



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 343 OF 2011**

**ROSEMARY WANJIKU MUNGAL.....PLAINTIFF**

**VERSUS**

**ANNUNCIATA WAITHIRA KIBUE.....DEFENDANT**

**JUDGMENT**

On 18<sup>th</sup> May, 2004, the plaintiff entered into an agreement for sale with the defendant in her capacity as the administratrix of the estate of James Aram Njau Kibue, deceased, in respect of a portion of L.R No. 5989/17 (Original Number 5989/11/6) measuring 0.2 hectares that was marked "36" on a sketch plan attached to the said agreement (hereinafter referred to as "the suit property"). Under the said agreement, the plaintiff agreed to purchase from the defendant the suit property at a price of Kshs. 2,700,000/=. The agreement provided as follows in part:

- 1. "The purchase price is Kenya Shillings Two Million Seven Hundred Thousand (Kshs.2,700,000.00) of which the sum of Kenya Shillings Two Hundred and Seventy Thousand (Kshs.270,000.00) being 10% deposit will be paid to the vendor's advocates as stakeholder on the signing of this agreement.*
- 2. In addition to the said 10% deposit the purchaser shall pay to the vendor's advocates as stakeholders a further sum of Kenya Shillings Seven Hundred and Thirty Thousand (Kshs.730,000.00) as part payment of the said purchase price.*
- 3. The balance of Kenya Shillings One Million Seven Hundred Thousand (Kshs.1,700,000.00) shall be paid to the Vendor's Advocates by a banker's cheque in exchange for the documents listed in clause 2 of Special Conditions hereof and released to the vendor together with other moneys paid to the said Vendor's Advocates under Clause 3 and 4 seven (7) days upon completion and successful registration of the transfer in favour of the purchaser and a first Charge to be created by the purchaser in favour of the lender. The completion date shall be One Hundred and Eighty (180) days after execution of this Agreement.*
- 4. The sale is subject to the Law Society Conditions of sale (1989) in so far as they are not inconsistent with the conditions contained in this Agreement or specifically hereby excluded."*

The plaintiff brought this suit against the defendant on 11<sup>th</sup> July, 2011 through a plaint dated 15<sup>th</sup> June, 2011. The plaint was amended on 21<sup>st</sup> March, 2012. In her amended plaint dated 20<sup>th</sup> March, 2012, the plaintiff averred that pursuant to the said agreement between the plaintiff and the defendant, the plaintiff paid to the defendant through the advocates who were acting for the defendant in the transaction Kshs.270,000/= being 10% deposit of the purchase price.

The plaintiff averred that in breach of the said agreement, the defendant failed to perform her obligations under the agreement even after being served with a completion notice on 4<sup>th</sup> June, 2009. The plaintiff averred that as a result of the defendant's breach of the said agreement for sale, the plaintiff suffered loss and damage. The plaintiff averred that at all material times, the plaintiff was ready, willing and able to complete her outstanding obligations under the said agreement for sale. The plaintiff sought judgment against the defendant for:

- a) Specific performance of the agreement for sale dated 18<sup>th</sup> May, 2004.
- b) Damages for breach of contract in lieu of or in addition to specific performance.
- c) In the alternative and without prejudice to the foregoing prayer for specific performance, a sum of Kshs.270,000/= together with interest at the contractual rate from 18<sup>th</sup> May, 2004 until payment in full.

The defendant filed a statement of defence on 30<sup>th</sup> March, 2012. The defendant averred that the suit property was an agricultural land and that the agreement for sale between the defendant and the plaintiff was not completed as a result of the plaintiff's own breach of the same and by operation of law. In the particulars of the plaintiff's breach of the said agreement, the defendant averred that the plaintiff failed to pay additional sum of Kshs.730,000/= which was payable under clause 3 of the agreement for sale and the entire purchase price within the 180

days completion period. The defendant averred further that due to the plaintiff's failure to pay the purchase price as provided for in the agreement for sale, the parties were unable to obtain the consent of the Land Control Board(LCB) for the transaction thereby rendering the same null and void. The defendant averred that since the agreement for sale between the parties was null and void for want of LCB consent, the plaintiff had no cause of action for specific performance against the defendant.

The defendant denied that she breached the agreement for sale between her and the plaintiff and that the plaintiff was ready, willing and able to complete the said agreement. The defendant denied further that the plaintiff had suffered loss and damage as a result of the alleged breach of the agreement for sale. The defendant averred that since the completion of the said agreement for sale was frustrated by the plaintiff, the reliefs of specific performance and damages sought in the amended plaint were not available to the plaintiff.

