



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL CASE NO.71 OF 2006

BENJAMIN MILTON KIPROTICH MARITIM.....PLAINTIFF

VERSUS

ROSA TABUTANY RERO.....1ST DEFENDANT

PHILIP CHEPSENGENY TOO.....2N DEFENDANT

JUDGEMENT

1. The Plaintiff filed a Claim for specific performance against the two defendants *vide* a Plaint dated 10th August, 2006 and filed on 15th August, 2006.
2. He claims that on 3rd July, 2002 the defendants agreed to sell to him land parcel No. KERICHO/KAPSAOS/518 @ Kshs. 216,000. He progressively paid Kshs.196,000 leaving a balance of Kshs.20,000.
3. That inspite of the sum paid the defendants have failed to transfer the land to him. He therefore sought an order to compel the defendants jointly and severally to transfer the said land to him and also pay him mesne profits plus costs of the suit.
4. The defendants filed a joint defence denying the Plaintiff's claims. The 2nd defendant denies having proprietary rights in the suit land.

The 1st defendant is the reged proprietor of the suit land and denies entering into any sale agreement with the Plaintiff.
5. When the matter came up for hearing the Plaintiff gave evidence and did not call any witness. He told the Court that on 3rd July, 2002 he entered into an agreement for sale of land known as Kericho/Kapsaos/518 with the 2nd defendant. He produced the agreement as PEXBI. The sale price was Kshs. 216,000.
6. Subsequently on 9th August, 2004 they entered into another sale agreement where the 1st defendant was a witness. In this agreement the 1st defendant acknowledged receipt of Kshs.196,000.
7. The balance of Kshs.20,000 was to be paid upon transfer of the property. He produced the 2nd agreement as PEXB2.

8. He produced the Certificate of Search (PEXB3) which shows the 1st defendant as the reged owner of the land. The land had been charged to the bank but the charge had been discharged.

9. In cross-examination he admitted that the land in issue is Agricultural Land and they had not obtained any consent from the Land Control Board. He had intended to plant maize on the said farm but was not sure of how many bags the land would yield.

10. The 2nd defendant testified as DW1. He admits having entered into an agreement of sale of his portion of land in Kericho/Kapsaos/518 at Kshs. 216,000. He indicated that his intention was to purchase another piece of land which he had identified elsewhere.

11. That the Plaintiff frustrated the agreement by not paying the full purchase price on time, which led to his failure to acquire the other land.

12. The Plaintiff who is a policeman used his office to threaten him over this matter. He admitted receiving Kshs.183,000 and not Kshs.196,000 as claimed by the Plaintiff. He was willing to refund the sum paid to him.

13. In cross-examination he said he had been assigned the portion he sold to the Plaintiff by his mother (1st defendant), who is the reged owner of the land.

14. The 1st defendant testified as DW2. She denied each and everything concerning the sale agreement between the Plaintiff and 2nd defendant. She asserted that she is the owner of land No. Kericho/Kapsaos/518 and the 2nd defendant has no right over it.

15. In cross-examination she stated that she only heard from people that the 2nd defendant had sold her land to the Plaintiff. She therefore advised him to refund the money to the Plaintiff.

16. Both Counsels agreed to file written submissions in respect of the cases of the parties.

The Plaintiff's Submissions .

Mr. Siele for the Plaintiff submitted that the Plaintiff had proved his case on a balance of probabilities.

He cited the case of **DOGE VS KENYA CANNERS LTD** but did not avail this authority to the court.

It was his submission that the sale agreement could not be voided because of lack of consent when it was the sole responsibility of the defendants to obtain the consent.

17. Mr. Siele also referred the court to the case of **JAYESH SAINI VS CHARLES MUTISYA NYAMAI Civil case No.255 of 2009 NRB (MILIMANI COMMERCIAL COURTS)** where the court entered judgment in favour of the Plaintiff in a similar matter. He therefore prayed that if the Court is not persuaded to enter judgment for the Plaintiff as prayed then it could order for the refund of Kshs.196,000 plus interest at Court rates from 3rd July 2002, plus costs of the suit.

