



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 195 OF 2013

GABRIEL KIPKERIN G ASENWA.....PLAINTIFF

VERSUS

JOEL KIPROTICH KEINO.....DEFENDANT

JUDGMENT

1. *Gabriel Kipkerin Asenwa*, the Plaintiff, sued *Joel Kiprotich Keino* through the Plaintiff dated the 1st August, 2011 seeking for the following;

“(a) A declaration that the Defendant is in breach of sale agreement dated 23rd March, 2004 and of no consequence for being in breach of its terms and conditions, and requisite procedures governing land transactions.

(b) Reinstitution integrum.

(c) The Defendant to hand over vacant possession of the suit premises to the Plaintiff and permanent injunction from reverting back thereon.

(d) Damages for the breach of contract and mesne profits.

(e) Costs of this suit.”

The Plaintiff avers that on the 23rd March 2004, he entered into an agreement with the Defendant under which the Defendant agreed to buy land parcel *Soy/Kapsang Block 7 (Ziwa) 19*, measuring approximately 13.5 acres of the suit land. That the Defendant made part payment upon signing the agreement, and promised to pay the balance on or before 31st January, 2005. That however, the Defendant has refused and or declined to pay the balance as promised but has continued to enjoy the suit premises. That the Defendant has breached the terms of the agreement causing the Plaintiff loss and damages.

2. The Defendant has opposed the Plaintiff's claim through the amended defence and counterclaim dated 1st December, 2017. The Defendant confirms entering into the said sale agreement on 23rd March, 2004, and paying shs.865,000 at execution and balance of Shs.350,000 by the 24th January, 2005 before the deadline of 31st January, 2005. He thus avers that he has not breached the terms of the said agreement, and that the Plaintiff has no legal or equitable claim against him, and the suit should be dismissed with costs. The Defendant has counterclaimed against the Plaintiff for a declaration that he is a bona fide purchaser of the suit land and that the Plaintiff is in breach of the sale agreement for failure to comply with clauses 6, 7, 8 and 9 thereof. He also prays for extension of time to apply for Land Control Board consent, damages for breach of contract, specific performance, permanent injunction, order directing the Plaintiff to execute the completion documents, and in default, the Deputy Registrar be empowered to execute the same; costs and interests.

3. The Plaintiff filed a reply to the defence and defence to the counterclaim dated the 11th June, 2018 denying the Defendant's claim, and sought for the counterclaim to be dismissed with costs.

4. The Plaintiff testified in support of his claim on the 22nd September, 2015. He told the court that he sold 13.5 acres of land parcel Ziwa/19 to the Defendant under a sale agreement made before Ngala Advocate on the 23rd March, 2004 at a purchase price of Kshs.1,215,000. That upon execution of the sale agreement, the Defendant paid him Kshs.865,000, out of which Kshs.65,000 was in cash. That the balance of Shs.350,000 was to be paid before the 31st January, 2005. That he subsequently Defendant paid him Kshs.20,000, Kshs.150,000, and Kshs.130,000 on the 10th May 2004, 19th November, 2004 and 10th January, 2005 respectively leaving a balance of Kshs.50,000 which was never paid. On 4th March 2011, he instructed an advocate to write to the Defendant terminating the sale agreement due to breach. He also came to Court to stop the Defendant from burying the remains of his relative on the suit land for he had not fully paid for the land. That he also reported to the criminal investigations department after the Defendant claimed he had fully paid the purchase price. That investigations

showed the signature on the acknowledgment for payment of Kshs.50,000 note was not his. During cross examination, the Plaintiff denied receiving the Kshs.50,000 balance and signing the acknowledgment of 24th January, 2005. He confirmed that he reported the matter to the police after filing the suit. That he filed the suit for he had not been paid all the purchase price.

