



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT

E.L.C. NO.14 OF 2014

SAMUEL KIRUBI NJUKI..... PLAINTIFF

VERSUS

MARGARET WANGARI MACHARIA.....DEFENDANT

R U L I N G

PLAINTIFF'S CASE

The plaintiff has sued the defendants for judgment for specific performance of the agreement dated 11th June 2008 and variation dated 18th August 2008. He prays further for a declaration that property title number Nyeri/Mweiga/2441 belongs to the plaintiff and that the transfer of title No.Nyeri/Mweiga/2441 to the 2nd defendant was fraudulent. He seeks the cancellation of the title issued to the 2nd defendant in respect of property title No.Nyeri/Mweiga/2441 and to have the same transferred to the plaintiff. Lastly, he seeks a declaration that the charge over title No.Nyeri/Mweiga/2441 is null and void *ab initio*.

The 1st defendant is a female adult of sound mind residing and working for gain in Mweiga Town, Nyeri within the Republic of Kenya. The 2nd defendant is a female adult of sound mind residing and working for gain in Nyeri Town within the Republic of Kenya. The 3rd defendant is a Government Officer mandated by law to maintain and keep the register of properties, he is also mandated to effect registrable interests on the register as by law provided. The 4th defendant is a Savings Co-operative Society registered under the Co-operative Act Laws of Kenya which Sacco has its headquarters in Nyeri and with branches across Nyeri county within the Republic of Kenya.

At all material times according to the plaint, the 2nd defendant was the registered proprietor of title No.Nyeri/Mweiga/802 measuring approximately one decimal six one hectares (0.61 Ha.).

By an agreement for sale dated the 11th day of June 2008 and made between the plaintiff on the one part and the 1st defendant on the other part, it was agreed that the 1st defendant to sell and the plaintiff to purchase (½) half an acre out of all that title No.Nyeri/Mweiga/802 at a consideration of Kshs.50,000/=.

The Plaintiff paid a deposit of Kshs.14,000/= at the time of execution of the agreement which receipt the 1st defendant acknowledged and undertook to pay the balance of Kshs.36,000/= as follows thus Kshs.10,000/= on or before 1st July, 2008 and Kshs.26,000/= upon obtaining consent to transfer and execution of the transfer of land.

The plaintiff avers it was a term of the said agreement that the 1st defendant would effect the

subdivision of her land to excise the plaintiff's portion and thereafter obtain the consent to transfer to the plaintiff.

It was a further term of the said agreement that the plaintiff would take possession from the date of the agreement pending completion which indeed the plaintiff did and has carried out major developments on the said portion of the property.

By a variation of sale agreement dated 18th August 2008 and made between the plaintiff on one part and the 1st defendant on the other part, it was agreed that the plaintiff should buy and the 1st defendant should sell an additional $\frac{1}{4}$ of land to be subdivided from all that parcel of land known as Nyeri/Mweiga/802 at a consideration of Kshs.25,000/= making a total acreage to be sold to the plaintiff from the 1st defendant $\frac{3}{4}$ of an acre and the total purchase price of Kshs.75,000/=.

The 1st defendant acknowledged receipt of Kshs.49,000/= from the plaintiff on the 18th August, 2008 being payment pursuant to the agreement dated 11th June, 2008 leaving a balance of Kshs.26,000/= in respect to the entire land transaction.

It was a term of the said second agreement dated 18th August 2008 that the balance of Kshs.26,000/= was to be paid in exchange of the Land Control Board Consent to transfer the land.

Despite the plaintiff having paid all the monies due in respect of the said agreement dated 18th August 2008 being Kshs.26,000/= to the 1st defendant, the 1st defendant refused to take any steps towards the completion of the said agreement for sale and the plaintiff placed a caution over the property to protect his purchasers interest.

By an agreement dated 9th July 2013 (the 3rd agreement) the plaintiff and the 1st defendant entered into a further agreement by which the plaintiff agreed to withdraw the caution over title No.Nyeri/Mweiga/802 in consideration of the 1st defendant and her children completing the sale transaction with the plaintiff. The said agreement was executed in the presence of an advocate and the local administration and the plaintiff was certain that he would eventually have the property registered in his name.

