



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 400 OF 2013

MURIITHI NJINGAPLAINTIFF

VERSUS

PAUL MUCHIRI NJOGU.....DEFENDANT

JUDGMENT

INTRODUCTION

The plaintiff filed this suit vide a plaint dated 21st March 2013 and filed on 26th March 2013 seeking the following orders:

a. Compelling the defendant to vacate the suit premises and in the alternative forcefully evicted from the premises comprised in the L.R. No. MUTIRA/KANGAI/2003.

b. Costs and interest at Court rates.

On 24th April 2013, the defendant filed a statement of defence which was amended on 15th July 2014 pursuant to the leave of the Court granted on 8th July 2014. In his counterclaim, the defendant claim a refund of Ksh. 115,000/= plus interest and damages of Ksh. 20,000/=. The defendant is also seeking costs of the counter-claim and the suit.

PLAINTIFF'S CASE

The suit had been fixed for the plaintiff to show cause why the same could not be dismissed for want of prosecution on 24th July 2018. When the matter was called out, neither the plaintiff nor his advocate was present. There be no cause shown, this suit was dismissed with costs.

DEFENDANT'S CASE

The defendant testified and stated that they entered into an agreement with the plaintiff for the sale of two acres out of land parcel No. MUTIRA/KANGAI/404 at a consideration of Ksh. 100,000/= on 30th January 2003. He paid a deposit of Ksh. 10,000/= and the balance was to be paid upon transfer and all the relevant documents have been issued to effect the transfer in his name. The defendant further stated that on 3rd April 2003, he paid the plaintiff a further sum of Ksh. 65,000/= which he acknowledged receipt thereof. He stated that on 25th July 2003, they entered into a supplementary agreement for the purchase of an additional one acre (1) at a price of Ksh. 50,000/=. He acknowledged receipt of Ksh. 115,000/= for the three (3) acres leaving a balance of Ksh. 35,000/=. It was a term of the said agreements that any party in default of any term(s) of the agreement shall pay the other an agreed amount of Ksh. 20,000/= being liquidated damages. He stated that he was not given the land he bought by the plaintiff.

ISSUES FOR DETERMINATION

The issues for determination in this case are as follows:

1. Whether the defendant has proved the counter-claim to the required standard?

2. Who shall bear the costs of the counter-claim?

1. Whether the defendant has proved the counter-claim to the required standard?

The defendant stated that he entered into an initial agreement with the plaintiff for the sale of two acres from land parcel No. MUTIRA/KANGAI/404 on 30th January 2003 at a price of Ksh. 100,000/= (fifty thousand per acre). The plaintiff acknowledged receipt of Ksh. 10,000/= from the said sale agreement leaving a balance of Ksh. 90,000/=. It was a term of the said agreement that in the event of the vendor failing to execute his part of the agreement, he shall pay back to the purchaser all the monies paid and expended in furtherance of the transaction together with interest at a rate of 40% p.a. It was a further term of the said agreement that should the purchaser fail to execute his part of the bargain, he shall pay back to the vendor the monies spent in furtherance of this transaction and that his monies will be refunded without interest. It was a further term of the said agreement that any party in default shall pay the other an agreed liquidated damages of Ksh. 15,000/=.

In the second sale agreement described as a supplementary agreement between the same parties, the plaintiff agreed to sell and the defendant accepted to buy an additional one (1) acre from the suit land parcel No. MUTIRA/KANGAI/404 at the sum of Ksh. 50,000/= to make a total of three (3) acres. The defendant paid a further sum of Ksh. 105,000/= making the total amount paid to Ksh. 115,000/= leaving a balance of Ksh. 35,000/= for the three (3) acres. It was a term of the subsequent agreement that any party in default shall pay the other an agreed liquidated damages of Ksh. 20,000/= instead of Ksh. 15,000/= contained in the previous agreement entered on 30th January 2003. The evidence preferred by the defendant in the counter-claim has not been controverted as the plaintiff or his advocate did not attend Court. I am satisfied that the defendant has proved the counter-claim to the required standard. The defendant has produced the first and subsequent agreement entered between him and the plaintiff for the sale of 3 acres of land parcel No. MUTIRA/KANGAI/404. The plaintiff received the down payment amounting to Ksh. 115,000/=. The supplementary agreement dated 25/7/2003 provides a default clause to the effect that any party in default shall pay the other a liquidated sum of Ksh. 20,000/=. The agreement produced by the defendant was entered into by the parties themselves. They agreed to be bound by those agreements. The duty of this Court is to interpret the agreements entered by parties and give effect to their intentions. In the case of *Margaret Njeri Muiruri Vs Bank of Baroda (Kenya) Limited (2014) e K.L.R.*, it was stated thus:

“It is not for the Court to re-write a contract for the parties. As this Court held in National Bank of Kenya Limited Vs Pipeplastic Sankolet (K) Ltd Civil Appeal No. 95 of 1999 “a Court of law cannot re-write a contract with regard to interest as the parties are bound by the terms of their contract”.

The upshot is that the defendant has proved his counter-claim for the refund of Ksh. 115,000/= plus interest thereon at Court rates. The plaintiff shall also pay the defendant damages agreed at Ksh. 20,000/= plus costs of this suit and the counter-claim.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 21st day of February, 2020.

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E.C. CHERONO

ELC JUDGE, KERUGOYA

In the presence of:

1. Mr. Asiimwe holding brief for Mr. Magee
2. Okatch – Court clerk.