



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 184 of 2012

PHILIP MUHOHO KIMINDA.....1ST PLAINTIFF

KENNEDY WAINAINA THAIRU.....2ND PLAINTIFF

VERSUS

JAMES GATHECHA KARIUKI.....DEFENDANT/RESPONDENT

JUDGEMENT

The Plaintiffs instituted this suit by way of a Complaint dated 20/3/2012 and sought for Judgment against the Defendants for:

- a) An order that the Defendant herein James Gathecha Kariuki does sub-divide and transfer ¼ acre to the Plaintiffs and in default the Court Executive Officer does endorse the necessary documents to effect the transfer.
- b) Costs of the suit be borne by the Defendant.

The Plaintiffs averred that by a written agreement dated 15/12/2009 the Defendant sold to the Plaintiffs ¼ acre of the parcel of land known as Kabete/Karura/2000 (a sub-division of Kabete/Karura/515) at an agreed purchase price of Kshs. 560,000/-. The Plaintiffs stated that they paid the purchase price on various dates between 2009 and 2011. It is their averment that the Defendant, at the time of sale, disclosed to the Plaintiffs that there was a pending suit – Kiambu CMCC No. 260 of 1991, Samuel Muhari Gathecha V Esther Waithira Kariuki and James Gathecha Kariuki relating to the original parcel of land Kabete/Karura/515 and further that he would transfer the title once the suit is finalized.

The Plaintiffs clarified that the original parcel of land Kabete/Karura/515 was sub-divided into Kabete/Karura/1999 and Kabete/Karura/2000. They stated that the suit- Civil Suit No. 260 of 1991 filed in Kiambu was finalized 28th July 2011 with orders in relation to Kabete/Karura/1999 and not Kabete/Karura/2000 the subject matter of this suit. The Plaintiffs stated that the Defendant despite the finality of the suit in Kiambu has failed to effect transfer of the ¼ acre in respect of Kabete/Karura/2000. The Plaintiffs therefore prayed that the Defendant be ordered to sub-divide the parcel and transfer the ¼ acre to the Plaintiff pursuant to the sale agreement.

The Complaint and Summons to enter appearance was served upon the Defendant on 27/4/2012. There is an Affidavit of Service sworn on 23/5/2012 by a Joseph Maina who deposed that he is an authorized process server. It is noteworthy that the Defendant acknowledged receipt of service of the Plaintiffs' documents including the summons by signing at the back of the copy of the summons. Despite such service, the

Defendant failed to enter appearance and respond to the Plaintiffs' claim. Consequently, an interlocutory judgment was entered on 11/7/2012 and the Plaintiffs directed to set the matter for formal proof.

The matter came up for formal proof on 10/12/2012 when the 1st Plaintiff took the stand. He reiterated the contents of the Complaint and testified further that after making the deposits of the purchase price, the Defendant agreed to let the 1st Plaintiff take possession of the property and a surveyor was called to survey the property when after the Plaintiffs' portion was realized. He took possession, fenced the property and sunk a borehole and delivered building materials and commenced construction. It was during this time that he heard that there was a case between the Defendant and his uncle Samuel Muhari Gathecha who had bailed the Defendant's father out of a loan taken in AFC on the understanding that the said uncle would be given a portion measuring ½ acre of the original parcel of land.

The matter was taken to Court upon the Defendant father's demise and the Court held in favour of Samuel Muhari Gathecha wherein it held that he was to be given ½ acre. **It was the 1st Plaintiff's testimony that the portion that Samuel Muhari Gathecha was awarded was one he had purchased, and thus he was affected as he was left with no property**, whereas the Defendant was in possession of a substantial amount of the purchase. This necessitated the filing of this suit which he prayed that Judgment be entered against the Defendant as prayed and further that he is willing to pay the balance of the purchase price of Kshs. 64,000/- to the Defendant.

In support of their claim, the Plaintiffs relied on the Sale Agreement between themselves and the Defendant dated 29/11/2011. Therein, the parties enumerated the various amounts of money that was paid to the vendor on different dates between 2009 and 2011 as deposits and further deposits of the purchase price which the vendor acknowledged receipt of the amounts by endorsing the sale agreement. There was a balance of purchase price of Kshs. 64,000/- which was agreed that it shall be paid as per the special conditions, which provides at part (c)

“Upon the vendor obtaining the land control board consent to transfer the property to the purchaser, the purchasers shall pay the final balance of the full purchase price of the sum of Kshs. 64,000/- and the vendor shall deliver to the purchasers upon receipt of the final balance and hand over all documents listed below and the purchasers' Advocate shall proceed to stamp and register the transfer in favour of the purchasers.”

The Plaintiffs also relied on a certificate of official search in respect of Kabete/Karura/2000 which listed Esther Waithera Kairuki and the Defendant as proprietors of the same and finally a plan showing the location of the property.

The Plaintiffs also filed submissions dated 24/12/2012 reiterating the contents of the Complaint. They submitted that the Defendant received a total of Kshs. 500,200/- from the Plaintiffs with a remainder of Kshs. 59,800/- . It is their submission that the Defendant declined to complete the transaction by failing to obtain the necessary land control board consent in order to effect transfer. Further that the Defendant declined to accept any more monies from the Plaintiffs from the balance of the purchase price.

Having now analysed the evidence before me, has the Plaintiff been able to prove by case on a balance of probabilities.

The Court has considered sale agreement attached to the Plaintiff's pleadings.

On paragraph 8, special condition, the vendor was to obtain the Land Control Board consent for subdivision and transfer of the property. There was no evidence that such consent was ever obtained by the vendor without the consent of the Land Control Board, can the Court find that the sale agreement was valid? I do not think so.

It is also evidence clause in clause 8 (c) of the special condition upon obtaining the Land Control Board consent, to transfer the property to the purchaser, the purchaser was to pay the final balance of the purchase price. It is evident from the evidence of the Plaintiff that he has not paid the final balance price

of Ksh.64,000/= which he said he was willing to pay. The Court cannot hold that the sale was complete and the vendor failed to meet his part of the bargain.

It was also the evidence of the Plaintiff that the suit property was in the name of **Esther Waithira Kariuki** the mother to the Defendant. The land was not in the name of the Defendant and so the Defendant not being the registered owner had no good title to pass over to the Plaintiff.

Clause 8 (e) of the sale agreement provides remedy for breach of the said agreement.

“The vendor shall refund all the purchase price paid to him by the purchaser together with interest of 4090 in the event he deliberately fails to transfer the land to the purchase and in the alternative the purchase shall forfeit 4090 of the sum of the purchase price paid to the vendor in the event of being unable to complete the transaction of payment as agreed therein above”.

What is evident is that the Defendant is in breach of the sale agreement. The Plaintiff has a recourse in clause No. 8 (e). The Plaintiff is entitled to refund of the purchase price paid together with interest of 4090 as stipulated in the sale agreement. There was no consent from the Land Control Board and the sale was therefore not complete. However Plaintiff is entitled to refund of by purchase price plus interest as provided by clause 8 (e) of the sale agreement. Plaintiff should have brought a shit of such recording of the purchase price but not specific performance as there was no consent from the Land Control Board for such transfer.

The Court would therefore find it very difficult to grant the Plaintiff the relief that he has sought in the Plaint for the above reasons, the Court finds that the Plaintiff suit should fail the Court dismissing the Plaintiff suit with no orders as to costs since the defendant did not enter appearance nor file defence.

Dated, signed and delivered this 20th day of March 2013

L.N. GACHERU

JUDGE