The plaintiff in consideration of the 1st defendant agreeing to transfer to him the property measuring $\frac{3}{4}$ of an acre withdrew the caution over title No.Nyeri/Mweiga/802. The understanding was that as the caution was withdrawn the 1st defendant's surveyor would effect the subdivision and thereafter obtain consent to transfer and sign the transfer of land in respect of $\frac{3}{4}$ of an acre in favour of the plaintiff as per the agreement for sale dated 18th August 2008.

To further convince the plaintiff into signing the agreement, the 1st defendant provided the plaintiff with a sketch map for the intended subdivision showing the plaintiff's parcel measuring 0.30 Ha (0.75 acres) and marked C on the sketch plan.

The said parcel measuring 0.30 Ha ($\frac{3}{4}$ an acre) was registered by the 3rd defendant as title No.Nyeri/Mweiga/2441 and the plaintiff waited for the 1st defendant to obtain Land Control Board Consent and to sign a transfer in his favour as per the executed agreements for sale dated 11th June, 2008, variation dated 27th August, 2008 and further agreement dated 9th July 2013.

The plaintiff was and has always been ready, able and willing to complete the sale transaction as per the agreement dated 11th June 2008 and the variation of agreement for sale dated 18th August 2008.

The 1st defendant together with her children entered into an agreement dated 23rd July 2013 with Cyrus Kabiro Wambugu and Joseph Karani Githinji for sale of one (1) acre to be excised from Nyeri/Mweiga/802 at a consideration of Kshs.660,000/= in which agreement they acknowledged to the purchaser that the land was to be surveyed on the 27th of July 2013 and were to excise $\frac{3}{4}$ of an acre to be transferred to the plaintiff and that they were to obtain consent to transfer in favour of the plaintiff.

In breach of the agreements for sale dated 11th June, 2008, the variation 18th August 2008, the further agreement dated 27th July, 2013, the plaintiff alleges that the 1st and 2nd defendants conspired and colluded to have the plaintiff's land transferred to the 2nd defendant.

The plaintiff has always resided on the part of land now registered as title No.Nyeri/Mweiga/2441 which is now registered in the name of the 2nd defendant and charged to the 4th defendant since taking possession on 11th June 2008 and has considerably developed the property.

The 1st defendant in breach of the agreements aforesaid and notwithstanding the requests by the plaintiff as well as his advocates on his behalf wrongly failed refused and continues to neglect to complete the said sale or transaction but has fraudulently transferred title No.Nyeri/Mweiga/2441 to the 2nd defendant. Demand has been issued but the defendant has remained adamant hence institution of the suit.

The 2nd and 4th defendant filed Memorandi of Appearance and later filed Defence and Notice of Preliminary Objection respectively. The gist of the 2nd defendant's defence is that she is the registered owner of the property having bought it for value without Notice of any fraud. She took possession and charged the property to the 4th defendant.

The gist of the 4th Defendant's Preliminary Objection is that the entire suit and the application is bad in law by dint of the provision of Section 6(1) and 7 of the Land Control Act Cap 302 Laws of Kenya and that the 4th respondent is a mere chargee and that there are no prayers sought against the 4th defendant in the suit.

The 4th respondent further filed written submissions whose *gravamen* is that where a sale transaction in land requires Land Control Board Consent, an agreement becomes void for all purposes if the same is not given. He relied on the decision of **Richard Kamiri Gachewe Kahia -VS- Edward Kamau Nganga**. Secondly he argues that nobody can be bound by the terms of a contract to which he is not a party.