18. RESPONDENTS SUBMISSIONS

Mr. Kirui for the Respondents submitted that the sale agreement entered into by the Plaintiff and Defendants is void for non-compliance with **Section 8** of the **Land Control Act**. No consent from the Land Control Board was or has been obtained. That under **Section 6a, b & c** of the **Land Control Act** where no application has been made in a controlled transaction within the prescribed period, the said transaction becomes void.

19. He further submitted that Under **Section 7** of the said Act the Plaintiff's only option was to sue for a refund of his purchase consideration.

20. He referred the court to several authorities;

a. JOSEPH BORO NGERA VERSUS WAJIRU KAMAU KAIME & KARUNGARI KAMAU KAIME. CIVIL APPEAL NO.32 OF 2005 COURT OF APPEAL OF KENYA AT NAKURU.

b. SAMUEL MIKI WAWERU VERSUS JANE NJERI RICHU. CIVIL APPEAL NO.122 OF 2001 COURT OF APPEAL OF KENYA AT NAIROBI.

c. EZEKIEL KISORIO TANUI VERSUS JACINTA EKAI NASAK. CIVIL SUIT NO.76 OF 2012 HIGH COURT OF KENYA AT KITALE.

d. SIMON OYARO OGACHI VERSUS SAMWEL MAIYO. E&L NO.291 OF 2013 HIGH COURT OF KENYA AT ELDORET.

21. From the above evidence and the submissions I find three issues to fall for my determination.

(i) Are the agreements dated 3rd July, 2002 and 9th August, 2004 enforceable?

(ii) If not, can there be refund of the price when it was not pleaded?

(iii) Is the Plaintiff entitled to mesne profits?

22. ISSUE NO (I)

Are the agreements dated 3rd July, 2002 and 9th August, 2004 enforceable?

The evidence adduced shows that the reged owner of land parcel no. KERICHO/KAPSAOS/518 is one **Rosa Tabutany Rero** who is the 1st defendant herein (EXB3). The person the Plaintiff entered into an agreement with is one **Phillip Chepsengeny Too** who is the 2nd defendant herein, (EXB1&2).

23. Besides their word of mouth there is no piece of evidence adduced to show that the 2nd defendant had any proprietary rights in land no. Kericho/Kapsaos/518. All that has been stated is that the 1st defendant is the 2nd defendant's mother and had assigned him a portion in the said land. The land had not been subdivided and there was no title to this assigned portion. The Certificate of Search EXB1 shows the land to measure 2.5 acres. So was he disposing of his share or the whole parcel?

24. One can only sell what is theirs and what they have title to. The 2nd defendant had no title which he could have passed over to the Plaintiff in the first instance.

The only person who could have transferred title to the Plaintiff is the 2nd defendant. Unfortunately, she is not the one the Plaintiff entered into an agreement with.

25. The 2nd agreement produced herein as EXB2 shows that the vendor is the 2nd defendant while the reged owner is the 1st defendant. Secondly, the 1st defendant was a witness to this agreement.

The 1st defendant has in her evidence denied ever seeing and/or signing the said agreement. The agreement shows it was thumb printed by the said 1st defendant. Its not even confirmed that the identification card number shown on it as belonging to the 1st defendant is hers. Even if it was the question is whether she sold this land to the Plaintiff.

26. The Certificate of Search shows that the acreage of the land no. Kericho/Kapsaos/518, is 1.0 Hectares which translates to 2.5 acres. And this is what the Plaintiff says he was buying from the 2nd defendant. It

is therefore clear that the 2nd defendant was not actually selling the portion assigned to him but the whole of the 1st defendant's land! There is no iota of evidence to show that the 1st defendant gave the 2nd defendant authority to dispose of her land. This was unlawful and this kind of agreement cannot be sanctioned by any Court of Law.

