



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANGA

ELC NO. 182 OF 2017

PETER KABURI MAINA.....PLAINTIFF

VS

ROSEMARY WANGARI MWANIKI.....DEFENDANT

JUDGEMENT

1. This suit was first filed on the 28/9/2011 against the Defendant namely Celestine Mwaniki Muna. On the 21/2/14 the current Defendant was enjoined upon successful application by the Defendant. Upon the demise of the late Muna, he was substituted with Catherine Nyambura Muna. Upon her death the current Defendant was substituted in place of the estate of Muna. The later died during the subsistence of the suit leaving the current Defendant to defend the suit.

2. By leave of the Court the Plaintiff filed an amended plaint on the 15/1/2018 seeking the following orders;

- a. An order that the Defendant do transfer to the Plaintiff parcel No LOC 19/GACHARAGEINI/1490 and the Deputy Registrar of the Court be authorized to sign on behalf of the Defendant all documents and /or application to facilitate the transfer herein.
- b. In the alternative and without prejudice to prayer a) above the Defendant to refund the sum of Kshs 1.9 million and comply with clause 9 of the agreement dated the 8/6/2011.
- c. Costs of the suit.

3. It is the Plaintiffs case that on the 8/6/11 he and Celestine Mwaniki Muna entered into an agreement of sale in 2011 in which he agreed to buy and Muna agreed to sell the suit land at the total costs of 2.1 million out of which Kshs 1.9 million was paid leaving a balance of Kshs 200,000/- payable on completion. He testified that he paid Kshs 1.1 million in cash and banked Kshs 800,000/- in the account of Muna at Equity Bank Limited. Immediately he was put in possession of the suit land, he avers.

4. That it was one of the conditions that the seller would obtain the Land Control Board consent. That the application was made but was frustrated by the objection which was raised by the Defendant. The Land Control Board consent was never obtained. The seller and his two wives were present at the Land Control Board meeting but the wives withheld their consent and the parties were referred to the chief for mediation.

5. In the meantime, the registered owner of the suit land Celestine Muna died in 2013 before completing the transfer of the suit land to the Plaintiff.

6. It is his case that the Defendant breached the agreement of sale.

7. PW2- Godfrey Njaria Kimani testified and stated that he is a friend of the Plaintiff and witnessed the agreement of sale. He confirmed that the purchase monies in the sum of Kshs 1.1 million was paid in his presence. That he also accompanied the Plaintiff to the Land Control Board meeting and confirmed that the Land Control Board consent was declined because of the objections raised by the Defendant.

8. The Defendant denied the Plaintiffs claim and contended that her husband never entered into any agreement with the Plaintiff for varied reasons; the suit land is ancestral and matrimonial property, there is no agreement of sale in existence, sale if any is voidable for want of spousal consent as well as the Land Control Board consent, no consideration was paid for the land by the Plaintiff to the registered owner, the late Muna.

9. Instead she averred that the Plaintiff was let to harvest and tend the tea bushes and in return share the tea proceeds equally with Mr. Muna

and remit payments to her husband which the Plaintiff failed to do so since 2011. It is her case that the Plaintiff has earned close to Kshs 5 million from tea sales since 2011 and that the Plaintiff should be ordered to give an account of the farm earnings including bonuses earned to date.

10. In conclusion she sought the following orders;

- a. An order that the Plaintiff pays the Defendant and the estate of Muna its share of the proceeds earned from the suit land
- b. In the alternative and without prejudice to prayer a above, the Plaintiff be ordered to pay mesne profits to the Defendant for the denial of user or the suit land.
- c. An injunctive order issued to stop the Plaintiff from entering accessing and in any way using the suit land.
- d. The Plaintiff be condemned to pay costs of the suit and the counterclaim.