The defendant averred that she had not received any payment from the plaintiff on account of the purchase price for the suit property and as such she was not liable to refund to the plaintiff the sum of Kshs.270,000/= that was paid by the plaintiff as 10% deposit of the purchase price. The defendant averred further that the estate of James Aram Njau Kibue which includes the suit property was distributed to the beneficiaries of the estate following confirmation on 16<sup>th</sup> November, 2005 of grant of letters of administration in respect of his estate in Nairobi High Court Succession Cause No. 2358 of 1996. The defendant urged the court to dismiss the plaintiff's suit with costs.

The plaintiff filed a reply to defence on 19<sup>th</sup> April, 2012 in which he joined issue with the defendant in her statement of defence save where the same consisted only of admissions. The plaintiff denied that she breached the agreement for sale between her and the defendant and averred that the defendant did not make any demand upon her to remedy the alleged breach.

At the trial of the suit, the plaintiff narrated to the court how she entered into an agreement for sale with the defendant in respect of the suit property and how the agreement was breached by the defendant by her failure to complete the same. The plaintiff took the court through the terms of agreement for sale dated 18<sup>th</sup> May, 2004 and how she complied with her obligations thereunder. The plaintiff told the court that after paying the 10% deposit, she waited for the completion documents from the defendant which never came. The plaintiff stated that she was to Charge the suit property to raise the balance of the purchase price. The plaintiff stated that the original large parcel of land was subdivided and that despite numerous letters written to the defendant's advocates, they did not provide the completion documents.

The plaintiff stated that the deposit that she paid was not refunded to her as she was waiting for the completion of the agreement for sale. The plaintiff urged the court to order specific performance of the agreement for sale contending that she had performed her part of the agreement. The plaintiff stated that she was advised by her advocates to wait for the completion documents before paying the additional sum of Kshs. 730,000/=. She stated that the payment of the balance of the purchase price was hinged on the production of the completion documents.

The plaintiff produced as exhibits among others, copies of; the agreement for sale dated 18<sup>th</sup> May, 2004, the indenture of conveyance in respect of L.R No. 5989/15-17, sub-division certificate in respect of L.R No. 5989/17 (sub-plots 12, 13, 14, 15, 22, 26, 27, 28, 30, 32, 34, 36 and 38), certificate of confirmation of grant in respect of the estate of James Aram Njau Kibue, Grant of Letters of Administration in respect of the estate of James Aram Njau Kibue and various correspondence exchanged between the advocates who were acting for the parties in the transaction in dispute.

Paul Kamau Njau (DW 1) the defendant's co-administrator in the estate of James Aram Njau Kibue gave evidence on behalf of the plaintiff. He adopted his witness statement dated 16<sup>th</sup> April, 2018 filed in court on the same day as his evidence in chief. He told the court that the defendant was his mother and a co-administrator of the estate of his father James Aram Njau Kibue. He admitted that his deceased father was registered as the owner of L.R. No. 5989/17 (hereinafter referred to as "the original parcel of land") which was an agricultural land situated off Kiambu Road. He admitted that the defendant entered into the agreement for sale dated 18<sup>th</sup> May, 2004 with the plaintiff in respect of the suit property. He also admitted the terms of the agreement.

DW1 told the court that it was the plaintiff who breached the said agreement for sale by failing to pay the balance of the purchase price within the completion period of 180 days. He stated that the plaintiff also failed to pay additional deposit of Kshs.730,000/= and had not paid the same as at the time he was giving evidence. DW1 stated that due to the plaintiff's failure to pay the purchase price in accordance with the terms of the agreement for sale, the defendant was not able to obtain Land Control Board (LCB) consent for the transaction. DW1 stated that the estate of James Aram Njau Kibue including the suit property had been distributed and that the reliefs sought by the plaintiff were not available to her.

DW1 stated that the 10% deposit of Kshs.270,000/= that was paid by the plaintiff was still being held by the firm of Kamau Kuria & Co. Advocates. He told the court that he and his sister one, Dr. Susan Njeri Kibue were added as co-administrators of the estate of James Aram Njau Kibue when the grant was confirmed on 16<sup>th</sup> November, 2005. DW1 stated that the Ministry of Lands had confirmed that the suit property was agricultural land. DW1 stated further that the suit property had already been sold to a third party and had been developed following the distribution of the estate of his father. He stated that the property was not available for transfer to the plaintiff. As concerns the 10% deposit of the purchase price, DW1 stated that the plaintiff was at liberty to collect the same from the firm of Kamau Kuria & Company Advocates to which it was paid as the same was not received by the defendant. DW1 produced the documents attached to the defendant's list of documents dated 11<sup>th</sup> September, 2013 filed in court on 12<sup>th</sup> September, 2013 as exhibits.

