



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 145 OF 2016**

**MUCHIRA PAUL MBOGO.....PLAINTIFF**

**VERSUS**

**LINCOLN MUCHOKI MWANGI.....DEFENDANT**

**JUDGMENT**

**Summary of Facts**

Vide a Complaint dated 21<sup>st</sup> September 2016, the Plaintiff sued the Defendant for recovery of money paid to the Defendant in respect of a sale of land agreement dated 3<sup>rd</sup> May 2013. It is the Plaintiff's case that consequent to executing the said sale agreement over Plot No. D 357 Kagio (hereinafter referred to as the suit land), the Plaintiff paid to the Defendant Four Hundred and Ninety Thousand Shillings (Ksh. 490,000) and finalized the remainder of the consideration, being the sum of One Hundred and Ten Thousand Shillings (Ksh. 110,000) on 3<sup>rd</sup> June 2013. That the Plaintiff thus fully settled the consideration of Six Hundred Thousand Shillings (Ksh. 600,000) specified in the agreement. That the agreement was that, once

the full consideration is received by the Defendant, he would transfer the suit land to the Plaintiff. At the time of completing the final deposit in June of 2013, the Plaintiff was in Afghanistan for official duty. That even then, he began paying the relevant levies awaiting the transfer to be effected. That when he returned to the country in May of 2014, he erected a temporary house on the suit land. That even by this time, the Defendant was yet to finalize the transfer. That once the building he was putting up on the land was completed, it was immediately demolished by an unknown person. That the Plaintiff later learnt that the person responsible for the demolition was one Daniel Mbugua Gachina who was also claiming ownership over the suit land. That they proceeded to the County Government of Kirinyaga for resolution of the dispute. In December of 2015, he discovered that the County Government had resolved the dispute in favour of the said Daniel Mbugua Gachina and had allocated the suit land to him. That he reported the matter to the police station and the Defendant was arrested and charged with obtaining money under false pretenses. That the present suit is brought to recover the sum of Six Hundred Thousand Shillings (Ksh. 600,000) paid to the Defendant, together with interest thereof at the rate of 30%, as well as costs of the suit.

The Defendant entered appearance on 7<sup>th</sup> October 2016 and filed his statement of defence on 20<sup>th</sup> October 2016. He admits that he sold the suit land to the Plaintiff and received the full consideration. That although he tendered documentation to the County Government of Kirinyaga demonstrating how he came to acquire the suit land, they did not inform him of the outcome of the land dispute resolution and he only came to know of it when he was arrested and charged in Baricho SPM Criminal Case 667 of 2016 for obtaining money by false pretenses. He denied liability to refund the Plaintiff the sum of Six Hundred Thousand Shillings (Ksh. 600,000) together with interest thereof at the rate of 30%.

On 1<sup>st</sup> November 2017, the Defendant filed an amended statement of defence and counterclaim. He contended that he had purchased the suit land from one Joseph Njuguna Kimani for a consideration of Two Hundred Thousand shillings (Ksh. 200,000) vide a memorandum of undertaking on 24<sup>th</sup> September 2010. That the said undertaking was converted to a sale agreement on 30<sup>th</sup> September 2010 and that he settled the full purchase price on 11<sup>th</sup> October 2010. That he received assurances from the Town Council of Sagana/Kagio that Joseph Njuguna Kimani was the lawful owner of the suit land and the transfer was effected vide Town Council of Sagana/Kagio Minutes no. WTDM & HC 17/2011. That consequent to the transfer, he continued to pay the relevant rates and rents and also applied for the approval of a building plan on the suit land. That he was therefore surprised to learn of the County Government's decision that the suit land was not Plot No D 357 Kagio but was Plot No. 322 belonging to Daniel Mbugua Gichina. The Defendant (as Plaintiff) therefore counterclaimed against the Plaintiff as the 1<sup>st</sup> Defendant; Joseph Njuguna Kimani (being the person who sold him the suit land) as the 2<sup>nd</sup> Defendant and The County Government of Kirinyaga as the 3<sup>rd</sup> Defendant. He counterclaimed against the Defendants for:

- a. Dismissal of the Plaintiff's case with costs; in the alternative

- b. A declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants should indemnify him for the claim made against him by the Plaintiff in the suit;
- c. An order for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to settle the Plaintiff's claim against him;
- d. Costs of the counterclaim.

