



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 45 OF 2014

KADHENG KALAMA FONDO.....PLAINTIFF

VERSUS

SANGABA YUSUF ABDI.....DEFENDANT

JUDGMENT

BACKGROUND

1. By a Plaintiff dated and filed herein on 13th March 2014, Kadhengi Kalama Fondo (the Plaintiff) prays for Judgment against Sangaba Yusuf Abdi (the Defendant) for: -

1) A declaration rescinding or cancelling the agreement of sale dated 1.12.1999;

2) Costs of the suit;

3) Interest; and

4) Any other or further relief the Court may deem fit to offer.

2. The Prayers are borne of the Plaintiff's contention that on or about 1st December 1999, he entered into a sale agreement wherein he sold three acres out of his Plot No. 218 Mtondia Settlement Scheme to the Defendant at a price of Kshs 55,000/- per acre. To-date the Plaintiff has only received Kshs 50,000/- out of the total purchase price of Kshs 165,000/-. The Plaintiff asserts that the Defendant has since been asked to collect the deposit paid from the Plaintiff's Advocates office but she has declined to do so.

3. But in her Statement of Defence and Counterclaim dated and filed herein on 25th August 2016, the Defendant while admitting entering into the sale agreement avers that consent of the Land Control Board was obtained and that she has so far paid a total of Kshs 140,000/- in partial performance of the agreement and that it is the Plaintiff who refused to receive further payments and/or to obtain further consents from the Land Control Board.

4. By a way of her Counterclaim, the Defendant avers that without any just cause or excuse, the Plaintiff breached the Sale Agreement by refusing to obtain the consent to transfer and also refusing to accept the last instalment of the purchase price.

5. Accordingly, the Defendant urges the Court to dismiss the Plaintiff's suit and instead to enter Judgment for: -

i) An order compelling the Plaintiff to accept the said balance of Kshs 25,000/- of the purchase price;

ii) The Plaintiff be ordered to obtain the Land Control Board Consent to transfer;

iii) The transfer of the said parcel of land to be effected in favour of the Defendant herein; and

iv) The Deputy Registrar of this Court to execute the Transfer Form and any other relevant document for the registration (of) the three acres in favour of the Defendant herein.

The Plaintiff's Case

6. At the trial, the Plaintiff(PW1) testified as the sole witness in support of his case. He told the Court that he is a farmer residing in Plot No. 218 Mtondia which belongs to him.

7. The Plaintiff told the Court that on 1st December 1999, he entered into an agreement with the Defendant in which he sold to her three acres of his Plot No. 218 Mtondia for Kshs 165,000/-. The Plaintiff told the Court to-date, he had only been paid Kshs 123,000/- by the Defendant. He reported the Defendant to the Chief but did not get any help. His Advocates then wrote a letter to the Defendants asking them to go and take back their money but they have never complied. He further told the Court that since 2002, he has not received any money from the Defendant.

8. DW1 further told the Court that they were unable to complete the transfer at the Land Control Board as the Defendant had not completed payment. He told the Court he was no longer interested in the Defendant's money and that he was ready to refund the amount received.

9. On cross- examination, PW1 denied that he was seeking to rescind the Agreement because someone had offered him more money. He conceded that the Defendant brought him Kshs 42,000/- at the Chief's Office but he declined to take their money. He told the Court by the time the money was brought to him, he had already taken the case to the lawyers.

The Defence Case

10. On her part, the Defendant called two witnesses who testified in support of her case at the trial.

11. DW1- Mohamed Amin Ali Sheikh is a resident of Diani and a son to the Defendant. DW1 told the Court his mother was unwell and had given him a power of attorney to proceed with the case. DW1 told the Court his mother entered into the Sale Agreement on 1st December 1999 for the purchase of three acres to be excised from Plot No. 218 Mtondia Settlement Scheme. The purchase price was Kshs 55,000/- per acre.

12. DW1 testified that on the date of the sale, the Defendant paid Kshs 50,000/-. The balance was paid in various instalments as follows: -

- | | | |
|-------|---------------------------------|---------------|
| i) | 3 rd December 1999- | Kshs 49,000/- |
| ii) | 5 th October 2000- | Kshs 5,000/- |
| iii) | 7 th July 2000- | Kshs 5,000/- |
| iv) | 11 th August 2000- | Kshs 5,000/- |
| v) | 12 th January 2001- | Kshs 5,000/- |
| vi) | 7 th September 2001- | Kshs 5,000/- |
| vii) | 3 rd November 2001- | Kshs 5,000/- |
| viii) | 29 th November 2001- | Kshs 2,000/- |
| ix) | 5 th December 2001- | Kshs 5,000/- |
| x) | 6 th January 2002- | Kshs 4,000/- |

13. DW1 further told the Court that sometime in 2012 his mother gave his cousin Mohamed Adan Yusuf Kshs 42,000/- to take to the Plaintiff at the Chief's Office, Tezo. This sum comprised of Kshs 25,000/- as the last instalment and Kshs 17,000/- as a gratuitous payment to enable the Plaintiff to obtain consent to transfer the land. His cousin however returned the money stating that the Plaintiff and his wife could not agree on who was to receive the money.

14. DW1 further testified that his mother was always willing to conclude the transaction but the Plaintiff had refused to invite her to the Land Control Board for the requisite consent.

15. On cross-examination, DW1 conceded that the Agreement was executed in 1999 and that the last payment had been made in the year 2002. He further told the Court they were paying in small instalments as they did not have all the money at the time.

