



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 33 OF 2017**

**DENIS WALTER BALA.....PLAINTIFF**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The plaintiff in this suit appears to have hoped to strike it rich by buying a property in an affluent neighbourhood within Kitale Municipality for the development of residential dwellings but came to grief owing to the events that transpired thereafter.

2. The summary of the facts in this case is that one **Richard Kissa Matayo** approached the Agricultural Finance Corporation and successfully sought an agricultural development loan on the security of two parcels of land, one of which is referred to as **Kitale Municipality Block 11/65**. Richard defaulted on his contractual obligations to AFC and the latter tried to realize the security by advertising the land for sale. However, the loan was somehow repaid and the land was saved from auction after which Richard instructed AFC to release the certificate of title in respect of the suit land to the plaintiff herein which it did. The plaintiff, upon receiving the title document and discharge of charge commenced and completed construction of residential dwellings on the suit land. However, after completion of the project the plaintiff was sued by two persons in court in a separate suit, **Kitale Land Case No 18 of 2013**, in which he was alleged to have trespassed on their land (which turned out to be the suit land) and judgment was entered against him and the houses the plaintiff had erected on the land were totally demolished through implementation of the decree for removal of structures and eviction orders issued in that case. The plaintiff thereafter lodged this suit against the defendant and claimed damages for breach of contract, interest and costs.

**THE PLAINT**

3. The plaintiff filed a plaint dated **13/2/2017** on **24/2/2017**. Pursuant to leave of court granted on **15/10/2018** he later filed an amended plaint dated **25/10/2018** in which he seeks judgment against the defendants for:-

(a) **Damages for breach of contract in the sum of Kshs.248, 560,000/=**

(b) **Interest from the date of eviction and costs of the suit.**

(c) **Any other relief this court shall deems fit to grant.**

4. The plaintiff's case is that vide an agreement made on **5/11/2009** he purchased a parcel of land known as **Kitale Municipality Block 11/65** measuring **0.625 ha** from one **Richard Matayo** which sale the defendant, being the chargee holding the title to the suit land as security for a loan advanced to the seller, consented to. The defendant had advertised the suit land for sale by public auction through a firm of auctioneers to realize its security. In the sale, the plaintiff alleges that he made out a banker's cheque in favour of the defendant for the sum of **Kshs. 990,000/=** in full settlement of the loan facility and the defendant issued a discharge of charge which was released to the plaintiff through one Richard Kissa Matayo. Later on the defendant released the certificate of lease to the plaintiff and the plaintiff took possession of the suit property and commenced developments thereon. While the construction was at an advanced stage the plaintiff was sued by two persons who alleged trespass in **Kitale Land Case No 18 of 2013**. The plaintiff avers that the decision of the court in that case was that the title documents given to him were forged and the loan was faked and that the leasehold title belonged to one **David Kagoyo Bett**. Consequently the plaintiff states, his permanent residential structures on the land were demolished and he was exposed to mental and psychological stress and anguish and claims damages. The plaintiff avers that if there was any forgery it was on the part of the defendant. Particulars of fraud were pleaded in the plaint against the defendant. Particulars of loss amounting to **Kshs. 248,560,000/=** were also pleaded.

**The Defendant's Defence**

5. The defendant filed his defence on **20/3/2017** which remained unaltered after the amendment of the plaint. Its defence is that it did grant one Richard Matayo a **Kshs. 880,000/=** agricultural development loan on **27/3/2007**; that the suit land was offered as security by the loanee and a notification of charge was registered against the suit land and another parcel known as **Kitale Municipality Block 11/126** to secure the sum advanced; that the loan was repaid in full by the said loanee in **2009** and at the instructions of the loanee the title document and the discharge of charge in respect of **Kitale Municipality Block 11/65** were released to the plaintiff personally; the defendant therefore claims that there existed a valid loan agreement between it and Richard Matayo and the documents handed over to the plaintiff at Richard's instructions were the ones it had received as security after conducting due diligence. The defendant claims not to be aware of any developments on the suit land. The defendant denied the plaintiff's claims of forgery.

### **The Plaintiff's Evidence**

**6. PW1, Dennis Walter Bala**, the plaintiff, testified on **20/11/2019**. He relied on his statement on **24/2/2017** and further statement dated **31/10/2019** both filed in this matter. His evidence largely followed the matters stated in the plaint as outlined earlier in this judgment. He further testified that the person who demolished the structures on the suit land had carried away the building materials. He produced a number of documents including receipts and agreements to support his expenditure on the suit land. The cheque he used to defray the loan owed by the seller to AFC was produced as PExh 7. He stated that he had engaged the services of a contractor at a cost of **Kshs. 15,000,000/=** who had erected two housing units on the suit land one which was rented out at **Kshs. 30,000/-** and one which his son lived in. He stated that the land was about **2.5 acres** and its current value is **Kshs. 230,000,000/=**.

