



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 288 OF 2013

SAMWEL KIPLIMO RONO.....PLAINTIFF

VS

THOMAS AUTA MARITA & ANOTHER.....DEFENDANTS

(Application for injunction; principles upon which the court will determine an application for injunction; plaintiff alleging that he bought the suit land through agreement; land being agricultural land for which consent of the land control board was never obtained; whether prima facie case established; consent of the land control board being mandatory plaintiff has failed to demonstrate a prima facie case; application for injunction dismissed with costs)

RULING

The application before me is a motion filed by the plaintiff pursuant to the provisions of Order 40 Rule 2 of the Civil Procedure rules, 2010 and Section 3 and 3A of the Civil Procedure Act, Chapter 21, Laws of Kenya, and all the enabling provisions of the law. It is an application for injunction. The plaintiff wishes to have the defendants restrained from selling, offering for sale, repossession, trespassing or in any other manner dealing with the land parcel Nandi/Kaboi/1671, pending the hearing and determination of this suit. The application is opposed by the defendants.

This being an application for injunction, I stand guided by the principles laid out by the court of appeal in the case of ***Giella v Cassman Brown (1973) EA 358***. First, I need to be satisfied that the applicant has laid out a prima facie case with a probability of success; be alive to the tenet that an injunction will not normally be granted unless damages are an inadequate remedy; and finally, if in doubt, decide the matter on a balance of convenience.

The case of the plaintiff is discernible from the plaint and the affidavits in support of the application. It is his case that on the 9th of June 2008, he entered into a sale agreement with the 1st defendant for the sale of the land parcel Nandi/Kaboi/664 measuring approximately 4 acres for a consideration of Kshs. 1,250,000/= sold at the rate of Kshs. 312,500/= per acre. He has averred that at the time of the agreement, he made a down-payment of Kshs. 780,000/= and the balance of Kshs. 470,000/= was to be paid later. It is claimed that at the request of the 1st defendant, the amount of Kshs. 780,000/= was paid to the 2nd defendant, by way of a banker's cheque dated 9 June 2008 for the sum of Kshs. 500,000/=: and cash of Kshs. 280,000/= paid on the same day. It is averred that the plaintiff then took possession of the property. On 1 July 2008, the plaintiff claims to have paid a further Kshs. 20,000/= to the 1st defendant. The plaintiff claims that later, the 1st defendant approached him with a request that the plaintiff purchases 2.6 acres of the suit land instead of the original 4 acres, which request the plaintiff accepted and a second agreement dated 25 July 2008 was drawn. The second agreement is also annexed to the supporting affidavit. Owing to the reduced acreage, the plaintiff was to pay a total of Kshs. 812,500/= and since he had paid Kshs. 800,000/=: the balance was Kshs. 12,500/= only, which he claims to have paid to the 1st

defendant on 25 July 2008, in the presence of the relatives of the 1st defendant. The plaintiff asserts that he has been in possession of the 2.6 acres from 9 June 2008 and has been plucking green tea leaves which he has been selling to Chemomi Tea Factory of the Eastern Produce Limited, a company engaged in the tea industry. The plaintiff has claimed that the remainder of 1.4 acres was sold to the 1st defendant's son-in-law, one Joash Kiplel Ngetich.

The plaintiff has deponed in his supporting affidavit, that he made efforts to ask the defendants to transfer the 2.6 acres to him, but the defendants kept giving one excuse after another. Subsequently, he learnt that the land parcel Nandi/Kaboi/664 has been sub-divided into two parcels, being Nandi/Kaboi/1671 and 1672. The two parcels are registered in the names of the 1st defendant and Joash Kiplel Ngetich respectively.

It is averred that despite the plaintiff having paid the full consideration, the 1st defendant in collusion and instigation of the 2nd defendant, has refused to transfer the said land to the plaintiff, and has fraudulently transferred the land into his own name and that of Joash Kiplel Ngetich. He has pleaded various particulars of fraud being, registering 2.4 acres of the original Nandi/Kaboi/664 in the name of the 1st defendant as Nandi/Kaboi/1671; secretly transferring 1.6 acres of the original Nandi/Kaboi/1672 (probably meant 664) without involving the plaintiff; procuring titles to Nandi/Kaboi/1671 and 1672 without the knowledge of the plaintiff; failure to disclose the plaintiff's interest in the land parcel Nandi/Kaboi/664; failure to refund the plaintiff the consideration paid; and failure to disclose to the original owner of the land parcel Nandi/Kaboi/664 of the existence of the plaintiff's interest.

