



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 249 OF 2012

Formerly HCC 48 OF 2006

JANE MMBONE BUSALAMWA.....PLAINTIFF

VS

KIMAIYO KIBUSIO MUGUN.....DEFENDANT

(Suit by plaintiff to reclaim land; defendant stating that land had been sold to him by the plaintiff; such sale not sanctioned by the Land Control Board and cannot be upheld; defence that suit is time barred; suit having been brought 12 years after the plaintiff moved into possession; held that suit is time barred; suit dismissed)

JUDGMENT

A. INTRODUCTION AND PLEADINGS

This suit was commenced by way of plaint filed on 3 April 2006. The plaintiff pleaded that she is the registered proprietor of the land parcel Uasin Gishu/Ngenyilel/798. She pleaded that on 9 February 1993, she did enter into a sale agreement with the defendant over the said land, by which the defendant was to pay a sum of Kshs. 266,000/= in consideration for the sale of 2 acres of the said parcel. The plaintiff pleaded that in breach of the terms, the defendant has paid Kshs. 260,000/=, and insists on taking possession of the whole parcel. The plaintiff pleaded that the defendant has forcefully entered the said land and interfered with her quiet possession. In the suit, the plaintiff has sought the following orders :-

- (i) A permanent injunction to restrain the defendant from continued interference, occupation alienation of the said land.*
- (ii) An eviction order to evict the defendant from the parcel of land.*
- (iii) Costs and interest.*

The defendant entered appearance and filed defence. In the defence, the defendant admitted the sale, but contended that the sale was for the whole of the suit land. He averred that the whole land was sold for a consideration of Kshs. 260,000/= and that he took vacant possession upon signing the agreement on 9 February 1993. It is averred that the plaintiff stormed into the suit land in the year 2005 and erected a structure on it. It is pleaded that the plaintiff's claim has been caught up by limitation of time and further that the plaintiff will file a suit for adverse possession. The defendant has asked that the plaintiff's suit be dismissed.

B. EVIDENCE OF THE PARTIES

In her evidence, the plaintiff testified that in the year 1993, the defendant approached her for the suit land and they wrote an agreement. She testified that the purchase price was Kshs. 260,000/= and that Kshs. 50,000/= was paid on the day of the agreement. She denied having received any other money. She testified that the plaintiff moved into the land around April 1993 after the agreement. She asked that the defendant be evicted because he has not paid the balance of the purchase price. She testified that at the moment, she lives on 2 acres only, whereas the rest of the land, which she stated is 13 acres, is occupied by the defendant, who is also said to have sold portions of it to other parties. In cross-examination, the plaintiff insisted that she was only paid Kshs. 50,000/= and denied that she was paid upto Kshs. 294,000/=. Some documents indicating acknowledgment of money by the plaintiff were put to her, but the plaintiff denied having executed the acknowledgments. It was put to her that she also received maize in kind, valued at Kshs. 32,000/=:, as part of the purchase price, but she only admitted receiving the maize but did not consider it as part of the purchase price. She testified that she vacated the land and came back in the year 2004. She stated that the total acreage of the land is 25 acres and that she has sold to 3 other parties about 14 acres of the land.

PW-2 was Wilson Kalya an advocate of the High Court of Kenya and the proprietor of M/s Kalya & Company Advocates. He testified that the parties entered into an agreement on 9 February 1993. The parties agreed to deposit the title deed with Mr. Kalya pending completion of the agreement. He is still holding the original title deed as stakeholder as there is contention between the parties over the ownership of the same. He testified that his office drew the agreement which was attested to by Luka Kimaru then as advocate in his firm (now a Judge of the High Court of Kenya). He testified that the agreed purchase price was Kshs. 266,000/= for 4.856 Hectares which is the acreage in the title deed.

With the above evidence, the plaintiff closed his case.

DW-1 was Honorable Justice Luka Kimaru. He testified that in the year 1993, he was an associate in the law firm of Kalya & Company Advocates. He testified that at that time, there were tribal clashes between the Kalenjin and Luhya communities at the border of Uasin Gishu and Kakamega Districts. For that reason, there was movement of members of the Kalenjin community who had settled in Kakamega District, and vice versa. Many agreements for sale of land were entered into at that time between the two communities. One of the agreements was the subject agreement. He stated that he could not trace the original agreement owing to effluxion of time but he could identify a copy that was put to him as being the agreement between the two litigants. He confirmed that he is the one who drew the agreement on 9 February 1993. The consideration was Kshs. 266,000/= for the whole land and a sum of Kshs. 50,000/= was paid when the agreement was signed. Subsequently, further sums of Ksh. 112,000/= and Kshs. 100,000/= were paid and acknowledged by the vendor. He witnessed these payments which were endorsed on the reverse of the agreement. In the agreement there was endorsed a sum of Kshs. 32,000/= as having been paid but he did not witness this payment. The parties had agreed that after full payment, they would attend the Land Control Board for consent. However, he left the law firm before the transaction could be finalized. He produced the agreement as an exhibit.

DW-2 was the defendant. He testified that the suit land was sold to him by the plaintiff and an agreement was drawn. He testified that Kshs. 50,000/= was paid on the date of the agreement, Kshs. 112,000/= paid on 8 March 1994, and Kshs. 100,000/= paid on 5 July 1994. Later on this latter day, the plaintiff collected 32 bags of maize which each bag being valued at Kshs. 1,000/= thus Kshs. 32,000/=. What he ended up paying therefore was in excess of the agreed purchase price of Kshs. 266,000/= , an overpayment of Kshs. 28,000/=. He stated that after the agreement, he took possession of the land. After the sale, the plaintiff disappeared and did not transfer the land to him. They also did not attend the Land Board owing to the disappearance of the plaintiff. She came back in the year 2005 and seized possession of 0.5 acres of the land while the defendant was away.