On 19<sup>th</sup> July 2018, consent was entered for the Plaintiff for a refund of the full purchase price, being Six Hundred Thousand Shillings (Ksh. 600,000) by the Defendant. The Defendant however sought the court's determination on whether or not he was liable to pay the 30% interest to the Plaintiff. Vide a ruling delivered on 26<sup>th</sup> July 2018, **Mukunya J.** found that the Defendant was liable to pay the agreed interest of 30% on the purchase price to the Plaintiff.

In his reply to the Defendant's amended defence and counterclaim filed on 14<sup>th</sup> December 2018, the Plaintiff opposed the prayer of having the co-defendants settle his claim against the Defendant in the suit, since there lacked privity of contract. He further averred that he would face hardship in executing judgement against third parties whose location and assets were unknown to him. He thus prayed for the defence and counterclaim to be dismissed.

In reply to the counterclaim, the 3<sup>rd</sup> Defendant (The County Government of Kirinyaga) filed its statement on 06<sup>th</sup> March 2020. It supported the outcome of the Dispute Resolution Committee in relation to the dispute over the suit land. Its finding was that the suit land belonged to Daniel Mbugua Gachina and not the Plaintiff in the counterclaim.

By consent, the Parties agreed to file written submissions for consideration by the court.

The Defendant (Plaintiff in the counterclaim) filed his submissions on 07<sup>th</sup> April 2021. He framed three questions for determination: first, whether or not the Defendant was a bona fide purchaser for value without notice and with a valid title; secondly, whether there was a duty or liability on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in causing the transfer of the suit property to the Defendant and lastly, the party responsible for bearing the costs of the suit. He reiterated the fact that he had sought for and gotten assurances from the Town Council of Sagana/Kagio that the suit land did indeed belong to the 2<sup>nd</sup> Defendant and that it was upon these assurances that the Defendant proceeded with the purchase of the suit land. That the transfer was effected vide Town Council of Sagana/Kagio minutes no. WTDM & HC 17/2011. That consequent to the transfer, he continued to pay the relevant rates and rents and also applied for the approval of a building plan on the suit land. Relying on **Sections 26, 53 and 80 of the Land Registration Act**, he contends that the title acquired consequent to the transfer is indefeasible and cannot be cancelled. He also cited *Katende Vs Haridar & Co Limited [2008] 2 E.A 173* and *Alice Chemutai Too (Suing in her capacity as the personal representative of Kipkoech Tele (deceased) Vs Nickson Kipkurui Korir & 2 Others ELC No. 51 of 2014* in support of the fact that he qualified as a bona fide purchaser for value. The failure of the 3<sup>rd</sup> Defendant to inform him of the outcome of the land dispute resolution in respect of the suit land was faulted for violating *Article 40 of the Constitution of Kenya, 2010*. Reliance was also placed in the decision in *Redcliff Holdings Limited Vs Registrar of Titles & 2 Others (2017) e KLR*; *City Finance Bank Limited Vs Cedar Bank Enterprises Limited and Commissioner of Lands Civil Suit 152 of 2012*; *Salome Warware Vs George Muna & Another [2015] e KLR* and *Francis Mwaura Vs Bernard Mucheke and Another [2017] e KLR*. On the question of costs, he cited *Section 27 of the Civil Procedure Act* and the decision in *Ethics and Anticorruption Commission Vs Nderitu Wachira & 2 Others Misc Civ App No.19 of 2015* to the effect that costs ought to follow the event. He thus prayed for the counterclaim to be allowed.

The 3<sup>rd</sup> Defendant filed his submissions on 15<sup>th</sup> April 2021. It is his submission that although the Plaintiff in the counterclaim states that he conducted due diligence in purchasing the suit land from the 2<sup>nd</sup> Defendant, he has not provided any proof of the search, nor has he provided evidence of the assurance ostensibly given to him by the Town Council of Sagana/Kagio in relation to the legality of the purchase. Relying on *Sections 107 and 108 of the Evidence Act, Cap 80*, it is his contention that the burden of proof has not been discharged. It is his further submission that the Plaintiff in the counterclaim as well as the 2<sup>nd</sup> Defendant cannot be categorized as *bonafide* purchasers for value, having failed to produce any ownership documents to the suit land. He cited *Katende Vs Haridar & Co Limited [2008] 2 E.A 173* in support. He thus prayed for the counterclaim to be dismissed.

