

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 504 of 2004

DR. PHILEMON P. A. KIWOOL PLAINTIFF

VERSUS

ANNAH NDUNGE MALAVU1ST DEFENDANT

JONATHAN MASAMBU KHATETE2ND DEFENDANT

JUDGEMENT

The Plaintiff's claim is that having bought two other pieces of land from the Defendant, the Defendant by an oral agreement, agreed that should the 1st Defendant wish to sell the remaining portion of 4 hectares of her land she would give the Plaintiff the first option to purchase the same.

That the Defendant in breach of the said agreement sold the said 4 hectares to the 2nd Defendant.

The Plaintiff seeks an order that the transfer of the 4 hectare to the 2nd Defendant is reversed and that the land be transferred to the Plaintiff.

The Defendant denied that she gave a first option to the Plaintiff and that she breached the alleged option and further that she had sold the 4 hectares to the 2nd Defendant who had bought the piece of land legally.

The point in issue is whether there was an option granted by the 1st Defendant to the Plaintiff and that the 1st Defendant breached the agreement and if so what are the Plaintiff's remedies if any.

Having heard the evidence, I find that although there might have been some talk between the Plaintiff and 1st Defendant about his buying the piece of land, namely four acres no binding agreement was reached. In any event even if such an agreement had been made there was no consideration for the same nor were the terms of it agreed. It was at most a pactum nudum.

The 2nd Defendant said he had no knowledge of the alleged option agreement and was a bona fide purchaser of the piece of land without notice. No claim can be sustained against him.

So far as the claim that the 1st Defendant transfer the land to the Plaintiff, no terms were agreed nor was there an act of part performance. The Plaintiff cannot succeed as he has not established any right to the land pursuant to the provisions of Section 3 of the Law of Contract Act prior to its amendment which therein stated:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it:

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

(i) has in part performance of the contract taken possession of the property or any part thereof; or

(ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.“

In the result the Plaintiff has failed to establish his claim against either Defendant which is dismissed with costs to the Defendants.

Dated and delivered at Nairobi this 25th day of May, 2006.

P. J. RANSLEY

JUDGE