After the conclusion of evidence, the court directed the parties to make closing submissions in writing. The court also ordered the parties to furnish it with the latest search on the title of the suit property. The defendant's advocates filed in court a certificate of postal search on the title of the suit property on 15<sup>th</sup> August, 2019. The plaintiff filed her submissions on 24<sup>th</sup> July, 2019 while the defendant filed her submissions on 18<sup>th</sup> July, 2019.

I have considered the pleadings, the evidence adduced, the submissions by the advocates for the parties and the authorities cited in support thereof. The following in my view are the issues which arise for determination in this suit.

1. Whether the agreement for sale between the plaintiff and the defendant was subject to the Land Control Act, Chapter 302 Laws of Kenya.
2. Whether the defendant had the legal capacity to enter into the agreement for sale dated 18<sup>th</sup> May, 2004.
3. Whether the defendant breached the said agreement for sale.
4. Whether the plaintiff breached the agreement for sale.
5. Whether the plaintiff is entitled to the reliefs sought in the amended plaint.
6. Who is liable for the costs of the suit?

Whether the agreement for sale between the plaintiff and the defendant was subject to the Land Control Act, Chapter 302 Laws of Kenya.

The defendant contended in her defence that the suit property was an agricultural land and as such the agreement for sale dated 18<sup>th</sup> May, 2004 between the plaintiff and the defendant in respect thereof was subject to the Land Control Act, Chapter 302 Laws of Kenya. The defendant contended that since the consent of the LCB was not obtained by the parties for the transaction within the prescribed period of 6 months, the sale transaction became void and unenforceable. At the trial, the defendant produced in evidence a letter from the Commissioner of Lands dated 10<sup>th</sup> June, 2010 (D.Exh.1) confirming that the suit property was an agricultural land and as such dealings with the same were controlled under the Land Control Act, Chapter 302 Laws of Kenya. The plaintiff did not place any evidence before the court to rebut the defendant's contention that the sale transaction between the plaintiff and the defendant was a controlled one and as such required consent of the LCB. It is therefore my finding that the agreement for sale dated 18<sup>th</sup> May, 2004 was a controlled transaction and failure to obtain consent of the LCB in respect thereof rendered the transaction void and unenforceable.

There are certain circumstances in which the court can uphold an agreement for sale of agricultural land even where consent of the LCB has not been obtained on equitable grounds. In this case, the plaintiff did not plead or lead evidence that there existed equitable grounds that would warrant sustenance of the agreement dated 18<sup>th</sup> May, 2004. In the circumstances, since no consent was obtained in respect of the sale transaction in question, the same became void under Section 6(1) of the Land Control Act, Chapter 302 Laws of Kenya.

Whether the defendant had the legal capacity to enter into the agreement for sale dated 18<sup>th</sup> May, 2004.

It was not disputed that the suit property was at all material times registered in the name of James Aram Njau Kibue, deceased. The agreement dated 18<sup>th</sup> May, 2004 between the plaintiff and the defendant was entered into by the defendant as an administratrix of the estate of James Aram Njau Kibue. When the defendant entered into the said agreement, she was the sole administrator of the estate of James Aram Njau Kibue (hereinafter referred to only as "the deceased") pursuant to a grant that was issued in her favour on 15<sup>th</sup> August, 2001. It was not disputed that when the defendant entered into the said agreement for sale, the grant of letters of administration issued to her on 15<sup>th</sup> August, 2001 as aforesaid had not been confirmed and that the same was confirmed on 16<sup>th</sup> November, 2005; over one year after the date of the agreement for sale. When the grant was confirmed, two more persons were added as administrators of the estate of the deceased namely, Susan Njeri Kibue and Paul Kimani Kibue(DW1).

