



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 3 OF 2017**

**PHILIP WANJOHI KARIUKI.....PLAINTIFF**

**VERSUS**

**KENNEDY NJENGA NYAMBURA.....<sup>1ST</sup> DEFENDANT**

**STEPHANIE NJERI NJOGU.....<sup>2ND</sup> DEFENDANT**

**LEONARD N. NJAU T/A**

**KINYANJUI & NJAU ADVOCATES.....<sup>3RD</sup> DEFENDANT**

**AND**

**LAZARUS SANKORI KARINO.....INTERESTED PARTY**

**JUDGEMENT**

By a Plaint dated the 20<sup>th</sup> January 2017, the Plaintiff prays for judgement against the Defendants jointly and severally for:-

- a) An order for specific performance compelling the Defendants to forthwith complete the sale transaction herein and give the Plaintiff title to five acres or thirty eighth acre portions from title Number Kajiado/ Kaputiei North/ 59924;
- b) A declaration that the Plaintiff is entitled to five acres or thirty five eighth acre portions to be excised from title Number Kajiado/ Kaputiei North/ 59924;
- c) Order of inhibition restraining any dealings of any nature whatsoever on title Number Kajiado/ Kaputiei North/ 59924 without the express approval and consent of the Plaintiff;
- d) In the alternative to prayers a) and b) above, an order compelling the Defendants to refund all sums paid towards this transaction being Kshs. 6, 250,000/= plus interest at 20% per annum;
- e) Damages;
- f) Costs and Interest of this suit.
- g) Any other relief that this Court may deem fit and just to grant.

The Defendants filed a joint statement of Defence dated the 8<sup>th</sup> March, 2017 where they denied the averments in the Plaint except for the descriptive and jurisdiction. They contended that the Plaintiff was not ready to complete the sale. They explain that the agreement for sale clearly provided under clause 1.2 that the parcel of land being sold to the Plaintiff was to be excised from the whole parcel of land. The Defendants aver that the contract was frustrated by the interference of a third party Sankori Karino who placed a caveat over the subject property. They insist the Plaintiff was kept informed of all the developments as provided in the agreement for sale and he has come to court as an afterthought. Further, that the Plaintiff has also not come to court with clean hands as he sold the land to third parties while being fully aware of the caution placed on it. They contend that this suit is premature as the agreement for sale between the parties provided that all disputes in the agreement be referred to an arbitrator and any orders can only be sought once the matter is placed before an arbitrator.

The Interested Party filed his Defence where he denied that the Defendants were owners of land parcel number Kajiado/ Kaputiei North/

59924 as the same was obtained by fraud. He contends that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are not capable of specifically performing the agreement between them and the Plaintiff since he has lodged a caution over the entire land which cannot be removed. He denied knowledge of any dealings between the Plaintiff and the Defendants, however he is aware there is a dispute over failure of payment of the purchase price between the Defendants and himself. He explained that he entered into an agreement dated the 1<sup>st</sup> September, 2014 for sale of Kajiado/ Kaputiei North/ 59924 measuring 16.6 acres for Kshs. 20,000,000/= wherein the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only paid a deposit of Kshs. 300,000/= leaving a balance. Further, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants agreed before the 3<sup>rd</sup> Defendant that he signs consent and transfer form and money be deposited in a joint account No. 04800006992 Family Bank which money was never deposited. He avers that having obtained the transfer and consent from him, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant proceeded to register the land into their names. He lodged a counterclaim and prayed for judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for:

- a) That the agreement dated 1<sup>st</sup> September, 2014 be declared null and void.
- b) That title Kajiado/ Kaputiei North/ 59924 be cancelled and the same to revert into the names of the Interested Party.
- c) That in the alternative the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be ordered to specifically perform the agreement and pay the current market price of the land.

The Defendants and the Interested Party entered into a consent judgment on 19<sup>th</sup> November, 2018 in favour of the Interested Party for the sum of Kshs. 19, 700, 000 and the Interested Party accepted to remove the restriction once he received a sum of Kshs. 3,000,000/=. The matter proceeded for hearing where the Plaintiff had one witness but the Defendant failed to call any witnesses.

### **Evidence of the Plaintiff**

The Plaintiff as PW1 testified that he entered into a Sale Agreement dated the 25<sup>th</sup> August, 2015 with the 1<sup>st</sup> and 2<sup>nd</sup> Defendant for the purchase of five acres to be hived off land parcel number Kajiado/ Kaputiei North/ 59924, at Kshs. 9,000,000/=. He confirmed paying Kshs. 6, 250,000 towards the purchase price through the 3<sup>rd</sup> Defendant's bank account as well as mpesa. He further confirmed that there was a balance of Kshs. 2,750,000/= that he was yet to pay but in the Sale Agreement it was indicated that the balance of Kshs. 6,300,000/= was only to be paid upon completion. It was his testimony that on 24<sup>th</sup> March, 2016, he conducted a search and found that on 21<sup>st</sup> September, 2015, the Interested Party through messrs Itaya & Company Advocates had entered a restriction against the suit land. Further, that the Defendants had been evasive to update him on the progress of the transaction. Despite discovering the registration of the restriction and issuing a completion notice to the Defendants, they have failed to make full disclosure of the correct status of the transaction or advise him on any third party claim. The Plaintiff contended that the Defendants never informed him that the 2<sup>nd</sup> Defendant is the daughter to the 1<sup>st</sup> Defendant. In cross examination, Plaintiff confirmed that he sold some plots to two people but later revoked the said transaction and refunded monies to them as the Defendants had failed to transfer his land to him. He further explained that part of the purchase price had been monies he had paid to the 3<sup>rd</sup> Defendant for a previous transaction which was not completed hence the monies were transferred to the transaction herein. It was also his testimony that at the time of entering into the Sale Agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the title of land was in their names.

The Plaintiff produced various documents including Sale Agreement dated 25<sup>th</sup> August, 2015; Copies of banking slips for monies paid towards purchase price; Search dated 26<sup>th</sup> March, 2016; Letter dated 12<sup>th</sup> October, 2016 from 3<sup>rd</sup> Defendant; Letter dated 25<sup>th</sup> October, 2016 from Itaya & Company Advocates; Reply on email from Itaya & Co. Advocates; Completion Notice dated 19<sup>th</sup> December, 2016; Plaintiff's Statement of Account from Commercial Bank of Africa; Mpesa Transaction print out from 2<sup>nd</sup> December, 2015 for Kshs. 30,000; two letters dated 26<sup>th</sup> March, 2015 by the 3<sup>rd</sup> Defendant; CBA Bank Limited Confirmation for deposit of Kshs. 2 million of 16<sup>th</sup> November, 2013; Cheque No. 000242 image for Kshs. 500,000 dated 3<sup>rd</sup> March, 2014; Cheque No. 000212 image for Kshs. 60,000 dated 21<sup>st</sup> November, 2013; and Cheque No. 000234 image for Kshs. 60,000 dated 25<sup>th</sup> November, 2013 as his exhibits.

### **Evidence of the Defendants**

The Defendants failed to avail any witness in court to testify and produce exhibits to prove their claim.

The Plaintiff filed his submissions but the Defendants failed to do so.

### **Analysis and Determination**

Upon consideration of the Plaintiff, Defence, testimonies of the witnesses, exhibits and submissions, the following are the issues for consideration:

- Whether the Defendants have breached the terms of the Sale Agreement dated the 25<sup>th</sup> August, 2015
- Whether the Arbitration Clause contained in the Sale Agreement ousts the Court's jurisdiction.
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff.

As to whether the Defendants have breached the terms of the Sale Agreement dated the 25<sup>th</sup> August, 2015. It is not in dispute that the Plaintiff together with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered into a Sale Agreement dated the 25<sup>th</sup> August, 2015 before the 3<sup>rd</sup> Defendant who

was the advocate acting for both of them. The Plaintiff claims to have paid Kshs. 6, 250,000/= out of the Kshs. 9,000,000 which was the agreed purchase price for five acres of land to be hived from land parcel number Kajiado/ Kaputiei North/ 5994. The Plaintiff claims the Defendants have failed to transfer the land he purchased to him. The Defendants have blamed the third party herein Sankori Karino for their failure to transfer the five acres of land to the Plaintiff. It emerged in evidence that the third party herein entered a restriction against the parcel of land as the Defendants had failed to pay the full purchase price for the land. Further, the Defendants and the third party already entered into a consent judgment in favour of the third party wherein the Defendants agreed to pay him Kshs. 19,700,000/= as part of the purchase price. The Plaintiff submitted that the completion date is long past and the Defendants have never made any efforts to complete the transaction despite severally promising to do so. Further, that the Defendants colluded, acted in bad faith and fraudulently in breaching the sale agreement. He further submitted that the 3<sup>rd</sup> Defendant acted unprofessionally and in conflicting interest as the 2<sup>nd</sup> Defendant is his daughter. I note the Defendants entered into a consent judgment with the third party in respect to the suit land where they were to pay the balance of the purchase price they were yet to pay. Further, that a restriction still subsists over the suit land. This in essence means that the Defendants cannot complete the transaction herein. Based on my analysis above, I find that the Defendants have indeed breached the terms of the Sale Agreement dated the 25<sup>th</sup> August, 2015 as they were unable complete the transaction within the stipulated period despite receiving most of the purchase price.

As to whether the Arbitration Clause contained in the Sale Agreement ousts the Court's jurisdiction. The Defendants contended that the Sale Agreement dated the 25<sup>th</sup> August 2015 contained an arbitration clause and hence the Plaintiff's claim herein is premature as he failed to refer the matter first to arbitration before filing the instant suit. The Plaintiff in his submissions stated that insofar as they were alive to clause 19 of the Agreement on arbitration, the Defendants waived their right to refer the matter to arbitration as they filed their Memorandum of Appearance, Statement of Defence and Witness Statements on 19<sup>th</sup> March, 2017. He referred to the case of **Adrec Limited V Nation Media Group Limited (2017) eKLR** to buttress this argument.