**7. PW2, John Apondi**, testified on **15/11/2019**. He adopted his statement dated **31/10/2019** as his evidence-in-chief in this case. His evidence is that he constructed the houses on the suit land on behalf of the plaintiff for the consideration of **Kshs. 15,500,000/=**. According to him, he visited the Lands office and the County Government office and verified that the land belonged to the plaintiff. He then obtained a building plan for the houses (**P. Exh 13**) and a building plan for the septic tank (**PExh 14.**) He later went to the site and found that the houses that he had constructed had been demolished.

**8. PW3, Stephen Bala**, testified on **10/12/2020**. He adopted his statement dated **4/11/2019**. His evidence is that the plaintiff is his father; that he was the manager in charge of the construction on the suit land; that he was in charge of buying materials and taking them to the suit land and generally supervising the works. He produced various receipts and photographs as evidence of expenditure on the construction site.

9. At that point the Plaintiff's case was marked as closed.

### **The Defendant's Evidence**

**10. DW1, Ann Kahambi Kimadoso**, the Branch Manager at Defendant Corporation, testified on **10/12/2020**. She adopted her written statement dated **29/10/2019** filed in court on **30/10/2019** as her evidence-in-chief. Her evidence closely followed the statements made in the defendant's defence. She also produced documents in support of the defendant's defence including a certificate of official search dated **2/4/2007** showing that **Kitale Municipality Block 11/126** was registered in the name of Richard Kissa Matayo on **10/1/2007** and that a notification of charge in the defendant's favour had been registered on **2/4/2007**. She stated that the defendant had carried out an official search at the Kitale Lands Registry and ascertained that Richard owned the suit land, having been registered as proprietor on **10/1/2007**. Subsequent to the charging of the land in favour of the defendant Richard defaulted on his contractual obligations and the defendant issues a notice recalling the loan together with interest on **23/12/2008** to which the chargor never responded prompting the chargee to instruct Nyaluoyo Auctioneers to issue a redemption and a notification of sale with a view to realizing the security. However before any auction could take place the chargee repaid the entire outstanding loan in **2010** and subsequently wrote a letter dated **15<sup>th</sup> November 2010** instructing the defendant to remit the certificate of lease to the suit parcel of land to the plaintiff herein which was done and receipt acknowledged by the plaintiff and the defendant's interests in the suit land were discharged.

11. The defendant then closed its case.

### **SUBMISSIONS**

12. Submissions were filed on behalf of the plaintiff on **18/1/2021**. The defendant's submissions was filed on **22/1/2021**. I have considered the pleadings, the evidence and the filed submissions.

### **DETERMINATION**

#### **Issues for determination**

13. The main issues for determination in this matter are:

- (a) Is the defendant liable for damages to the plaintiff for breach of contract?*
- (b) Does the plaintiff deserve compensation by damages from the defendant*
- (c) What Orders should issue?*

14. The issues are addressed as hereunder:-

- (a) Is the defendant liable for damages to the plaintiff for breach of contract?*

15. For damages to be awarded for a breach of contract there has to be a valid and enforceable contract between two contracting parties. Were there any contractual relations between the plaintiff and the defendant in the instant suit? In the plaintiff's counsel's submission, there were.

16. The plaintiff's counsel filed very detailed submissions. While relying on **Stephen Kibowen Vs Agricultural Finance Corporation 2015 eKLR** and **Joyce Wairimu Karanja Vs James Mburu Nguire & 3 Others 2018 eKLR** and Section 99 of the **Land Act** he stated that that section protects the purchaser from "*unjust and inequitable loss*" resulting from an irregular sale that causes him loss, and that **Section 99(4)** provides the plaintiff damages as a remedy therefor. Citing **David Karanja Kamau Vs Harrison Wambugu Gaita & Another 2020 eKLR**, counsel for the plaintiff urged that the plaintiff's interest be protected by this court under **Section 99** of the **Land Act**.

