



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC CASE NO.290 OF 2017

BENEDICT NZIOKA.....PLAINTIFF

VERSUS

AGNES WAITA.....DEFENDANT

JUDGEMENT

1. By his plaint dated 21st April, 2017 and filed in court on 31st May, 2017, the Plaintiff prays for judgement against the Defendant for: -

1) Refund of purchase price being aggrieved damages for breaching of contract.

2) Costs of the suit.

2. The Plaintiff has averred in paragraphs 3, 5, 6 and 7 of his plaint that the claim against the Defendant is for breach of contract and refund of purchase price, that on various dates between 2001 and 2007 the Defendant sold to the Plaintiff a portion of plot measuring approximately 127 by 120 by 20 at a purchase price of Kshs.122,000/=, that the Defendant put the Plaintiff into possession and that the Plaintiff developed the plot and put up a poshomill building and started a poshomill business complete with electricity, borehole and a drainage system to the tune of Kshs.500,000/=.

3. In her defence dated 14th August, 2017 and filed in court on 15th August, 2017 the Defendant at paragraph 2 admits the contents of paragraphs 2, 3, 4 and 6 of the plaint that the purchase price of Kshs.121,000/= was paid. In paragraph 3, 5 and 7 of her defence, the Defendant has averred that the Plaintiff did not sink a borehole, that the sale between the parties was null and void by virtue of sections 6 and 7 of the Land Control Act and that the Plaintiff is only eligible for the refund of the purchase price and nothing else and that on 23rd April, 2014 she wrote a letter to the Plaintiff asking him to collect the consideration paid from the Defendant's advocate which letter elicited no response from the Plaintiff.

4. During the hearing of the Plaintiff's case of the 08th July, 2019 the Plaintiff adopted his undated statement filed in court on 31st May, 2019.

5. Briefly his evidence was that the dispute between himself and the Defendant involves three parcels of land that he bought from the Defendant at the purchase price of Kshs.121,000/=. He went on to say that he paid in full the purchase price upon which the Defendant put him in possession. That he proceeded to build a shop and installed a poshomill. He said that the Defendant has now chased him from the plot in question. He produced the sale agreement and other documents as P.Exhibit Nos.1 to 7 respectively. Those other documents were a valuation report dated 29/08/2016, letters dated 24/06/2016, 13/03/2017, 23/04/2014, 21/11/2002 and 16/11/2007.

6. The Plaintiff was thereafter stood down to enable him amend his pleadings. He however failed to amend his plaint and was deemed to have forfeited his right to do so. On the 20th November, 2019, he was cross-examined by the Counsel for the Defendant.

7. His evidence in cross-examination was that even though he has averred that he put up a poshomill and other developments worth Kshs.500,000/=: he did not avail any evidence to show that he spent such an amount of money. He however added that he could produce evidence if given time. He said that he received the Defendant's letter dated 23rd April, 2014 (D.Exhibit No.1) but did not go to the office of the Defendant's Counsel to collect the refund of the purchase price. He added that he did not know if the money referred to in D.Exhibit No.1 had been deposited in the advocates bank account as per the deposit slip (D.Exhibit No.2). He pointed out that he paid the Defendant Kshs.122,000/= and that the money in the account is Kshs.121,000/=. He said that his prayer is for refund of Kshs.121,000/= plus costs and interest from the date of sale.

8. The Defendant in her evidence in chief adopted her statement which she recorded on 14th August, 2017 and filed in court on 15th August,

2017 as her evidence. She went on to produce two (2) documents in her list of documents dated 14th August, 2017 as P.Exhibit No.1 and 2 respectively. The documents in question were a letter dated 23rd April, 2014 and deposit slip of the same date.

9. The Defendant denied the Plaintiff's assertion that he had sank a borehole in the suitland. She however admitted that the Plaintiff had indeed erected a poshomill which he later pulled down.

10. Her evidence in cross-examination by the Plaintiff was that she did not sell the suitland to him even though the two had entered into a sale agreement. She pointed out that her children objected to the sale agreement after about 8 months and denied the assertion that the objection was raised about 6 years after the sale took place.

