



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC SUIT NO. 147 OF 2017

JOSEPH NZUVE MUSAU.....PLAINTIFF

-VERSUS-

MBUKI KIALA.....DEFENDANT

JUDGEMENT

1. The Plaintiff filed this suit on vide Complaint dated 30th November, 2016 and filed on 1st December, 2016. He prays for judgment against the Defendant for: -

- a) Refund of the sum of Kshs. 52,000/= together with interest thereon from the date of payment to date at current commercial rates.**
- b) A sum of Kshs. 411,980/= being the assessed value of the damaged crops.**
- c) Costs and interest.**
- d) Any other relief this Honourable Court may deem fit.**

2. The Defendant filed her Statement of Defence on 5th September, 2019 in which she prays that the suit herein be dismissed with costs.

3. Having certified the matter ready for trial, it was set down for hearing on 14th October, 2020. The Defendant was duly served with a hearing notice by the Plaintiff on 10th July, 2020 and a return of service filed on 14th October, 2020.

Nonetheless, the Defendant did not appear in court as scheduled and the matter was heard and closed in her absence.

4. In his sworn evidence, the Plaintiff averred that he entered into a sale agreement with the Defendant on 1st October, 2010 for the sale of one acre of land to be excised from all that land known as Plot No. 3199 situate at Mbukuni Village, Upete Adjudication Section – Mukaa Location (the suit property). The agreed purchase price was Kshs. 52,000/=. The Plaintiff stated that he paid a deposit of Kshs. 20,000/= at the execution of the agreement and the balance was paid in six instalments. The agreement was duly attested by Jacob Wambua, John Muteti Makumbi, Mwau Musau and the Area Assistant Chief, Alex Musau. The final instalment was paid on 6th February, 2011 in exchange of which the Defendant gave him vacant possession of the suit property.

5. The Plaintiff took possession immediately and demarcated the suit property with his beacons. He then embarked on developing the suit property and built terraces. He planted crops and fruit trees. Soon thereafter, in or about 2014 the Defendant illegally entered the suit property and removed the Plaintiff's beacons. She also illegally brought in her domestic animals to graze which caused extensive damage to the land, crops and trees that had been planted by the Plaintiff.

6. The Plaintiff then reported the incident to Kilome Police Station as well as the Area Chief but the Defendant has completely refused to cease the encroachment.

Additionally, the Defendant has failed to heed the advice of elders and local administration. She has also refused to refund the purchase price and to compensate the Plaintiff for crops damaged.

7. In support of his claim, the Plaintiff called one witness, David Mwau Musau (PW1), who corroborated the Plaintiff's evidence. He was

also a witness to the sale agreement. The Plaintiff produced the list of documents dated 7th October, 2019 as PEX Nos. 1 – 6 respectively to further propound his claim.

8. I have perused the evidence tendered by the Plaintiff and his submissions dated 17th November, 2020. I have seen the issues framed by the Plaintiff and I am of the view that two issues are for determination:

i) Whether the Plaintiff's claim for refund of the purchase price is tenable in law?

ii) Whether the Plaintiff's claim for loss suffered is tenable?

9. At the outset, I have perused the subject sale agreement and I am in no doubt that it satisfied the requirements of Section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya in that it was prepared in writing, signed by both parties herein and their signatures duly attested. Nevertheless, since the suit property is agricultural land, the consent of the Land Control Board needed to be obtained before the same could be disposed of. The transaction herein is therefore voided by virtue of Section 6(1) of the Land Control Act Cap 302 Laws of Kenya.

10. I am convinced from the weight of the evidence by the Plaintiff and the Defendant's admission in paragraph 4 of her Statement of Defence that the purchase price was fully paid. The Plaintiff can therefore find relief under Section 7 of the Land Control Act Cap 302 Laws of Kenya. The provision states as follows:

“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”

11. Secondly, the Plaintiff claims for special damages for the loss suffered in the sum of Kshs. 411,980/=. The claim has been pleaded under paragraph 7 of the Plaintiff. The Plaintiff also produced P. Exhibit No. 5 being the Landscape/Crop Evaluation Report that was prepared by Julius Muema Ngove, the Ward Agriculture Extension Officer – Mukaa/Kitaingo Ward. The report finds that the grand total for the loss and damages on the suit property as Kshs. 411,980/=. The same amount being uncontroverted is therefore tenable.

12. The Plaintiff relies on two authorities in support of his claim namely:-

i) Steadman -Vs- Steadman [1976] AC 536, 540 for the principle that a party will not be allowed to turn around and assert that an agreement is unenforceable if he lets another party incur expense or prejudice on the faith that the agreement is valid.

ii) Emily Chonge Wanyama -Vs- Patrick Mang'eni Yusto [2014] eKLR wherein A. Omollo J. found that the Plaintiff was entitled to a refund of not just the sum paid as consideration i.e. Kshs. 70,000/= but also the current value of the property plus the developments therein pleaded and proved.

13. I agree with the authorities relied on by the Plaintiff. I find that on a balance of probabilities that the Plaintiff has proved his claim against the Defendant. I hereby proceed to enter judgment in favour of the Plaintiff against the Defendant as follows;

a) Refund of the sum of Kshs. 52,000/= together with interest thereon from the date of payment to date at the current commercial rates.

b) A sum of Kshs. 411, 980/= being the assessed value of the damaged crops.

c) Costs and interest.

It is so ordered.

Signed, dated and delivered at Makueni via email this 9th day of February, 2021.

MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi