



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 11 OF 2004

SAMUEL KARUGA.....PLAINTIFF

VERSUS

SAKISH FLORA LIMITED.....DEFENDANT

DELOITTE CONSULTING LIMITED.....THIRD PARTY

JUDGMENT

1. Background and Pleadings

This suit was filed by a plaintiff dated 15th January 2011 and amended on the 15th March 2011. The Amended plaintiff was filed on the 31st March 2011. A perusal of the Amended plaintiff shows that the dispute concerns the use and Title to land parcel known as **LR 9770/6**. The case was partly heard before the High Court(Hon. Musinga, J, as he then was) before the enactment of the **Environment and Land Act** which became effective on the 30th August 2011.

2. By Chief Justice practice directions gazetted as **No. 5178 of 25th July 2014**, the High Court was directed to continue to hear and finalise all parheard cases relating to disputes on land ownership, use and title.

It is upon such basis that I took over the hearing and conclusion of the case as a High Court Judge.

3. The plaintiff sued the defendant and the 3rd party upon a sale agreement executed on the 27th October 2000 between himself and the defendant for a purchase of the suit land of 90 acres at a price of Kshs.7.2 Million. It is alleged that the defendant paid a sum of Kshs.4,686,556/= but failed to pay the balance of Kshs.1.5 Million and also failed to transfer 10 Acres out of the suit property to itself. The 3rd party was later withdrawn from the suit. See below, Paragraph 7.

4. The plaintiff therefore sought:

a) A permanent injunction restraining the defendant, its servants and agents from trespassing, interfering or in any way dealing with the 10 Acres fronting the Nakuru-Rongai Highway in the suit parcel.

b) An Order of payment of the balance of the purchase price.

c) Transfer of the said 10 Acres to himself and

d) Equivalent value of shares in the flower business of the defendant.

4(a) In its defence dated the 24th March 2005 the defendant denied the plaintiff's claim.

5. The Plaintiff's evidence was taken before Hon. D.K. Musinga (as he then was). **He testified as PW1.**

He produced a Sale Agreement dated the 27th October 2000 between himself and Sakish Flora Ltd the defendant (PEX1) for the sale of 90 Acres out of the 100 acres suit property for Kshs.7.2 Million.

It was his testimony that the suit land was charged to National Bank of Kenya and out of the purchase price he paid Kshs.4,600,000/= to discharge the property which was done and the title forwarded to Aminga Advocate on 14th November 2000. It was his testimony that the payment was made before execution of the sale agreement, and that the balance of Kshs. 1.5 Million was to be paid to him but the defendant paid only Kshs.500,000/=. He testified that the terms of the agreement were that the defendant would use the 90 Acres for planting flowers and that the Defendant would give him shares to the value of Kshs.1,013,446/= in the flower business and pay him cash of Kshs.1,500,000/= but only Kshs.500,000/= was paid to him. He further stated that the parcel was to be sub divided and the 90 acres were to be retained by the defendant, and 10 acres were to be transferred to the plaintiff. The said 10 Acres were never transferred to him, and the defendant claimed and fenced the entire land parcel claiming ownership of the entire 100 acres despite intervention by the local administration.

Upon cross examination, the plaintiff stated that the agreement drawn by the parties joint advocates indicated the sale was for the entire 40.25 Hectares but his intention was to sell only 90 Acres.

6. PW2 Lawrence Maina Mwangi was an agent for the defendant and was present during negotiations for the sell of the suit property. He witnessed the signing of the agreement (PEX1) but had no knowledge of other subsequent agreements. He stated that the defendant was to subdivide the entire suit property and return or re transfer 10 Acres to the plaintiff.

7. The plaintiff withdrew the 3rd party case on the 7th February 2014 and 2/3 costs were awarded to the said 3rd party on the 10th March 2016.

The defendant did not call any evidence despite several opportunities given to it.

As such the plaintiff's evidence remains unchallenged and uncontroverted.

Written submissions were filed on the 25th January 2017 for the plaintiff.

