



SAMSON OKUN ORINDA PLAINTIFF

VERSUS

AYUB MUTHEE M'IGWETA 1ST DEFENDANT

FREDRICK MWITI M'IGWETA 2ND DEFENDANT

JAPHET MUTITHI M'IGWETA 3RD DEFENDANT

JUDGMENT

The plaintiff and the 3 defendants entered into an agreement for sale dated 20th November 1990 whereby the plaintiff agreed to buy and the defendants agreed to sell parcel No. Ntima/Igoki/4218. The agreement specifically noted that the suit property measured 0.6228 Ha. The consideration for that land was Kshs. 350,000/=. The agreement broke down the mode of payment of that amount. The agreement further provided that the plaintiff was to pay the defendants Kshs. 30,000/= for structures that were on the suit property. Until transfer however, the defendants were to continue collecting rent over those structures. It was a specific term of the contract that the plaintiff was to obtain possession of the suit property upon “official transfer” of the suit property. The defendant had an obligation to obtain the consent of the Land Control Board. The plaintiff has sued the defendants alleging that they have refused to transfer the suit property to him having paid them Kshs. 261,000/=. This was part of the purchase price. He prays in his action for orders to be directed to the defendants to execute the transfer documents of the suit property in his favour. In the alternative, he prayed that the defendants be ordered to refund to him the payment he had made to them plus payment for the development he carried out on that land. He accepted in the plaint that he was in possession of the suit property. He had carried expensive developments which included a permanent house. He also pleaded that subsequent to signing the agreement for sale, he had confirmed that the size of the land was in actual fact half an acre less than it was stated in the agreement. In evidence, the plaintiff stated that having made the payment of Kshs. 261,000/= he could not make further payment because the defendants were involved in a court action with their neighbour who occupied property Ntima/igoki/4217. He said that that property had been sold to his neighbour by the defendants. That the defendants when they sold that property the suit property was reduced in size in 1994 to 0.482Ha. That reduction had been carried out by the District Surveyor. The reduction followed a court order that was made. He said that the reduction also was due to the creation of a road between the suit property and parcel No. 4217. As a result of that exercise, he lost half an acre. He produced a green card of the suit property which reflected that reduction. The Land Registrar had canceled the previous measurements of the land and substituted it with the measurements of 0.482Ha. He said that he had approached the defendants to pay them Kshs. 89,000/= to enable them transfer the land to him but they had declined to accept the amount. He then stated in evidence:-

“I still took possession and constructed a house.”

According to him, he only owed the defendants, Kshs., 89,000/= as the balance of the purchase price plus, Kshs. 12,000/= for the structures. On being cross examined, he did accept that there had not been an official transfer of the suit property in his name. He also accepted under cross examination:-

“The defendants demanded money from me many times but I did not pay. This was between 1990 and 1993.”

He then finally stated that the defendants should refund him for the purchase price and pay for the developments that he had undertaken and if they do so then they can retain the suit property. PWII was the assistant district land registrar. He stated that the suit property originally was 0.622Ha but now was 0.482Ha. In his evidence he stated,

“District Surveyor gave authority for the reduction in acreage. The authority was issued under Cap 300. The acreage was changed on 7th March 1994 by the surveyor’s letter..... the acreage was lawfully changed as an error.”

PWIII was the Land Surveyor. He said originally there was parcel No. Ntima/Igoki/1137 which was subsequently subdivided into 3 parcels namely, parcel No. 4216 - 0.01Ha. Parcel No. 4217 – 0.405Ha. and parcel No. 4218 – 0.5228Ha. The acreage of those plots was reflected in the green card. However, the acreage shown on the mutation was different from what was shown in the green card. That there was a court action being HCC No, 55 of 1989 which ordered the district surveyor and the land registrar to mark the boundaries and determine the divisions of those plots. They were ordered to measure the ground. This was done on 25th February 1994 whereby it was found that the suit property was 0.482Ha. In that exercise, the suit property was affected because it was found that on the ground the land was less than what was reflected in the green card. He then said:-

“This is a regular happening in our work.”

