



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 123 OF 2014

PRISCILLA JEMESUNDE TENAI.....1ST PLAINTIFF

LEONARD KIMARU SAINA.....2ND PLAINTIFF

VS

RICHARD KIBIWOTT TUITOEK.....DEFENDANT

(Application for injunction; principles to be applied; plaintiffs alleging that defendant sold them a portion of the suit land; agricultural land; no consent of land control board; whether prima facie case established; application dismissed)

RULING

This suit was commenced by way of plaint filed on 16 April 2014. In the plaint, it is pleaded that by an agreement dated 16 September 2013, the defendant agreed to sell to the plaintiffs 2.2 acres out of the land parcel described as Kongasis Farm L.R No. 9642 (the suit land). The purchase price was Kshs. 660,000/= which was paid in two installments. The 1st payment was for Kshs. 400,000/= paid on 16 September 2013 and the second payment was for Kshs. 260,000/= paid on 6 January 2014. It is pleaded that the sale was to be completed on 2 February 2014. It is pleaded that it was agreed that the defendant would give vacant possession after he harvested his maize crop for the year 2013. It is said that the crop was harvested in November 2013 but that the defendant has refused to give possession to the plaintiff and continues to occupy the 2.2 acres to date. It is also pleaded that the defendant has declined to sign the conveyance documents. In the suit, the plaintiffs want orders of specific performance, damages for breach of agreement and an eviction order.

On 7 October 2014, the plaintiffs filed this application. It seeks orders to have the defendant restrained from selling or offering for sale or in any other way encumbering the suit property, or trespassing on it, destroying trees or interfering with the plaintiffs' use and enjoyment of the same, pending hearing and determination of this suit. The reasons given for the application are that the plaintiffs are the owner of the 2.2 acres and unless restrained, the defendant will waste the property and cause the plaintiffs irreparable damage. In the supporting affidavit, the plaintiff has more or less repeated the averments in the plaint. It is said that the defendant has now offered to sell the 2.2 acres to any willing third party and has erected a new fence within the 2.2 acres. It is said that the defendant has persistently continued to interfere with their entry to the suit land.

The defendant has so far neither entered appearance nor filed defence to the suit. Neither has he filed a reply to the subject application.

This does not however mean that the application must be allowed. Principally, this is an application for injunction. It is now basically settled that for one to succeed in an application for injunction, he needs to

demonstrate a prima facie case and if the court is in doubt, the application will be decided on a balance of convenience (See *Giella v Cassman Brown (1973) EA 358*). Determining whether an applicant has demonstrated a prima facie case inevitably requires the court to make a preliminary assessment of the case of the applicant.

The case of the applicants is that they had an agreement with the defendant for the sale of 2.2 acres of the suit land and they have performed their part of the agreement. The defendant has however refused to perform his part and has also denied them entry into the purchased portion. However, to me, the land appears to be agricultural land which is subject to the consent of the Land Control Board. This is as required by Section 6 of the Land Control Act (CAP 302) which provides 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.

Consent of the Land Control Board ought to be applied for within 6 months of the transaction. This is provided for in Section 8 of the Land Control Act which provides as follows :-

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.

It will be seen from the above that any sale or sub-division of agricultural land requires the consent of the land control board. The application needs to be lodged within 6 months of the transaction. The plaintiffs herein have not mentioned any application made to the Land Control Board, yet such application needed to have been lodged latest 16 March 2014, since the agreement was entered into on 16 September 2013.

Without the consent of the Land Control Board, the agreement of the parties herein is liable to be declared void. I am not therefore convinced that the plaintiff has laid down a prima facie case with a probability of success. I also think that the balance of convenience lies with the defendant who appears to be in possession of the premises.

I am afraid that given the circumstances, I am unable to allow this application. The plaintiffs will however have an opportunity to prove their case at the hearing of the suit. I have no option but to dismiss this application. I however make no orders as to costs.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF NOVEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. J.K. Kiplagat holding brief for Mr. Kirwa for plaintiff/applicant.

Defendant – absent.