Section 6 (1) of the Arbitration Act 1995 stipulates that: **' A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration ...'**

I note the Defendants indeed filed their Memorandum of Appearance, Statement of Defence and Witness Statements in the matter herein. Further, there is no indication on record that they sought for leave to refer the matter to arbitration. In associating myself with the case of **Adrec Limited V Nation Media Group Limited (2017) eKLR** where the Court held that: **' the option to refer the matter to arbitration was sealed when the Defendant herein entered appearance and followed it with a defence. ....any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.'**, I find that the Defendants indeed waived their right to arbitration and hence this Court has jurisdiction to handle the matter herein.

As to whether the Plaintiff is entitled to the orders sought in the Plaintiff. The Plaintiff sought for various orders including specific performance compelling the Defendants to forthwith complete the sale transaction; declaration that the Plaintiff is entitled to five acres or thirty five eighth acre portions to be excised from title Number Kajiado/ Kaputiei North/ 59924; an Order of inhibition and in the alternative an order compelling the Defendants to refund all sums paid towards this transaction being Kshs. 6, 250,000/= plus interest at 20% per annum, Damages; Costs and Interest of this suit. Since I have already held that the Defendants breached the terms of the Sale Agreement, I note in the Sale Agreement dated the 25<sup>th</sup> August, 2015 at Clause 4, the completion date was meant to be One Hundred and Eighty (180) days from the date of its execution. From the evidence of PW1, his Advocates issued a completion notice to the Defendants but they failed to adhere to the same. Clause 6.3 of the Sale Agreement was explicit that the vendor shall refund to the Purchaser the entire purchase price in respect of the purchase price paid with interest at 20% within seven (7) days from the date of the expiry notice and further pay any pocket expenses incurred by the purchaser on account of the transaction. I note that the purchaser issued a completion notice but in evidence it emerged that the Vendor despite receiving Kshs. 6, 250,000/= never effected transfer nor refunded the purchase price. The Plaintiff submitted that he was no longer interested in the land but wanted his monies back since the Defendants could not be able to conclude the transaction herein as they had not paid the third party. Further, that since the Defendants had not paid the third party, who will not remove the restriction, he can never get his five acres of land. He sought for specific performance and relied on the cases of **Reliable Electrical Engineers (K) Limited V Mantrac Kenya Limited (2006) eKLR; Manjit Singh Sethi & 2 Others V Samson Kariuki Njengi & Another (2008) eKLR** to buttress his argument.

In the case of **Hadley Vs Baxendale (154) 9. Exch 214** where **Anderson P** at page 354 stated as follows:

**"Where two parties have made a contract which one of them has broken the damages which the other ought to receive should be such as may fairly and reasonably be considered either as arising naturally i.e according to the usual course of things, from such breach itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made a contract as the probable result of a breach of it."**

Yet in another Court of Appeal decision of **Millicent Perpetua Atieno Vas Louis Onyango Otieno (2013) e KLR**, the said Court while citing in approval Halsbury's Law of England, Volume 12, 4th Edition at paragraph 1183 on the type and measure of damages recoverable by a purchaser upon breach by a seller of land held thus. **"where it is the vendor who wrongfully refuses to complete the measure of damage is similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain....."**

Further in the case of **Manjit Singh Sethi & 2 Others V Samson Kariuki Njengi & Another (2008) eKLR** the Court held that: **' It is clear from the foregoing reasons that the defendants entered into a sale agreement with the plaintiffs for the sale of the suit property yet they had no intention whatsoever of completing the agreement. The plaintiffs are no longer interested in continuing with the said land sale agreement. As correctly stated by the 2nd defendant, the plaintiffs are entitled to a refund of the purchase consideration.**

**The plaintiffs proved to the required standard that they had indeed paid to the defendants, jointly and severally the sum of KShs.6,117,137/30 in part payment for the purchase of the suit property.’**

Based on the facts at hand and in associating myself with the three decisions cited above, I find that the Plaintiff is entitled to a refund of the Kshs. 6, 250,000/= that he paid to the Defendants as purchase price. The Plaintiff has sought for damages in respect of the claim herein but failed to adduce any evidence to that effect and I am hence unable to grant him the same.

In the circumstance, I find that the Plaintiff has proved his case on a balance of probabilities and will proceed to enter judgment in his favour as against the Defendants in the following terms:

- i. The Defendants be and are hereby directed to refund all sums paid by the Plaintiff towards the Sale Agreement dated 25<sup>th</sup> August, 2015 being Kshs. 6, 250,000/= plus interest at 20% per annum from the date of filing the suit.
- ii. The Plaintiff is awarded the Costs of the Suit with Interest until payment in full.

**Dated signed and delivered in open court at Kajiado this 29th day of January, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**