When the matter came up for hearing **Mr. Ng'ang'a** appeared for the 4th defendant and forcefully submitted that the sale agreement was not specific but just stated that the plaintiff was buying $\frac{1}{4}$ of NYERI/MWEIGA/802. The 1st defendant divided this parcel of land into two parcels of land and sold Nyeri/Mweiga/2441 to the 2nd defendant. This parcel of land was ultimately transferred to the second defendant who created a charge to the 4th defendant and therefore the 4th defendant is non suited as he is not a party to the agreements. Moreover, that under Section 6(1) and 7 of the Land Control Board agreements became void ab initio if the said Sections are not complied with.

Mr. Wachira for the 2nd defendant supported the preliminary objection and submitted that though the plaintiff's claim was based on specific performance, he does not deny that the land was within a land control area and measures one acre and there is no change of user.

Mr. Kioni on his party eloquently submitted that the preliminary objection is misplaced as it is based on facts contrary to the legal understanding that a preliminary objection should be based on a point of law. All facts must be looked at to establish whether a consent was obtained or not is an issue of fact. According to Mr Kioni there is no evidence that the consent was not obtained but evidence is on record that an agreement was entered into between the plaintiff and the 1st defendant. He further argued that Section 8 of the Land Control Act provides for the application being made within six months of the date of the agreement.

He cited Article 159 of the Constitution of Kenya and the Bill of rights and stated that the court can apply the said Article in making orders dismissing the preliminary objection for proper and fair administration of justice and submitted that Justice should be administered without undue regard to technicalities and that Section 6 of Cap 302 is such technicalities.

On the issue of having failed to seek the relief of damages or refund of the purchase price, he

argued that he had applied for any further or better relief and therefore the court can grant damages under this head. He cited **KITUMBI & OTHERS -VS- COMMISSIONER OF MINES & GEOLOGY.**

Citing **Article 40(2) read with Article 2 of the Constitution of Kenya**, he submitted that the court should hold Section 6(1) of the Land Control Board Act unconstitutional as Article 40(2) protects property but Section 6(1) arbitrarily enables ones property to be taken away.

After hearing both parties, the court retired to chambers to consider the issues raised by the parties.

In summary of the facts herein, by agreement made on 11/6/2008 the 1st defendant agreed to sell to the plaintiff ½ of an acre out of the parcel of land No.Nyeri/Mweiga/802 at Kshs.50,000. The 1st defendant received Kshs.14,000 at the time of executing the agreement and agreed to apply for consent to effect subdivision and the surveyors fees were to be shared equally. The balance of the purchase price was to be paid in the installments of Ksh 10,000 on the 5/7/2008 and 26,000 after consent to transfer was granted and execution of the transfer. The completion was to be within 3 months.

It was a clear term of agreement that in the event of the defendant failing to complete the transaction,he was to refund the money at an interest of 10% and compensate for development. On the other hand, if the plaintiff failed to complete the transaction he would be refunded the money less 10%.

On the 18/8/2008, the 1st defendant received, Kshs.34,000 less Kshs.1000 however, the 1st defendant added more land valued at Kshs.25,000 to make the total acreage being sold to be three quarters of an acre and therefore the total balance was Kshs.26,000. Later the balance of the purchase price was paid and a caution registered in favour of Samuel Kirubi Njuki claiming purchaser's interest.

On the 9/7/2013 the plaintiff and the 1st defendant agreed to remove the caution to facilitate application for consent to effect subdivision and thereafter consent to transfer. However, the consent to transfer never came. The land was subdivided and Nyeri/Mweiga/2441 was created but was transferred to the 2nd defendant hence the plaintiff came to this court alleging fraud by the 1st defendant, 2nd defendant and 3rd defendant.

Mr. Ng'ang'a argument that the forth defendant is non-suited is not valid as the plaintiff has prayed for a declaration that the charge over title number Nyeri/Mweiga/2441 is null and void **ab initio**. The 2nd defendant charged this property to the the 4th defendant and therefore such a declaration will affect the 4th defendant. This prayer can be granted or dismissed only after hearing the substantive suit with the participation of the 4th defendant but subject to the court's finding on the consequences of non complacence with the provisions of the Land Control Act Cap302 Laws of Kenya.

