



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
LAND AND ENVIRONMENT CASE NO. 32 OF 2012

EMILY CHONGE WANYAMAPLAINTIFF

VERSUS

PATRICK MANG'ENI YUSTO.....DEFENDANT

JUDGMENT

1. The Plaintiff EMILY CHONGE WANYAMA has brought a suit against the Defendant **PATRICK MANG'ENI YUSTO**. Her claims as contained in her amended plaint are;

(a). Refund of the current value of the plot now Kshs. 300,000/= (50ft.by 100ft) and plus all the developments which included houses, trees and any other developments as per valuation report – valued at Kshs. 1,385,000/=.

(b). Costs and interest

(c). Any other relief this honourable court shall be pleased to grant in the present circumstances.

2. The Defendant denied the Plaintiff's claim in its entirety and counter claimed. In the counter-claim he seeks for;

(a). Declaration that the Plaintiff's occupation of land parcel No. Ndivisi/Khalumuli/2737 is illegal and an eviction order directed against the Plaintiff, her servants, agents or any other persons claiming through her.

(b). Costs of the suit

3. The Plaintiff gave evidence on 21st May 2013. After being sworn, she told court that they entered into an agreement for sale of undeveloped land measuring 50ft by 100ft to be carved out of L.R. No. Ndivisi/Khalumuli/648 They agreed the price was Kshs. 70,000/=. The agreement was reduced into writing on 5th February 2002 (produced as Pex.1). She paid a deposit of Kshs. 40,000/= on 5th February 2002 and the balance paid on 29th May 2002.

4. The Plaintiff said although she did not get title of the sold portion into her name, she began carrying on developments on the plot. She built her residential house and 2 units of rental houses. She showed photographs of the houses which were marked for identification but were not produced.

5. She later obtained evidence that the Defendant had subdivided the land and her portion fell on the part bearing number L.R. 2737. She also discovered that the Defendant had applied for and obtained a loan of Kshs. 500,000/= using this title Ndivisi/Khalumuli/2737 together with her developments as security from K-Rep Bank Ltd. The property has been advertised by Garam Investments Auctioneers on behalf of K-Rep bank.

6. The Plaintiff concluded her testimony by saying she had done valuation of the suit property and it was valued at Kshs. 1,385,000/=. She claimed for refund of this sum then she vacates the land Ndivisi/Khalumuli/2737. She also prayed for damages and costs of the suit.

7. In cross-examination, she said she bought part of L.R. Ndivisi/Khalumuli/648 registered in the name of a third party not named in the agreement. The Defendant got title in his name in 2004. From 2004 to date, the Defendant had not given him consent of the Land Control Board to transfer. She said she developed the plot on the basis of the sale agreement she had and did not see any risk at all. She wanted refund of the monies she paid plus the value of the developments she had undertaken.

8. PW2, PIUS ISAYA KHAOYA is a registered valuer. He did undertake valuation on the suit property on instructions of the plaintiff. He produced his report as Pex. 3. The report detailed the nature of the developments on the plot and their current market value as follows;

- Shop building Kshs. 650,000/=
- Residential building Kshs. 300,000/=
- Pit latrine (35ft) Kshs. 30,000/=
- Water well Kshs. 25,000/=
- Gate and fencing Kshs. 20,000/=
- Trees and bananas Kshs. 10,000/=
- **Total Kshs. 1,035,000/=**
- value of land Kshs. 350,000/=
- **Grand total Kshs. 1,385,000/=**

After the testimony of PW2, the Plaintiff closed her case.

9. The Defendant testified as the only witness in support of his case. He admitted the sale of land agreement between him and the Plaintiff. His evidence is that at the time of writing the contract, the land was in the name of one Hudson Simiyu. He got registered as owner on suit property on 7th February 2005. He said there has been no consent of land control board obtained to date and the Plaintiff had never prompted him to acquire one.

10. DW1 said he took a loan in 2008 and at the time, the Plaintiff had constructed a semi-permanent house on the suit plot. He admitted the loan is still outstanding as having lost his job with Pan Paper Mills he does not have income to continue repaying the loan.

11. On cross examination by Mr Situma for the plaintiff, he admitted having sold a part of this land to a Mr. Wickliff at Kshs. 450,000/=. He later refunded Wickliff his money. He has never stayed on the suit property. He says he is ready to refund the Plaintiff her 70,000/= if she moves out as he had never given her consent to stay on that plot. The Defendant then closed his case.

