



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 735 OF 2017**

**WAITHAKA KARIUKI.....PLAINTIFF**

**VERSUS**

**JOHNSON KARANI RIGU.....DEFENDANT**

**JUDGMENT**

By a **Plaint** dated **7<sup>th</sup> September 2017**, the Plaintiff sought for the following orders against the Defendant:-

- a) The Defendant be ordered if legally possible to transfer plot number Thika/ Municipality/Block 29/262 measuring 40 feet by 80 ft to the name of the Plaintiff and render vacant possession thereof to the Plaintiff.*
- b) Alternatively, the Defendant be ordered to refund to the Plaintiff a total of Kshs.748, 000 inclusive of transfer fees paid plus penalty for breach.*
- c) The Defendant be ordered to pay costs and interest of this suit.*
- d) Any other or better relief this Honourable Court may deem fit to grant.*

In his statement of claim, the Plaintiff averred that on the **21<sup>st</sup> June 2013**, he entered into a sale agreement with the Defendant wherein the Defendant/ Vendor sold to him the suit property at the agreed consideration of **Kshs. 560,000/=** which sum was fully paid to the Defendant. Further that he paid **Kshs.20,000/=** being transfer fees. It was his contention that at the material time, the Defendant represented himself as the owner of the suit property and that it was a term of the agreement that the Plaintiff would be put into possession of the plot as at the date of the agreement and further that the Defendant would facilitate and effect transfer in his favour.

He averred that the Defendant materially breached the contract dated **21<sup>st</sup> June 2013**, and that despite various promises and undertakings on the part of the Defendant, he has failed and/ or neglected to either transfer the plot to him or refund the consideration paid to him of **Kshs.580,000/=** and thus the he has invoked the default clause and claim **30%** of the consideration as penalty for breach.

The suit is contested and the Defendant filed a statement of Defence dated **29<sup>th</sup> September 2017**, and denied the allegations made in the Plaintiff. He admitted entering into an agreement with the Plaintiff and receiving the consideration. He denied being paid the **Kshs. 20,000/=** transfer fees by the Plaintiff and averred that the sums were paid to **Kilimambogo Housing Developers**. He further acknowledged having agreed to put the Plaintiff in possession of the suit property and to facilitate the transfer. He also averred that in pursuance of the agreement, he handed to the Plaintiff vacant possession and surrendered his plot ownership **Certificate No. 230** to Ms **Kilimambogo Housing Developers** who issued the Plaintiff with a new plot certificate upon payment of the transfer fees and therefore the issue of a default penalty does not arise. It was his contention that he had no capacity to transfer the plot for a second time as it belonged to the Plaintiff.

After close of pleadings the matter proceeded by way of viva voce evidence wherein the Plaintiff gave evidence for himself and the Defendant also testified and closed his case.

**PLAINTIFF'S CASE**

**PW1 Waithaka Kariuki**, adopted his witness statement dated **7<sup>th</sup> September 2017**, and testified that he knows the Defendant who sold to him a **Plot No. 7** being **L.R No. Thika Municipality Block 29/262** on **21<sup>st</sup> June 2013**, for a consideration of **Kshs.560,000/=** to which he paid the full amount. However, the Defendant did not transfer the plot to him nor put him into possession. He further testified that the Defendant showed him the title, however on the ground, the plot was never there and that the people who were in the parcel of land were evicted. He told the Court that he paid **Cobson Investment**, the monies where he had been directed by the Defendant to pay. He produced his list of document as exhibit 1 and further testified that he paid **Kshs. 20,000/=** to **Kilimambogo** as transfer fees and that the breach of agreement was attracting **30% penalty** . It was his further testimony that he was taken to the ground and he was shown the plot but that it

was an open plot but the title was not the one that the Defendant was selling to him as the map showed that the plot was not his.