In this application, the plaintiff has averred that unless restrained, the defendants will encroach into the suit land and continue harvesting green tea leaves to the detriment of the plaintiff, which he asserts will cause him irreparable loss. He has deponed that the defendants have no legal right to refuse to transfer the land into the plaintiff's name. The plaintiff has averred that the defendants have exhibited violent tendencies. It is pleaded that in March 2013, the defendants forcefully chased away the plaintiff's worker from the suit land and illegally harvested green tea leaves from the land. The plaintiff has thus sought mesne profits. In addition, the plaintiff has sought orders that the plaintiff be declared to be entitled to ownership of 2.6 acres of the land parcel Nandi/Kaboi/1671; a permanent injunction to restrain the defendants from dealing with the land parcel Nandi/Kaboi/1671; an order to compel the defendants to transfer the land parcel Nandi/Kaboi/1671 to the plaintiff and costs and interest.

The application is opposed by the defendants through a Replying Affidavit sworn by the 2nd defendant, on his own behalf, and on behalf of the 1st defendant. He has deponed that he is on the land on behalf of himself and the 1st defendant, who is his father and the registered proprietor of the land parcel Nandi/Kaboi/1671. He has averred that a registered proprietor cannot be said to be a trespasser on his own land. The existence of a valid sale agreement has been denied over the land parcel Nandi/Kaboi/664. It is averred that the 1st defendant has never been the registered proprietor of the land parcel Nandi/Kaboi/664. It is further contended that the agreement is unenforceable, null and void as there is not consent to transfer issued by the Land Control Board. The 2nd defendant has averred that, personally, he had no land to sell and has denied the existence of any written authority to receive purchase money, but has on a without prejudice basis, stated that he is willing to convince the 1st defendant to transfer 0.8 acres of the land to the plaintiff to cover part of the purchase price allegedly received.

It is deponed that the registered proprietor of the land parcel Nandi/Kaboi/664 legally transferred a portion of 2.4 acres to the 1st defendant after the plaintiff breached the contract between himself and the 1st defendant. It is claimed that the plaintiff could not purchase a property of 2.6 acres while the property in question only measures 2.4 acres. It is alleged that the tea plantation belongs to the 1st defendant. Occupation of the suit land by the plaintiff is denied. It is averred that owing to the 2007 post-election violence, the 1st defendant moved to his native home and the plaintiff took advantage of the situation to claim the property of the 1st defendant. The defendants have denied being violent. They have further contended that the plaintiff's case has no probability of success and have asked that the application for injunction be dismissed.

The plaintiff filed a further affidavit where he has more or less emphasized his claims to the suit land. He

has also asserted that he is in occupation of the land and has annexed various photographs. He has denied taking advantage of any absence by the 1st defendant owing to post election violence and has contended that he genuinely entered the suit land by virtue of purchase.

Mr. Bitok for the plaintiff urged me to allow the application for injunction. He stated that the defendants ought to be restrained from dealing with the land parcel Nandi/Kaboi/1671 pending the hearing of this suit. He pointed out that the basis of the plaintiff's claim is that he purchased 2.6 acres of the said land which was previously comprised in the land parcel Nandi/Kaboi/664. He referred me to the two agreements of 9 June 2008 and 25 July 2008. He averred that the first agreement was for 4 acres of land and the second agreement modified that, to 2.6 acres. He asserted that the whole purchase price has been paid for 2.6 acres and that the plaintiff is therefore entitled to it. He contended that the sub-division of the original parcel into the parcels Nandi/Kaboi/1671 and Nandi/Kaboi/1672 was fraudulent and that the transfer of the land parcel Nandi/Kaboi/1671 to the 1st defendant was also fraudulent. He stated that the original owner of the land parcel Nandi/Kaboi/664 was one Lasoi (deceased), and his son, Richard Kipkemboi Sigei, later became the registered owner. He asserted that at the time Sigei transferred the land to the 1st defendant, the 1st defendant ought to have disclosed that he had already sold his entitlement to the plaintiff. He further argued that the possession of the plaintiff ought to be protected pending hearing and determination of the suit.

Mr. Choge for the defendants, as expected, was of a contrary view. He first stated that the first purported agreement does not identify the subject matter through the land parcel number. He argued that although it said that this first agreement was rescinded, no such agreement to rescind was displayed by the plaintiff. He further contended that the vendor in the agreement (the 1st defendant) was not the registered proprietor of the land parcel No. 664 and the purported agreements do not have any terms. He refuted the allegation that the plaintiff is in possession of the land. As to the photographs annexed by the plaintiff, aimed at demonstrating occupation, he was of the view that the said photographs could be of any land. He further pointed out that the administrators of the late Lasoi are not parties to this suit. He also pointed out that the suit land Nandi/Kaboi/1671 is 2.4 acres yet the plaintiff's claim is for 2.6 acres, which to him, did not add up. Finally, he argued that if any money was paid, this was only for 0.8 acres.