The Plaintiff filed his submissions on 27<sup>th</sup> April 2021. It is his submission that the Defendant's counterclaim is misplaced and is an abuse of court process. This is because, the counterclaim seeks to have two judgements delivered in the same case in a piecemeal manner, offending *Order 7 Rule 3 of the Civil Procedure Rules, 2010*. He contends that only one judgement ought to be entered in respect of the main suit as well as the counterclaim. Reliance is placed on the decision in *William Koross (Legal representative of Elijah Koross) Vs Hezekiah Kiptoo Komen & 4 Others Eldoret Civil Appeal No. 223 of 2013*. It is his further submission that the manner in which the Defendant used to enjoin the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is unknown in law, the same not amounting to third party proceedings. The Plaintiff also highlights the fact that the counterclaim hinders the execution of the consent judgement entered into three years ago between the Plaintiff and the Defendant. He is thus opposed to the settlement of his judgement by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, citing lack of privity of contract. He relies on *Indemnity Insurance Co. of North America and Another Vs Kenya Airfreight Handling Ltd and Another [2004] 1 EA 52*. The Plaintiff thus prays the court to allow him to execute his judgement against the Defendant and for costs of the counterclaim.

#### **Issues for determination**

- 1. Whether the Defendant's counterclaim ought to be allowed;**
- 2. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant are liable to indemnify the Plaintiff (in the counterclaim) against the judgement in favour of the Plaintiff.**

#### **Legal analysis and opinion**

The court has considered the Parties' rival pleadings, affidavits and submissions.

From the outset, there is no contention that the Defendant sold the suit land to the Plaintiff and received the full consideration of Six Hundred Thousand Shillings (Ksh.600,000). On this basis, the Plaintiff and Defendant filed a consent judgement on 19<sup>th</sup> July 2018 upon which the Defendant was to refund the entire purchase price. In addition, following the ruling delivered on 26<sup>th</sup> July 2018, the Defendant was found liable to pay the 30% interest on the consideration agreed in the sale agreement.

The Defendant then filed a counterclaim seeking the following orders:

- a. Dismissal of the Plaintiff's case with costs; in the alternative
- b. A declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants should indemnify him for the claim made against him by the Plaintiff in the suit;
- c. An order for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to settle the Plaintiff's claim against him;
- d. Costs of the counterclaim.

Judgement already having been entered against the Defendant for the full refund of the purchase price together with 30% interest on the consideration thereof, the court agrees that the counterclaim seeks another judgement on the same matter. **Order 7 Rule 3 of the Civil Procedure Rules, 2010** provides for the issuance of one final judgement in the main suit and the counterclaim. The section provides as follows:

"3. A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.' (Underline, mine)

The orders sought in the counterclaim are directly contrary to the judgement already entered against the Defendant, requiring him to refund the Plaintiff. The Court of Appeal decision in **William Koross (Legal personal Representative of Elijah C.A. Koross) Vs Hezekiah Kiptoo Komen & 4 others [2015] e KLR** is instructive. The Court therein held as follows:

"..... We need to state that there cannot properly be two judgments, and contradictory ones at that, in the same suit. The presence of a counterclaim in a suit, while essentially amounting to a cross-suit, does not give rise to a separate, stand-alone second judgment. A counterclaim never stands on its own and cannot be a pleading independent of a defence..... A plain reading of **Order 7 Rule 13** shows that whereas a stay, discontinuance or dismissal of the plaintiff's suit may still leave a live and efficacious counterclaim that may be proceeded with and determined by way of a judgment, there is no corresponding provision whereby a judgment for the plaintiff leaves a residual counterclaim to be determined at a later date as purported to happen in this case."

The Court of Appeal decision being binding on the present court, it is my view that the Defendant's counterclaim cannot be allowed. That is not to say that the issues raised by the Defendant and the 3<sup>rd</sup> Defendant are not weighty. They are, but because their import would be to upset the judgement already entered in favour of the Plaintiff, the same cannot be entertained. Consequently, the counter-claim is hereby dismissed with costs

**JUDGMENT READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 16<sup>TH</sup> DAY OF JULY, 2021.**

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**E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Ms Ndungu holding brief for Ms Ann Thungu
2. Ms Wanjiru Waweru holding brief for Wachira Kibanya for 3<sup>rd</sup> Defendant
3. Mr. Asimwe holding brief for Magee for 1<sup>st</sup> Defendant

4. Kabuta – Court Assistant.