I am in agreement with the defendant that as at 18<sup>th</sup> May, 2004, the defendant had no capacity to dispose of the suit property to the plaintiff. The agreement for sale dated 18<sup>th</sup> May, 2004 was entered into by the defendant in violation of the provisions of section 55 of the Law of Succession Act, Chapter 160 Laws of Kenya. I am in agreement with the decision of my sister Gacheru J. in Gitanga Mwaniki & Another v Anunciata Waithira Kibue [2013] eKLR in which she held that letters of administration does not confer upon an administrator a right to sell property of a deceased person and that before confirmation of a grant, an administrator of an estate has no legal capacity to enter into an agreement for sale of land. Since the agreement for sale dated 18<sup>th</sup> May, 2004 was made in violation of the law when the defendant had no capacity to bind the estate of the deceased, the agreement was not binding upon the other administrators of the estate of the deceased and as such was not enforceable.

The plaintiff submitted that the agreement was enforceable against the defendant because during the distribution of the estate of the deceased, the suit property was given to the defendant as her share of the estate. This argument in my view has no basis in law. The defendant entered into an agreement for sale dated 18<sup>th</sup> May, 2004 not in her personal capacity but as an administrator of the estate of the deceased. The agreement cannot therefore be enforced against her personally.

Whether the defendant breached the agreement for sale dated 18<sup>th</sup> May, 2004.

As I have held above, the agreement for sale dated 18<sup>th</sup> May, 2004 was not capable of being performed by the defendant. The defendant had no legal capacity to perform her obligations under the same. The completion date of the agreement was 180 days from the date of the agreement which fell on 18<sup>th</sup> November, 2004. By this time, the grant of letters of administration on the strength of which the defendant had entered into the said agreement for sale had not been confirmed and the parties had also not obtained consent of the LCB. The agreement between the plaintiff and the defendant was void on account of the defendant's lack of capacity to enter into the same and for want of LCB consent. Avoid contract cannot be performed. It is my finding therefore that the defendant did not breach the agreement for sale dated 18<sup>th</sup> May, 2004.

Whether the plaintiff breached the agreement for sale dated 18<sup>th</sup> May, 2004.

On this issue, I will reiterate what I have stated in issue number three above. Since the agreement between the parties was void, performance therefore even by the plaintiff would have been futile as such action would have perpetuated an illegality. That said, I would add that if the agreement between the plaintiff and the defendant was not void and was enforceable in accordance with its terms, I would have held that the plaintiff breached clause 3 thereof by her failure to pay a further sum of Kshs.730,000/=. This additional payment was not dependent upon the defendant providing completion documents to the plaintiff as the plaintiff was advised by her advocates according to her testimony. I am in agreement with the defendant that the defendant was not obliged to furnish the plaintiff with the completion documents before the plaintiff had paid the said additional sum of Kshs.730,000/=.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

From the findings above, the plaintiff is not entitled to specific performance of the agreement for sale dated 18<sup>th</sup> May, 2004. As I have stated above, a void agreement cannot be enforced by the court. Even if the agreement was enforceable, I would not have ordered specific performance. First, because the remedy is not available to the plaintiff who had not performed some of her obligations under the agreement and secondly, because the suit property from the search produced in court is now in the name of a third party and as such cannot be transferred to the plaintiff. The plaintiff is also not entitled to damages for breach of contract for the reason which I have already given above.

The plaintiff is however entitled to a refund of Kshs.270,000/= that she paid as a deposit. The said amount was paid to the defendant's advocates in the transaction as stakeholders. In his evidence DW1 stated that the said amount is still being held by the said advocates. It is the responsibility of the defendant to instruct her advocates to pay the said amount to the plaintiff. I find no basis for ordering the defendant to pay interest on the said amount. In the event that the defendant's said advocate placed the said amount in an interest earning account, the plaintiff shall be entitled to the amount together with the accrued interest.

Who is liable for the costs of the suit?

In the circumstances of this case, it would only be fair for each party to bear her own costs the parties having entered into a void and unenforceable agreement.

Conclusion:

In conclusion, judgment is entered for the plaintiff against the defendant in sum of Kshs.270,000/= plus accrued interest if the amount was deposited in an interest earning account by the defendant's advocates. The said sum of Kshs.270,000/= plus interest if any shall be paid to the plaintiff by the firm of Kamau Kuria & Kiraitu Advocates or its successor. In the event that the payment is not made by the said firm, the plaintiff shall be at liberty to recover the same from the defendant in which case, there shall be no interest payable on the said sum of Kshs.270,000/=. Each party shall bear her own costs of the suit.

**Delivered and Dated at Nairobi this 27<sup>th</sup> Day of February, 2020**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in presence of:**

Mr. Maina h/b for Mr. Aboge for the Plaintiff

Mr. Nganga for the Defendant

Ms. C. Nyokabi-Court Assistant