



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT

CIVIL SUIT NO. 226 OF 2012

CATHERINE WAITHIRA GITUMBU.....PLAINTIFF

VS

DANIEL KAMAU KIROGA.....1ST DEFENDANT

WANJUGU PETER WAMITI.....2ND DEFENDANT

JUDGMENT

By Plaintiff dated 29.10.2012 Catherine Waithira Gitumbu (*hereinafter referred to as the Plaintiff*) sued the Daniel Kamau Kiroga and Wanjugu Peter Wamiti (*hereinafter referred to as the 1st and 2nd Defendants*) respectively claiming that on or around the year 2002, he bought a piece of land from the 1st Defendant at consideration of Kshs 70,000 being *Makuyu/Kimorori block III/715) 0.2025 Hec*. That the said consideration was paid and settled in installments and acknowledged by the 1st defendant, and reduced into writing. The Plaintiff accordingly became the buyer and the 1st defendant the seller. Around the year 2002, the 1st defendant signed consent forms for purpose of transfer and gave the same to the Plaintiff to forward to the land board.

In the same year 2002, the 1st defendant surrendered the original title to the defendant as part of complete sale and also for presentation to the Land Control Board. On or around 2002, the plaintiff entered upon the land and has been cultivating up to now. That towards the end of the year 2002, the Plaintiff called the 1st defendant at the Land Control Board office for the transfer purpose, but the 1st defendant failed or refused to attend. That in the year 2012, in course of plaintiff cultivating the land, the Plaintiff found 2nd defendant in her land uprooting beacons and planting grass, and the latter claimed that he had bought that particular land from the 1st defendant.

The plaintiff claims against 1st defendant is for transfer of land Makuyu/Kimorori block III/715 and the eviction 2nd defendant from that land and the 2nd title obtained by 2nd defendant be canceled.

The 2nd defendant's filed Defence whose import is that he purchased the parcel of land known as Makuyu/Kimorori/BLK/715 from the 1st Defendant after ascertaining that the parcel of land indeed belonged to the 1st Defendant and after a search which yielded no encumbrances or cautions. The 2nd defendant agreed to pay the purchase price to the 1st Defendant only after the process of appearing before the Land Control Board and obtaining a letter of consent .He applied for consent to transfer land from the land control board on the 19th day of June, 2012 and thereafter obtained a letter of consent dated 26th July, 2012. The 1st defendant and the 2nd defendant entered into an agreement of sale on the 13th of August, 2012 and the 2nd defendant issued two cheques of amounts of Kenya shillings one million, one hundred and fifty thousand (Kshs 1,150,000.00/ in favour of the 1st Defendant.The title deed is now in

favour of the 2nd defendant having paid the requisite stamp duty and attending to all formalities to ensure transfer of ownership of the aforementioned title deed.

The 2nd Defendant avers that the Plaintiff was not cultivating the land at the time of purchase and he is therefore an innocent purchaser without notice and who found the Plaintiff's agents trespassing on the land prompting him to report the said acts of trespass to the police. The 2nd Defendant contends that he has now constructed a well and planted kei-apple trees when he took possession and title over the said parcel of land and denies uprooting beacons which are on the land as is alleged paragraph 11 of the plaint as the beacons would be of use to him and further he had no need to uproot the same having established the size of the land at the time of the sale. He claims to be a stranger to any dealings between the 1st Defendant and the Plaintiff and as such the remedy should lie in an action for damages as the 2nd defendant is not privy to any contract between the 1st defendant and the Plaintiff.

The Plaintiff relied on his statement whose import is that in the year 2002, the 1st Defendant approached her with a proposal of selling his land Makuyu/Kimorori Block 111/715, measuring ½ acres (0.2025 Hec)

That in the year 2003, they reduced the proposal of sale of land into writing, and the 1st Defendant signed and the plaintiff also signed including some witness. The consideration was for Seventy Thousand, and the seller acknowledged 65,000/= and the balance was to paid later. Later on in the same year the balance was paid and the defendant signed forms for consent but failed to turn up at the Land Control Board's office for the necessary consents. The 1st defendant gave her the original title which she still posses as proof that he sold and parted with possessions.

