REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA KITALE

CIVIL SUIT NO. 143 OF 2000

JOSEPH NATEMBEYA ==========PLAINTIFF

V E R S U S

PATRICE MATASI ========== DEFENDANT

J U D G M E N T

The plaintiff's claim against the defendant is for his eviction from the suit property; plot No.838, which is located on L.R NO.3740 to L.R. NO.4834. The plaintiff also prays for costs of the suit.

The claim is founded upon the fact that there was no Land Control Board consent for the defendant to stay on the land.

In answer to the plaintiff's claim, the defendant has not only filed a defence but also a counterclaim. He says that the plaintiff had given him the suit property in exchange for another piece of land, which he had bought earlier from the plaintiff. Therefore, the defendant avers that the attempt to have him evicted is misplaced. Instead, the defendant believes that the plaintiff should be compelled to transfer the suit property to him, as the defendant holds the view that he was the rightful owner thereof.

In the alternative, the defendant seeks a refund of the purchase price of the 5 acres of land which he had earlier purchased from the plaintiff. However, his view is that such a refund should be based on the current market price of land .He also feels that the plaintiff ought to compensate him for all the developments he had made on the suit property.

Separately, the defendant is asking for an order to compel the plaintiff to refund to him the sum of Kshs 35,000/= which was a loan from the defendant to the plaintiff.

Finally, the defendants seeks costs of the suit together with interest at court rates.

When faced with the Defence and counterclaim, the plaintiff filed a Reply to Defence. He asserted that the deal, if any, was for agricultural land and was thus subject to the consent of the land Control Board. As no such consent was given, the plaintiff expressed the view that any such transaction was void.

Notwithstanding the contention that the transaction was void, the plaintiff expressed a willingness to refund the purchase price, amounting to Kshs 68,000/=, to the defendant.

But as regards the defendant's claim for Kshs 35,000/=, the plaintiff insists that he had already repaid that sum in full.

The case first came up for trial on 6/5/2002, before the Hon. Etyang Judge. On that date, the plaintiff testified and was cross-examined. He was also re-examined. Then, on 10/7/2002 PW2 , Eric Wekesa, testified. The plaintiff then closed his case.

On 29/10/02, the defendant gave his evidence. However, it was not until 5/2/03 when DW2, Moses Mbuti, testified.

The Hon. Etyang J. thereafter retired from the judiciary. On 24/5/2005, the Hon. Karanja J. ordered that the further hearing of the case would proceed from the stage which the case had reached when the matter was before the Hon. Etyang J.

(retired).

Finally, the trial was able to resume on 1/11/2006. On that date DW3, Ahmed Hassan Mohamed, gave his evidence. Also DW4, Gabriel Namasaka Wekunda, gave his evidence. The defendant then close his case.

However before the parties could make their respective submissions, the Hon. Karanja J. was transferred from Kitale to Bungoma.

At the request of counsel, I did allow the parties to file their respective written submissions.

I have deemed it necessary to set out the foregoing history of the case because it will help in making it clear that I did not have the benefit of observing any of the witnesses, as they gave their evidence. Consequently, I will not be in a position to make any comments or observations about the conduct or demeanour of the parties or of their respective witnesses.

In effect, my decision will be founded solely on the evidence on record and the submissions made by counsel.

The first step towards resolving this matter is to set out the issues which arise from the pleadings.

After perusing the issues set out in the respective submissions, I find that the matters that need to be resolved are as follows: -

1. ***Did the plaintiff exchange the suit property with the 5 acres which the defendant had earlier purchased from him at Kapomboi?***

2. If so, did the said transaction require the consent of the Land Control Board?

3. Can and should the plaintiff be compelled to transfer the suit property to the defendant, OR should the defendant be evicted from the said property?

4. Is the plaintiff liable to refund or repay to the defendant. The loan of Kshs.35, 000/=.

5. If the plaintiff is not to transfer the suit property to the defendant, is he liable to repay the purchase price to the defendant?

6. If the answer to (5) above is in the affirmative, what sum is the plaintiff liable to pay to the defendant? Is it KShs.80, 000/= or KShs.68, 000/=?

7. Is interest payable? If so, on what sum and at what rates? From what date should the interest, if any, be calculated?

8. Who should pay the costs of this suit?

From the evidence adduced, it is common ground that in April, 1988, the plaintiff sold to the defendant, some five (5) acres of land at Kapomboi. The said piece of land was known as Plot No.134, and the purchase price was Kshs. 80, 000/=.