11. In her evidence in chief she informed the Court that she is the wife of the late Celestine Muna and co – wife of Catherine Muna, both deceased. That the suit land measures 4 acres. She denied that the Plaintiff and her late husband entered into any agreement for sale. She contended that the purported agreement is void since no spousal consent was obtained; no consideration was paid; no Land Control Board consent was obtained; the suit land is ancestral land which was held by her husband in trust; the deceased allowed the Plaintiff to manage the 4000 tea bushes and share the proceeds equally which the Plaintiff failed to comply.

12. Further she added that in 2011 when the purported agreement was signed, she lived in Nakuru but separately from her husband who lived with the late Catherine and yet she was not informed of any sale of the land by her then husband. That she was not present when the Plaintiff visited Muna in his Nakuru home to discuss and negotiate the sale of the suit land. On learning that the late Muna was selling the land she lodged a caution on the register of the suit land. That though she objected to the Land Control Board consent being issued, she did not attend the meeting. She informed the Court that she is the Legal Administrator of the estate of the late Muna.

13. In addition, she stated that she is not willing to sell the land to the Plaintiff nor refund any monies. That in any event the Plaintiff did not pay any consideration for the suit land. That the suit land is ancestral land and no spousal consent was sought and given by the Defendant.

14. The Plaintiff submitted that the late Muna entered appearance but never filed a defence up to the time of his death. In his view this is because the late Muna did not challenge the Plaintiffs case at all. That he wanted the transfer of the land to proceed and that is why he did not file a defence for a period of 3 years but instead entered a consent to have the land transferred to the Plaintiff. As fate would have it this consent was set aside by the Court for interalia being illegal because it sought to avoid the process of seeking and obtaining consent of the Land Control Board.

15. That the original Defendant died in 2013 and the substituted Defendant Catherine Nyambura Muna died in 2017. That the Defendant cannot deny the agreement of sale because she was not present at the time as she lived alone elsewhere and the late husband lived with Catherine Nyambura Muna then. That the Defendant has not proved that the Plaintiff was to manage the tea and share the tea proceeds equally with the husband. Neither can she proof mesne profits he asserted.

16. Further the Plaintiff insists that he purchased the land from Muna and was put in possession. He paid Kshs 1.9 million and the balance of Kshs 200,000/- was to be paid on completion which was 31/8/11. That the late Muna never denied the Plaintiffs claim at all till his death in 2013.

17. In the alternative the Plaintiff contends that if his prayer for specific performance fails, he should be entitled to the refunds plus interest.

18. The Defendant on the other hand opposed the Plaintiffs claim and submitted that the Court in 2014 allowed her to be enjoined in the case and at the same time set aside irregular orders obtained by consent whose import was to overwrite the provisions of the Land Control Board to the extent that the parties purported to dispense with the Land Control Board consent and that the Deputy Registrar to execute the transfer instead of the late Muna who was alive then.

19. Further that by the time of the death of Muna, he had not filed a defence in the suit meaning that he had no intention of contesting the suit given that he sold the land to him.

20. That on the 15/5/18 the Defendant learnt that she had been substituted as the Defendant in the suit after the death of her husband and her co-wife. She then proceeded to file her defence and counterclaim with the leave of the Court.

21. At the trial the Defendant led evidence that she and her husband planted 4000 tea bushes on the land. That the land was inherited by her husband from her mother the late Lucy Wanyi Muna who in turn inherited it from her husband. That she was lawfully married to the late Muna and produced in evidence a marriage certificate to support her averment. She stated that the deceased husband, to her knowledge, had put the Plaintiff on the land for purposes of picking tea since they were not residing in Muranga and share the tea proceeds with the late Muna whose health was deteriorating and needed funds for medication.

22. As to whether the sale agreement was valid, the Defendant submitted that though the agreement entered into on 8/6/2011 was purported to have been signed before an Advocate the said Advocate was not called to testify to confirm the agreement. That no spousal consent was sought and obtained. That the land was ancestral land and therefore required the consent of the family before it could be sold. As a result of failure to obtain spousal consent the agreement is rendered void at the option of the spouse or spouses who have not consented to the sale.

