



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 1059 of 1995**

**BERNARD ALFRED WEKESA.....**  
**.....PLAINTIFF**

**-VERSUS-**

**JOHN MURIITHI KARIUKI & 2 OTHERS.....**  
**DEFENDANT**

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**JUDGEMENT**

**Background**

The plaintiff and the defendant entered into an agreement in which the plaintiff was to sell the plot LR No. 209/9684 in Nairobi at a price of Shs.200,000/- which the defendant paid. It was part of the agreement that the defendant was to obtain the necessary consents from the Commissioner of Lands for the purposes of effecting the transfer. The 1<sup>st</sup> defendant later (vendor) sold the plot to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant.

**Evidence**

In his evidence the plaintiff (purchaser) testified that:

- (1) He and the vendor entered into the agreement on 14.7.1983, the vendor in addition gave a power of Attorney to the Purchaser dated 28.2.1983.
- (2) He paid the purchase price at the time of signing the Agreement for Sale.
- (3) In order to comply with the conditions of grant he employed an architect to prepare the necessary plans, which were eventually approved by the City Council relevant authorities.

- (4) He paid the rates outstanding with the City Council and which were necessary for the transfer.
- (5) On checking with the Land office later he found that the purchaser had sold the plot to the defendants. He had difficulties tracing the file in Lands office between 1988 and 1995. He then filed this suit in which he is asking for orders:
  - (a) That the vendor be restrained from putting up any development in the plot.
  - (b) The Sale to the defendants is null and void.
  - (c) The registrar strikes out the registration of the defendant.

The vendor and the defendants in their defence gave evidence, which blames the plaintiff for the long delay since the agreement for sale was entered into. The vendor took the stand that there was an understanding between him and the purchaser to cancel the deal and to refund the money paid which was paid with an ex gratia amount. The action is time barred as the suit was filed 10 years from the time the parties entered into a sale agreement. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants stand is that they are innocent buyers without notice. They deny that there was any fraud or conspiracy as alleged by the plaintiff.

It is common ground that the sale was subject to the Law Society conditions of sale. It is not in dispute that the purchase price was Kshs.200,000/- which sum the purchaser paid to Messrs. Wambaa and Co. Advocates who appears to have acted for both parties in this transaction. Upon payment of this sum it was the understanding between the parties that the purchaser was to obtain the necessary consent from the Commissioner of Lands. For consent to be granted building plans had to be submitted to the Local Authority within six months. This in essence is the special condition No. 8 as contained in the original grant LR No. 3666. In order to make it possible for the purchaser to meet the conditions for obtaining this consent the vendor gave him an irrevocable power of Attorney. It is not disputed that the purchaser proceeded to employ the firms of Jan-Star Consultants a firm of architects who drew up building plans for submission to the City Council and to the Commissioner of Lands. From the purchasers evidence, it was the primary responsibility of the vendor to obtain the consent as per special condition C of the Sale Agreement and Conditions No. 16 (1) of the Law Society Conditions of Sale. The Power of Attorney was for authorizing the purchaser to act on behalf of the vendor in the application for consent. From this evidence I find that it was the intention of the parties that the purchaser in applying for the consent, was acting on behalf of the vendor whose responsibility it was to obtain the consent being the owner of the plot. There was no provision in the agreement providing for time limit within which the purchaser was to obtain the consent. For the vendor to act against this arrangement would amount to a breach of the contract. The vendor entered into another agreement for sale with the defendants on 24.8.1988. The vendor purportedly entered into this agreement without first serving the purchaser with a Completion Notice on the purchaser as required under the Sale Agreement. The completion notice is important in such a transaction as it puts the purchaser on guard as to the consequences of non-compliance of the notice and it also gives the vendor a right of action against the purchaser. In this case the vendor entered into this second agreement without informing the purchaser. The vendor was aware of the purchaser's rights in this property even though they were not registered. The two defendants who subsequently purportedly bought the property were also aware of these rights. Section 3 of the Registration of Titles Act (Chapter 281, Laws of Kenya) defines fraud as a proved knowledge of the existence of an unregistered interest which interest is knowingly and wrongfully defeated by the registration. The vendor and the plaintiff had knowledge of the purchaser's rights or so they were deemed to have the knowledge for they must have come across the plaintiffs application for approval of the plans when they applied for consent to transfer the plot from the vendor to the defendants. They proceeded to knowingly and wrongfully to defeat that unregistered interest by registration of the charge. In that case the registration can be set aside. See Jandu Vs. Kirpal where it was held that a registration may be set aside on the proved knowledge of the existence of unregistered interest and a defeat of that interest by registration.

Is the action time barred? The answer to this question will be in the negative. The purchaser came to know of the sale and transfer of the property in 1995 and that is when the cause of action arose.

On the whole I find that the Plaintiff, the purchaser has proved his case. There will be judgment for the Plaintiff in terms of prayers in the plaint. The Plaintiff shall have the costs of the suit.

Dated and Delivered on this 6<sup>th</sup> day of October, 2000.

**KASANGA MULWA**

**JUDGE**