DW-3 was Paul Kibowen Leting. He testified that he is aware of the sale between the plaintiff and defendant. He in fact acted as a broker in the transaction. He testified that the two parties agreed at a consideration of Kshs. 266,000/= for the entire land. He was present when the payments of Kshs. 50,000/=:, Kshs. 112,000/= and Kshs. 100,000/= were made, and he is also the one who delivered the 32 bags of maize to the plaintiff as part of the consideration. He testified that the defendant disappeared but

came back in the year 2005 when the defendant had gone to visit his sick father in Eldoret.

With the above evidence the defendant closed his case.

In his submissions, counsel for the plaintiff submitted only on one issue, i.e whether the sale agreement is valid. He submitted that the transaction is void for want of consent of the Land Control Board by dint of the provisions of the Land Control Act, CAP 32, Laws of Kenya. He relied on various authorities to buttress his point. He submitted that the only remedy of the plaintiff is refund of the purchase price. He also submitted that the defendant had failed to pay the balance of the purchase price.

No submissions were filed by counsel for the defendant.

C. ANALYSIS AND DECISION

It is with the above pleadings, evidence and submissions that I need to make a decision in this matter. The parties did not draw any issues but I trust that in the following discourse, I will have addressed all pertinent issues arising from this suit.

The pleadings of the plaintiff are that she only sold 2 acres to the defendant but that the defendant is insisting on taking possession of the whole land. She has also pleaded that the plaintiff has failed to pay the purchase price in full. The defendant on the other hand insists that the sale was for the whole parcel of land and that he has paid the full purchase price.

In my opinion, the evidence is overwhelming that the parties did enter into a sale agreement on 9 February 1993 over the sale of the land parcel Uasin Gishu/Ngenyilel/798 which is land measuring 4.856 Hectares (in my approximation, slightly above 12 acres). The plaintiff was the vendor and the defendant the purchaser. The consideration was one of Kshs. 266,000/=. Although the plaintiff testified that she only sold 2 acres of this land, the evidence is again overwhelming that it is the whole of the suit land that was on sale, not a portion of it. This comes out from the agreement itself, and the evidence of the defence witnesses, which evidence I have no reason to disbelieve. I think the plaintiff was being economical with the truth and I indeed found her demeanor to be wanting.

I also do not agree with the plaintiff's assertion that the defendant did not pay the full purchase price. A sum of Kshs. 50,000/= was received on the signing of the agreement. This is indeed acknowledged by the plaintiff. DW-1, testified that subsequent deposits of Kshs. 112,000/= and Kshs. 100,000/= were made in his presence and he attested the acknowledgments. I have no reason to doubt the evidence of DW-1. I also believe the evidence of DW-3 that 32 bags of maize in further consideration was made to the plaintiff. In total therefore I hold the view that the sum of Kshs. 294,000/= was paid. This was actually payment that exceeded the agreed purchase price of Kshs. 266,000/=. I am therefore prepared to hold that the defendant did his part, in so far as the consideration is concerned. He thereafter took possession of the suit land and has been in occupation from 1993 to the year 2005 when the defendant emerged and seized possession of a portion of the suit land.

The only complication with the agreement is that consent of the Land Control Board was never sought. The parties themselves, at clause 5 of the agreement, stated that the transaction shall be subject to the Land Control Board but they never applied for consent and none was granted. This was in contravention of the requirements of the Land Control Act, CAP 302, Laws of Kenya, which provides that dispositions on agricultural land shall be void if consent of the Land Control Board is not applied for and granted.

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 Section 6 above, that one of the controlled transactions is a sale. Under Section 8, an application for consent is to be made within 6 months of the agreement. The effect of failure to have consent to a controlled transaction is that such transaction is nullified by operation of law. The only remedy is a refund of the amount paid as noted in Section 7 of the Land Control Act. There have been numerous decisions on this point, one of which, is the case of ***Kariuki v Kariuki (1983) KLR 225***. 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 from the foregoing that the agreement between the plaintiff and defendant herein cannot be affirmed for want of consent of the Land Control Board.

However, in his defence, the defendant averred that the plaintiff's suit is barred by limitation of time, and I believe that this argument is based on the provisions of Section 7 of the Limitation of Actions Act, CAP 22, Laws of Kenya. I think there is substance to this defence, for Section 7 of the Limitation of Actions Act provides as follows :-

S.7 Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

The plaintiff could claim the land within 12 years of the defendant's entry, or at the latest, within 12 years of the time that the agreement between the two of them was rendered void for want of consent of the Land Control Board. The agreement was entered into on 9 February 1993, and it therefore became void on 9 August 1993, which is the 6 month period required for the consent of the Land Control Board. The plaintiff therefore ought to have claimed back the land, at the latest, within 12 years of 9 August 1993, which ought to have been by 9 August 2005. This suit was filed on 3 April 2006 outside the 12 years period which is the period that the law has set down as the limitation period for the recovery of land. The defence of limitation is available to the defendant and I do hold that this suit, being a suit for the recovery of land, has been filed outside the 12 year limitation period.

Although the defendant in his defence had pleaded that he would file a suit for adverse possession, no such suit has been filed. There was no counterclaim filed in this case and I therefore hesitate to make any pronouncement on whether or not the defendant ought to be declared the rightful owner of the suit land. The defendant needs to file the appropriate pleadings for this to be determined, but his defence, based on limitation, is available to him and must be upheld, irrespective of the fact that he has not filed a counterclaim.

The upshot of the above is that I find the plaintiff's suit to have been time barred. It is hereby dismissed with costs.

Judgment accordingly.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF NOVEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of: