



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
ELC CASE NO. 541 OF 2009

GITANGA MWANIKI1ST PLAINTIFF

ONESMUS MWANIKI GICHUIRI.....2ND PLAINTIFF

VERSUS

ANNUNCIATA WAITHIRA KIBUE.....DEFENDANT

JUDGEMENT.

The Plaintiffs herein **Gitonga Mwaniki** and **Onesmus Mwaniki Gichuiri** filed an amended Plaint dated 17th May, 2012 and sought for the following prayers against the Defendant herein. Annunciata Waithira Kabue.

- a. Specific performance more specifically transferring or causing to be transferred to the Plaintiff plot No. 5989/14/B a sub division from LR No. 5989 /14 off Kiambu Road.
- b. Damages for breach of contract in lieu of or in addition to specific performance as prayed in (a) above.
- c. Costs of this suit and interest thereon.

The Defendant on her part filed her Defence and denied the plaintiff's claim. She contended that:-

- i. The Plaintiff's suit as drawn and filed is bad in law, defective, incompetent, misplaced and an abuse of the Court process and should be dismissed with costs .
- ii. That the sale agreement entered herein on 23rd October, 2003 between the Plaintiffs and Defendant was in respect of an agricultural land whose sale and other transactions are controlled within the meaning of the Land Control Act , cap 302 Laws of Kenya and therefore no valid sale in respect of such type of land without the consent of the Land Control Board of the area within which the land is situated .
- iii. That the Plaintiffs breached the agreement by failing to pay the agreed purchase price to her in line with terms of the agreement.
- iv. The Defendant also contended that the description of the property subject of this suit is ambiguous vis –avis the one in the agreement for sale. The amended Plaint shows the Plot No. is **5989/14/B** whereas the agreement shows **Plot No. 5989/4/B**.

The matter proceeded for hearing and the Plaintiffs herein called two witness – Gitonga Mwaniki, the 1st Plaintiff and Prof. G Munoru advocate. The Defendant herein Annunciata Waithira Kabue gave evidence for herself and called no witness.

Briefly, the facts of the case are:-On 23/10/2003,the parties herein entered into an agreement for sale of Plot known as 5989/14/B which was a sub division from a larger parcel of land known as LR No. 5989/14 which is situated off Kiambu Road.The sale agreement is **exhibit No.1**(Plaintiffs). The terms of this agreement were.

- The vendor (Defendant) would sell to the purchasers (Plaintiffs) for a consideration of **Kshs. 2900,000/-** a parcel of land to be sub-divided from **LR No. 5989/14**.
- Completion date was 180 days from the date of signing the agreement or such earlier date as the parties were to agree in writing.
- The purchasers were to pay a deposit of **Kshs. 290,000/=** and thereafter the balance was to be paid on or before the completion date.
- The vendor was to deliver a vacant possession of the property to the purchasers.
- The vendor was to deliver to the purchasers or the purchasers' advocate's completion documents in relation to the property.

That purchasers' made payments of **Kshs. 1500,000** which was deposited in the office of their mutual advocates on 6/10/2003 and a final payment of **Kshs. 1400,000/=** on 7/4/2007.The Purchasers expected the vendor to fulfil her part of the agreement which she failed to do so.That when the vendor failed to fulfil her part, the purchasers filed this suit.

The Defendant on her part filed her statement of Defence and admitted entering into an agreement for sale with the Plaintiffs but alleged that the Plaintiffs failed to pay the purchase price in line with the agreement for sale and that she has not received any consideration from the Plaintiffs herein. Defendant also contended that the agreement was null and void since the property in question falls under the Land Control Act and Land Control Board consent was not sought.From the Court record, I have noted that agreed issues were filed by the Plaintiffs on 25/2/2011. The parties herein have also put in their written submission which I have considered.

Having now considered the pleadings, the evidence on record and the written submissions, I find that these are the issues for determination.

- i. Whether there was a valid sale in law between the Plaintiff and the Defendant.
- ii. Whether the parcel of Land known as LR No. 5989/14 is an agricultural land hence subject of Land Control Board and if so, if lack of Consent was sufficient to nullify the sale.
- iii. Whether there was a breach of contract by either of the parties to the suit and if so by which party.
- iv. Whether the Plaintiffs are entitled to the relief sought.
- v. Who bears the costs of this suit?

On the first issue, there is no doubt that there was a sale agreement entered between the Plaintiffs herein as purchasers and Defendant herein as vendor of **Plot No. 5989/4/B** which was a proposed sub-division of **LR No. 5989/14/ off Kiambere Road**. In the said agreement of sale, the vendor was described as the administratrix of the estate of the late James Aram Njau Kabue.The said James Aram Njau Kabue was the registered owner of all that parcel of land known as LR No. 5889/14 (original 5989/11/13).It is also evident that at the time of signing the agreement, the Defendant was only the administratrix of the said estate (she only had letters of Administration) but the grant had not been confirmed.The Grant was eventually confirmed on 16/11/2005.