17. The plaintiff's counsel further relied on **City Finance Bank Ltd vs Cedar Bank Enterprises Ltd & another 2015 eKLR** and **Moses Lutomia Washiali Vs Zephaniah Ngaira Angweye & Another 2018 eKLR**. He urged that the plaintiff has demonstrated to the court that he purchased the suit land *under the chargee's exercise of statutory power of sale* and was not aware of impropriety or irregularity in the said sale and was not motivated by fraud and he should therefore be shielded by this court from walking away with empty hands.

18. On the other hand the defendant's counsel, citing **RTS Flexible Systems Ltd Vs Molkerei Alois Muller GbmH & Co KG (UK production) 2010 UKSC14 [45]** urged that there were no contractual obligations between the plaintiff and the defendant, terming it an undisputed issue. He urged that the documents produced by both parties showed that there was no agreement between them, and hence no intention to create a legal relationship. According to the defendant's counsel the issue of breach of contract does not therefore arise. Citing the decision in **Joseph Kangethe Irungu Vs Peter Nganga Muchoki 2018 eKLR** he submitted that there is no express or implied terms of agreement that the court may rely on and that the plaintiff is therefore not entitled to the damages that he seeks.

19. While distinguishing the plaintiff's authorities the defendant's counsel submitted that all those decisions related to public auctions that were under challenge. He urged that protection is afforded by **Section 99** of the **Land Act** to persons purchasing securities from an auction conducted in the exercise of the chargee's statutory power of sale. According to his argument, the plaintiff entered into a private treaty with the borrower and the suit property was therefore not auctioned by or on behalf of the defendant and the plaintiff can not claim to be a purchaser for value without notice.

20. In seeking to establish if there were there any contractual relations between the plaintiff and the defendant, this court has perused the record of evidence of the parties. Evidence from both the plaintiff and the defendant does not demonstrate that there was any express or implied agreement between the plaintiff and the defendant.

21. The plaintiff's evidence is that the land was advertised by Nyaluoyo Auctioneers on **24/10/2009**. The substantive sale agreement that the plaintiff relies on is dated **5/11/2009**. In that agreement the reference to the defendant herein is no more than a footnote. It does not refer to the defendant as a party. Under the terms of the agreement no part of the consideration was expressed to be intended to be paid directly by the purchaser to the defendant. The defendant never executed that agreement. There is no statement to show that the defendant issued its consent to the sale of the suit land to the plaintiff herein. The only part of the agreement that refers to the defendant states as follows in part:

**"The vendor shall sell and the purchaser shall buy the said land which is subject to disclosed charge to AFC, rates and rents."**

22. I also find no reference to the defendant in **PEXh 5** which is an acknowledgment of receipt of part of the consideration by the seller. In the letter (**PEXh 6**) from the seller to the defendant's manager Kitale office dated **15/11/2010**, it is clear that the seller created the impression in the eyes of the defendant that he is the person who had cleared the loan. He wrote thus:

**"After clearing your loan, I visited your office with Mr. Dennis Bala with a request that the above referred title (Kitale Municipality Block 11/65) be surrendered by you to Mr Dennis Bala..."**

23. There was no mention that the plaintiff herein had paid the loan on behalf of the seller. The copy of banker's cheque (**PEXh 7**) of the sum of **Ksh 990,000/=** payable to the defendant does not show who caused it to be issued and this court can not assume that the plaintiff did so.

24. It would appear that both the plaintiff and the seller are not strangers to litigation, with Richard Kissa Matayo's name being more acquainted with criminal cases than civil cases in relation to the transaction herein. This court takes judicial notice of **Richard Kissa Matayo v Republic 2012 eKLR**, a Criminal Revision in respect of a matter in which the seller named in the instant dispute appeared before the **Senior Principal Magistrate Nairobi** on **25/6/2007** charged with 2 counts, that is making a false document contrary to section **347 (a)** of the **Penal Code** and obtaining registration by false pretence contrary to **Section 310** of the **Penal Code**.

25. This court has also noted that among the plaintiff's documents filed in this court a copy of a judgment in **Kitale Land Case No 18 of 2013- Joyce Chemaiyo Bett & John Kitilit Bett v Dennis Walter Bala & 2 others [2015] eKLR**. A perusal of the judgment in that case reveals the deceit the plaintiff has been engaged in in the filing of this suit against the defendant. For the reason that the contents thereof are very relevant to the instant issue under discussion, this court will take the trouble to replicate here under a great part of the judgment which had determined most of the issues between the plaintiff and the defendant and which reads as follows:

