



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Environmental & Land Case 667 of 2012**

**KELLANY ASEYO KAREYE.....PLAINTIFF**

**VS**

**PETER NDIRANGU & OTHERS.....DEFENDANT**

**JUDGEMENT**

This suit was commenced by way of plaint filed on the 30 November 2010 which plaint was amended on 15 October 2012. In the original plaint, the plaintiff's cause of action was for an order of specific performance to compel the defendants to jointly and severally effect transfer of the suit land being Kakamega / Soy /1238 to the plaintiff. The plaintiff also sought an order of permanent injunction to restrain the defendants from interfering with the suit land. The plaintiff's case as drawn in the original plaint was that at all material times the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were the registered proprietors of the suit land. It was pleaded that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had commenced the process of transferring the suit land to the 1<sup>st</sup> defendant. On the 17<sup>th</sup> October 2008, the plaintiff entered into a sale agreement wherein the 1<sup>st</sup> defendant agreed to sell the whole of the land for a total consideration of Kshs. 1,880,000/= and it was pleaded that the said sum has been paid in full. It was pleaded that despite being paid, the 1<sup>st</sup> defendant refused to commence the transfer process to convey the land to the plaintiff. It was also pleaded that the 1<sup>st</sup> defendant has instead entered into the suit land, felled tree, uprooted fencing material, and pulled down the roof to the plaintiff's kitchen. It is for these reasons that the plaintiff sought the prayers in the plaint.

There then followed a flurry of applications and objections starting with the plaintiff's application dated 29 November 2010. The same was an application for injunction seeking to restrain the defendants from interfering with the suit land pending the hearing and determination of the suit. The plaintiff went before court ex-parte but did not obtain interim orders. It seems as though the application was never argued inter partes and was abandoned midway. Upon being served, the defendants entered appearance and filed a Notice of Preliminary Objection filed on 15 December 2010 where it was inter alia averred that the plaintiffs' suit is bad in law as there was no privity of contract between the plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, and that there was no contract enforceable by virtue of the provisions of Section 6 of the Land Control Act. The preliminary objection was followed by an application dated 18<sup>th</sup> February 2011 seeking to have the plaint struck out as disclosing no reasonable cause of action. The preliminary objection and the application of 18 February 2011 were never heard but certainly to pre-empt the same, the plaintiff filed an application dated 17<sup>th</sup> April 2012 to amend her Plaint. The application to amend was unopposed and leave to amend was granted on 21/11/2011. The gist of the amendment was to add an alternative prayer for refund of all monies paid to the 1<sup>st</sup> defendant from the subject transaction in the event that the agreement is declared void.

The amended defence of the defendants denied that there was an agreement, stated without prejudice that

the 1<sup>st</sup> defendant held a duly executed transfer which would have conveyed the land to the plaintiff had she not been in breach of the contract of sale, without prejudice pleaded that the contract was unenforceable by reason of non-compliance with Section 6 of the land Control Act, CAP 302 ; further without prejudice pleaded that the agreement was rescinded by the plaintiff failing to pay the consideration ; pleaded that no privity of contract existed between the plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants ; pleaded that a party in breach cannot institute proceedings for specific performance and sought for the plaintiff's suit to be dismissed with costs.

This matter was heard on the 13 February 2013. The plaintiff testified in support of her case without calling a witness. For the defendants, only the 1<sup>st</sup> defendant testified and no further witness was called. The evidence on record is therefore that of the plaintiff and the 1<sup>st</sup> defendant only.

The plaintiff testified that on 17 December 2008, she entered into a written agreement with the 1<sup>st</sup> defendant for the sale of the land parcel Kakamega/Soy/1238. The agreement was produced as plaintiff's exhibit No. 1. The plaintiff testified that the land was of six acres and that the agreed price was of kshs.1,880,000/= being kshs.285,000/= per acre for each of the six acres and an additional amount to compensate the defendant for the developments on the land. On the date of the agreement she paid a sum of kshs.855,000/= by way of Cheque and cash of Kshs.40,000/=. A copy of the cheque was produced as plaintiff's exhibit No.2. She made further payment of kshs. 400,000/= by way of cheque on a date that she could not remember. A copy of the cheque was produced as plaintiff's exhibit No.3. She stated that in order to make the last payment of kshs.585,000/= , she drew a cheque in favour of the 1<sup>st</sup> defendant and on 15 October 2010, deposited the same into his account at Equity Bank. However the cheque was returned by the bank on 17 January 2010 because by the time the cheque was deposited the 1<sup>st</sup> defendant had closed his account with Equity Bank. A copy of the cheque, the deposit slip and the letter from Equity Bank dated 17 January 2010 were produced as plaintiff's exhibits Nos.4.

