

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL SUIT NO.35 OF 2008

MWANGI NDIRANGI.....PLAINTIFF

VRS

VERONICAH CHEPWAMBOK TOO.....1ST DEFENDANT

KHATUMBA TAHERALI RAJABALI alias MOHAMED....2ND DEFENDANT

JUDGMENT

On 3rd March 2004, the plaintiff entered into a sale agreement with the 1st defendant for the purchase of plot number 1901 (original number 1076/3, section 111, Mainland North.) The agreed purchase price was Ksh.1,100,000/=. The plaintiff paid a deposit of Ksh.650,000/= and the balance of Ksh.450,000/= was to be paid on or before 31st December, 2005. The plaintiff later found that the same plot had been sold to the 2nd defendant.

The plaintiff informed the court that he did not take possession of the land after paying the deposit, he was to pay the balance after a period of one year. In July 2006 he went to the 1st defendant and offered to pay the balance but the 1st defendant declined indicating that the plaintiff was late: He then discovered that the plot had been sold and the second defendant had already moved into the property. The plaintiff conducted a search and found that the plot had been transferred to the second defendant.

It is the plaintiff's evidence that he delayed in paying the balance of the purchase price. The plaintiff never dealt with the second defendant. The plot was transferred to the 2nd defendant in November, 2006. His prayer is that the transfer of the property to the 2nd defendant be revoked as the subsequent sell was unlawful, illegal and unprocedural. He seeks specific performance of the contract between himself and the 1st defendant.

The 1st defendant did not tender any evidence. The second defendant's evidence is that she is the owner of the suit land. She bought the land in 2006 from the first defendant. Before the transaction was done, she conducted a search and found that the 1st defendant owned the land. She bought the land for Ksh.775,000/=: The land was transferred to her and she was issued with a beacon certificate upon being registered as the owner, she charged the property with the Kenya Commercial Bank on 10th November, 2008: She has a caretaker who lives on the plot.

It is the 2nd defendant's evidence that she was not aware that someone else was claiming the same plot.

The record and evidence shows that the 1st defendant entered into a sale agreement with the plaintiff and the 2nd defendant for the same plot. The 1st defendant swore an affidavit on 11th June, 2008 indicating that she was selling plot number 4308 to the 2nd defendant but the second defendant occupied plot number 4310 without her knowledge. This seems not to be correct. The sale agreement dated 22nd October, 2006 between the two defendants indicate that what was being sold was subdivision number 4310, original number 1901 section 111 in Mainland North. This seems to be same plot sold to the plaintiff. The 1st defendant did not file any defence as per the record. His advocate was served for the defence hearing but did not attend. The same applies to the plaintiff: The defence case proceeded ex-parte.

The evidence shows that the plaintiff was to pay the balance of the purchase price by 31st December 2005. The plaintiff concedes that he failed to do so. It is therefore clear that the plaintiff is to blame himself. He even failed to go back to the 1st defendant and agree in writing an extension for the payment of the balance of the purchase price. It is clear that when he went back in 2006 the 1st defendant had decided to sell the land to the 2nd defendant. Although the plaintiff claimed that he went back to the 1st defendant in July 2006, this could not be true as by that time the same transaction with the 2nd defendant had not taken off. The sale was done in October, 2006.

The current position is that the plot was duly transferred to the 2nd defendant who is the registered owner. The 2nd defendant is in possession. The property is charged to the Kenya Commercial Bank for Ksh.950,000/=. No allegations of fraud are pleaded in the plaint. The 1st defendant was within her right to sell the property to the 2nd defendant as the 1st defendant had breached the sale agreement. I do find that the plaintiff's claim for specific performance cannot be effected. The circumstances have changed. The property belongs to a third party. There was no caveat registered against the title. The plaintiff is to blame for the sale of the land to the 2nd defendant as he failed to abide by the terms of his own agreement.

In the end, I do find that the plaintiff has failed to prove his case. This suit is dismissed with costs to the 2nd defendant.

Dated, signed and delivered at Malindi this 20th day of May, 2015.

SAID J. CHITEMBWE

JUDGE