. She submitted that their decision is therefore a nullity.

17. On the other hand, counsel for the defendant submitted that DW-2 had confirmed in evidence that the defendant purchased 4.5 acres from PW-2. He also referred to the evidence of DW-6 on the proposed sub-divisions of the land. He submitted that consent to sub-divide the land to a portion of 6 acres for the defendant was obtained. He submitted that the matter has been determined by the Tribunal, and if the plaintiffs were aggrieved, they ought to have appealed to the Provincial Land Disputes Appeal Tribunal as envisaged by S. 8 of the Land Disputes Tribunal Act, or in the alternative, file a Judicial Review to quash the decision. He submitted that the plaintiff could not challenge that decision by way of plaint. He relied on the case of ***Peter Karanja Kinyanjui v Peter Kamau Matiru (2008) eKLR***. He further submitted that the Tribunal did have jurisdiction.

D. DECISION

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

19. There is no question that the dispute revolves around 0.5 acres of the suit land. There is no dispute

that the defendant purchased 1.5 acres from the deceased through the agreements of 23 February 1999 and 17 February 2000. These agreements are for 1 acre and 0.5 acres respectively. The contention over the 0.5 acres has arisen because the defendant asserts that he purchased 4.5 acres from PW-2 while PW-2 asserts that he only sold 4 acres to the defendant. The acreage that PW-2 sold to the defendant is what he had purchased from the deceased. The first issue that needs to be resolved is whether PW-2 purchased 4 acres or 4.5 acres from the deceased.

20. The only evidence tabled before me is that PW-2 purchased 4 acres and not 4.5 acres from the deceased. This is through the agreement dated 14 February 1997 that was produced by the plaintiffs as an exhibit. No document was tendered to me to demonstrate that there was ever an agreement between PW-2 and the deceased for the sale and purchase of 4.5 acres, or of another 0.5 acres, separate from the 4 acres purchased on 14 February 1997. There was mention of an agreement for 0.5 acres but none was produced and I cannot assume that the same exists. PW-2 himself was categorical that he purchased 4 acres and not 4.5 acres. He has nothing to lose nor gain in this litigation for he sold whatever share he had to the defendant. I believe him. Although the defendant attempted to demonstrate that he had an agreement for 4.5 acres, PW-2 refuted this agreement.

21. But even assuming that the agreement between PW-2 and the defendant was for 4.5 acres, that does not bind the deceased to give the defendant 4.5 acres. If PW-2 went ahead to sell land that he did not have, the plaintiffs are not bound by that. The deceased was not a party to the agreement between PW-2 and the defendant, and cannot be bound by it, owing to the doctrine of privity of contract. It therefore makes no difference to the plaintiffs whether PW-2 sold 4 acres or 4.5 acres to the defendant.

22. The evidence tabled is that the deceased only acknowledged 5.5 acres to the defendant. He seems to have had no problem transferring directly 5.5 acres to the defendant. Problems arose when the defendant started demanding 6 acres and not 5.5 acres. This indeed came out of the evidence of DW-3, who stated that the deceased declined to sign mutation forms that gave out 6 acres to the defendant. Although PW- 6 stated that he had instructions to carve out the land into several acreages, no mutation forms signed by the deceased were ever produced in evidence.

23. Moreover, the defendant cannot enforce transfer of 6 acres for he does not have consent of the Land Control Board to transfer 6 acres. The transaction herein is a disposal of agricultural land and Section 6 of the Land Control Act, CP 302, requires consent of the Land Control Board to such a transaction. I have not been shown any minutes through which the Land Control Board approved transfer of 6 acres to the defendant.

24. From the evidence tabled, I do not see how the defendant can attempt to claim 6 acres from the plaintiffs. The defendant is indeed lucky that the deceased agreed to acknowledge the agreement for 4 acres that the defendant had with PW-2, for there was absolutely no obligation upon him to be bound by the terms of agreement between the two parties.

25. My holding is that the defendant has not proved that he is entitled to 6 acres of the suit land. At most his entitlement can only be for 5.5 acres.

26. This brings me to the decision of the Land Disputes Tribunal (LDT or Tribunal). Land Disputes Tribunals were established by the Land Disputes Tribunal Act, CAP 303 (now repealed by the Environment and Land Court Act, Act No. 19 of 2011). The jurisdiction of the Land Disputes Tribunal was set out in Section 3 (1) which provided as follows :-

3. *(1) Subject to this Act, all cases of a civil nature involving a dispute as to—*

> *(a) the division of, or the determination of boundaries to land, including land held in common;*
>
> *(b) a claim to occupy or work land; or*
>
> *(c) trespass to land,*

shall be heard and determined by a Tribunal established under section 4.

