



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 919 OF 2012

FORMERLY HCC 19 OF 2012

CHRISTOPHER KENDAGOR.....PLAINTIFF

VS

CHRISTOPHER KIPKORIR.....DEFENDANT

JUDGMENT

In this suit, the plaintiff has sought the following orders against the defendant :-

- (a) A declaration that the plaintiff is entitled to exclusive enjoyment and use of the land parcel Moiben/Kapsumbere Block 2 (Tachasis)/ 111 and that the defendant has no legally enforceable claim thereon.*
- (b) An injunction to prevent the defendant from using the suit land.*
- (c) Mesne profits.*
- (d) Costs of the suit.*

In his pleadings, the plaintiff has pleaded that he is the registered owner of the suit land. He has pleaded that the said land is agricultural land subject to the Land Control Act. He has stated that the defendant has trespassed on 5 acres of the land pursuant to an agreement dated 1/7/2005 but which has been voided by law. He has averred that the defendant has no legally enforceable claim on the land thus the orders sought.

The defendant filed a statement of defence. Although he has denied that the plaintiff is the registered proprietor of the suit land, he has stated that the plaintiff sold him 5 acres of the land but, the that plaintiff refused to transfer the same. He has further pleaded that the plaintiff has allowed him access to 4 acres of the land and has only denied him access and use of one acre. The defendant has asked for specific performance of the agreement dated 1 July 2005.

Pleadings having closed, this matter was set down for hearing. The plaintiff testified and closed his case without calling any other witness.

It was his evidence that the suit land is jointly registered between himself and his late wife, one Christina Jerop Bor. He produced the certificate of title deed, certificate of official search and certificate of death as exhibits. He testified that sometimes in the year 2005, the defendant approached him asking to buy some land. He agreed to sell to the defendant two parcels of land. The first is Moiben/Kapsumbere Block 2

(Tachasis)/46 measuring 10 acres. That land was transferred to the defendant and there is no issue on it. The second agreement was in respect of the suit land which also measures 10 acres. The plaintiff agreed to sell 5 acres of this land to the defendant. In total therefore, the plaintiff was selling 15 acres of land to the defendant. The agreed purchase price for the 15 acres was Kshs. 1.2 Million with an acre being valued at Kshs. 80,000/=. Out of the Kshs. 1.2 Million, the plaintiff only received Kshs. 746,500/=. To be entitled to 10 acres, he ought to have been paid Kshs. 800,000/=. All the same, the plaintiff transferred the first 10 acres to the defendant despite not being fully paid.

The plaintiff asserted that the defendant needs to vacate the 5 acres that he occupies out of the suit land as he has failed to pay for the same. The plaintiff further stated that the land is agricultural land, for which consent of the land control board is required but has never been issued. He stated that they never applied for a consent to transfer, from the land control board, for the suit land. He testified that the defendant started using the land in the year 2006 and asked that he be paid, as mesne profits, the equivalent of the leasehold value of the time that he has occupied the land. He asked for Kshs. 5,000/= per year per acre thus kshs. 200,000/= for the five years that the defendant has occupied the 5 acres. He also testified that the defendant has placed a caution on the land.

An issue arose in cross-examination as to whether the plaintiff had been paid Kshs. 1, 016,500/= which was reflected in a letter written by counsel for the plaintiff, but the plaintiff stated that this was an error. The plaintiff was also cross-examined as to why he has never taken out succession proceedings on behalf of his late wife despite the land being jointly registered. He denied that he has refused to take out succession proceedings so as to frustrate the sale. With that evidence, the plaintiff closed his case.

The defendant despite being granted numerous adjournments, failed to attend court nor adduce evidence. The evidence on record is therefore only that of the plaintiff.

In his submissions, Mr. Momanyi, learned counsel for the plaintiff, submitted inter alia that the sale of the suit land was a dealing in agricultural land, which required the consent of the land control board. No consent was ever sought nor obtained, and therefore the sale became void after 6 months. In any event, he submitted that the defendant never performed his part of the bargain. He stated that the defendant is thus a trespasser. He further submitted that the plaintiff is entitled to the mesne profits of Kshs. 200,000/=. He submitted that the plaintiff has proved his case and is entitled to the prayers asked.

Mr. A.K. Songok for the defendant, submitted inter alia that the suit land became registered jointly in the name of the plaintiff and his wife, 15 years after the death of his wife. He submitted that the plaintiff has no locus standi to file suit as he has not applied for letters of administration on behalf of the estate of his late wife. He further submitted that the plaintiff had received the full consideration.