16. DW2- Mohamed Adan Yusuf is a resident of Diani and a Cousin of DW1. He told the Court he was the one who was sent to the Plaintiff with a balance of Kshs 42,000/-. At the Chief's Office where he went to pay, he met the Plaintiff's wife but the Plaintiff was not there. He further told the Court that the Plaintiff's wife refused to take the money stating that the Plaintiff had himself taken all the money previously paid.

17. On cross- examination, DW2 conceded that he did not know who took Kshs 4,000/- to the Plaintiff on 6th January 2002 as stated by DW1. The sum of Kshs 59,000/- was however paid by the Defendant in his presence.

Analysis and Determination

18. I have perused and considered the pleadings filed herein, the testimonies of the witnesses and the evidence adduced at the trial. I have similarly perused and considered the rival written submissions placed before me by the Learned Advocates for the parties.

19. The Plaintiff herein seeks a declaration rescinding or cancelling a sale agreement executed between himself and the Defendant herein dated 1st December 1999. The hand-written agreement executed at the Tezo Location Chief's Office reads in the relevant portion as follows:

“SALE AGREEMENT

MTONDIA SETTLEMENT PLOT NO. 218

I Kadhengi Kalama Fondo ID No...the Vendor of Plot No. 218 Mtondia Settlement enter into agreement with Mama Sangaba Yusuf Abdi ID No.....as the Purchaser to buy three acres on the said Plot at the rate of Kshs 55,000/- per acre in total of Kshs 165,000/-. Today the Vendor acknowledge receipt of Kshs 50,000/-. The other amount will be paid after the Land Control Board gives a consent. This agreement is made with the consent of all family members.”

20. In his Complaint filed herein on 14th March 2014, the Plaintiff accused the Defendant of failing to pay the balance of the purchase price being Kshs 115,000/- from the time the Agreement was entered into. At the trial herein however, the Plaintiff testified that he had been paid a total of Kshs 123,000/- thereby leaving a balance of Kshs 42,000/-.

21. The Defendant does not deny taking time to make the payments. It is her case however that she has since paid the Plaintiff a sum of Kshs 140,000/- leaving only a balance of Kshs 25,000/-. It is further her case that the Plaintiff is entirely to blame for the 13 years delay including the transaction as he failed to obtain the requisite consent from the Land Control Board.

22. From a perusal of the material placed before me, marked as Bundle A in the Defendant's List of Documents, I was only able to see evidence of payment purportedly made to the Plaintiff amounting to Kshs 128,000/- and not Kshs 140,000/- as indicated by the Defendant. While I was prepared to accept this amount as having been paid to the Plaintiff on the basis of the various hand written notes purported to have been signed by the Plaintiff, I found it curious that the Defendant would later on, on a date they say was in 2012 try to pay the sum of Kshs 42,000/- to the Plaintiff purporting the additional Kshs 17,000/- in excess of their own calculations as a gratuitous figure aimed at helping the Plaintiff to obtain consent. This to me reinforced the position held by the Plaintiff that he was still owed a sum of Kshs 42,000/-.

23. From the Defendant's own List of Documents filed herein on 25th August 2016 it was evident that following the execution of the Sale Agreement on 1st December 1999, the Plaintiff did on 30th December 1999 apply for the consent to sub-divide his then 12 acres parcel of land into two portions- one measuring 3.0 acres and the remainder comprising of 9.0 acres. The Board subsequently gave its consent to the transaction at its meeting held on 27th January 2000.

24. As was conceded by the Defendant, the last payment made in respect of the transaction was on 6th January 2002. Having waited in vain for the conclusion of the agreement for another ten years, the Plaintiff wrote to the Defendant on 1st October 2013 giving her 21 days within which to complete the sale otherwise the same would stand cancelled and the deposit paid refunded.

25. It is clear to me that the said notice was not complied with and that contrary to their claim that they tried to pay the balance of the purchase price in 2012, no such attempt was made until much later in 2017 when this matter was already in Court. A perusal of the Defendant's Supplementary List of Documents filed herein on 2nd October 2017 reveals a letter dated 12th July 2017 from the Chief Tezo in which he confirms that the balance of the purchase price had been brought to his office but the family of the Plaintiff refused to take the money and it was thus taken away by the Purchaser. While the Chief's letter does not outrightly state that the money was taken to his office on the said date, I was unable to see why the letter was being written in July 2017 when indeed the money had been taken to his office five years earlier.

26. As the Court of Appeal stated in *Njamunyu –vs- Nyaga (1983) KLR 282*, where completion has not taken place as intended by the parties, the issue between them is when thereafter. Before the agreement is rescinded the party in default should be notified of the default and given reasonable time within which to rectify.

27. Rescission as it were arises where one party to a contract is in default and the one who is not in default gives notice to the other party to perform the contract. Where the party so given notice fails to perform, the contract is rescinded. In the instant matter before me, it is evident that the Plaintiff sub-divided the three acres of land sold to the Defendant within two months of execution of the Agreement.

28. It is also evident that the Defendant last made an instalment payment of Kshs 4,000/- to the Plaintiff on 6th January 2002. For another ten years, nothing was done to conclude the contract. On 1st October 2013, the Plaintiff duly gave notice of 21 days to the Defendant to perform her part of the contract. She did not.

29. Arising from the foregoing, I am satisfied that the Plaintiff has made out a case for the rescission of the contract dated 1st December 1999. The same is hereby rescinded and the Plaintiff's suit is allowed as prayed with costs.

Dated, signed and delivered at Malindi this 29th day of January, 2021.

J.O. OLOLA

JUDGE