8. Analysis of Evidence

I have perused the sale agreement executed by the plaintiff and the defendant on the 27th October 2000. The suit land parcel measures 40.24 Hectares or thereabouts which translates to 99.433 acres. The purchase price was for 90 Acres. That leaves approximately 9.43 Acres out of the entire land parcel.

It was a term of the agreement that the defendant as purchaser was to pay off the balance of the loan from the National Bank, and pay Kshs.1.5 Million to the seller (plaintiff) upon commencement of a flower growing project on the farm and thereafter the balance of purchase price would be controverted to shares in the flower business in favour of the plaintiff, clearly supported by the subsequent paragraphs of the agreement.

9. Paragraph 3 of the agreement states:

“That it is hereby agreed that the vendor shall cause the title to be transferred to the purchaser

in the first instance

Paragraph 4

“That it is agreed that the purchaser shall thereafter transfer 10 Acres or thereabouts on an area fronting the tarmac road long the Nakuru-Rongai Highway.”

Paragraph 5:

“That the vendor shall be responsible for the sub division of his 10 Acres land fronting the highway.

10. It is a further term of the agreement that the vendor was to obtain the Land Control Board Consent for the transfer of the title in the first instance.

Paragraph 13 is specific that the purchaser upon receipt of the title from the Bank (National Bank) through the Advocates, within 90 days was to cause the subdivision and re-transfer of 10 Acres to the vendor the plaintiff. The above is the only sale agreement that was produced in court and therefore the only one binding both the plaintiff and the defendant.

11. The agreement as drawn in my opinion is not ambiguous. It is in very clear and plain language and needs no interpretation as to what the intention of the parties were.

The plaintiff's evidence supported the terms thereof.

He performed his part of the agreement, but the defendant failed to.

No evidence was adduced that the defendant paid to the plaintiff the balance of Kshs.1.5 Million nor re-transferred the 10 Acres after subdivision of the suit land back to the plaintiff (**Paragraph 2)(b), 4, 13**).

It is therefore evident that once the title to the suit property was released to the defendant, he converted the whole land parcel to itself and failed to perform its obligations stated in the agreement by re-transferring 10 Acres to the plaintiff as clearly agreed. I find that the defendant breached the terms of the agreement. It is therefore in breach of the agreement.

12. The statements in the defence filed on 29th March 2005 are mere statements. No evidence was adduced to support the denials. It is trite that an unchallenged defence stands unsubstantiated, and therefore mere pleadings and statements, and not supported by any evidence.

See **Trust Bank Ltd -vs- Paramount Universal Bank Ltd & 2 Others HCCC No. 1243 of 2001** (Milimani). See also **Sections 107 and 108 of the Evidence Act**.

13. It is also trite that the business of the courts is not to rewrite a contract to parties agreements entered into freely unless it is evidentially shown that there existed coercion, fraud or misrepresentation. Its duty is to enforce performance of the terms thereof. **Hassan Zubedi -vs- Patrick Mwangangi Kibanya & Another (2014) e KLR**.

14. There being no other agreement or variation of the only agreement executed on the 27th October between the plaintiff and the Defendant, I find that the plaintiffs uncontroverted and unchallenged evidence credible. The plaintiffs balance of Kshs.1,013,444/= was not converted into shares in the defendants flower farm, as was the intention stated in the agreement.

It is my finding that, that sum too ought to be given back to the plaintiff in addition to the balance of Kshs.1.5 Million. It is a further finding that the defendant ought to re-transfer 9.43 Acres back to the plaintiff.

15. Consequently judgment is hereby entered in favour of the plaintiff against the defendant as follows:

a) Kshs.2,013,446/=

b) Re-transfer of 9.43 Acres to the plaintiff being a portion of the sub-division of Land Parcel known as LR No. 9770/6 fronting the Nakuru Rongai Highway within 90 days.

c) Interest at court rates on (a) above from date of filing of the suit.

(d) Costs of the suit are awarded to the plaintiff.

Dated, Signed and Delivered this 20th Day of July 2017.

J.N. MULWA

JUDGE