Although in the typed record of proceedings it is indicated that the plaintiff (PW1) had admitted having received

Kshs.60, 000/=; I did verify from the original hand-written record that PW1 admitted receipt of Kshs.68, 000/=, as payment for the five acres at Kapomboi.

On the other hand, the defendant insisted having paid the full purchase price, of Kshs.80, 000/=. To support his contention, the defendant produced the original agreement for sale, dated 25/4/1988.

Although the said agreement for sale indicates that the plaintiff received Kshs.12, 000/= on 7/12/91, the plaintiff did not append his signature against the said payment. Accordingly, on a balance of probability I do find that the defendant paid no more than Kshs. 68, 000/=, towards the purchase of the five acres at Kapomboi.

According to the plaintiff, land clashes erupted in Kwanza Division, in or about 1992. Kapomboi is within the said Kwanza Division, and the tribal land clashes are said to have affected the defendant.

It was the plaintiff's evidence that the defendant and his family was forced to flee the farm at Kapomboi. The plaintiff also said that even though the clashes end in or about 1994, the defendant declined to move back to Kapomboi. Therefore, the plaintiff agreed to refund to the defendant, the money which he had paid for the Kapomboi farm, so that the defendant could purchase an alternative farm in Kiminini.

According to the plaintiff, he allowed the defendant to move onto his (the plaintiff's) farm at Kiminini, on a temporary basis, whilst the plaintiff was still striving to sell-off the Kapomboi farm.

Later, the plaintiff was able to sell the farm for

Kshs.90, 000/=. However, he testified that even though he was ready to repay to the defendant, the sum of Kshs.68, 000/=, the defendant declined to receive that sum.

On the other hand, the defendant's story was that in the year 1992, the plaintiff was involved in a motor vehicle accident, in which several people were injured. Some of those who were injured sued the plaintiff and got judgment against him for Kshs.442, 000/=.

It is for that reason that the plaintiff is said to have asked the defendant to let him have back, the Kapomboi farm, so that he could sell it and use the proceeds therefrom in settling the decretal amount.

The plaintiff admits having been involved in an accident, and having been sued. He also admits that the judgment against him was in the sum of Kshs.400, 000/=. But he insists that he did not need to sell the Kapomboi farm so as to raise money for settling the decree.

To my mind, it is significant that although the plaintiff had sold the Kapomboi farm to the defendant, it was the plaintiff who thereafter was looking for a buyer for the same property. And whilst he was doing so, he had allowed the defendant to move onto and stay on the suit property.

In my considered opinion, those actions were more consistent with the defendant's version of events. I

therefore find that the plaintiff needed to raise money with which to settle the decree against him. He therefore asked the defendant to let him see-off the Kapomboi farm.

The defendant willingly gave up the Kapomboi farm, for sale, as he and his family had experienced the trauma of land clashes, earlier. In exchange for the 5 acres at Kapomboi farm, the defendant accepted 3 acres of the suit property.

If the plaintiff had not intended to give to the defendant the 3 acres of the suit property, he would not have had reason to testify as follows: -

"***On 29th December 2001 I went to the Saboti Land Control Board and they asked for the agreement .Allowing the defendant to live on the Mt. Elgon Farm. As there was no such agreement, no consent was given."***

I find and hold that the plaintiff's conduct is reflective of his clear intention to transfer the suit property to the defendant. The said conduct is wholly inconsistent with the plaintiff's contention that the defendant was only supposed to stay on the suit property temporarily. Surely, the period between 1994, when the defendant moved onto the land, and 2001 when the plaintiff went to the Land Control Board, cannot be described as being temporary.

Following the exchange of the suit property with the Kapomboi Farm, the defendant paid for the survey of the 3 acres which the plaintiff had given to him. It is in those circumstances that the suit property, Plot No.838, was curved out of the plaintiff's Plot No.578.

DW2, Moses Mbuti, was the secretary to the Mt. Elgon Investment Farm since 1991 upto 2003. He confirmed to the court that the defendant became a member of the said farm, and that he paid the survey fees for the suit property.

According to DW2, the name of the defendant was entered into the list of members, and that he was then given the suit property.

However, the defendant's name was thereafter removed from the list, on the instructions of the District Commissioner, Trans-Nzoia District. The defendant's name was removed pending the determination of this suit.