She has on several occasions reminded and called him to finish all transfer and consents but he has been giving excuses. That she has been cultivating the land since 2003 and planted Napier grass, maize and beans, bananas until September 2012, the 2nd Defendant trespassed on the land saying that he has bought the land. He uprooted beacons and now her corps are exposed to any danger. The 1st Defendant cannot sell to a second buyer while she still possesses the original title, she is the true owner, and still in occupation. The 1st defendant should be compelled to transfer the land to her or in alternative the executive officer to sign all necessary documents.

She produced a copy of the sale agreement, an application for consent by Land Control Board, a title deed in the name of Daniel Kamau Kiroga and demand notice. She prayed that the Deputy Registrar to sign transfer forms and the eviction of the second Defendant and that the suit land be transferred to the Plaintiff. On cross-examination he states that the 1st Defendant sold him the land but refused to go to the Land Control Board.

PW1, was Margaret Kamau who adopted the statement made on 29.10.2012. she claims to have witnessed the agreement in Catherine's shop in Nairobi and saw Catherine give the 1st Defendant Kshs 65,000/= for the land. The Plaintiff closed her case with the testimony of PW1.

The Defendant gave a sworn statement that he purchased the land after doing a search. There was no consent and he was surprised that Daniel had two titles. He bought the land for Kshs 1.5 million. He has fenced the same built a house for his workers. They went to the police station when his people who went to plant maize were chased. He produced the agreement of sale, title deed in his name, application for consent and the letter for consent, transfer of land duly executed and copies of the cheques for payment.

The plaintiff submitted that she has proved her case against the defendant whilst the defendant submitted hat the 2nd Defendant is an innocent purchaser for value without notice and the only remedy to Plaintiff is a refund.

I have considered the evidence on record, the submissions of parties and do find that the plaintiff entered into agreement with the 1st Defendant for sale of the disputed land and paid a consideration of Kshs 65,000/=. It is not clear whether the application to the Land Control Board was declined by the secretary of the board but it is clear that no consent of the board was produced. She was given the original title deed to hold as security for the money paid but did not lodge a caution on the register. The 1st defendant

who neither filed defence nor appeared in court entered into another agreement with the 2nd defendant. The 2nd defendant produced a Sale Agreement duly executed by the both Defendants, an Application for the Consent, Transfer of Land Investment to title and cheques as evidence of payment.

It was correctly submitted by M/s Ngaruiya that Section 6 (I) of the Land Control Act cap 302 Laws Of Kenya controls transaction such as the sale, transfer, lease, mortgage, exchange, partition or other disposal of, or dealing with any agricultural land situated within the land control area is void is for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect with the transaction in accordance with the Act. In the case of *Karuri -Vs- Gitura (1981) KLR 247 at 248*, it was held by the court of Appeal that the provisions of the Land Control Act are of an imperative nature, there is No room for the application of any doctrine of equity to soften its harshness. In the case of *Kariuki -Vs- Kariuki 1983 KLR 225* the court of Appeal held that no general or special damages are recoverable in respect of a transaction which is void for all purposes for want of consent. The only remedy open to a party in a transaction which has become void under the Act is that he/she can recover any money or consideration paid in the course of the transaction under section 7 of the Act. It therefore follows that the Plaintiff's prayers are not sustainable.

I agree with *Ngaruiya* that a sale is not complete until the parties go to Land Control Board and obtain the consent and subsequently transfer the said land. I do find that the Plaintiff did not comply with Section 6(1) of the Land Control Act Cap 302 Laws of Kenya hence all transactions in respect of the suit property by the plaintiff is a nullity. The agreement between the Plaintiff and 1st Defendant for its' worth is deemed null and void for lack of the consent of the Land Control Board. The upshot of the above is that the suit is dismissed with costs.

DATED AND SIGNED AT ELDORET THISDAY OF..... 2015

OMBWAYO ANTONY

JUDGE

DELIVERED AND SIGNED AT NYERI THIS 6TH DAY OF FEBRUARY, 2015

LUCY WAITHAKA

JUDGE