I have considered the application and the rival submissions. It is the case of the plaintiff that he initially purchased 4 acres from the 1st defendant out of the land parcel Nandi/Kaboi/664 for a consideration of Kshs. 1,250,000/=. It is further his case that the two later agreed to reduce the subject matter from 4 acres to 2.6 acres and a second agreement was drawn. The case of the plaintiff is solely based on these two agreements and it is his contention that owing to the two agreements he is entitled to be registered as owner of the land parcel Nandi/Kaboi/1671, which was carved out of the land parcel Nandi/Kaboi/664 and registered in the name of the 1st defendant, after the land parcel No.664 was sub-divided into two portions. The plaintiff has also asserted that he occupies 2.6 acres of the land that he purchased and thus this occupation ought to be protected, pending the hearing and determination of this suit.

To succeed in the application for injunction, the plaintiff needs to establish a prima facie case and inevitably, I need to make a preliminary assessment, of the plaintiff's case. In my view the following issues are important :-

- 1. Whether there was a valid agreement entered for the sale of 4 acres between the plaintiff and the 1st defendant.*
- 2. Whether this agreement was rescinded and replaced with an agreement for 2.6 acres.*
- 3. Whether the agreements alluded to by the plaintiff are enforceable.*

I think that the plaintiff will have established a prima facie case if these three points are answered in the affirmative.

I have seen the two agreements relied upon by the plaintiff. Both agreements are homemade and executed in the presence of the Chief, Kaboi Location, Nandi South. I have a problem with persons transacting land

sale agreements before Chiefs. It is not part of the job description of Chiefs to draft, or advise persons on land sale agreements. That is the preserve of advocates, and it is time that persons stopped the practice of drafting sale agreements before Chiefs, rather than seeking advice from legal practitioners. It is sad that in this day and age, persons would prefer to deal with Chiefs, rather than with professionals, when transacting on land. I think much of the problem we have touching on land would be avoided if people dealt with professionals. I know I have digressed a bit, but I thought that it is important that I emphasize the point that it is time people transacting on land sought advice from legal practitioners before entering into any land transaction.

Back to the sale agreements. The first is dated 09/06/08. It is between Marita Auta (the 1st defendant) and Samuel Kiplimo Rono (the plaintiff). The agreement is for a parcel of land measuring 4 acres. The land is only described as Nandi/Kaboi. The consideration is Kshs.1,250,000/=. The agreement is not only poorly drafted, but is confusing as well. In a section of it, it provides as follows :-

"THAT today 9/06/08 day of June paid amount of Ksh 1,250,000/= Having previously paid me amount of Ksh 780,000/= Now that there is Ksh 470,000/= Balance to be claimed as per the above agreement.

THAT Mr. Samwel Kiplimo Rono has today an access to the same parcel of land measuring four acres (4) acres without any hindrance whilst awaiting further processes to take place administratively..."

Now, of course if Kshs. 1,250,000/= was paid, there would be no balance, but the agreement refers to a balance of Kshs. 470,000/=. I think the consensus, despite the terrible drafting, is that a sum of Kshs. 780,000/= was paid on 9 June 2008 leaving a balance of Kshs. 470,000/=. The agreement has been thumb-printed by the vendor and purchaser, alongside three other witnesses. The Chief, for good measure, has affixed his stamp and signed on it.

The second sale agreement is dated 25/7/2008. It is between Thomas Auta Marita (1st defendant) and Samuel K. Rono (plaintiff). The agreement is for a parcel of land measuring 2.6 acres being part of the land parcel Nandi/Kaboi/664 at an agreed amount of Kshs. 812,500/=. A portion of the agreement states as follows :-

"THAT today 25th day of July 2008 paid amount of Ksh 12,500.00 Having previously paid me amount of Ksh 800,000.00 Now that there is Ksh NIL Balance to be claimed as per the above agreement.

THAT Samuel K. Rono has today an access to the same parcel of land measuring 2.6 acres without any hindrance whilst awaiting further processes to take place administratively..."