The plaintiff further testified that she took possession of the land after making the first installment. At the time the agreement was being entered into she was aware that the land was registered in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. However, the 1<sup>st</sup> defendant had a transfer executed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants conveying the suit land to the 1<sup>st</sup> defendant. The transfer form was produced as plaintiff's exhibit No.5. The plaintiff affirmed that they never attended the land control board and consent of the Board to the transaction was never issued. She testified that her prayer now is that she be refunded the money paid which is of kshs. 1,295,000/=. She stated that before instituting the suit, a letter of demand had been issued and the same was produced as plaintiff's exhibit No.6.

In cross-examination, the plaintiff admitted that according to the agreement of 17 December 2008, the purchase price was to be paid by the 30 March 2009. She admitted that she had not paid the full purchase price by this date. She also admitted that there was no clause in the agreement entitling her to a refund in the event that she failed to pay the full purchase price within time. She refuted that it was because of her failure to pay the full purchase price that the 1<sup>st</sup> defendant declined to accompany her to the land control board. It was put to her that she was the author of her own misfortune for failing to pay the balance of the purchase price in time but she was of a contrary view.

The 1<sup>st</sup> defendant admitted having entered into the agreement alluded to by the plaintiff. He testified that according to the agreement, the full purchase price was to be paid by the 30 March 2009. He testified that all he has ever received is the amount of Kshs.1,295,000/=. He averred that there was no agreement that he should refund the money paid to him if the plaintiff did not complete the purchase price. He stated that he could not go to the land control board with the plaintiff because he had not been paid in full. He stated that the plaintiff is not entitled to her money. He stated that if the plaintiff was to be refunded the money, account should be given of some wastage caused by the plaintiff to the land. Specifically, the 1<sup>st</sup> defendant stated that the plaintiff cut some trees and converted a borehole which was on the land into a latrine.

In cross-examination, the 1<sup>st</sup> defendant stated that he gave the plaintiff possession and the plaintiff built a

semi-permanent structure. He stated that at the moment he is the one utilizing the farm and not the plaintiff. He denied refusing to repay the plaintiff stating that he needed account to be taken of the wastage caused by the plaintiff. He admitted that he had no valuation of the wastage and had not counterclaimed for the same. He also admitted that he never informed the plaintiff that he had changed his account.

I invited counsels to make submissions on the case. Mr. Mwinamo, learned counsel for the plaintiff submitted that the plaintiff has proved her case on a balance of probabilities. He submitted that since no consent was issued by the land control board, the agreement became null and void and the only recourse was for the plaintiff to be refunded the money paid. He also submitted that there was no proof that the plaintiff caused any waste on the land and there was no valuation of such waste. Mr. Barasa, learned counsel for the defendants submitted that the plaintiff has failed to prove her case. It was his view that the agreement bound the plaintiff and the 1<sup>st</sup> defendant and that there was nowhere in the agreement where it was agreed that the plaintiff would be refunded her money if she did not make full payment. He submitted that it was the plaintiff who breached the agreement.

I have considered the evidence and the submissions of the parties. It is not in doubt that there was an agreement between the plaintiff and the 1<sup>st</sup> defendant for the sale of the parcel of land known as Kakamega / Soy / 1238 at a consideration of kshs.1,880,000/=. It is also not disputed that out of this sum, the 1<sup>st</sup> defendant received a sum of kshs.1,295,000/=. The sum of kshs. 585,000/= was never received by the 1<sup>st</sup> defendant as the cheque that was deposited by the plaintiff was returned by the 1<sup>st</sup> defendant's former bank as the 1<sup>st</sup> defendant had closed his account.