27. If for a moment I assume that the agreement was lawful, the question is whether it would be enforceable. The defendants at paragraph 5 of their defence pleaded that the sale agreement was unenforceable as there was no consent obtained from the land control board. There is no dispute that the land the subject of the transaction is agricultural land which is subject to the provisions of the **Land Control Act Cap 302, of the Laws of Kenya.**

28. **Section 6 (1) of the Land Control Act** provides that any transaction requiring the consent of the Land Control Board is void 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 of that transaction in accordance with the Act.

There is no evidence showing that such a consent has been applied for or issued by the relevant Land Control Board.

29. The Plaintiff herein inspite of having paid the money (Kshs. 196,000) has never taken possession of the land in question i.e from the year 2002-2015.

There are three things which work against the Plaintiff. These are;

- (i) *The purchase of land from a person who had no title.*
- (ii) *Failure to obtain the Land Control Board consent.*
- (iii) *He has never had possession for thirteen years since the alleged purchase.*

30. For the reasons already stated above and the three things I have indicated in paragraph 29 above I find both agreements of sale (EXB1 &2) to be void for lack of the consent of the Land Control Board and most importantly sale by a person who had no proprietary rights in the land he was purporting to sell.

See;

(i) SAMUEL MIKI WAWERU VS JANE NJERI RICHU – COURT OF APPEAL NRB Civil Appeal No.122 of 2001.

(ii) EZEKIEL KISORIO TANUI VS JACINTA EKAI NASAK KTL HCCC NO.76 OF 2012.

(iii) SIMON OYARO OGACHI VS SAMWEL MAIYO.

31. **ISSUE NO (II)**

If not, can there be refund of the price when it was not pleaded?

It is true that the Plaintiff did not plead for refund of his money as an alternative prayer. However, in the submissions Mr. Siele seemed to be asking just for that.

The evidence on record clearly confirms that the 2nd defendant received money from the Plaintiff in respect of the land in issue. It is the Plaintiff's evidence that the 2nd defendant received a total of Kshs.196,000 from him but the latter says he only received Kshs.183,000.

32. The document EXB2 confirms the Plaintiff's position. Indeed the 2nd defendant acknowledged receipt

of Kshs.196,000 and he cannot turn around to deny it.

Section 7 of the Land Control Act provides;

“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”

33. My finding is that even though the Plaintiff did not plead for refund of his money the evidence before this court confirms that the Plaintiff paid and the 2nd defendant received money in respect of this transaction that has been found to be void. There would be no good reason for him to file another suit for recovery of the same. It has equally been found that he has never been in possession of the said land. I therefore find that he is entitled to a refund.

34. **ISSUE NO. (III)**

Is the Plaintiff entitled to mesne profits?

The case of **KARIUKI VS KARIUKI 1983 KLR 225** is very relevant here. The Court of Appeal stated this;

“ No general or special damages are recoverable in respect of a transaction which is void for all purposes for want of consent from the Land Control Board and the only remedy open to a party to a transaction which has become void under the Land Control Act is that he can recover any money or consideration paid in the course of the transaction, under section 7 of the Act.”

Since the sale agreement has been found to be void by the operation of the law, no damages and/or mesne profits are payable as claimed by the Plaintiff.

35. In conclusion,

(a) I find the Plaintiff's claim for specific performance and payment of mesne profits to be without merit and it's dismissed.

(b) The Plaintiff to get a refund of the amount paid to the 2nd defendant which is Kshs.196,000 (one hundred and ninety six thousand shillings only), plus interest at Court rates from 9th August, 2004 when the 2nd defendant acknowledged receipt. I enter judgment for the same.

(c) The plaintiff and 2nd defendant to each bear their own costs.

(d) The 1st defendant to get costs which are payable by the Plaintiff.

Dated, signed and delivered in open court this 5th day of June, 2015.

H.I.ONG'UDI

JUDGE

In the presence of

Mr. Siele for Plaintiff- present

Mr. Kirui for Defendant-present

Kipyegon- court assistant