11. In his written submissions the Plaintiff stated that his evidence was not contradicted by the defence either through pleadings or in her oral testimony. The Defendant went on to submit that the Defendant's bundle of documents show that it was the Defendant's daughter, one Justina M. Waita who deposited the Kshs.121,000/= through the law firm of O. N. Makau & Mulei Advocates on 23rd April, 2014 whereupon the law firm vide its letter of even date purported to compel him to accept the refund. The Plaintiff pointed out that the instructing clients were not the Defendant but her daughters and that two of those instructing clients were witnesses to the sale agreement. It was further submitted that the Defendant's breach of contract was occasioned by coercion and undue influence by persons who are not parties to the contract.

12. The Plaintiff prayed for the defence to be dismissed and due performance of the contract be enforced.

13. On the other hand, the Defendant's Counsel's submission addressed the issue of whether or not the Plaintiff has a cause of action against the Defendant. The Counsel submitted that although the Defendant does not dispute the fact that she entered into a sale agreement with the Plaintiff, the agreement is marred by mistakes and irregularities such as the registered owner of the suitland was deceased at the time of sale. The Counsel pointed out that the Defendant had not taken out letters of administration in respect of the said land and, therefore, she lacked the capacity to enter into the sale agreement of the suitland. The Counsel went on to submit that in addition, the other beneficiaries of the estate of the deceased had not consented to the agreement and neither did the Defendant who was the vendor follow the right procedure in selling the land as provided for under the Land Act No. 6 of 2012. (*emphasis are mine*)

14. In support of her submissions, the Counsel relied on the case of **Benson Mutuma Muriungi vs. C.E.O Kenya Police Sacco & Another [2016] eKLR** where the Court observed that: -

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

15. As for the prayer of costs sought by the Plaintiff, the Defendant's Counsel submitted that the Plaintiff instituted the suit on 31st May, 2017 long after the Defendant had offered to refund the purchase price vide the letter dated 24th April, 2014. As such, it was the Counsel's submissions, the Plaintiff should only seek for the refund of the purchase price and in any case, parties are bound by their pleadings.

16. Having considered the evidence on record and the rival submissions, I am of the view that the only issue for determination as framed by the Defendant's Counsel (i.e. is whether or not the Plaintiff has a cause of action against the Defendant). It is not in dispute that both the Plaintiff and the Defendant entered into a sale agreement in respect of portions of land LR number Okia/Mukuyuni/1810 on various dates between the 30th October, 2001 and 5th February, 2007. The copy of the search document dated 29th August, 2016 and which document the Plaintiff relies on clearly shows that land parcel number Okia/Mukuyuni/1810 was registered in the name of one Kivuva Musumbi Mwiu whom the Defendant says is deceased. The Defendant further says that as at the time when she and the Plaintiff entered into the sale agreement in respect of portions of the suitland, she had not taken out letters of administration. The Plaintiff does not deny this fact. Evidently, the Defendant had no capacity to enter into the said contract for sale of land and the sale agreement between her and the Plaintiff is void by operation of the law.

17. Arising from the above, the Plaintiff is only entitled to a refund of the purchase price. Even though the Plaintiff has averred in paragraph 7 of his plaint that he incurred expenses amounting to Kshs.500,000/= while carrying out development on the portions of land that he had possession of, he did not adduce evidence in support of the same and he cannot be awarded damages for the same. Further, even though the Plaintiff in his plaint has averred that the purchase price was Kshs.122,000/= he has admitted in his evidence in cross-examination that the amount was indeed Kshs.121,000/=. This is the amount that he is entitled to. And with regard to the refund of Kshs.121,000/= I would agree with the Defendant's Counsel that the Plaintiff cannot be awarded costs of the suit in view of the fact that the Defendant had through her advocates letter dated 23rd April, 2014 (D.Exhibit No.1) informed him to collect the money from the Advocate's office. The fact that the Advocate may have been instructed by a person who was not necessarily a party to the sale agreement is neither here nor there since the contents of the letter are clear on the subject in issue. In any case, the letter indicated that the Defendant was a client of the advocate. As was clearly submitted by the Defendant's Counsel, parties are bound by their pleadings. In the plaint dated 21st April, 2017 and filed in court on 31st May, 2017, there is no prayer for interest. In my judgement, the Plaintiff is, therefore, not entitled to the same.

18. The upshot of the foregoing is that the Plaintiff's suit is partially successful and I will enter judgement for him and against the Defendant for the refund of Kshs.121,000/=. For the reasons that I have given on the issue of cost, each party shall bear their own cost. It is so ordered.

Signed, dated and delivered at Makueni via email this 6th day of July, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Ms. C. Nzioka