By virtue of the provisions of Section 6 (1) (c) of the Land Control Act, the transaction between the plaintiff and the defendant was a controlled transaction. Therefore, unless the Land Control Board of the area where the suit property was located, gave consent to the transaction, it was void for all purposes.

In the case of ***HIRANI NGAITHE GITHIRE Vs WANJIKU MUNGE [1979] KLR 50***, at page 52, the Hon. Chesoni J. (as he then was) said;

"***The position is simple and clear. Section 6 of the Land Control Act is an express provision of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The courts cannot do that; for it is not for us to legislate but to interpret what parliament has legislated. So in this case, that agreement between the parties having been entered in June 1969became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it; and, since no consent had been obtained within that time, nothing can revise or resurrect such agreement. Failure to obtain the necessary land control board consent automatically vitiates an agreement to a controlled transaction."***

Having come to the conclusion that the transaction was void for all purposes, it follows that specific performance could not issue, to compel the plaintiff to transfer the title to the suit property, to the defendant.

Therefore, the next question that arises is whether or not the defendant should be evicted.

The plaintiff told the court that: -

"***Members of Mt. Elgon Farm have not issued with title deeds and that the Directors are the ones getting the Boards consents. The Head Titles for Mt. Elgon Farm have not been surrendered to the lands office."***

Later, during his re-examination, the plaintiff went further to say:-

"***Mt. Elgon Farm is agricultural land measuring about 2555 acres. It is owned by Mt. Elgon Investment Company Limited."***

In the light of the plaintiff's admission that the suit land belongs to Mt. Elgon Investment Company Limited, it begs the question as to the locus of the plaintiff in seeking the defendant's eviction.

The plaintiff did concede that it was not for him to obtain the consent from the land control board. That role was played by the directors of the company.

If the defendant, who is a member of the company, was to be evicted simply because the company had not obtained consent in relation to his particular transaction, that would imply that all the other members of the company would risk being evicted.

In the result I hold that the plaintiff is not entitled to an order for the eviction of the defendant from the suit property.

If the company, which the plaintiff concedes to be the owner of the suit property, is satisfied that the defendant is a member thereof, and is also satisfied that the defendant had fulfilled the terms set out for members, the company ought to give consideration to effecting transfer of the suit property, to the defendant. However, as the company is not a party to these proceedings, I cannot order or direct them to take specific actions, as they have not had the benefit of a hearing before this court.

The contract between the parties was in relation to Plot No.134, Kapomboi Settlement Scheme. The agreed purchase price was Kshs.80, 000/=. However, I have held that the only sum which the defendant has proved, as having been paid to the plaintiff, was KShs.68, 000/=.

Accordingly, in line with the Court of Appeal's decision in ***WAMBUGU Vs NJUGUNA [1983]*** KLR I72, the defendant would not have been entitled to an order for specific performance, as he would not have performed his part of the contract fully.

However, if the defendant cannot obtain the title to the suit property, due to the lack of consent from the Land Control Board, he would certainly be entitled to a refund of the money which he had paid to the plaintiff. As I have already held, that is the sum of Kshs.68, 000/=.

Provided that the defendant continues to remain in occupation of the suit property, and continues to derive benefit therefrom, he could not also be entitled to claim for a refund of the money which he had paid as consideration. It is only as and when the defendant is told that he has no enforceable claim for the title to the suit property, that he could then seek a refund of the money he had paid. Therefore, I hold that the defendant's alternative prayer (for a refund of the money he had paid as consideration for Plot No.134) is not barred by limitation.

In the result, the claim for specific performance is dismissed. And, as regards the refund of the purchase price, I hold that the plaintiff is not entitled to it, unless the registered owner of L.R NOS.3740 upto 4834 should decide to revoke his membership of the Mt. Elgon Investment Company limited.

In the event that such an eventuality should ensue, the plaintiff would be liable to pay to the defendant the sum of K.Shs.68,000/=, together with interest at court rates, from December 1990, until payment in full.

Although the defendant has not succeeded in his counter-claim for specific performance, he has substantially succeeded in defeating the plaintiff's claim against him. Accordingly, the plaintiff will pay to the defendant the costs of the suit.

Dated and Delivered at Kitale, this 29th day of October, 2007.

FRED A. OCHIENG

JUDGE