



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Civil Case 104 of 2012**

DULU IGWO .....PLAINTIFF  
VERSUS  
LYDIA WANGUI KAMAU & ANOR .....DEFENDANT  
**RULING**

The Plaintiff in this case has filed a Notice of Motion dated 30th May 2012. In that motion he has prayed for the following orders

- 1.that the application be certified urgent and its service be dispensed with in the first instant.
- 2.That interim and temporary order of injunction be granted against the Respondents by themselves, their servants, and/or agents from dealing, selling, or wasting the suit property by tilling or ploughing KILIFI/MTWAPA/979 in any manner pending the hearing and finalization of the suit filed herein.
- 3.That the costs of this application be provided for.

The application is supported by an affidavit of one Dulu Igwo who states that on 20/11/1011 he entered into an agreement with the 2nd defendant for the purchase of Kilifi/Mtwapa/979. The consideration is stated as ksh. Two Million[ 2,000,000].

The agreement is dated 11/2/2010 and is signed by the plaintiff and the 2nd defendant who is the wife of the 1st defendant. She did so through a signed Power of Attorney registered at Kilifi Land Registry on 26/9/05. the same is registered as No. 902. She enumerated in her said affidavit how she paid the purchase price of ksh.2,000,000 on diverse dates . The last payment being ksh.400,000/ made on 25/5/2011.

The agreement for sale 1/2/2010. it was signed by the 2nd defendant and the plaintiff herein. The agreement merely provided for the purchase price. The mode of payment did not state how the balance of the purchase price would be paid after ksh.600,000 was paid. It merely states that the purchaser shall surrender prior to payment of the balance, the transfer duly executed, original title deed, copy of the identity card for the seller and a copy of the pin certificate, three passport size recent coloured photographs and a search certificate. The agreement had no completion date . Finally the agreement stated,

4."*the vendor shall ensure that necessary consent forms are completed and lodged with the Land Control Board*".

The Purchase price was paid between 11/2/2010 and 23/05/2011 a period of over one year 3 months.

The respondent filed his reply to the notice of Motion dated 30/5/2012. she admitted that she has a power of Attorney from the 2nd defendant and that she had signed the agreement dated 11/2/2010. she admitted that ksh.600,000/- was paid on signing of the agreement leaving a balance of Ksh.1,400,000/-. She stated

that the said amount would ordinarily be paid in a period of 90 days.

She stated in paragraph 6 of the affidavit that for a period of one year the plaintiff did not pay the balance of the purchase price and refused to communicate with her completely or pick her phone calls. She stated that she got a hint that some money had been deposited in her account on 25/5/2011. she stated that both her and her husband have business accounts with lots of transactions. All in all the 2<sup>nd</sup> defendant does not deny having received the entire purchase price albeit in a period of over 90 days.

She does not deny that this was a controlled transaction and that she did not attend the Land Control Board . She however stated that she is prepared to refund the purchase price. She argues that the agreement for sale is invalidated by lack of consent of Land Controls Board. She argues that the orders sought cannot issue against her and the 1<sup>st</sup> respondent. That the recourse available to the plaintiff is the refund of the purchase price.

The issues for determination in this case are as follows;

- 1) what is the effect of not having obtained the Land Control consent
  - a) on the agreement of sale entered into by the parties herein
  - b) on the suit between the parties?
  - c) can the orders sought be granted?
  - d) What orders should be granted?

#### *Effect of not obtaining the Land Control Boards consent*

the parties in this case agree that land parcel Kilifi/Mtwapa/979 is in a Land Control area. Indeed the agreement for sale entered into by the parties has a clause stating that the vendor shall ensure that the necessary consent forms are completed and lodged with the Land Control Board. The vendor relies on that clause to argue that the sale is void for lack of land Control Consent. Sec. 61(a) of the Land Control Act Cap 302 says that any transaction for sale within a Land Control area which does not have Land Control consent is void for all purposes. There is no doubt that there was no Land Control Consent for the sale transaction herein. This fact is admitted by both parties herein.

Under Sec. 8(1) of Cap 302 the application to the Land control Board must be made within 6 months of making the agreement. The High Court may notwithstanding the period of six months extend the period.

There was never an application to extend the time once the six months ended on 2/8/2010 as contemplated by Sec. 8(1). The agreement for sale herein is void for non compliance with the law.