Section 55 of succession Act ,Cap 160 laws of Kenya states as follows:-

“ No Grant of representation whether or not limited in its terms shall confer power to distribute any capital assets constituting , a net estate or to make any divisions of the property , unless and until the grant has been confirmed as provided by section 71”.

The Letters of Administration therefore only conferred the Administratrix the right to collect and preserve the estate but not to sub divide the estate and even purport to sell it.From the confirmed grant, the Defendant's inherited 1 acre from the estate or after the grant was confirmed on 16/11/2005.That was

almost two years after the sale agreement had been signed. It is not clear whether the resultant 1 acre now is 5989/4/B as described in the Sale Agreement. The Court will concur with the Defendants' submissions that at the time the sale agreement was signed, the Defendant did not have sufficient legal capacity to enter into the said Sale Agreement for lack of confirmed grant in respect of the estate of the late James Aram Njau Kabue. In **Nairobi HCC No. 3111 of 1985**, Justice Khamoni (as he then was) held that:-

On the second issue, the land in question was LR No. 5989/14/off Kiambu Road. The Defendants in her evidence told the Court that this Land was an agricultural land. The Defendant exhibit 1, a letter from the ministry of lands dated 10th June, 2010, also confirmed that LR NO. 5989/14 falls within an area marked for agricultural use and therefore was controlled under the provisions of the land Control Act Cap 32. If the Suit falls under an agricultural area, then the consent from the land Control Board was necessary. Both parties herein agreed that no Land Control Board was obtained by any party herein.

Section 6 of the Land Control Act Cap 302 expressly provides that for any transaction /dealing in respect of land designated for agricultural use, consent must be obtained from the local Land Control Board. Further, it states that in case of a sale, the same must be done within six months of execution of the sale agreement for sale. Failure to obtain the sale would render such transaction invalid and void for all purposes.

The Plaintiffs did submit that it was the obligation of the vendor to obtain Land Control Board Consent and the Plaintiff should not be penalized for such failure. However, the Law is very clear that lack of consent from the Land Control Board renders any transaction especially for sale invalid and void for all purposes.

The Court of Appeal in the case of **Leonard Njonjo Kariuki Vs Njoroje Kariuki alias Benson Njonjo, Nairobi Civil Appeal No. 26 of 1979**, upheld the above position. The court stated:-

“ In Law, the plots in Muguga /Kenyari are agricultural land and controlled transactions affecting those plots are void for all purposes in the absence of such consent’.

The transaction in LR No. 5989/14 which falls under an agricultural area was therefore void for lack of land Control Board Consent.

On the third issue, there is no doubt that a Sale Agreement was signed by the parties herein. Supposing the Land Control Board consent had been obtained, and the court finds the transaction was lawful, could the Court have found that there was a breach of contract and if so by who?

There is no doubt that the parties herein signed the agreement of sale dated 23/10/2003. The parties also confirmed that they executed the agreement with intention to bind itself to the contents thereof. Both parties herein were therefore bound by the terms of the Sale Agreement.

Clause 5 of the Agreement for Sale stipulates the terms of the agreement on completion date. The completion date was to be within 180 days from the date of execution of the Sale Agreement. Both parties were supposed to have met certain conditions before the completion date.

The purchasers ought to have paid the full purchase price and the vendor was to deliver to the purchasers.

- i. Duly executed transfer
- ii. Duly executed discharge
- iii. Rent and rates clearance certificates
- iv. Stamp duty valuation form.

From the available evidence, what is clear is that the purchasers paid the initial deposit of Kshs. 290,000/= plus more on 6/11/2003. That was before the execution of the agreement for sale. Receipts and letter to Kamau Kuria & Kiraitu Advocates confirms that position. P Ex 2 The purchasers were to pay the balance of Kshs 1.4 Million on or before 180 days from date of execution of the sale

agreement) .However, it is evident that the Plaintiffs paid this balance on 16/4/2007as per Plaintiffs **exhibit No. 3**.This was almost 4 years after the signing of the sale agreement.The Plaintiffs were therefore in breach of the Sale Agreement.

Clause 13:3 on special conditions provided that:-

“ In the event that any sum payable by purchaser hereunder is not paid on its due date for payment , the purchaser shall pay to the vendor interest at the interest rate on the unpaid sum from the due date for payment of such sum until the date of actual payment of unpaid sum (together with accrued interest in full)”.

The Purchasers herein did not pay the balance of the purchase price within the stipulated time (180 days after execution of the Agreement of Sale).He ought to have paid to the vendor the unpaid sum with interest at the interest rate by the time they paid the balance on 16/4/2007.The purchasers were also in breach of clause 13 of the Sale Agreement.On her part, the Defendant ought to have met the conditions on clause 5:3 of the Sale Agreement on or before the **Completion** date.There is no evidence that she ever met any of the conditions thereon.

The Defendant was also in breach of the said Sale Agreement.The Court finds that both parties herein were in breach of the said Agreement of Sale.