## **DEFENCE CASE**

**DW1 Johnson Karani Rigu** adopted his witness statement dated **29<sup>th</sup> September 2017** and further testified that he was the owner of **Copson Investment Limited**. He acknowledged selling to the Plaintiff a plot and receiving the consideration of **Kshs. 560,000/=** from the agreement they had. He further testified that he was the registered owner of the suit property through certificate of ownership given to him by **Kilimambogo Housing Developers**. Further that he had visited the suit property, but that they had not transferred the land to his name and he did not have a title document. He further acknowledged that as per the Plaintiffs documents, the property belonged to a deceased person and it was to be transferred to **Fredrick Mwangi Nyaga** and that the said **Fredrick Mwangi Nyaga** did not have title the property. He confirmed that he bought the property through **Kilimambogo Housing Cooperative** and that the beneficiary in the certificate was **Fredrick Mwangi Nyaga** and not Kilimambogo Housing. He told the Court that there was a connection between the two. He further confirmed that the Plaintiff paid **Kshs. 20,000/=** as a transfer fees to **Kilimambogo Developers** and that he undertook to ensure that the transfer was effected and denied that he had been conned by the Kilimambogo Housing Developers.

After the close of viva voce evidence, the parties filed written submissions to which the Court has now carefully read and considered and renders itself as follows;

It is not in doubt that the Plaintiff and the Defendant entered into a sale agreement dated **21<sup>st</sup> June 2013**, that the Defendant being the vendor sold the suit property to the Plaintiff at a consideration of **Kshs.560,000/=** and that the Plaintiff would later pay **Kshs. 20,000/=** as transfer fees to Kilimambogo Housing Company. It is further not in doubt that the Plaintiff in compliance with his obligations under the contract, fulfilled the said obligations. Under **clause 4 the said sale agreement**, it was the duty of the vendor in this case being the Defendant to expedite the transfer of the said land into the name of the purchaser. It was further the vendor's obligations under clause 6 to ensure that the transfer in the name of the purchaser had been effected and that the purchaser was issued with a certificate of ownership by the said **Kilimambogo Housing Developers**.

While the Plaintiff contends that the Defendant is in breach of the contract as he failed to fulfil his obligations, It is the Defendant's contention that he had fulfilled all his obligations and had further ensured that the Plaintiff had been issued with a certificate of ownership and given the Plaintiff vacant possession and thereby fulfilled his obligations under the Contract.

From the available evidence, the Court finds the issues for determination are;

- 1. Whether the Defendant is in breach of his Obligations under the Contract.**
- 2. Whether the Plaintiff is entitled to the orders sought.**
- 3. Who should bear the Costs of the suit**

### **1. Whether the Defendant is in breach of his Obligations under the Contract.**

What then were the Defendant's Obligations under the Contract? As already stated above, the Vendors obligations under the sale agreement dated **21<sup>st</sup> June 2013**, were captured under **Clause 3, 4 and 6**. In essence the Defendant being the vendor was to guarantee that there were no rival claims over the suit property. He was under a legal duty to expedite the transfer into the name of the purchaser and that he was to ensure that the name of the Plaintiff being the purchaser had been effected and that the Plaintiff was issued with a certificate of ownership.

The Plaintiff has averred that despite these obligations resting on the shoulders of the Defendant, the Defendant has failed to ensure that he has the transfer has been effected in his name. While the Defendant has submitted that his obligations were to take the Plaintiff to **Kilimambogo Housing Developers** and ensure that the Plaintiff had paid his transfer fees, where upon he was to surrender his plot certificate and then the Plaintiff would be issued with a new one, this Court is of the considered view that that was not case. In the agreement, it specifically stated that the Vendor was to ensure that the property was transferred to the Plaintiff and he was to further do everything possible. It is trite that parties are bound by the terms of their Contract. See the case of **Total Kenya Ltd... Vs... Joseph Ojiem, Nairobi HCCC No.1243 of 1999**, where the Court held that:-

