



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 207 OF 2015

RAMBART MIHESO IFEDHA.....PLAINTIFF

VERSUS

ROSEMARY BRENDA MUTENDE

MAHIVIR TRANSPORTERS & CONST. LTD

THE REGISTRAR OF LANDS, KAKAMEGA.....DEFENDANTS

JUDGEMENT

The plaintiff avers that by a sale agreement dated 7th day of September 2002 the plaintiff and the 1st defendant entered into a contract whereby the plaintiff purchased the suit land Block IV/9 Kakamega Municipality from the 1st defendant for kshs. 450,000/=. The plaintiff avers that he paid the full purchase price and took possession in 2002. In 2015 he discovered that the 1st defendant had sold the suit parcel of land to the 2nd defendant and has transferred the title to them and a certificate of title was issued on the 20th May 2015. The 1st and 2nd defendants have tried to forcefully evict the plaintiff from the suit land. The plaintiff prays for judgement against the defendants for, a revocation of the purported transfer of lease to the 2nd defendant of the leasehold interest in all that property known as Block IV/9 Kakamega Municipality, an order of specific performance and a permanent injunction to restrain the defendants. In the alternative a refund of the purchase price at the current market rates. And further in the alternative a declaration that the title to the suit property has devolved to the plaintiff by operation of the doctrine of adverse possession.

The 1st defendant in her defence stated that they received kshs 250,000/= from the plaintiff and he never paid the balance of kshs. 200,000/= which was to be paid as school fees for her daughter in the USA. The 2nd defendant denies that by a sale agreement dated 7th day of September, 2002, the plaintiff and the 1st defendant entered into a contract whereby the 1st defendant agreed to sell to the plaintiff and the plaintiff agreed to purchase from the defendant all that parcel of land known as Bloc IV/9 Kakamega Municipality hereinafter the suit property for the sum of Ksh. 450,000/= (Four hundred and fifty thousand). The 2nd defendant denies forcibly attempting to evict the plaintiff from the suit property with the help of the 1st defendant. The 2nd defendant denies the transfer of the interest in the property by the 1st defendant to the 2nd defendant being unlawful, null and void ab initio in so far as the 1st defendant had previously sold the same parcel of land to the plaintiff.

PW1 testified that by a sale agreement dated 7th day of September, 2002, the plaintiff and the 1st defendant entered into a contract whereby the 1st defendant agreed to sell to the plaintiff and the plaintiff agreed to purchase from the defendant all that parcel of land known as Bloc IV/9 Kakamega Municipality hereinafter the suit property for the sum of Ksh. 450,000/= (Four hundred and fifty thousand) PEx1. His representative signed on his behalf. The 1st defendant's husband acknowledge payment of the full purchase price by a letter produced as PEx2. The plaintiff testified that he connected water and fenced the plot but never got the title. His care taker was threatened with eviction in 2015 and he obtained an injunction. The plaintiff produced an allotment letter confirming that the plot belonged to the 1st defendant (PEx9) and has since been transferred to the 2nd Defendant (PEx10). PW2 Paul Ligonon a preacher confirmed that he introduced the plaintiff to the 1st defendant after she said they were looking for a buyer for their plot. The plaintiff was then in the USA and he negotiated on the plaintiff's behalf. The 1st defendant and her husband were his close friends and he was present during the payment of the first installment of kshs. 250,000/= on 29th July 2002. The balance was not to be paid as school fees in the USA.

DW1 the first defendant testified that her husband entered into the sale agreement with the plaintiff and the plaintiff never paid the balance of kshs. 200,000/=. Her husband then got a second buyer the 2nd defendant and she signed all the documents of transfer. Her husband wanted to refund the plaintiff's money but the latter refused. She does not know if the plaintiff used the land. Her husband died thereafter. In cross examination she states that the plaintiff did not take possession and nothing happened for 10 years. She now understands that the plaintiff is on the property. They wanted to refund the plaintiff kshs. 1.5 million but he refused.

DW2 Godfrey Otieno Oyier testified that he was the 2nd defendant's Safety and Human Resource Officer. He testified that they bought the

suit land from the 1st defendant for kshs. 6 million (DEx1) and are innocent purchasers for value.

