



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 151 OF 2016

MOSES SHIVANDA AMUHAYA.....PLAINTIFF

VERSUS

TOROKASI KAVERE KADANYE.....DEFENDANT

JUDGEMENT

By an amended plaint the plaintiff claims that in the year 2005, he purchased part of land parcel No. S. Kabras/Chesero/1200 measuring 5.5. acres from the defendant's husband one, Lukas Kadanya Lumadede. The plaintiff avers that he took possession of the 5.5. acres upon payment of the purchase price and boundaries were mutually agreed by the late Lukas Kadanya Lumadede. That upon the demise of the said Lukas Kadanya Lumadede, the plaintiff entered into an agreement between the defendant and her sons whereby the sale done between the plaintiff and the late Lumadede was confirmed. This was on 3rd of April, 2010. The plaintiff avers that the defendant initiated succession case number 490 of 2009 at Kakamega High Court which cause included him as a beneficiary to the estate of the late Lumadede. The plaintiff further avers that the defendant applied for confirmation in succession cause number 490 of 2009 and a confirmed grant was issued on 1st November, 2010 which confirmed grant, confirmed the plaintiff's interest in the estate. The plaintiff avers that the defendant duly applied for consent, to transfer the land to the beneficiaries and the same was granted by Land Control Board. The plaintiff avers that the defendant changed her mind later and fraudulently had to seek and obtain another certificate of confirmation in succession case number 490 of 2009, which deleted the name of the plaintiff hence causing the plaintiff loss and damages. The plaintiff avers that he has occupied 5.5. acres of land parcel number S. Kabras/Chesero/1200 till to date, a period of 11 years and that the defendant is aware of the plaintiff's interest. The plaintiff prays that the defendant be ordered to transfer 5.5. acres of land parcel number S. Kabras/Chesero/1200 to the plaintiff. The plaintiff avers that he paid total of Kenya Shillings Seven Hundred and Eighty Thousand (780,000/=) being purchase price to the defendant, her husband and family members. The plaintiff claims, in the alternative Ksh. 780,000/= from the defendant with interest from the time of filing the suit till full payment is done. The plaintiff prays for the following orders:-

1. That the defendant be ordered to transfer 5.5. acres of land parcel number S. Kabras/Chesero/1200 to the plaintiff.
2. In the alternative, a refund of Ksh. 780,000/= plus interest from the date of filing this suit.
3. Any other order deemed suitable by the court.

In her defence, the defendant avers that if there was any confirmation of any sale of land agreement done between the plaintiff and herself together with her son, which is expressly denied, the same was illegal, and she nor her sons had no capacity to enter into such arrangement involving capital assets of a deceased person and this would amount to intermeddling with the estate of a deceased person. That the defendant filed Kakamega High Court Succession Cause No. 490/2009 and put the plaintiff's name as a dependent of the deceased's estate but avers that the plaintiff's name was put there by mistake which mistake was eventually corrected in the succession file. That she did not apply for consent to transfer the land to the beneficiaries and avers that it is the plaintiff who fraudulently and/or illegally applied to the Land Control Board for its consent to transfer 5.5. acres to himself. The defendant avers that the plaintiff's actions in respect to L.R. No. S. Kabras/Chesero/1200 which is in the name of a deceased person amounted to intermeddling with an estate of a deceased person.

This court has carefully considered the evidence and the submissions herein. Judge Maraga as he then was, in the case of Reliable Electrical Engineers Ltd & Another v Kenya Petroleum Refinery Ltd (HCC 190 of 2005), held that :

“the jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source.”

The Land Control Act (CAP 302), Section 6, 7 and 8 provide as follows;

6. (1) Each of the following transactions -

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

7. 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.

It is the plaintiff's evidence that he entered into an agreement on 10th August 2005 and the Late Lukas Lumadede the defendant's husband agreed to sell and the plaintiff agreed to buy 5.5 acre portion of the piece of land known as South Kabras/Chesero/1200 at the purchase price of Kenya Shillings Seven Hundred and Eighty Thousand (Ksh. 780,000/=). At the signing of the said agreement the plaintiff paid a sum of Ksh. 390,000/= part payment of the purchase price and completed paying the sale purchase price on 30th October 2005. He entered into another agreement with the defendant and her son on 3rd March, 2010 which confirmed that the entire purchase price had been paid. He produced the said agreements as PEx1 and 4. However, the land was never transferred to him as it was fraudulently resold to a third party DW2.

In the case of Fiat Kenya Ltd vs Ali Jama Roble (1973) EA 11 the Court held that;

"The Court never award specific performance when it is incapable of enforcing the order. By part of reasoning I do not think it should ever award specific performance if it entertains any serious doubt that the contract is capable of performance".

According to the *Black's Law Dictionary 2nd Edition*, breach of contract is defined as:

"A legal cause of action in which a binding agreement or bargained-for exchange is not honoured by one or more of the parties to the contract by non-performance or interference with the other party's performance".

I find that this contract is incapable of performance. In the case of *Simiyu v Watambala (1985) KLR 852* the court held as follows on a transaction that was declared void for want of consent :-

"The appellant's remedy, subject to the laws of limitation (emphasis mine), was an action for damages, coupled with the right of recovery of the purchase money under Section 7 of the Act"

In the case of Kenneth Kipruto Chebet vs Laban Kipkering Murei (2013) eKLR, the court held that;

"Given that the land has been resold to another buyer, the plaintiff is perfectly entitled to rescind the contract, and I order it rescinded. I opt to have the contract rescinded rather than order it "frustrated". The end effect is in any event the same. I will also award the plaintiff costs of the suit as the defendant had an obligation to refund the money received as he was never going to complete the sale".

Likewise I find that the defendant in this case despite accepting the purchase price she fraudulently resold the same suit land to a third party DW2. DW2 testified that he bought the land in 2008 and took possession and that the plaintiff does not live there. After succession was done by the defendant he got the land. It is in evidence that the defendant signed the two sale agreements PEx1 & 4 and she is now the administratrix of the estate of the Late Lukas Lumadede. PW2 the Land Registrar produced a transfer by personal representative by person entitled by a will or on an intestacy dully signed by the defendant relating to the suit land PEx9. The certificate of confirmation of grant dated 1st November 2012, clearly shows that the plaintiff was entitled to 5.5 acres of the suit land PEx3. The defendant cannot dismiss this as a mistake. She cannot now turn round and say that she had no capacity to enter into the said agreement. I find that the defendant resold the suit land to a DW2 and for this reason *the Court cannot award specific performance when it is incapable of enforcing the order*. I find that the defendant is liable to refund the money which she took from the plaintiff with her husband and then failed to transfer the land to the plaintiff but resold the same suit land to DW2. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The defendant is to refund the sum of Kshs 780,000/= plus interest at court rates from the date of filing this suit.
2. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 21ST JULY 2021.

N.A. MATHEKA

JUDGE