The agreement is thumb-printed by the vendor and signed by the purchaser and six witnesses. I have not seen the Chief's official stamp nor signature in this second agreement, not that it matters. There is nothing in the said agreement that makes reference to the earlier agreement of 9 June 2008 and to me it looks like a stand-alone agreement. Although there is completely no basis for doing so, I am prepared, for the purposes of this application, to accept that the second agreement is a modification of the first agreement. There is no document annexed by either party to show who was the registered proprietor of the land parcel Nandi/Kaboi/664 at the time of the agreement. I have however seen that the parcel No. 664 was sub-divided into two portions to create the land parcels Nandi/Kaboi/1671 and 1672. The first registered proprietor of both of these two sub-divisions is one Richard Kipkemboi Sigei who became registered as proprietor on 14 December 2012. On 21 February 2013, the land parcel No. 1671 was transferred to the 1st defendant and the land parcel No. 1672 was transferred to Joash Kipler Ngetich on 16 January 2013. The land parcel No. 1671 measures 0.99 Hectares whereas parcel No. 1672 measures 0.57 Hectares.

There are many gaps in the first sale agreement, most glaring of which, is that it does not contain the land number parcel that is the subject matter of the transaction. I have also said that the second agreement has no reference to the first agreement. All the same, for the purposes of this ruling, I will assume that there was a first agreement for 4 acres which was modified to 2.6 acres, of which the purchase price was paid. Thus on the first two issues I will make the assumption that there is a valid first agreement modified by a second agreement.

The third issue is whether these two agreements are enforceable. They may probably pass the test of Section 3 (3) of the Law of Contract Act, CAP 3, which requires agreements to be in writing, executed and attested, although there is of course serious doubt as to whether the 1st defendant had capacity to sell, as he appears not to have been the registered owner of the land parcel No. 644, and there is no reference whatsoever in the two agreements to the registered proprietor, who is also not involved in the two sale agreements. That is another issue, but for now, my concern is that there appears to have been no consent of the Land Control Board to the transaction upon which the plaintiff is asserting title.

There is no doubt that the land in question is agricultural land. Section 6 of the Land Control Act, CAP 302, provides as follows :-

S. 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.

S. 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.

The plaintiff has not shown that any application was made to the Land Control Board for consent, despite the agreement between himself and the 1st defendant, being one for sale of agricultural land. Consent was indeed never obtained from the relevant land control board. In the absence of the required consent, the agreement between the plaintiff and 1st defendant became void after 6 months. Having been declared void, the agreements of course cannot now be enforced. The only remedy that the plaintiff has recourse to, is the refund of any purchase price tendered. This is covered in Section 7 of the Land Control Act which provides as follows :-

S. 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.

Section 22 of the Land Control Act, does not aid the plaintiff for the same provides as follows :-

22. Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6, and any person -

(a) pays or receives any money; or

(b) enters into or remains in possession of any land,

in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.

It will be seen that indeed Section 22 above creates an offence, and it is an offence, for a person to seek to keep possession of land, pursuant to an agreement that has been rendered void.

Numerous decisions have been made to assert the provisions of Sections 6, 7 and 22 of the Land Control Act, and I find it unnecessary to make reference to them. I will however echo the case of ***Kariuki v Kariuki (1983) KLR 225*** as an example. In the said case, the Court of Appeal asserted that there can be no right to specific performance on a sale touching on agricultural land where no consent of the Land Control Board had been obtained. The court also held that :-

"When a transaction is clearly stated by the express terms of an Act of Parliament to be void for all purposes for want of the necessary consent, a party to the transaction which has become void cannot be guilty of fraud if he relies on the act and contends that the transaction is void." (At p227)

In our case, the plaintiff's case is founded on agreements that are null and void. Prima facie therefore, the plaintiff cannot assert title to the land parcel Nandi/Kaboi/1671 or any portion of land originally comprised in the parcel Nandi/Kaboi/644. My preliminary view is that the agreements upon which the plaintiff asserts title are null and void and incapable of transferring any interest in land. Any allegations of fraud cannot therefore be supported in the face of the dictum in *Kariuki v Kariuki*, cited above.

From the foregoing, it is my position that the plaintiff has failed to establish a prima facie case with a probability of success. I am also alive to the position that the essence of an application for injunction is to make an interlocutory order on how the subject matter of the suit ought to be preserved pending hearing of the suit. I am afraid that the plaintiff has failed to demonstrate to me that he ought to be allowed to continue in occupation of the suit property, if indeed he is in occupation. I am afraid that I have to ask him to cede occupation of the suit land to the 1st defendant or his assigns pending the hearing and determination of this suit. I therefore order that the suit land be in possession and occupation of the 1st defendant, or his assigns, pending the hearing and determination of this suit.

If the plaintiff feels that he still has a good case, he will have opportunity to ventilate his case at the full hearing of the suit, and hope that he will succeed. But for now, the application for injunction stands dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF SEPTEMBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. J.K. Kipnyekwei holding brief for Mr. Bitok for the plaintiff/applicant

Mr. Kipkoskei Choge present for the defendants

/respondents