12. The parties filed their respective submissions which I have had occasion to read and consider in determining this matter. The Plaintiff has relied on the following case law in support of her submissions;

i. Leonard Njonjo Kariuki vs. Njoroge Kariuki, Civ. App. No. 26/1979

ii. James Mutinda Moni vs. Tom Muthiani Mumo [2004] eKLR

iii. Ramesh C. Dhingra vs. Charles Otiso G. Otundo [2005] eKLR

While the Defendant relied both on statute law and case law of;

i. Omulo vs. Small Enterprises Finance Co. Ltd. & another [2005] I KLR 668.

ii. Njamuyu vs. Nyaga [1983] KLR 282

13. (a) There are three issues which come out as not disputed i.e.

i. There was a sale agreement between the parties for land measuring 50ft. by 100ft comprised in title no Ndivisi/Khalumuli/648.

ii. The agreed purchase price was paid in full by the Plaintiff and the Defendant acknowledged receipt.

iii. The Plaintiff is in possession of the suit land and has put up developments on the sold portion.

(b). The issues in dispute and are for determination are as follows;

(i). If the transaction was void for lack of land Control Board consent.

(ii). If the finding in (i) above is positive, whether the Plaintiff is entitled to a refund of Kshs. 70,000/= or current value of the property pleaded at Kshs. 1,385,000/=.

14. In determining whether the contract was void I will consider the provisions of the Land Control Act, the prevailing case law and the evidence adduced. In Plaintiff's exhibit 1; the contract was entered into on 5th February 2002. The balance was paid on 29th May 2002. The Defendant stated that at the time of sale, the land was not in his name. He secured registration of the title in his name in the year 2005. From a copy of certificate of official search produced as exhibit 4, he is the registered owner of Ndivisi/Khalumuli/2737 as at 7th February 2005. No document was shown to the court when he became registered as owner of L.R Ndivisi/Khalumuli/648 which is the original number that created 2737 after its subdivision. It did not come to be in dispute that the portion sold to the Plaintiff comprised in L.R no 2737 where is in ctual occupation of.

15. Under the provisions of section 6 (1) of the Land Control Act Cap 302, this transaction required the consent of the Land Control Board to be obtained within six (6) months from the date of the agreement. That consent was not obtained within the timeframe or upto date. There is a proviso to Section 8 (I) ***“provided that the High Court may notwithstanding that the period of six months may have expired, extend that period where it considers there is sufficient reason to do so, upon such conditions if any, as it may think fit.”*** However no such extension of time was sought.

16. In the case of **Omulo supra** cited by the Defendant at No. 8 it was held, *“any dealing in land such as this one without the Land Control Board Consent is void and at holding No. 9 if an act is void, no party can get any benefit from such transaction.”* In the decision of **Njamunyu supra**, the court of appeal at holding No. 2 & 3 said,

“Land Control Board consent does not make an agreement for sale of land binding. The agreement is only binding between the parties who make it although it is not enforceable until consent is obtained.

Specific performance cannot be claimed in respect of a dealing which becomes void and only recovery of the consideration paid under the agreement is allowed under Section 7 of the Land Control Act. (Underline mine for emphasis)

16. In my opinion, the two cases cited by the Respondent contradicts each other. In substance, this Act does not discharge parties from the agreement but only question enforceability on a claim for specific performance. The Plaintiff herein has not claimed for specific performance. She claimed for refund which

is provided for under Section 7 of the Land Control Board Act Cap 302. Similar view was held in the case of **Leonard Njonjo Kariuki supra** that an order for specific performance cannot be given in a transaction that is void under the Act. In the Njonjo case, neither can general or specific damages except recovery paid for under Section 7 of the Act not even compensation for improvement was recoverable in addition to the money paid.

17. The Defendant has introduced the issue of limitation by way of his written submission that this claim is statute barred. He submitted that the cause of action herein was executed on 5.2.2002. Any suit ought to have been filed on or before 6.2.2008 while the present suit was filed on 14.8.12. I have looked at the defence and counter-claim on record. The Defendant did not in his fourteen paragraph document plead this suit being statute barred. In his oral testimony, the Defendant made no mention of the suit being filed out of time. It is trite law that parties are bound by their pleadings. In **G.P. Jani Properties Ltd. Vs. Dar -es - salaam City Council [1966] E.A. 281**, the court said in Paragraph (ii) ***“the Learned Chief Justice was right in refusing to hear the “ultra vires” allegation because it was raised at the last moment without being pleaded and without any application for amendment of the defence.”*** For this court to consider whether the claim is statute barred will amount to condemning the Plaintiff unheard. I will therefore disregard that line of submission.

18. In light of the issues stated in paragraph 13 (a), 14 and 15 *supra* above, It is clear that the Plaintiff is entitled to recover the consideration she paid to the Defendant as provided for in section 7 of the Act. In any event, the Defendant in paragraph 3 of the defence admitted receipt of the sum of Kshs.70,000/=. The Defendant in his evidence in chief had no objection to refund the money as long as the Plaintiff left the land. The Plaintiff also stated she has no interest in the land but only sought compensation for the value of the land and the developments she had put up. In any event the land is currently charged to K-Rep Bank Ltd and it would be difficult to order for specific performance with the loan outstanding.

