



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 13 of 2010

GRACE WAIRIMU KARUGA.....PLAINTIFF

VERSUS

MALANCHA ENE MAKOPE.....1ST DEFENDANT

THE DISTRICT LAND REGISTRAR, KAJIADO.....2ND DEFENDANT

JUDGMENT

By way of a plaint dated 20/1/2010 and filed in court the same day, Grace Wairimu Karuga, the plaintiff herein, seeks the following orders against the defendants;

- (a) A permanent injunction to restrain the defendants from interfering with the suit property known as /LOODARIAK/41.**
- (b) Specific performance of the contract by the 1st defendant.**
- (c) General and punitive damages for breach of contract by the 1st defendant.**
- (d) A declaration that there was a constructive trust in the Plaintiff's favour.**
- (e) Costs of the suit.**

Malancha Ene Makope, the defendant herein filed a statement of defence dated 21/4/2011 in which the defendant denies having intended to sell the entire state of the deceased to the plaintiff save for 10 acres.

The plaintiff told the court that she entered into an agreement with the defendant for sale of 20 acres of the suit land at Kshs.150,000/= per acre. The total price was Kshs.3 million. She first paid Kshs.400,000/= on 8/6/2009 when they signed the Sale Agreement (**P.Ex.No.1**). Further payments were made to the defendants on diverse dates vide Exhibits 2 and 3 all totaling to the sum of Kshs.1,500,000/=. Subsequently, a Sale Agreement was prepared by the 1st defendant's Advocate and signed on 26/6/2009 (**P.Ex.No.4**). PW1 was asked to pay a further Kshs.500,000/= for purposes of division of the land (**P.Ex.5**). She did not pay but instead a letter was addressed to the defendant to comply with the Sale Agreement (**P.Ex.6**). By a letter dated 1/12/2009, the defendant's counsel wrote to the plaintiff indicating that the defendant now wanted Kshs.500,000/= per acre, change in price that was declined by letter dated 2/12/2009 (**P.Ex.8**). The plaintiff told the court that she had intended to use the land for event management and had purchased the equipment for that purpose.

In support of the defence, Malancha Ene Makope agreed that she entered into a Sale Agreement with the plaintiff for sale of land which belongs to the estate of Makope Ole Ntingisha her late husband. At the time of the agreement, she had not obtained letters of administration in respect of the estate of her late husband. She denied that she knew how to read and that the Agreement was never read to her though she signed it. She also denied that she ever sought the Land Control Board consent. She denied that she ever intended to sell part of the land **Kajiado/Loodariak/41** but another piece of land all together and she only intended to sell 3 acres. DW1 also told the court that she discovered that her husband had already sold the land; that the land is only 20 acres, it is where she lives with her family and she could not have intended to sell all of it. She asked the court to allow her to refund the sums paid to her.

I have now considered the pleadings, evidence on record and submissions by counsel of both parties. The Sale Agreement entered into by both the plaintiff and defendant is not denied. However, the evidence adduced by the defendant does not support her pleadings. At paragraphs 4 and 5 of the defence, she pleaded that she only intended to sell 10 acres out of the 20 acres of the suit land. In her evidence, she totally departed from her defence and said that she only intended to sell 3 acres out of another piece of land that her husband owned. She was not truthful. I also took note that in the first Agreement (**P.Ex.No.1**), the land the subject to the sale agreement was 30 acres not even 20 or 10. The Agreement before the Advocate, was for sale of 20 acres of land. It is obvious that the defendant is not candid and has not told the court the truth. The land from which she intended to excise and sell to the plaintiff must have been more than 20 acres.

To further demonstrate the defendant's untruthfulness, I doubt that she would have intended to sell 3 acres of agricultural land in Kajiado, at a consideration of Kshs.3 million in 2009. I believe the Sale Agreement must have been for more acreage than 3.

In the Sale Agreement, the defendant described herself as an intended legal administrator. The title produced in court is in the name of Makope Ole Ntingisha, the plaintiff's late husband. No evidence has been adduced to demonstrate that the defendant had taken out succession proceedings or that she had been appointed an administrator of her late husband's estate. There is no legal term known as "**intended legal administrator**". I find that the defendant did not have the capacity to sell or dispose off the disputed property. The Advocates who drew the Agreement must have known as much.

The land in question is registered under the **Registered Land Act Cap. 300 Laws of Kenya**. It is agricultural land. The sale transaction is governed by the **Land Control Act cap. 302 Laws of Kenya. Section 6** thereof requires that the consent of the Land Control Board of the area in which the land is situated be obtained. **Section 6** provides as follows:-

S.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."**

The agreement was entered into on 26/6/2009 and no application for consent of the Board was made within 6 months as required by **Section 8(1)** of the **Land Control Act**. In the case of **Jacob Gachuki Minjire Vs Agricultural Finance Corporation - Civil Appeal No. 61 of 1982**, J. Kwach said:-

“where a controlled transaction becomes void for lack of consent of the Land Control Board, the Act gives the innocent party a special cause of action which gives him a remedy independently of the void transaction. It was provided by section 7 of the Act that any money or other valuable consideration paid in the course of a controlled transaction that becomes void will be recoverable as a debt by the person to whom it was paid”.

The controlled transaction entered into by the plaintiff and defendant became void once the Land Control Board Consent was not obtained within 6 months (**section 8 (ii)**).

Apart from the defendant lacking the capacity to enter into any transaction in respect of the suit land, because she was not an administrator of her deceased's husband's estate, there was no consent of the Land Control Board. Although the defendant's actions are not consistent with a person who generally wanted to enter an agreement but to unfairly enrich herself, the only remedy that the plaintiff has is a refund of the purchase price which the defendant is ready and willing to refund.

Although the plaintiff claimed that she had intended the land for event management and had purchased equipment, she did not adduce any evidence on how much she spent and she did not make any specific claim.

At clause 9.3 of the agreement, the parties agreed that in the event that vendor failed to meet his part of the agreement, he would refund the purchase price at an interest rate of 15%. In the end, I decline to grant prayers (a) seeking an injunction, prayer (b) seeking specific performance and, (d) a declaration that there were a constructive trust in the plaintiff's favour. I grant prayer (c) and the plaintiff will have judgment for Kshs.1,500,000/= plus interest at 15% since 26/6/2009 plus costs of the suit. It is so ordered.

DATED and DELIVERED this 15th day of November, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Maragia holding brief for Mr. Konosi the Appellant.

N/A the Respondent.

Kennedy – Court Clerk.