Sec. 7 of Cap 302 says that any money or valuable consideration that has been paid in the cause of a controlled transaction that becomes void under the Act, the money or consideration shall be recoverable as a debt by the person who paid it from the Person to whom it was paid.

I have been urged to find that the provisions of the land Control Act are not absolute in view of the Land Act 2012 which Act was enacted to give effect to Article 68 of the Constitution, more pertinently Sec. 42 of the Land Act which deals with reliefs against recursion of contract for sale. Sec 42(3) of Land Act was cited as the section that gives the Court power to grant reliefs as set therein. It was argued that under those provisions the Court can grant specific performance, in this case being, registration of Land.

A scrutiny of Sec. 38, 39, 40, 41 and 42 of the Land Act, will quickly reveal that these sections deals with administration and management of private land. Sec 39 deals with the vendors right to regain possession while Sec. 40 deals with damages for breach of Contract and Sec 41 deals with the procedure for obtaining order for possession while Sec. 42 deals with reliefs against recursion of contract for sale of Land.

It should be noted that these sections deal with situations where the purchaser is in occupation of the land through a contract for sale.

The purchaser in this case is not in occupation at all. In fact, he says in his pleadings that when he tried to send people to enter the suit premises they were chased away by the defendants herein. The sections above quoted have not in any way ousted the mandatory requirements of the Land Control Act. The Land Act 2012 and the Land Registration Act 2012 were enacted in 2012, and they repealed various land Acts namely, Way Leaves Act Cap 22, Land acquisition Act Cap 295, Indian Transfer of Property Act 1882, Government Land Act Cap 280 Registration of Titles Act Cap 281, Land Titles Act Cap 282 and Registered Land Act Cap 300. The Land Control Act was not repealed. The intention of parliament is therefore apparent and it was and still is to keep Land Control Act. To my mind, it cannot be argued that the Land Act 2012 had any amending effect on the provisions of Land Control Act Cap 302.

In any case, a court of law cannot compel a party to a contract for sale to apply for Land Control consent nor can it compel him to attend the Land Control Board for such an application. It can neither compel such Board to grant a consent. The recourse for a purchaser who pays money to a vendor who is unwilling to attend the Land Control Board or who altogether refuses to apply for such consent lies elsewhere. Various remedies are stipulated by Cap 302 aforesaid. Parties should be careful and should protect their interest in case of breach of contracts by well drafted contract for sale.

Can the orders sought in the plaint be granted?

**i. Specific Performance.**

In view of what is stated above, and due to lack of the Land Control Boards consent, specific performance is not a remedy available to the plaintiff. Specific performance can only be available to the plaintiff where beneficial interest has passed to the purchaser. This is not the case in this matter

**ii. Order to transfer parcel No. Kilifi/Mtwapa/979 from Plaintiff to defendants**

This order cannot be granted because of lack of Land Control Boards consent. Under Registered Land Act Cap. 300 (now repealed) this was a legal requirement. This land was in a Land Control area. The Land Control Boards consent cannot be enforced on the parties.

**iii. Vacant possession**

In view of what is stated in (i) &(ii) above, and in view of the fact that the contract of sale is void for all purposes under section 6(1) Cap 302, this prayer is also not available to the plaintiff.

The only prayer available for the plaintiff is prayer 4 for General damages and for loss and damage and the alternative prayer for refund of purchase price and costs.

This court is mindful of the fact that the purchaser has paid Ksh.2,000,000/-. The vendor may have his reasons for refusing to attend the Land Control Board, but he has not denied having received Kshs.2,000,000 as purchase price. He cannot have the money and keep the Land. The issues raised in prayer 4 and 5 shall be canvassed in court on merits.

What orders can the court make under the circumstances.

In view of the findings of the Court on what the laws says, the Court makes the following orders;

(1) That the defendants are ordered to deposit ksh.2,000,000/- on an interest earning account in the joint names of the Advocates for the plaintiff and defendants until the final determination of this case. Such amount be deposited within fourteen(14) days from todays date.

(2)Further that if the defendant are unable to do so in the time stated herein, an interim injunction will

automatically be granted against the respondents as prayed in prayer (2) of the Notice of Motion dated 30/5/2012

(3) in the meantime status quo shall be maintained until the Court orders are complied with.

(4) That this case be fixed for hearing for prayer 4 and 5 of the plaint.

(5) Costs shall abide with the judgment in this case.

**Dated and delivered in open Court this 18th day of April 2013**

**S. MUKUNYA**  
**JUDGE**