



## REPUBLIC OF KENYA

### IN THE ENVIRONMENT AND LAND COURT AT KITALE

#### LAND CASE NO. 1 OF 2013

**BARASA MARK KHALAGAI .....PLAINTIFF**

**VERSUS**

**MOSES KIMITEI CHELELGO.....DEFENDANT**

### J U D G E M E N T

#### INTRODUCTION

1. The Plaintiff brought this suit against the Defendant seeking for a declaration that the agreement between him and the Defendant dated 8/3/2004 is null and void and that the Defendant should be ordered to refund the purchase price together with the developments thereon.
2. The agreement relates to one acre of land which the plaintiff bought from the Defendant. The one acre was part of Plot No. 49 at Twiga Farm in Trans Nzoia County.

#### PLAINTIFF'S CASE

3. The Plaintiff testified that on 8/3/2004 he entered into an agreement with the Defendant whereby it was agreed that the Defendant was to sell to the Plaintiff one acre at a consideration of Kshs 100,000/=. The one acre was part of plot No. 49 which was five acres and had been allotted to one **Kimaru Ole Mertich Kiriongi** who had sold it to the defendant in the 90's. It was a term of the agreement that the Defendant was to ensure that the land was transferred to the Plaintiff.
4. The Plaintiff paid a down payment of Kshs 75,000/- on signing of the agreement and the balance of Kshs 25,000/- was cleared later. The Plaintiff then took possession of the one acre and carried out developments thereon. He stays on the land. The Plaintiff later bought one more acre from one **Alfayo Namukoa Wabwile** who had also bought it from the Defendant.
5. The Plaintiff further testified that he has planted three Avocado trees, grevillea, eucalyptus, banana stems, napier grass and tomatoes. He has been requesting the Defendant to process the transfer of the land to him but that the Defendant has not done so. The Defendant keeps giving empty promises. The Plaintiff contends that the Defendant did not disclose to him that the land was not in his name and that some persons had registered a caution against the title.
6. The Plaintiff called **PW2 Joseph Situma Litunya** who valued the developments on the two acres held by the Plaintiff. There were three semi permanent houses, a fence round the plot, borehole, pit latrine and various trees. The value of the developments together with the land came to Kshs 1,065,900/-.

## DEFENDANT'S CASE

7. The Defendant stated that he sold one acre to the Plaintiff together with improvements thereon. He had bought the one acre from **Kimaru Ole Mertich Kiriongi** on 11/5/1990. There were three houses on the land, a toilet, borehole, banana stems, avocado trees and other trees. When Kimaru Ole Mertich Kiriongi died, his son sold to him three acres. He also gave him the allotment letter which had been given to his deceased father.

8. The Defendant denied that it is the Plaintiff who constructed the houses which are on the land. He is willing to refund the purchase price but not meet the value of the improvements arguing that the Plaintiff has benefited from utilising the land since he bought it.

## ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

9. There is no contention that the defendant sold one acre to the Plaintiff at Kshs 100,000/= . There is also no contention that the entire purchase price was paid by the Plaintiff. One of the issues for determination is whether the agreement dated 8/3/2004 is null and void. The other issue is whether the Plaintiff is entitled to any compensation for developments on the land.

10. On the first issue, there is evidence that the land which formed part of the one acre sold to the Plaintiff belonged to **Kimaru Ole Mertich Kiriongi** who has since died. A copy of his death certificate was produced as defence exhibit 4 and it shows that he died on 16/6/1996. The land was agricultural land and consent of the land control board was necessary. The Plaintiff was never taken before the land control board for consent. The agreement between the Plaintiff and the defendant therefore became null and void after six months from the date it was made. The agreement is therefore null and void and the Plaintiff can only seek refund of the purchase price.

11. On the issue as to whether the Plaintiff is entitled to compensation for developments on the land, there is no clear evidence as to who put up the houses, toilet and borehole which both the Plaintiff and Defendant claim to have put up. A look at the agreement of 8/3/2004 [Plaintiff exhibit 1] shows that the one acre was sold together with the developments thereon. This is clear from clause 4 of the agreement. The developments were however not disclosed. It is therefore not possible to state which developments were put up by the Plaintiff and which ones were put up by the Defendant.

12. The valuation which was carried out by PW2 was done on the basis of two acres. It is important to note that the defendant only sold one acre to the Plaintiff. The other acre was sold to the Plaintiff by one **Alfayo Wabwile**. The fact that the one acre which the Plaintiff bought from **Alfayo Wabwile** was sold to him by the Defendant cannot entitle the Plaintiff to claim compensation from the Defendant. There is no privity of contract between the Defendant and Plaintiff in as far as the one care he bought from **Alfayo Wabwile** is concern.

13. During cross-examination, PW2 was unable to tell whether the developments and crops he assessed lay on the one acre which the Plaintiff bought from the Defendant or on the one acre which the Plaintiff bought from **Alfayo Wabwile**. As this was not clearly pointed out and given the rival contentions by both the Defendant and Plaintiff on the developments, there is no basis upon which I can hold that the Plaintiff is entitled to compensation. In any case even if the Plaintiff was to prove that there were developments which he carried on the land, the value of those developments ought to have been claimed as special damages which required to be pleaded and proved in evidence. The valuation even includes the value of the two acres which the plaintiff currently occupies. He cannot claim the value of the land as to do so will amount to unjust enrichment. Why should he paid for land which he is surrendering in return for the purchase price?

I therefore find that the Plaintiff has failed to prove that he is entitled to compensation for developments on the one acre he bought from the Defendant.

## DECISION

14. I find that the agreement of 8/3/2004 is null and void . The same is hereby declared to be null and void. The Plaintiff is only entitled to refund of the purchase price of Kshs 100,000/- with interest thereon at court rates to be calculated from 18/6/2004 when the last payment was made. The Plaintiff shall also have costs of this suit. The Plaintiff's claim therefore succeeds to this extent.

Dated, signed and delivered at Kitale on this 30th day of

June 2016.

**E. OBAGA**

**JUDGE**

**In the presence of Mr Wanyama for Mr Murgor for Defendant and M/s Bett for Plaintiff.**

**Court Assistant – Isabellah**

**E. OBAGA**

**JUDGE**

**30/6/16**