The Land Control Act was assented to on 11/12/1967 and commenced the following day on 12/12/1967. The **preamble** describes it as an act of parliament to provide for controlling transactions in agricultural land. Under the Act, controlled transaction means one of the transaction specified in **Section 6 (1) of the Act** other than those specified in 6(3).

Section 6 (1) (a) and b of the Act provides that transactions affecting agricultural land that is to say:- **sale, transfer, lease, mortgage, exchange partition or other disposal of or dealing with any agricultural land** which is situated within a **land control area**, and the subdivision of any such agricultural land into two or more parcels to be held under separate title other than the division of an area of less than 20 acres into plots in an area to which the development and use of land (planning) Regulation 1961 (LW 516/1961) for the time being apply is void for all purposes unless the land control board for the area or division in which the land is situated has given consent in respect of the transaction in accordance with the Act.

It is worth noting that **Section 8(1)** provides that the application for consent in respect of a controlled transaction shall be made within six months of the making of the agreement for the controlled transaction by any party thereto.

This court notes the use of **mandatory** and **directory** words and holds that the language used in a statute alone is not decisive as to whether the word is mandatory or directory, regard must be had to the context, subject matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. There is no universal rule as to whether mandatory enactments shall be considered **directory** only or **obligatory**. It is the duty of the court to get the real intention of the legislature, by carefully attending to the whole scope of the statute considered. However, when it comes to formalities prescribed for making contracts or transfers the use of the word **shall** is **imperative**.

This court holds that the use of the word shall in section **8(1)** of the **Land Control Act cap 302** laws of Kenya is **mandatory** and **imperative** and therefore failure to make the application within 6 months is a serious breach of the provision of the law and therefore any transaction undertaken under the said provision will be a nullity. It is clear from the record that no application for consent from the Land Control Board by either the plaintiff or 1st Defendant was made within six months after the execution of the sale agreement. The court finds this to have been in breach of the mandatory and imperative provision of Section 8 (1) of the Act. The plaintiff slept on his rights by failing to move the court for extension of time pursuant to the proviso to Section 8(1) of the said Act.

It is clear that the last agreement between the plaintiff and the 1st defendant was made on the 9/7/2013 when parties agreed to remove the caution and subdivide the land and thereafter obtain consent to transfer. This court finds that by the time of coming to court, the time limit for application for consent had lapsed on the 9 of January 2014. There was no application to extend the same albeit the law applies for it.

Failure to apply for consent and obtain the same as required by Section 6(1) & 7 of the Land Control Act Cap 302 Laws of Kenya meant that the process of transferring the property to the plaintiff had not been completed and therefore he had no proprietary rights to be protected under **Article 40(2) of the Constitution of Kenya** which protects property that has been legally acquired.

Article 159 of the said Constitution cannot come to the aid of the plaintiff as the omission to comply with a provision of statute that is imperative is not a procedural irregularity but amounts to failure to comply with a substitutive provision of law. **Luka Kitumbi & others -VS- Commissioner of Mines** is not relevant and can be distinguished from this case as in **Luka Gitumbi's case**, the Commissioner of Mines had expropriated the plaintiff's land and vested the same in another person as opposed to this case where the plaintiff has no proprietorship of the land.

In **Richard Kamiri Gachwe Kahia -VS- Edward Kamau Ng'ang'a** cited by Mr. Ng'ang'a ,the Court of Appeal agreed with Justice Rimita and stated at page 11;

“We are satisfied that the learned judge was right in granting the respondents prayer for recovery of the purchase price that he had paid in the transaction that became null and void by the provision of the Land Control Act.”

The upshot of the above is that the agreements between the plaintiff and 1st defendant became null and void on 9/1/2014 at the lapse of six months when the parties to the said agreements failed to apply to obtain the consent of the Land Control Board. The Preliminary Objection is upheld and the suit against the 2, 3 and 4 defendant is struck out with costs.

Dated, signed and delivered on 4th day of July 2014.

A. OMBWAYO

JUDGE