



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 3512 OF 1986

FRANCIS JOHN KIARIE KARUNGO PLAINTIFF

VERSUS

MORRISON WAWERUDEFENDANT

RULING

The proceedings in this case began by way of a plaint filed on 23rd September, 1986, by Francis John Kiarie Karungu.

He sued the defendant over an agreement of sale entered into with the defendant and claimed that pursuant to that agreement he paid Kshs.480,000/= which the defendant “accepted and converted to his own use”.

The plaintiff claimed that he has at all times been “ready able and willing to complete the sale”, but the defendant has refused. He claimed further that possession having been given to him by the defendant, he “expended considerable money, time and effort in developing the said land, harrowing the same and planting barley, pursuant to an agreement with Kenya Breweries to supply them with the same.

The plaintiff lamented further that completion was to be within 60 days after consent of the Land Board Control had been obtained, but the defendant did not get the deed plans out so they could not proceed to the Land Control Board for consent to subdivide the said land as the plaintiff was purchasing only 160 acres, not the whole land.

The plaintiff complained further that by 1966, the defendant wrote to say that he would now sell only 90 acres, but the plaintiff refused to accept this and filed this suit, praying for specific performance of the contract of sale of the 160 acres and further, that the defendant be ordered to execute a transfer in respect of the 160 acres and execute the necessary forms, to enable parties to obtain Land Control Board consent.

The plaintiff also prayed the court for an order to reasonably extend the time within which to obtain the Land Board consent and costs of the suit. In the court file are two applications filed by both parties. I decided to hear both at the same time.

The plaintiff’s application is dated 18th October, 1994, and is accompanied by his affidavit in support, thereof.

Paragraphs 7 and 8 of the affidavit state that the completion of the contract of sale was 60 days after the acquisition of the Land Control Board to transfer, and further that it was the duty of the defendant to

facilitate the acquisition of the surveyors deed plan to show the exact delimitations of the excisions.

Mr. Kamonde for the defendant filed the application dated 21st October, 1994 praying the court to strike out the plaint on the ground that

“it discloses no reasonable cause of action since the consent of the Land Control Board has never been obtained and the plaintiff’s prayer for specific performance are not sustainable”.

The application is made under Order VI Rule 13(1) of the Civil Procedure Rules.

Mr. Kamonde explained in court that the defendant’s application is not supported by affidavit as required by the law.

He urged the court to dismiss the plaintiff’s application seeking extension of time within which to obtain Land Control Board consent.

Mr. Thangei for the plaintiff submitted that the defendant’s application to strike out the plaint was brought in bad faith as the plaintiff’s application was already on record.

He submitted further that the failure to obtain consent of the Land Control Board in this case, was the defendant’s fault, as the affidavit of the plaintiff dated 18th October, 1994, shows.

In considering whether to extend time or not within which to obtain Land Control Board consent, I considered the averments in the affidavit of the plaintiff dated 18.10.94 and that of the defendant dated 23.2.95.

In paragraph 3 of the defendants affidavit, the defendant averred that the agreement ***“became void on or about 9 th and 10 th March, 1986 and the plaintiff did not apply for extension of time within which to obtain Land Control consent.....”***

Annexed to the plaintiff’s affidavit in support of the application of 18th October, 1994 were various documents, including the “agreement of sale” entered into by the plaintiff and the defendant. The agreement was made on 10th September, 1985. The property sold is described as, “160 acres to be excised from L.R No.8655/4 as delineated on the attached plan”.

The purchase price was given as “Kshs.1,600,000 of which the sum of Kshs.480,000/= has been paid to CRESSWELL, MANN & DOD, ADVOCATES”.

The contractual completion date was given as “60 days after the consent of the Land Control Board to the Transfer is obtained”.

There were special conditions agreed upon by the parties and attached to this sale transaction. They were 9. The first one reads, “

The purchaser hereby authorizes Messrs Cresswell, Mann & Dod Advocates to release to the vendor the said sum of Kshs.480,000/= on signing of the Agreement”.

Condition 3 reads,

“Possession shall be given to the purchaser after t he current crop has been harvested”

and condition 4 reads

“In the event of the sale not being completed the money paid to the vendor shall be refunded to the purchaser and the purchaser shall be entitled to use the land as long as the money is not refunded”.

Condition 7 reads,

“The vendor shall bear and pay all survey fee upto the production of the deed plan”.

And finally condition 8 reads,

“The vendor shall take immediate steps to apply for all necessary consent to the sub -division and sale to the purchaser ”.

With these conditions in the Agreement I am surprised to read the contents of para 3 of the defendant’s replying affidavit which claims that the plaintiff did not “meet the condition precedent” which was “obtaining the consent of the Land Control Board”.

The evidence on record shows that it was the vendor, in this case, the defendant who should have “taken steps to apply for all necessary consent to the subdivision and sale to the purchaser”.

The defendant seems to rely on the provisions of Section 8 of the Land Control Act, Chapter 302, Laws of Kenya.

Section 8(1) reads,

“An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land Control Board within 6 months of the making of the agreement for the controlled transaction by any party thereto.....:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend the period where it considers that there is sufficient reasons so to do, upon such conditions, if any, as it may think fit”. (the above underlining is mine).

The evidence I have gone through from the pleadings show that the plaintiff purchaser paid Kshs.480,000/= to the vendor (defendant) as per the agreement. Further evidence shows that the agreement had special conditions which the vendor would appear not to have complied with, especially the matter of obtaining Land Control Board consent.

The Agreement was signed on 10th September, 1985, and a sum of Kshs.480,000/= paid by the plaintiff purchaser, yet further evidence by way of a letter dated 22nd May, 1986 written by the defendant vendor show that he was breaching the terms of the Agreement whilst ignoring the special conditions referred to already.

From the evidence I have gone through I am satisfied that the failure to obtain the consent of Land Control Board is to be blame on the defendant vendor. It was his responsibility to obtain such consent, according to the Special Conditions in the Agreement. I am satisfied that the facts of this case which I have analysed in detail fall within the Proviso to Section 8(1) of Land Control Act. There are sufficient reasons to warrant me to exercise a discretion in favour of the plaintiff, and I hereby proceed to do so by extending the time within which the consent of the Land Control Board may be obtained in the transaction by a further period of six months from the date of this Ruling.

I find no merit in the defendant’s applications dated 21.10.94 seeking the dismissal of the plaint on

account of consent of Land Control Board not having been given. The facts I have gone through show that it was the defendant who should have taken steps to obtain such consent, but he failed to do so. His application is therefore dismissed with costs to the plaintiff.

It is the plaintiff's application dated 18th October, 1994 which I have granted and extended the period for obtaining consent of the Land Board by a further 6 months from today.

Dated at Nairobi this 7th day of March, 20002.

JOYCE ALUOCH

HIGH COURT JUDGE