



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L NO. 626 OF 2012

FRANCIS KIPKOLUM BII.....PLAINTIFF

VERSUS

DR. JOSEPHAT YEGO..... DEFENDANT

AND

RICHARD KIPKETER GARI..... THIRD PARTY

JUDGMENT

(Suit for eviction; defendant claiming to have bought suit land from 3rd party; no written agreement for sale; whether such agreement enforceable; Section 3 Law of Contract Act; no consensus on purchase price and no valid sale to the defendant; judgment entered for Plaintiff).

This suit was commenced by way of plaint filed on 15 July 2010. In the suit, the plaintiff wants the following orders :-

- (a) A declaration that he is the owner of the land parcel Nandi/Kiminda/1161.*
- (b) A permanent injunction to restrain the defendant from the said land.*
- (c) Costs and interest.*

The defendant filed defence and counterclaim. The gist of his defence is that he purchased the land from one Richard Cheruiyot Gari in 1994 and that the plaintiff found him in possession. In his counterclaim, he pleaded that the plaintiff is not a bona fide purchaser for value. He asked for orders to compel the plaintiff to transfer the suit land to him and an order of permanent injunction against the plaintiff. The defendant later enjoined Richard Cheruiyot Gari as a Third Party to these proceedings. His claim against the 3rd party is that the 3rd party sold the suit land to the defendant and that he has been in occupation of the same. The 3rd party entered appearance and filed defence. He denied ever entering into a contract for the sale of the suit land to the defendant. He also denied that the defendant has developed the same, save for planting a few eucalyptus trees, and denied that the defendant has been in possession. He also pleaded that he sold the land and lawfully transferred it to the plaintiff.

In his evidence, the plaintiff testified that he became interested in the land and was taken to see it by the 3rd party in September 2009. On 7 April 2010 they wrote an agreement which he produced as an exhibit. They went to the Land Control Board and obtained consent. The minutes of the Land Control Board and the consent were produced as exhibits. The land was then transferred to him and he became registered as proprietor. When he went to the land in the month of May 2010, he found some eucalyptus

trees, newly planted by the defendant, as they were not there when he was taken to the site in September of 2009. The land is 1/2 acre and the trees were on the whole land. He wrote a demand letter to the defendant but there was no response hence this suit. He stated that he has been unable to use the land since he bought it. When he bought the land the title was clean.

In cross-examination, the plaintiff was shown an agreement between himself and one Walter Tum dated 7 April 2010 over the suit land. The agreement showed that he was purchasing the land from Walter Tum. The plaintiff stated that Walter Tum had earlier purchased the land from the 3rd party but did not complete payment. Walter then opted to sell the land to the plaintiff hence the agreement. He explained that he still had to enter into another agreement with the 3rd party as owner. He stated that he was not aware of any agreement between the defendant and the 3rd party. He testified that when he first saw the land, it had been fenced but he did not know who had fenced it. The defendant was in occupation of the adjacent land which the defendant had bought from the 3rd party.

In his evidence, the 3rd party testified that he sold the suit land to the plaintiff for Kshs. 300,000/=. He has no claim over the transaction. He testified that he had earlier sold the land to Walter Tum who did not complete payment and he refunded him whatever he had paid. He stated that he had sold to the defendant an adjacent land which is Nandi/Kiminda/1134 but has never sold to the defendant the suit land. He had only announced to him his intention to sell, and the defendant had shown interest, but they were unable to agree on the purchase price. He denied that he sold the land to the defendant in the year 1994 and denied that the defendant has been using the land since the year 1994. He testified that when he sold the land to the plaintiff, the same was vacant and no trees had been planted on it. He is the one who fenced the land. Cross-examined by counsel for the defendant, the 3rd party stated that he sold the land parcel Nandi/Kiminda/1134 to the defendant in the year 1989 for Kshs. 110,000/=. He was shown a voucher which refers to sale of the suit land, and he stated that the position is that he had borrowed some money from one Elvis Kemboi and promised to refund after selling the suit land.

The defendant is a Professor of Education and Philosophy at Eastern University in the USA. He stated that in the year 1993, the 3rd party asked him to buy 2 acres of his land which he did and the title was transferred to his name. There was also another 1/2 acre on sale which according to the defendant, was sold to one Walter Otieno. In 1997, he stated that the 3rd party informed him that the Land Control Board did not approve the sale to Walter and he offered the 1/2 acre to him. Since he had bought his 2 acres at the rate of Kshs. 120,000/= per acre, the 1/2 acre was offered at Kshs. 60,000/=. He gave him Kshs. 10,000/= immediately but did not discuss when the balance would be due. No agreement was ever written. Possession was however given and the defendant fenced the land which he used to graze his cows. He stated that he has been utilizing it to date. In 2007, the 3rd party came and asked him to pay a different price as the cost of land had gone up. The next time he heard from the 3rd party was in the year 2009 when the defendant was called by his farm manager, Elvis Kemboi, and was informed that the 3rd party wants some money to process title. The 3rd party at that time was asking for Kshs. 600,000/= for the land. He asked the 3rd party to see his lawyer, a Mr. Cheruiyot, and instructed him to give the 3rd party Kshs. 5,000/= for purposes of transferring the title and he stated that the 3rd party signed for it. He produced a voucher as an exhibit. He stated that he has been in occupation from 1997 to 2014 which is a period in excess of 12 years. He stated that he wants the whole land but at worst, he should be allowed 0.2 acres of it, which in his view, he has expended about Kshs. 20,000. He said that he was ready to pay the balance which he considers to be Kshs. 40,000/=. In his view, the land is about kshs. 10,000/= for every 0.1 of an acre.