**"11. It is clear from the documents produced by the first defendant [Richard Walter Bala] that he was conned by Matayo. Matayo had told the first defendant that the original certificate of lease was with the AFC. He showed him a purported official search that Elgon Housing Services had charged the title to AFC to secure a loan of Kshs.880,000/=. If there was any such loan and charge, the same would have been reflected on the encumbrances section on the register. The first defendant produced a letter which Matayo wrote to the manager of AFC authorizing the first defendant to collect title. This letter is dated 15/11/2010 and was produced as Defence Exhibit 10. What is interesting is that this letter is different from the one**

which the defendant filed in his list of documents in court. In the letter produced as exhibit, there are hand written notes by Matayo confirming that he had received a notification of discharge in respect of the suit land. This was on 15/11/2010 the same date he wrote the letter to AFC. There are also hand written notes by the first defendant acknowledging that he had collected certificate of lease title deed. This was on 7/12/2010. These endorsements were inserted later because already the first defendant had filed the same letter in court without those handwritten endorsements. There is no way a certificate of lease would have been collected from AFC and yet there was no charge over the same. The truth of the matter is that it had dawned on the first defendant that he had been conned and he was now looking for ways to show that he was an innocent purchaser for value without notice. Matayo is said to have died on 13/9/2013 see certificate of death (Defence Exhibit 9). The first defendant filed his list of documents on 9/10/2013. It is therefore clear that the handwritten notes on the letter of 15/11/2010 purporting to have been written by Matayo were actually not written by him. They were written after Matayo's death purposely for this case. The first defendant was part of this scheme because he also endorsed that letter to indicate that he collected a certificate of title from AFC. The first defendant is the one who produced the letter as his exhibit and he was taken to task about the differences in the document he produced and the one he filed in court and the one he gave to the plaintiff's lawyer.

12. The documents given to the first defendant by Matayo were forgeries. The loan to the AFC was faked. The official search purporting to confirm the loan was also fake. The advertisement in the East African Standard about an alleged sale of the suit land was also fake as there was no charge over the suit property which would have called for the sale of the property. It is therefore clear that Matayo had no interest to pass to the first defendant. The first defendant cannot claim to be an innocent purchaser for value. Mr. Onyancha for the defendants submitted the first defendant was an innocent purchaser for value without notice. Mr. Onyancha referred to Section 39 of the Registered Land Act Cap 300 (Now repealed). Section 39 (1) states as follows:-

39 (1) “ No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned -

(a) to inquire or ascertain the circumstances in or the consideration for which a proprietor or any previous proprietor was registered”

The marginal notes under this Section are clear that the Section protects persons dealing in registered land. In the instant case it is clear that Matayo was not registered as proprietor of the suit land. The first defendant cannot therefore seek to come under the protection of this Section and argue that he was an innocent purchaser for value without notice. A reading of Section 39(1) (a) connotes that a purchaser is only required to deal with a registered proprietor. What he is not supposed to inquire into is how the person obtained registration. A person cannot purchase a property based on forged papers which have not been registered and then later claim that he was an innocent purchaser for value without notice. If this were to be the case, then land fraudsters would get a field day at the expense of genuine owners of land. Some basic diligence is required. The basics include an official search which the first defendant seems not to have done. He only depended on documents provided by Matayo.

13. I have demonstrated how the first defendant went on to manufacture evidence in support of his case. The first defendant went to the County Government and obtained demand for land rent which he paid. This was in 2014. This is long after the plaintiffs had obtained certificate of lease in 2012. Elgon Housing Services is not the owner of the property and the first defendant could not continue paying rent more particularly when it became clear to him that the property which he had bought did not belong to Elgon Housing Services owned by Matayo. The defendants tried to argue in their submissions that the plaintiffs did not include the suit land in the list of properties of the deceased. A look at the Certificate of Confirmation shows that they indicated that the deceased had a property in Kitale town. The evidence of the first plaintiff was that the deceased had one property in Kitale town. There is therefore no basis for the defendants submissions that the plaintiffs did not include the suit land in the list of the deceased's properties.”

26. The two records of cases both criminal and civil involving Richard and the plaintiff herein are sufficient to considerably tar the otherwise impeccable saintly image of both men projected by the plaintiff in the instant litigation.

27. It may be true that even the defendant acknowledged at one time that the title documents given to it (and later on passed on to the plaintiff) were forged and that the loan was not therefore obtained in the basis of sound security, and that the leasehold title belonged to one David Kagoyo Bett rather than Richard Matayo; however, if, as the defendant stated, it conducted due diligence and found that the suit land appeared to be registered, then it is not for it, but for the government of Kenya, to guarantee the validity of that title; in the case of **Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR** the court stated as follows concerning the Torrens Registration system:-

“If a certificate of lease duly issued by the Registrar is prima facie evidence of ownership and if the owner is proved to have exercised due diligence at the point of acquisition, on what basis could the appellants’ petition for protection under Article 40 be defeated?