This court has considered the evidence and the submissions therein. It is a finding of fact that by a sale agreement dated 7th day of September 2002 the plaintiff and the 1st defendant entered into a contract whereby the plaintiff purchased the suit land Block IV/9 Kakamega Municipality from the 1st defendant for kshs. 450,000/=. The 1st defendant was all along aware of the agreement signed by her husband. The issue for determination is whether or not the plaintiff was in breach of contract as per the 1st defendant's claim. The 1st defendant claims that the plaintiff failed to pay the full purchase price. **To determine whether or not there was breach of the contract, this Court must first determine whether there was a valid contract in place. The Plaintiff avers that he entered into a sale agreement with the 1st Defendant for the sale of the suit property as per PEx1. That the same was reduced into writing and signed by the parties. Section 3 (3) of the Contract Act provides that;**

“3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

The Court has carefully perused the sale agreement produced as Exhibit 1 by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of **Section 3(3) of the Contract Act**. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. I find that the sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. In the case of **Nelson Kivuvani Vs Yuda Komora & Another, Nairobi HCCC No.956 of 1991**, the Court held that:-

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

On whether or not the plaintiff breached the agreement for sale, Black's Law Dictionary, 9th Edition, Page 213, defines a breach of Contract as;

“a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”

In the case of **Shah -vs- Guilders International Bank Ltd (2003)KLR** the Court in considering the terms of the parties contract stated-

“The parties executed the same willingly and they are therefore bound by it.”

And in the case of **National Bank of Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503**, where the Court held that:-

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.

In the instant case, the sale agreement is clear that the purchase price was Ksh. 450,000/=. The agreement dated 7th September 2002 further stated that the defendant was paid in full by the date of the signing of the agreement. I am satisfied that the 1st defendant did sign the agreement and did receive the full purchase price and she failed to transfer the same to the plaintiff hence she is in breach of the sale agreement. The 1st defendant admits to receiving Kshs. 250,000/= and testified that she was willing to refund the same. PEx2 is clear that her husband now deceased acknowledged receipt of the full purchase price of kshs. 450,000/=. If this was untrue, why was she ready to refund kshs. 1.5 million if the plaintiff had only paid kshs. 250,000/=. There is no evidence that the balance if at all was to be paid as school fees for her daughter in USA. It has come out in evidence that the 1st defendant went ahead in 2015 sold the same land to the 2nd defendant for kshs. 6 million. I find this was fraudulent on her part after knowing very well that the plaintiff had taken possession way back in 2002 and there is evidence he had even connected water. I find that the 1st defendant was being greedy and dishonest by selling the said suit plot to a second buyer the 2nd defendant at a higher price in 2015 and attempting at one point to refund the plaintiff some money. I find that by the time the 2nd defendant was buying the suit plot the same was not available for sale as it had already been sold to the plaintiff way back in 2002 and he had taken possession. I find that the payment of the purchase price was completed way back in 2002 by the plaintiff as specified in the sale agreement and he took possession of the same. I find that the plaintiff has proved his case on a balance of probabilities and I grant the

following orders;

1. A revocation of the purported transfer of the lease to the 2nd defendant of the leasehold interest in all the property known as Block IV/9 Kakamega Municipality within the next 90 (ninety) days from today.
2. Thereafter, an order compelling the 1st defendant to complete the contract she has with the plaintiff for the sale of the leasehold interest in the property known as Block IV/9 Kakamega Municipality and execute all the transfer documents and in default the Deputy Registrar of the Court to do so.
3. A permanent injunction to restrain the defendants jointly or severally by themselves, their servants or agents from selling, disposing off, transferring, charging, pledging, leasing, wasting, attempting to take possession of, threatening and or/harassing and/or in any manner interfering with the plaintiff's possession of and quiet enjoyment of the property known as Block IV/9 Kakamega Municipality or in any dealing with the said property.
4. Costs of the suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 6TH DAY OF MAY 2020.

N.A. MATHEKA

JUDGE