27. It will be seen that the jurisdiction of the tribunal was only on matters related to the division or determination of boundaries; claims to occupy or work land; and trespass to land. The Land Disputes Tribunal did not have jurisdiction to issue declaratory orders on the ownership of land and neither did it have jurisdiction to determine disputes revolving around ownership of land. It follows that the Land Disputes Tribunals could not award land to a litigant, for that, would be beyond their jurisdiction. The dispute between the deceased and defendant was not one falling within the jurisdiction of the Land Disputes Tribunals as provided in Section 3 (1) above. It is clear to me that the Land Disputes Tribunal heard a dispute in which it had no jurisdiction.

28. The other issue in this case is whether this court has mandate to declare that decision of the Tribunal as null and void. Counsel for the defendant has argued that the avenue of the plaintiff was either to appeal against the decision of the Tribunal at the Provincial Appeals Committee or to file a suit for Judicial Review. He has argued that the court has no jurisdiction to issue a declaration that the decision is null and void through a claim presented by way of plaint. The question whether it is only through an appeal to the Provincial Appeals Committee and Judicial Review that one could quash the decision of the Land Disputes Tribunal has not derived an unanimous decision from the courts.

29. In the case of ***Jamin Kiombe Lidodo v Emily Jerono Kiombe & Another Eldoret E&L No. 218 of 2012 (2013) ekLR.*** I had occasion to review the jurisprudence and the conflicting decisions. I held that a party can through plaint, seek a declaration that the decision of the Land Disputes Tribunal was null and void for want of jurisdiction. I was not persuaded that the only avenues are appeal to the Provincial Appeals Committee or Judicial Review. I held as follows :-

"My own opinion of the matter is that there is no bar to filing a suit to declare the decision of a Land Disputes Tribunal null and void. True, the avenues of appeal and judicial review are available, but I am not of the view that these are the sole avenues for relief."

I have not been swayed by counsel for the defendant that I need to depart from that position. Although counsel for the defendant cited the case of ***Peter Karanja Kinyanjui v Peter Kamau Matiru (2008) eKLR***, that case is clearly distinguishable from this one. In that case, the plaintiff filed suit against the defendant on a dispute that had earlier been heard by the Land Disputes Tribunal. The court held that the dispute was a boundary dispute of which the Tribunal had jurisdiction. The court further held that the correct avenue was to appeal against the decision as provided by Section 8 of the Land Disputes Tribunal Act, and not to file a new suit. The case was therefore clearly *res judicata*, the dispute having been decided by a competent tribunal. Neither was there a prayer in that suit for a declaration that the Tribunal decision was out of jurisdiction.

30. As stated, I still abide by my decision in the ***Jamin Kiombe*** case. I am of the view that the plaintiff is deserving of a declaration, that the decision of the Tribunal which held that the defendant is entitled to 6 acres of the suit land, was a decision that was decided without jurisdiction. Having been decided without jurisdiction, that decision is hereby declared to be null and void and does not bind any of the parties herein.

31. I think I have dealt with all the issues in this suit save for costs. Ordinarily costs follow the event and I do not see any reason to depart from that. The defendant shall therefore bear the costs of this suit.

32. I now make the following final orders.

(a) That a declaration is hereby issued that the defendant is at most only entitled to 5.5 acres of the land parcel Karuna/Sosiani Block 2 (Progressive)/289.

(b) That a declaration is hereby issued that the decision of the Land Disputes Tribunal which awarded the defendant 6 acres of the land parcel Karuna/Sosiani Block 2 (Progressive)/289 was a decision made without jurisdiction and the same is null and void.

(c) That an order of permanent injunction is hereby issued restraining the defendant from interfering with the land parcel Karuna/Sosiani Block 2 (Progressive) 289 beyond the 5.5 acres that he is entitled to.

(d) The defendant shall bear the costs of this suit.

33. Judgment accordingly.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF OCTOBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Delivered in the presence of:

Mr. Kipkoske Choge holding brief for M/s Onyinka & Co for plaintiffs.

Mr. E.M. Balongo of M/s Chebii & Co Advocates present for defendant.