5. The Defendant testified as DW1 and adopted his filed statement dated 11th November, 2011. He confirmed entering into a sale agreement with the Plaintiff dated the 23rd March, 2004 under which he bought 13.5 acres of the suit land that measures about 20 acres at Shs.1,215,000. That upon executing the sale agreement, he paid the Plaintiff Kshs.800,000 by banker's cheque, and Shs.65,000 in cash. That the balance of Shs.350,000 was paid in instalments of Shs.20,000, Shs.150,000, Shs.130,000 and Shs.50,000 on the 10th May, 2004, 19th November, 2005, 10th January, 2005 and 24th January, 2005 respectively. That he had taken possession of the 13.5 acres of the suit land as agreed under the agreement. That he has since done various developments on the portion including constructing a residential premises, fencing, land planning, ploughing, tree planting, and paddocking. That the last payment of Shs.50,000 of the 24th January, 2005 was made before Mr. Ngala Advocates and signed by Mr. Keter Advocate. That in June, 2004, the Plaintiff had told him the sale agreement had not included the value of the trees and the grass thatched house on the land. That after discussion, they agreed to value those items at Kshs.14,500 which he paid the Plaintiff with ten (10) bags of maize. That on 4th March, 2011, the Plaintiff wrote to him through an advocate asking him to vacate from the land as he had not fully paid the purchase price. That to safeguard his interest, he had a caution filed against the suit land's title. He also sought the chief's assistance who wrote letters to the Plaintiff asking him to transfer the land to the Defendant. That on 28th October 2011, his mother passed on, and he buried her on the suit land without any objection. During cross-examination, **DW1** stated that he took possession of the 13.5 acres of the suit land in 2004. That the Plaintiff had promised to apply for the consent of the Land Control Board to subdivide the land, and transfer of the portion to him but did not do so, but instead disappeared from the area. That apart from himself, there are two other buyers of portions of the said parcel who like him had been asked to vacate and have not been sued. The Defendant called **Jackson Kiptoo Metto**, **Josphat K. Too** and **Charles Kipnetich Keter** who testified as **DW2** to **DW4** respectively. DW2 and DW3 confirmed being witnesses of the sale agreement between the Plaintiff and Defendant, and that they witnessed the payment of Kshs.800,000 in banker's cheque and Kshs.65,000 in cash. DW2 confirmed he has been the Chairman of Ziwa Farm from 1994 to date, and confirmed that the Plaintiff was the owner of Block 7/19 measuring about 20 acres. He further confirmed that the Plaintiff had sold 5 acres, and 1.5 acres respectively, to one Koech and Joel respectively before selling the 13.5 acres to the Defendant. He further confirmed that title deed for the Ziwa parcels have been issued. **DW4** is an advocate in private practice and was an associate at M/s Ngala & Company Advocates until 2009. He confirmed that on the 24th January, 2005 he witnessed **Joel Kiprotich** of Identity Card No. 3937187, Defendant, pay **Gabriel Kipkering** of Identity Card No. 1230222, Plaintiff, Kshs.50,000 and that he prepared an acknowledgment which was signed by the parties. That the payment was in respect of an agreement dated the 23rd March, 2004 made in their firm by the late Mr. Ngala Advocate. That the payment of the Kshs.50,000 was the final payment.

6. The learned Counsel for Plaintiff and Defendant filed their written submissions dated the 10th March, 2020 and 1st April, 2020 respectively.

7. The following are the issues for the Court's determinations;

(a) Whether the Defendant has breached the purchaser's terms of the sale agreement dated the 23rd March, 2004.

(b) Whether the Plaintiff has breached the Vendor's terms of the sale agreement dated the 23rd March, 2004.

(c) Whether the sale agreement dated the 23rd March, 2004 is null and void and or unenforceable for want of consent of the Land Control Board.

(d) Who between the Plaintiff and Defendant is entitled to the prayers, or any of the prayers, sought in the Plaintiff and counterclaim?

(e) Who pays the costs of the suit and counterclaim?

8. The Court has carefully considered the pleadings, oral and documentary evidence by the Plaintiff, DW1 to DW4, written submissions by the two learned Counsel for the parties, and come to the following findings;

(a) That both the Plaintiff and the Defendant are in agreement that they entered into a land sale contract dated the 23rd March, 2004 under which the Plaintiff sold to the Defendant 13.5 acres of land parcel **Soy/Kapsang Block 7(Ziwa) 19** at a total purchase price of Kshs.1,215,000. That both parties further agree that at the execution of the said agreement, the Defendant paid the Plaintiff Kshs.800,000 by banker's cheque, and Kshs.65,000 by cash and that the balance of Kshs.350,000 was under **Clause 2(c)** agreed to be paid on or before the 31st January, 2005. That further, both the Plaintiff and Defendant are in agreement that the Defendant subsequently paid the Plaintiff Kshs.20,000, Shs.130,000 and Shs.150,000 on the 10th May 2004, 19th November, 2004 and 10th January, 2005 respectively. That the dispute is on the last instalment of Kshs.50,000. The Defendant maintains he paid the Plaintiff that amount of Kshs.50,000 on the 24th January, 2005 at the Chambers of M/s Ngala & Company Advocates but the Plaintiff has denied receipt. That the Defendant has the obligation to tender proof on that payment.

(b) That both parties are in agreement that the Defendant took possession of the 13.5 acres of the suit land upon execution of the sale agreement. That the taking of possession was provided for under Clause 3 of the sale agreement. That while **Clause 6** provided that the Plaintiff as the Vendor "**shall attend land board and give consent to effect this transaction**", there is no evidence to show whether an application for Land Control Board consent to subdivide the land to create and register a 13.5 acres parcel from the 20 acres parcel was ever made by the Plaintiff. That obviously, it was the duty of the Plaintiff to make that application as the owner of the land. That the obligation for both the Plaintiff and Defendant to meet the survey fees as per **Clause 4** would only arise after the Land Control Board consent to subdivide the parcel was obtained. That accordingly, the Court finds that the Plaintiff, as the owner

of the parent parcel, has failed to comply with **Clause 6** of the Sale agreement.