The plaintiff in her amended plaint had sought several prayers including prayers for specific performance, permanent injunction and orders of eviction. However when she gave evidence she testified that all that she now wants is a refund of the money paid. It is discernable that the plaintiff has abandoned all other prayers in her plaint and she has now concentrated on the prayer for a refund of what she has paid to the 1<sup>st</sup> defendant. The reason for this is that there was no consent to the sale transaction issued by the land control board. The defendants' defence is that the plaintiff is not entitled to a refund since the agreement does not have a clause for a refund.

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.

Section 8 of the Land Control Act stipulates that 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.

Section 7 of the Land Control Act provides that :-

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.

There is no doubt that in this case, that no application for consent was made within 6 months of the agreement in question which was entered into on the 17 December 2008. In fact, no application for consent has ever been made to date. Under Section 6, one of the transactions in which consent of the land control board is required is a sale. If consent is not issued, then Section 6 goes further to provide that such transaction will be void for all purposes. The only relief is granted by Section 7 of the Land Control Act, which as noted above stipulates that if any money is paid on a voided transaction then such money is recoverable as a debt from the person to whom such money was paid.

I think it is clear beyond peradventure that the plaintiff is entitled to assert the right granted by Section 7 of the Land Control Act and claim a refund of all monies paid by her to the 1<sup>st</sup> defendant.

The argument of the 1<sup>st</sup> defendant that he has no obligation to refund what has been paid because their agreement had no clause for a refund cannot be allowed to override the statutory provisions of the Land Control Act.

Even without the benefit of the provisions of Section 7 of the Land Control Act, I would still have bound the 1<sup>st</sup> defendant to repay the monies to the plaintiff. The defendants' argument is that there was no clause in the agreement for a refund. It is true that the agreement did not have a clause for a refund. But neither did it have a clause stating that the purchaser would lose her money if she did not pay within time. If it had the latter clause, I would probably have upheld the defendants' argument as this would have been a matter agreed upon by the parties. In the absence of agreement to the contrary, I find that it will be inequitable to have the 1<sup>st</sup> defendant keep both the land and the money. He cannot have his cake and eat it too. In the same vein the plaintiff cannot be deprived of her money without any benefit.

Section 7 of the Land Control Act, provides that the money paid under a void transaction shall be recoverable as a debt "by the person who paid it from the person to whom it was paid". I find that the plaintiff has a sustainable claim against the 1<sup>st</sup> defendant and is entitled to a refund of all the money paid to the 1<sup>st</sup> defendant with interest. That said, I am of the view that the plaintiff cannot claim the money from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as they are not covered by the definition of the "person/s to whom the money is paid". The 1<sup>st</sup> defendant appears to have been acting in his own capacity and not as an agent of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and neither were the 2<sup>nd</sup> and 3<sup>rd</sup> defendants parties to the subject agreement. The plaintiff having abandoned her prayers for specific performance had no cause of action left against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. I have no option but to dismiss her suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants but with no orders as to costs.

The 1<sup>st</sup> defendant in his evidence stated that account should be taken that the plaintiff has wasted the premises. That may be so, but the 1<sup>st</sup> defendant has not brought forth any proof of such wastage and neither has the wastage been quantified in monetary terms. Even if he had a valuation of the waste, the 1<sup>st</sup> defendant would still not succeed because he has no counterclaim for the same.

I have already held that the plaintiff has a sustainable claim against the 1<sup>st</sup> defendant for the amount of the money paid to the 1<sup>st</sup> defendant. The money paid was of kshs.1, 275,000/=. I do not hesitate to enter judgement for the plaintiff for the sum of Kshs.1,275,000/= . The said amount shall accrue interest at court rates till payment in full from 15 October 2012 , the date that the amended plaint was filed, or that is the time when the plaintiff made the money claim.

The plaintiff shall also have the costs of this suit as against the 1<sup>st</sup> defendant only.

It is so ordered.

JUDGMENT DATED DELIVERED AND SIGNED THIS 19<sup>TH</sup> DAY OF FEBRUARY 2013.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET.**

Judgment delivered in presence of Mr. D. Mwinamo of Ms Mwinamo Lugonzo & Co for the plaintiff.

Mr. Y.M. Barasa of Ms Wambua Kigamwa & Co for the defendant.