***“Parties to a contract that they have entered into voluntarily are bound by its terms and conditions.....”***

Further See the case of **National Bank of Kenya Ltd ... Vs ... Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503**, where the Court held that:-

***“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.***

Having held that parties to a contract are bound by the terms of the said Contract, this Court finds that the Defendant was bound to ensure that the Plaintiff got registered as proprietor of the suit property. The Plaintiff has alleged that he has not been able to be registered as a proprietor of the suit property. Without any evidence to rebut his claims this Court finds and holds that that is the case. It is therefore not in doubt that the Defendant did not fulfil his obligations under the said Contract and was therefore in breach of the Contract.

### **2. Whether the Plaintiff is entitled to the orders sought.**

In his statement of claim, the Plaintiff has sought to have the Defendant compelled to transfer the suit property to him if it's legally possible. However, in his evidence the Plaintiff has produced title deed that indicates that **Nyaga Magu** is the registered owner of the suit

property. Further that the said **Nyaga Magu** is now deceased and the property has devolved to **Fredrick Mwangi Nyaga**, who is his beneficiary. The suit property being **Plot No. 7** forms part of **L.R Thika Block 29/262**. There has been no evidence produced before this Court to indicate that there is any other person including the Defendant that has ownership over the suit land. It has also been the Plaintiff's evidence that the people who were living on the suit property, had been evicted. Therefore the Court finds that prayer No. 1 is not tenable as it cannot order the Defendant to transfer Land which he has not proved ownership of and which land is held by a 3<sup>rd</sup> Party who is not a party to this suit.

The Plaintiff had also sought for the refund of **Kshs.748,000/=** being the consideration paid, transfer fees paid and the penalty for breach of Contract. This Court has already held that the Defendant had been in breach of the Contract when he failed to ensure that the Plaintiff has been registered as the owner of the property. Therefore as per the terms of the Contract which the parties are bound by, all the monies and expenses incurred plus a penalty of **30%** must then be refunded. This Court finds that the said prayer is merited and allows it.

### **3. Who should bear the Costs of the suit**

As provided by **Section 27 of the Civil Procedure Act**, costs are granted at the discretion of the Court and the said discretion must be exercised judiciously. See **Halsbury's Law of England**, which provides as follows:-

*“The court has discretion as to whether costs are payable by one party or another, the amount of those cost, and when they are to be paid. Where costs are in the discretion of the court, a party has not right to costs unless and until the court awards them to him and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially. It must not be exercised arbitrarily but in accordance with reason and justice”.*

However, it is also trite that costs follow the event. See the case of **R....Vs...Rosemary Wairimu Munene, Exparte Applicant ... Vs ... Ihururu Diary Farmers Cooperative Society Ltd**, where the Court held that:-

*“The issue of costs is the discretion of the court as provided by the law. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party, rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case”.*

Bearing in mind the above provisions of law and the decided cases on the issue of costs, the Court will be guided by the law that costs follow the event. The Plaintiff herein is the successful litigant and should ordinarily be accorded costs. Consequently, the Court uses its discretion and award costs of this suit to the Plaintiff who is the successful litigant. The costs to be borne by all the Defendant.

Having now carefully considered the available evidence, the relevant provisions of law, the written submissions and cited authorities, the Court finds that the Plaintiff has proved his case on the required balance of probability. For the above reasons, the Court enters Judgement for the Plaintiff against the Defendant in terms of prayers **Nos.(b) and (c)** of the Plaint dated **7<sup>th</sup> September 2017**.

It is so ordered.

**Dated, signed and Delivered at Thika this 15<sup>th</sup> Day of June 2020**

**L. GACHERU**

**JUDGE**

**15/6/2020**

**Jackline - Court Assistant**

### **ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

### **By Consent of :**

*No consent for the Plaintiff*

*No consent for the Defendant*

*L. GACHERU*

*JUDGE*

*15/6/2020*