(c) That though the Plaintiff disputed receiving Kshs.50,000 from the Defendant on the 24th January, 2005, and signing the acknowledgement note, the evidence tendered by DW4, an advocate then at the firm of M/s Ngala & Company Advocate who drew the note and witnessed the payment supports the Defendant's position that indeed, the payment was made. That the Plaintiff's claim that police investigated the acknowledgment note, and found the signature attributed to him was not his, is mere heresy as he did not call the police to come to Court, and tender that evidence or the report thereof. That the foregoing leads the Court to find that the Defendant made the last payment of Kshs.50,000 to the Plaintiff on the 24th January, 2005 which transaction was documented, and witnessed by DW4. That the Defendant therefore discharged his contractual duty under Clause 2(c) of the sale agreement to pay the balance **"on or before 31st January, 2005"**.

(d) That the Defendant produced copies of letters dated 30th May 2011, 14th July 2011, 18th July 2011, 28th July 2011, 29th July 2011, and 2nd August, 2011 by the Chief and District Officer confirming that he had sought their assistance to have the Plaintiff transfer the portion of the suit land he had bought to him. That all the letters, except the last one, were of before the filing of this suit in Court, and they go to confirm that the Plaintiff had failed to take the appropriate steps to apply for Land Control Board for consents to subdivide the land, and transfer the 13.5 acres to the Defendant. That having found as above that the Defendant had complied with the obligation to pay all the purchase price by the date agreed in their agreement, it would be unfair and unjust to allow the Plaintiff to terminate the contract on the basis that Land Control Board was not obtained within the time set by the law, while it was him who failed to apply for it. That the Defendant had upon completing performing his obligations under the sale agreement acquired rights over the 13.5 acres of the suit land that he had taken possession of on execution of the agreement. That as was held in **Joseph Mathenge Kamutu Vs Joseph Wainaina Karanja & Another [2019] eKLR** at paragraph 31, **"a party cannot run away from the terms of its agreement. It has often been stated that a Court's function is to enforce contracts that the parties enter into..."**. That in the said case, the court at paragraph 41 cited the Court of Appeal case of **Willy Kimutai Kitilit Vs Michael Kibet [2018] eKLR** in which it was held inter-alia that **"since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the Court will apply the doctrines of constructive trust, and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case..... Thus, since the current constitution has by virtue of Article 10(2)(b) elevated equity as a principle of justice to a constitutional principle, and requires the Courts in exercising judicial authority to protect, and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act, where a transaction relating to an interest in land is void, and enforceable for lack of consent of the land Control Board"**. That in view of the foregoing, the Court finds that though the agreement of 23rd March, 2004 would otherwise be void for lack of the requisite consent of the Land Control Board for reason of the Plaintiff failing to apply for it, the contract is still enforceable as the Defendant has been in possession of the land since 2004, and had complied with his contractual obligation by the time agreed. That had the 13.5 acres have been subdivided and registered in the name of the Plaintiff, the Court would not have hesitated to order that it be registered in the name of the Defendant forthwith. That however, as the subdivision has not been done, the Court finds this is an appropriate case for the Court to extend the period for applying for the Land Control Board consent to subdivide, and thereafter to transfer the 13.5 acres parcel thereof to the Defendant. That should the Plaintiff fail or decline to execute the necessary documents to give effect to the transaction then the Deputy Registrar of the Court should be empowered to do so.

(e) That as the Plaintiff is the one who has delayed or declined to comply with Clause 6 of the sale agreement leading to this suit, he should pay the costs of his suit and the counterclaim.

9. That flowing from the foregoing, the Court finds and orders as follows;

(a) That the Plaintiff has failed to prove his claim against the Defendant on a balance of probabilities and the suit commenced through the Plaint dated 1st August, 2011 is hereby dismissed with costs.

(b) That the Defendant has proved his claim in the counterclaim against the Plaintiff on a balance of probabilities, and judgment is hereby entered in his favour in the following terms;

(i) *That the Defendant is hereby declared as a bonafide purchaser for value of 13.5 acres of land parcel **Soy/Kapsang Block 7 (Ziwa) 19** that are under his possession pursuant to the sale agreement dated the 23rd March, 2004.*

(ii) *That the Plaintiff is hereby declared to be in breach of the said sale agreement for having failed to apply for consent to subdivide the suit land as required under **Clause 6** of the said agreement despite the Defendant having made the final payment of the purchase price within time on the 24th January, 2005.*

(iii) *That the Plaintiff is directed to execute all the necessary documents to effect the subdivision of the suit land and the transfer of 13.5 acres thereof to the Defendant, and in default, the Deputy Registrar of this Court is hereby authorized to execute all such documents on his behalf. That so as to give effect to this order, the Court extends by six (6) months, from the date of this judgment, the time for applying for the consent of the Land Control Board in accordance with **Section 8 of the Land Control Act Chapter 302 of Laws of Kenya**.*

(iv) *The Plaintiff to pay the Defendant's costs in the counterclaim.*

Orders accordingly.

Dated and signed at Eldoret this 22nd day of July, 2020.

S. M. KIBUNJA

JUDGE

Judgment read and be transmitted by the Deputy Registrar digitally through the e-mail addresses provided by Counsel in the presence of:

Plaintiff: No appearance

Defendant: No appearance

Counsel: No appearance

Court Assistant: Christine