It has long been accepted beyond debate that the land registration process in Kenya is a product of the Torrens system. This was acknowledged in, among a long line of decided cases, this Court’s judgments in *Dr. Joseph Arap Ngok V. Justice Moiwo ole Keiwua & 5 others*, Civil Appeal No. Nai. 60 of 1997 and *Charles Karathe Kiarie & 2 Others V Administrators of Estate of John Wallance Muthare (deceased) & 5 others*, Civil Appeal 225 of 2006.

Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests

shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. Finally, the statutory presumption of indefeasibility and conclusiveness of title based on the register can be rebutted only by proof of fraud or misrepresentation which the buyer is himself shown to have been involved.” (Emphasis mine)

28. The court further stated as follows later the **Elizabeth Wambui Githinji**(supra) case :

“The object of the Torrens system was, in very compelling language, explained in the decision of the Privy Council in **Gibbs V. Messer [1891] AC 247 P.C.** at page 254 as follows:-

“The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author’s title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author’s title.”. (Emphasis supplied).

In order to discharge the burden on them and for them to secure their titles, it was enough for the appellants to show that they acquired interests to their properties from the vendors who were registered owners; that they did so in good faith, without notice and did not participate in any fraud. This burden was discharged. It was not their duty to ensure the accuracy of the information contained in the register. They fully relied on the information contained in the register before committing themselves as they did beyond recall. Though not a consideration, the appellants took possession of the suit properties and have invested millions of shillings to put up palatial upmarket properties without knowing the existence of any other interest, through no fault of their own. It must have taken the appellants’ considerable period of time, in view of the massive nature of those developments, to complete the construction. All through the Government and its agencies cheered them on. They were granted all the requisite permits and licenses prior to commencing the construction. There is no proof that the respondents raised any objection to their activities.”(emphasis mine)

29. The plaintiff was unable to establish in this case that he acquired interests in their properties from a vendor who was a registered owner and that he did so in good faith, without notice of and did not participate in any fraud. The implication of the foregoing is that the plaintiff should have directed his claim if any against the seller and the government but he carefully avoided enjoining either of them. That omission is not surprising given that a judgment holding the instant plaintiff liable for complicity in forgery exists in **Kitale Land Case No 18 of 2013**.

30. Now that the documents presented to the defendant were forged, the defendant was only lucky to narrowly escape loss. Through what appeared to be an act of God, the plaintiff acted as its saviour when he purported to “purchase” the suit land, not through the defendant’s exercise of the chargee’s statutory power of sale, but directly from the purported owner. The defendant can not be blamed simply because it never suffered loss yet its successor in the subsequent transactions involving the suit land, in which it was not party, alleges he has sustained loss. There is simply no nexus as the defendant never sold the land to the plaintiff in any manner.

31. In the final analysis I find that there were no contractual obligations between the plaintiff and the defendant. There was also no approval issued to the sale by Richard to the plaintiff, either express or tacit, in respect of their sale transaction. The plaintiff’s claim against the latter for breach of contract can not therefore stand. This court finds no ground upon which to condemn the defendant for the plaintiff’s alleged misfortunes.

***(b) Does the plaintiff deserve compensation by damages from the defendant***

32. From the conclusion this court has arrived at in dealing with the preceding issue for determination, the plaintiff does not legally merit any compensation from the defendant.

***(c) What Orders should issue?***

33. The plaintiff was aware of the decision in **Kitale Land Case No 18 of 2013** and he never appealed it; it is this court’s conclusion that he was also aware of criminal charges filed in the magistrate’s court against Richard Kissa Matayo the seller. In the light of the foregoing, the plaintiff’s decision to file this case against the defendant is an abuse of the court process, an inexplicable show of bravado or a selfish act in furtherance of the same unpraiseworthy conduct for which he received a surfeit of blame in the judgment in **Kitale Land Case No 18 of 2013**.

34. Consequently, the plaintiff has failed to establish his claim against the defendant on a balance of probabilities as required by law. The only appropriate orders to issue in a case of this kind is an order of dismissal. I hereby dismiss this suit with costs to the defendant.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 15<sup>th</sup> day of April, 2021.**

**MWANGI NJOROGI**

**JUDGE, ELC, KITALE.**