19. This brings into question whether the refund is limited to the sum paid or refund of the current market value i.e. to determine whether the Plaintiff is entitled to the sum claimed of Kshs. 1,385,000/= which is over and above the Kshs. 70,000/= she paid. In the agreement executed, parties did not disclose any penalties to be borne by a defaulting party. This court is alive to the law that courts do not re-write contracts for parties.

20. In support of her claim for the compensation sought, the Plaintiff cited **Ramesh Dhingra vs. Charles Otundo [2005] eKLR** which decision is persuasive on this court. On reading of the case, I find the set of facts existing in the Ramesh case distinguishable from the present suit and therefore not very relevant to the Plaintiff's case. The Ramesh case involved sale of a business as well as the land and one transaction being linked to extraneous issues (goodwill) not included in the agreement. The Mutinda case cited refers to a claim for adverse possession and therefore not applicable.

21. In the recent decision of the court of appeal sitting at Nyeri in **Civ. Appeal no 6 of 2011 consolidated with Civ Appeal nos 26 & 27 of 2011, Macharia Mwangi & 87 Others vs Davidson Mwangi Kagiri(2014)eKLR** the Court dealt with an issue with similar background to this. The court said at para 15 of their judgement ***“whether the rights of the appellants who were in possession can be defeated by the rights of a registered proprietor who actually put them in possession as bona fide purchasers for value.”*** In answering that question, they referred to the decision of **Michael Kithinji Kimotho Vs Nicholas Muratha Mugo Civ Appeal no 53 of 1995** that, ***“The protected rights of a proprietor under sec 28 of the Registered Land Act cannot be defeated except as provided in that Act and certainly not at the instance of a trespasser”***

Section 30 of Cap 300 provides, **“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same without being noted in the register; (g) The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation save where an inquiry is made of such person and the rights are not disclosed”**

In the instant, the Plaintiff is in actual possession and therefore entitled to the rights created by the

overriding interest under section 30(g) of Cap 300 (*repealed*).

22. In dealing with the issue of absence of land control board consent, the court of appeal in **Macharia Mwangi** *supra* quoted the holding in **Steadman vs Steadman (1976) AC 536, 540** thus, “**If one party to an agreement stands by and let another incur expenses or prejudice his position on the faith of that agreement being valid, he will then not be allowed to turn around and assert that the agreement is unenforceable.** It was the finding of the court in the *Macharia case* *supra* that *the respondent created a constructive trust in favour of all persons who paid the purchase price and that a constructive trust relating to land subject to Land Control Act is enforceable.* The court also considered the overriding objective provided for in the Civil Procedure Act which is to dispense substantive justice not technical justice.

23. The modern law on proprietary estoppel is given illustration in the case of **Thorner Vs Major (2009)1 WLR 776** when Lord Walker of Gestinhorpe pointed out in par 29 of that judgment that the doctrine is based on three main elements;

- i. A representation or assurance made to the claimant
- ii. Reliance on it by the claimant
- iii. Detriment to the claimant in consequence of his (reasonable) reliance.

In our judicial setting, this finds backing in the case of **Doge vs Kenya Cannery Ltd (1988) KLR**; where it was held *that equitable doctrines apply generally unless excluded by statute.* In no 5, it said “*it is a principle of justice and equity that when a man by his words or conduct has led another to believe that he make act safely in faith of them ..., he would not be allowed to go back when it would be unjust and unequitable for him to do so.*”

24. Consequently being guided by the findings in the cases cited above, the provisions of statute law and article 159 of the Constitution I come to the following conclusions;

a). The Defendant led the Plaintiff to believe the land would be transferred to her in due time. The Defendant did nothing to stop the plaintiff from developing the suitland. He let the Plaintiff act to her detriment on the strength of the agreement they had. Later he charged the property irrespective of the fact that at the time the Plaintiff had already developed it and he is now willing to refund back the Seventy Thousand he received in the year 2002. In my view, the Defendant wants to unjustly enrich himself by the sweat of the Plaintiff.

b). In the foregoing circumstance, the Plaintiff is entitled therefore to a refund not just of the sum of Kenya shillings Seventy Thousand (70,000/=) only paid but the current value of the property plus the developments therein pleaded and proved at Kenya Shillings One Million Three Hundred Eighty Five Thousand (1,385,000/=) plus costs of this suit and interest at court rates from the date of filing the suit until payment is made in full. For completeness of this matter, the Plaintiff shall surrender to the Defendant possession of the suitland in exchange of her refund in full.

DATED, SIGNED and DELIVERED this 13th May 2014

A. OMOLLO

JUDGE.