23. As to whether the Plaintiff is entitled to the prayers sought, the Defendant submitted that the Plaintiff knew or ought to have known that the suit land is ancestral land held in trust by the deceased for the family. Further that the suit land was matrimonial property that required spousal consent as the Defendant and the co-wife had overriding interests in form of spousal rights. That the Plaintiff is not entitled to prayer no 1 on those grounds.

24. Further that the Plaintiff is not entitled to a refund of Kshs 1.9 million on account that he failed to prove that indeed he paid any monies in the first place. That the deceased Defendant was sick and senile at the time of the purported sale and it is possible that the Plaintiff took advantage of his failing health and senior age.

25. In respect to the Defendant's orders in the counterclaim, the Defendant stated that she is entitled to mesne profits or in the alternative a share of the proceeds earned by the Plaintiff from the date he was put in possession to the date of judgement.

26. Having evaluated the evidence of the parties, the submissions and all the pleadings, the issues that crystalize for determination are;

- a. Is there a valid agreement of sale between the Plaintiff and the late Muna?
- b. Is the Plaintiffs entitled to specific performance?
- c. Is the Defendant entitled to mesne profits?
- d. Who meets the cost of the suit?

27. It is not in dispute that the suit land was registered in the name of Muna on 31/3/92. According to the green card adduced in evidence the title was registered in the name of Lucy Wanyi Muna on the 19/3/1986. The Defendant led evidence that the suit land was family land having devolved from the father of the deceased, Muna, to his mother and finally to the late Muna. That no doubt this land was family or ancestral land cannot be gainsaid.

28. It is also not in dispute that the Plaintiff is in possession of the suit land. According to the account of the Plaintiff he was put in possession by the seller while according to the account of the Defendant he is in possession based on some arrangement between him and the late Muna for purposes of managing the tea bushes. That the proceeds of sale of tea leaves was to be shared between the two equally. It is however the view of the Defendant that the Plaintiff failed to pay any monies to the late Muna on that account, a charge that the Plaintiff has not challenged.

29. Let me consider the agreement for sale. The agreement is dated the 8/6/2011. The sale is in respect to 4 acres of land comprised in the suit land together with 4000 tea bushes. The price for suit land is disclosed as Kshs 2 million and the tea bushes is Kshs 100,000/-. It is claimed by the Plaintiff that Kshs 1.9 million had been paid at the time of the agreement and the balance was Kshs 200,000/-. Possession was to be availed upon completion of the purchase price. It is the vendor who was to apply for the Land Control Board consent. The completion date was the 31/8/2011. The penalty for breach was a sum equal to 50% of the purchase price. It would appear that there were other agreements between the parties dated the 8/12/2010 and drawn by the parties and that by a law firm namely M G Ntabo were cancelled.

30. The Defendant has challenged the agreement on various fronts. She states that the purchase price was not paid at all. The Plaintiff stated that he visited the late Muna on the 8/6/2011 in his home in Nakuru negotiated the sale and paid him Kshs 1.1 million in cash and that the agreement was signed the same day. PW2 states that the agreement was signed in Muranga before an Advocate namely Warema Mwaniki the following day. This evidence contradicts the evidence of the Plaintiff. The Plaintiff did not produce any evidence to support his averment that he paid the late Muna Kshs 1.1 million in cash or at all. He also claimed to have paid Kshs 800,000/- through the bank account of the late Muna. What was so difficult for the Plaintiff to produce evidence of the payment especially now that it is under challenge by the Defendant. The fact of the payment is not supported and the Court finds in the absence of evidence of payment, it cannot hold that payment of the purchase price was made. The deceased Defendant was said to be ailing and senile and though the Defendant did not produce evidence to support it on the balance of probabilities the Court finds that no payment was paid at all. The evidence of the Defendant is believable taken on a balance of probability.