In cross-examination, he denied that there was only an intention to sell but that no agreement was reached. He however agreed that Kshs. 5,000/= was given to the 3rd party when the 3rd party was demanding Kshs. 600,000/= for the land. On his part, he was not willing to pay this amount as they had an initial agreement for kshs. 60,000/=. He agreed that the land was not transferred to him as they could not agree on the price. He agreed that their agreement was verbal and that there was nothing to show that he had paid the deposit of Kshs. 10,000/=. He stated that he planted the trees in the year 2007 and that he had been given full possession although he had not paid fully for the land.

In his submissions, Mr. Arap Mitei, counsel for the 3rd party, inter alia submitted that no agreement was

ever written between the defendant and 3rd party, and that the 3rd party properly sold the suit land to the plaintiff. M/s Keter, Nyolei & Company Advocates for the plaintiff were also of a similar view. They further submitted that it is trite law that an agreement for sale must be put down in writing. They submitted that the defendant himself had testified that they were unable to agree on the price. They submitted that the plaintiff has been denied use of the land since the year 2010 and asked for general damages for trespass together with mesne profits.

Mr. Z.K Yego for the defendant submitted that the plaintiff is a mere decoy used by the 3rd party to achieve his fraudulent intentions and argued that there was no valid transaction between the plaintiff and 3rd party. In his view the alleged transaction was a "mere charade." He submitted that there was evidence that the defendant planted the trees in 1997. He submitted that if there was no agreement, the 3rd party would not have allowed the defendant to remain on the land for so long. He also submitted that there was no proof that the land is agricultural land subject to the consent of the Land Control Board. He asked for judgment for the defendant for the counterclaim.

I have considered the matter. I will start with the claim by the defendant for the suit land. His case is that he had a verbal agreement with the 3rd party, who was then the registered proprietor, and that they agreed for him to buy the land at Kshs. 60,000/=. He stated that he paid Kshs. 10,000/= as a deposit. Later the 3rd party demanded more money which the defendant thought was exorbitant.

There is no evidence before me of any written agreement between the defendant and 3rd party whereby the 3rd party agreed to sell the suit land to the defendant. The law requires that in land transactions, there must be an agreement in writing. This is spelt out in Section 3 (3) of the Law of Contract Act (CAP 23) which provides as follows :-

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.

It will be seen from the above that the law does not enforce any verbal agreement for the sale of land. It follows therefore that if the defendant is basing his case on a verbal agreement, then he must fail. If at all there was any verbal agreement, the same is of no consequence. This is not to say that I have been convinced that the defendant and the 3rd party ever reached any consensus on the sale of the land. It seems to me that the 3rd party wanted to give the defendant first priority over the land but they could not agree on the purchase price. It could be that the defendant gave out a little money to the defendant, and even allowed him some possession, but there was never any *consensus ad idem* or a meeting of minds. Moreover, even if there was an agreement, of which I have already held that there was none, the same would still have been voided by the provisions of the Land Control Act (CAP 302) Laws of Kenya, for the reason that no consent of the Land Control Board was ever applied for, and none was issued. Mr. Yego attempted to argue that the land is not subject to the Land Control Board, but nothing could be further from this. Indeed, the transaction between the plaintiff and the defendant had to go through the Land Control Board and there is ample evidence of this through the consent of the Board that was produced as an exhibit. There was an attempt to claim that the defendant has been on the suit land for an excess of 12 years, but this counts for nothing as his claim is not one of adverse possession.

On the other hand, the plaintiff demonstrated that he had a written agreement with the 3rd party. They also got consent of the Land Control Board. He is now the registered proprietor of the suit land. I have not seen any fraud or misrepresentation on his part. His title is a good title.

From the above, I do not see how the defendant can succeed in his counterclaim. The counterclaim is hereby dismissed. Having dismissed his counterclaim, I have no reason not to allow the plaintiff the order of permanent injunction against the defendant. The same is hereby granted. The plaintiff also asked for general damages for trespass, mesne profits and removal of the tree seedlings (now trees). However no evidence was tabled to demonstrate the amount of mesne profits and I make no award on that head. I however make an award for general damages in recognition of the fact that the defendant engaged in acts of trespass even when he had no colour of right over the suit land. In my discretion, I make an award of Kshs. 50,000/= as general damages for trespass. As to removal of the trees, I am sure that the plaintiff can derive some benefit from the same and I see no need for an order to compel the defendant to remove them.

The plaintiff has succeeded and the defendant has lost. Costs ordinarily follow the event and the defendant will therefore bear the costs of both plaintiff and 3rd party.

In summary, I make the following final orders :-

- (a) As against the defendant, I declare the plaintiff the owner of the land parcel Nandi/Kiminda/1161.
- (b) The defendant is hereby restrained from entering, being upon, felling any trees, cultivating, using, or in any other way interfering with the land parcel Nandi/Kiminda/1161.
- (c) I make an award of Kshs. 50,000/= as general damages for trespass in favour of the plaintiff against the defendant.
- (d) The counterclaim of the defendant and the defendant's claim against the 3rd party are hereby dismissed.
- (e) The defendant will shoulder the costs of the plaintiff and of the 3rd party.

Judgment accordingly.

DATED AND DELIVERED AT ELDORET THIS 11TH DAY OF NOVEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. C.K. Keter present for Plaintiff

No appearance for Z.K Yego for defendant.

Mr. Arap Mitei present for 3rd party.