The defence evidence was given by Japhet Murithi Igweta. He said that the total price of the agreement between the defendant’s and the plaintiff was Kshs. 380,000/=. The plaintiff paid Kshs. 261,000/=. The balance that was due was Kshs. 119,000/=. He and his co-defendants obtained consent to the transaction. The plaintiff however refused to pay Kshs. 30,000/= for the structures on the land. He infact demolished them. He then proceeded to build a house on the suit property without their authority. The defendant’s prayer is that the court would order them to refund the plaintiff the amount he had paid.

The contract between the parties was dated 20th November 1990. It had an express term that the plaintiff was purchasing the suit property which measured 0.6228Ha. at an agreed consideration of Kshs. 350,000/=. That term of the measurement of the suit property created a contractual obligation for the defendant’s to transfer on consideration being made by the plaintiff land measuring 0.6228 Ha. Evidence was lead by the plaintiff and through PWII and III that the suit property following a court order was reduced in size to 0.482Ha. A party in law can be excused from performing a term of the contract because of the impossibility. Like in this case, the parties contracted for a specific measurement of land to be transferred to the plaintiff. However due to factors which cannot be blamed either on the plaintiff or the defendant, that acreage was reduced. It was reduced following an order of the court. That reduction was done after the parties had contracted to sell and buy the suit property. The reduction of the measurement of the suit property makes the performance of the contract as per the agreement of the parties impossible. There is no way the defendants can be able to transfer the acreage they agreed with the plaintiff. Indeed the act of reducing the suit property measurements frustrated the party’s contract. Frustration is discussed in the book of **Treitel**: The Law of Contract, eleventh Edition Pg. 909:-

“Frustration terminates a contract automatically at the time of the frustration event though the parties for some time after the event went on behaving as if the contract existed.”

The plaintiff’s prayer therefore for orders of specific performance of the contract cannot be entertained because of that frustration of the contract. The defendants even if they were ordered to would not be able to transfer the land that they contracted to sell to the plaintiff. The plaintiff did however make a prayer for refund of the money paid as an alternative prayer. That prayer can be entertained. The plaintiff’s prayer however for compensation for the development he had carried out cannot be entertained. This is because the plaintiff even by his own evidence entered the suit property without the consent of the defendants. The agreement between them had provided that he would obtain possession

once the property was officially transferred to him. Having found that he occupied the suit property without the defendant's authority, he cannot then have his claim for compensation entertained. He in any case did not prove before court the value of that development. It follows that he built the house without the defendant's authority. The agreement they entered into did not allow him to construct a house. The plaintiff cannot be heard to seek compensation for what he did without the authority of the defendants. The defendants in their evidence are willing to refund to the plaintiff the money he paid. Having found that the party's contract was frustrated, the law allows for money paid under a frustrated contract to be recovered. The plaintiff had also sought for the refund to be subjected to bank rate interest but in considering the agreement I could not find any specific provision for that interest. The following then is my judgment:-

- 1. An order is hereby made for the defendants to refund the plaintiff Kshs. 261,000/= within 90days from today. In default, the balance not yet paid to the plaintiff on the 90th day will begin to accrue interest at court rate until payment in full. The plaintiff will have the right to execute for the outstanding amount after 90 days.**
- 2. After 90 days, the plaintiff shall give to the defendants vacant possession of parcel no. Ntima/Igoki/4218. In default, an order of eviction shall issue against the plaintiff over that parcel of land.**
- 3. It became obvious that the plaintiff had registered a caution over the suit property on 21st November 1990. An order is hereby issued for the removal of that caution over parcel No. Ntima/igoki/4218.**
- 4. Each party shall bear their own costs.**

Dated and delivered at Meru this 30th day of October 2009.

MARY KASANGO

JUDGE