I have considered the pleadings, the evidence and submissions of the parties. I have seen that the plaintiff became jointly registered with Christina Jerop Bor, as proprietors of the suit land on 26 November 1997, although Christina had died in the year 1982. I cannot tell how this happened and I do not want to hazard a guess. That joint ownership is however immaterial to this case. If one joint owner dies, the property devolves automatically to the surviving joint owner without the necessity of filing succession. Whether the property was registered solely in the name of the plaintiff or jointly with his deceased wife, therefore makes no difference. He is now the sole owner of the suit land, owing to the demise of the other joint owner, and he does not require to have acquired any grant of letters of administration to file suit. The issue of registration of Christine Jebor as joint owner, is to me a complete non issue.

I have seen the agreement of 1st July 2005 between the plaintiff and defendant. The plaintiff was purchasing 10 acres out of plot No. 2 and 5 acres out of plot No. 46 (the suit land). The total consideration for the 15 acres was Kshs. 1.2 Million. On the day of the agreement, Kshs. 300,000/= was paid. Kshs. 400,000/= was to be paid before 11th July 2005, and Kshs. 500,000/= was to be paid before 31st December 2005. I have seen a demand letter dated 30th January 2012, from the plaintiff's counsel informing the defendant that he has only paid Kshs. 746,500/= and that he is no longer willing to continue with the transaction for the 5 acres. The letter has indeed asked for payment of Kshs. 53,500/= being the balance still owing for the 10 acres already transferred to the defendant.

Although, counsel for the defendant alleged that there was a letter, from the plaintiff, stating that Kshs. 1, 016,500/= had been paid, such letter was never produced as an exhibit. Neither was any evidence called by the defendant to show that indeed he had paid Kshs. 1, 016,500/= as claimed. There would have been nothing easier than to demonstrate receipts or evidence of payment of this moneys. None was forthcoming from the defendant, and I therefore hold that on a balance of probabilities, the plaintiff only received Kshs. 746,500/= from the defendant. This of course did not cover the Kshs. 800,000/= that was needed for 10 acres, but the plaintiff has not filed suit for this amount and his interest appears more driven at having the defendant out of the 5 acres that he occupies.

The defendant having not paid for the 5 acres that he occupies has no entitlement to the same. He cannot claim specific performance since he has not met his end of the bargain. Even if he had, I would not have ordered specific performance, but only a refund of the purchase price, as it is not denied that the land is agricultural land for which consent of the land control board is required. Section 6 of the land Control Act 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.

The defendant therefore has no enforceable claim for the 5 acres of the suit land for want of consent of the Land Control Board and his claim would still be unenforceable for failure to pay the purchase price. In fact, he should consider himself lucky that the plaintiff has decided not to pursue the balance that he owes on the 10 acres that has already transferred to him. The caution placed by the defendant therefore has no basis and ought to be removed.

As to the claim for mesne profits, the defendant did not rebut the evidence of the plaintiff, that if the plaintiff was to lease the land, he would have received a sum of Kshs. 200,000/=. I see no reason why I should deny the plaintiff this amount.

The plaintiff's suit must succeed. I make the following final orders.

(a) That a declaration is hereby issued that the plaintiff is the rightful owner of the land parcel MOIBEN/KAPSUMBERE BLOCK 2(TACHASIS)/111 and that the defendant has no enforceable claim over it.

(b) That the defendant do vacate forthwith from the land parcel MOIBEN/KAPSUMBERE BLOCK 2(TACHASIS)/111 and if he does not vacate within 14 days from the date hereof the plaintiff be at liberty to apply for his eviction.

(c) That the defendant be and is hereby restrained by way of permanent injunction from entering, being upon, using or in any other way dealing with the land parcel MOIBEN/KAPSUMBERE BLOCK 2(TACHASIS)/111

(d) That the defendant do pay to the plaintiff mesne profits in the sum of Kshs. 200,000/= which sum

shall attract interest at court rates from the day of this judgment to full payment thereof.

(e) The caution entered by the defendant be removed.

(f) That the defendant shall pay the costs of this suit and of the counterclaim for specific performance.

It is so ordered and decreed.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF OCTOBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. E.M. Momanyi for the plaintiff

Mr. L. Sirtuy holding brief for Mr. Songok for the defendant.