31. It is not in dispute that the suit land is customary land. Under Section 28 (b) of the Land Registration Act, customary trusts are considered as one of the overriding interests that need not require registration on the title. It attaches with the land so much so that it subsists and affects the land without it being noted on the register. In the case of **Mbui Mukangu Vs Gerald Mutwiri Mbui (CA NO 281 of 2000)** the Court of appeal stated as follows;

“ that once it is shown that the land was ancestral land which devolved to a person (son) upon death of the owner i.e. father, then the same may be said to be held in trust for the others/family members.”

The Court further held that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations.

32. That being the case the late Muna had no capacity to dispose of the land without the consent of the family that is to say the Defendant and his co-wife. That explains why his wives objected to the issuance of the Land Control Board consent.

33. The Defendant adduced evidence that she was a wife of the deceased Muna and produced a marriage certificate. She also informed the Court that she and her husband planted 4000 tea bushes on the land. That the sale requires spousal consent. While the Court agrees with the Plaintiff that at the time of signing the purported agreement of sale in 2011, the requirement of spousal consent had not become law. The Land Registration Act was enacted and became law on the 2/5/2012.

34. The Defendant has asserted that the Plaintiff was allowed into the land for purposes of management of the tea and not for purposes of any sale. The Plaintiff did not rebut this position and in the absence of evidence that indeed there was a valid sale the Court is inclined to believe this position on a balance of probabilities.

35. It is not in dispute that the consent of the Land Control Board was not obtained. A sale of land such as this particular one is a controlled transaction that require the consent of the Land Control Board especially in a situation where the land is agricultural. The Act provides that in the absence of the consent the sale is void for all purposes. The Court holds that the sale if any is void for all purposes. The agreement provided that the Vendor was to apply for the Land Control Board consent. Evidence was led that upon application, the Defendant and her co-wife objected the same. The Act provides that either party may apply for the consent. However in this case the seller had undertaken to seek for the consent. It was however frustrated by the objection of the Defendant and the co-wife and the Court finds that the seller cannot be held to have breached the contract under the circumstances.

36. In respect to the issue of specific performance, like any other equitable remedy, is discretionary and the Court will only grant it on well settled principles. The basis of specific performance is based on the existence of a valid, enforceable contract. Any litigant seeking the remedy must meet the requirements to qualify for specific performance; existence of a valid contract, conduct of the parties must commend itself to equity – come to equity with clean hands, remedy should not cause hardship and damages must be insufficient or cannot be established.

37. Specific performance 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 unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. **Chitty on Contract, 30th edition, volume one at paragraph 27-003** observed that:

“The jurisdiction to order 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 formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.”

38. Failure to obtain the necessary Land Control Board consent automatically vitiates a sale of land which is subject to a controlled transaction like this one. I find that the transaction in this case is void, invalid and therefore the remedy of specific performance is not available to the Plaintiff.

39. It is the finding of the Court that specific performance is not available. The alternative prayer of refund cannot be granted because the Plaintiff has not proved that he paid any monies in the first place.

40. On the issue of mesne profits, the Defendant has not placed any evidence before the Court in form of a valuation of rentals, tea revenues and such other evidence that would support a prayer for mesne profits. Except for the mention of Kshs 5.0 million in passing there was no evidence to guide the Court on the quantum of the mesne profits and proof of the same. This prayer is therefore declined.

41. In the upshot the Defendants counterclaim succeeds and the Plaintiffs claim fails.

42. Final orders;

- a. The Plaintiff be and is hereby ordered to vacate the suit land within the next 60 days and in default eviction to ensue.
- b. The OCS commanding the police station in the area is ordered to supervise the eviction and ensure law and order.
- c. A duly authorized Court bailiff to undertake the eviction.
- d. A permanent injunction be and is hereby ordered stopping the Plaintiff his agents, workers from accessing and interfering with the suit land.
- e. Costs of the suit and the counterclaim shall be borne by the Plaintiff.

43. It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 5TH DAY OF MARCH 2020

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Mutuma HB for Wachira for the Plaintiff

Ms Lucy Mwai HB for Mangera for the Defendant