Having found as I have on the first three issues for determination, is the Plaintiff entitled to the relief sought?.The Plaintiff has sought for specific performance, damages for breach of contract and costs of the suit. The relief of specific performance is an equitable remedy accorded at the discretion of the court.This remedy compels the wrong doer to carry out his/her contractual obligations.In the instant suit, who is the wrong doer herein?.The Court has found that the Plaintiffs and Defendant entered into the Sale Agreement when Defendant was only a holder of letters of Administration.She therefore lacked legal capacity to enter into such agreement as the grant was unconfirmed. Further, the Court finds that there was lack of Land Control Board consent.This was a statutory requirement.The transaction was therefore void.For the above two reasons, the court would find it difficult to order for specific performance. The Court has also found that even if the consent had been obtained and the Defendant had legal capacity to sign the Sale Agreement, both parties were in breach of the said Sale Agreement. The Court cannot therefore order for specific performance on the part of the Defendant, since both parties were wrong doers.The sale Agreement was breached by the two parties and therefore incapable of enforcement.This position was held n the case of **Fiat Kenya Ltd Vs Ali Jama Roble (1973) EA 11** .where the Court held that :-

“The Court never award specific performance when it is incapable of enforcing the order.By part of reasoning I do not think it should ever award specific performance if it entertains any serious doubt that the contract is capable of performance”.

The Plaintiffs herein did not fulfil their obligations on time as per the terms of the Sale Agreement.They are in breach and therefore Plaintiffs themselves having been in breach of a particular undertaking cannot ask the Court to compel the Defendant to complete her part of the contract (Sale Agreement) .The Court only assists a party in the enforcement of a contract if the party has performed its part of the bargain.This was the finding in the case of **Aziz Vs Bhatia brothers Ltd (2001) 1 EA 7**, where it was held that :-

“ A party who has performed his part of the bargain may be assisted by the Court to enforce the contract against the defaulting party...”.

This Court has consequently found that the Plaintiffs were also in breach of the terms of the Sale Agreement, they are therefore not entitled to damages for breach of contract.The transaction was also found to be null and void **abinitio** and so Plaintiffs cannot be awarded for breach of that contract if any.

Finally, who should bear costs of this suit?.Ordinary costs should follow the event.In the instant suit, the Court has found that the sale agreement as entered cannot stand for lack of consent from the Land Control

Board. The Plaintiffs did not pay the full purchase price on time each party herein has its share of blame.

For the above reasons, the court finds that each party therefore should bear its costs.

Having found that the transaction herein for all purposes was void for lack of Consent from the Land Control Board and having found that the Defendant could not sell the land before the grant was not confirmed, what becomes of the Plaintiffs payments for the purported parcel of Land?.

From the exhibits **No. 2 and No. 3** by the Plaintiff, it is evident that the Plaintiffs deposited Kshs. 2.9 Million in the law firm of Kamau Kuria & Kiraitu Advocates as payment for purchase price of LR No. 5989/4/B.

Defendant denied receipt of this amount of money. Since the transaction is void, the Plaintiffs are entitled to refund of their purchase price.

Defendant denied receipt of the purchase price. PW2 Prof. G G S Munoru, a partner in the Firm of Kamau Kuria & Kiraitu Advocate told the Court that he did not know if the law Firm released the money to the Defendant or not. He confirmed at the completion date they had received Kshs. 1.5 million from the Plaintiffs. There is a letter dated 13/10/2003 from Defendant to her Advocates Kamau Kuria & Kirairu Advocates requesting for release of Kshs. 200,000/= to enable her pay the surveyor and Nairobi City Council. The Defendant made reference to LR No. 5989/14/B. The Defendant cannot therefore categorically deny that she did not receive any money from her advocates. The plaintiff had deposited the initial payment on 6/10/2003 and Defendant requested for the money on 13/10/2003. The Court will find the Defendant's denial of receipt of the money doubtful. The Court finds that Plaintiffs are entitled to refund of their purchase price. The Court will order the Defendant to refund to the Plaintiff Kshs. 1.5 Million which was deposited by Plaintiffs within the completion period. The other deposits Ksh. 1.4 Million which was done in the year 2007, is denied by the Defendant. The Plaintiff could claim the same from the Law firm from where they deposited the said amount.

Having now carefully analysed the available evidence and the written submissions, the Court finds that the Plaintiffs claim herein should fail at this stage save for refund of **Kshs. 1.5 Million** by the Defendant.

Each party to bear its own costs.

It's so ordered.

Dated and signed this 30th day of August, 2013.

28 days Right of Appeal

L N GACHERU

Before L N Gacheru

Anne: Court Clerk

Defendant : Absent

Mrs Kanyuingira holding brief for Mr Wanyoike for the Defendant.

L N GACHERU

Ms Mwangi Holding brief for Ms Kabuthi for the Plaintiffs.

L N GACHERU

Judgement read in open court in the presence of Ms Kanyuingira holding brief for Wanyoike for Defendant and M/s Mwangi holding brief for Ms Kabuthi for Plaintiffs.

L N GACHERU