



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 149 OF 2009

ALICE WAMBUI NDOME.....PLAINTIFF

VERSUS

MUIRU PROPERTY INVESTMENT LTD.....RESPONDENT

JUDGMENT

Alice Wambui Ndome (the plaintiff) filed this suit against MuiRU Property Investment Ltd (the defendant) seeking the following orders:-

1. Specific performance;
2. Injunction or in the alternative;
3. Damages for breach of contract;
4. Costs and interest.

By the plaint filed in court on 26/5/2009, the plaintiff pleaded that she is the proprietor of Nyanduraa/Kaimbaga/708 which measures about 40.44 Ha and that on 29/4/08, the plaintiff and defendant entered into a sale agreement for the sale of the said property; that the defendant failed to comply with one term of the agreement that they would pay the purchase price within 90 days from the date of execution; that the defendant took possession of the title deed after it had seen the property, done a search at Lands office and was satisfied with its location; the defendant breached the term of the agreement despite the extension of time given to them. The said breach has provoked the filing of this suit. The defendant filed a defence on 29/6/09 denying the plaintiff's claim and contends that the plaintiff misrepresented to it the physical location and description of the land and therefore at the time of the contract, there was no consensus in ad idem (meeting of the minds). The particulars of the fraud and misrepresentation are pleaded at paragraph 5 of the defence which is that the plaintiff pointed out the wrong piece of land on the ground; misrepresenting that the land parcel shown to the defendant was the suit land knowing it was not; accepting a deposit payment which did not belong to her and working in cahoots with her husband to defraud the defendant. The defendant also pleaded that the completion of the agreement was conditional, that the land shown to them was the correct one. It also denied having taken possession of the land as claimed. The plaintiff filed a reply to defence denying allegations of misrepresentation and that the defendant cannot deny the existence of the contract when it made a part payment and requested for extension of time.

PW1, Alice Wambui testified and reiterated the contents of the plaint and produced a copy of title as PEx.1. She told the court that the agreement was reduced into writing on 29/4/08 after the plaintiff visited the land and conducted a search; that the total costs of the land was to be Kshs.4,996,362/- with

each acre costing Kshs.50,000/-. She was paid Kshs.200,000/- upon signing the agreement then another cheque of Kshs.200,000/- and Kshs.100,000/- and all totaled to Kshs.510,000/-. The sale agreement was produced as PEx.2. She also produced in evidence the payment vouchers Ex.3-6. She demanded for the balance and on 2/10/08 the defendant explained she could not be paid but (PEx.7) would pay by 30/10/08. Instead of paying the defendant wrote to her on 28/10/09 demanding a refund of the money. After that the defendant started using police to harass the plaintiff demanding a refund of their money. After her release, her advocate wrote a demand to the defendant (PEx.8). She denied having shown the defendant a different parcel of land because her land is the largest in the area as shown on the Survey Map PEx.7. She blames the defendant for breaching the sale agreement.

Joseph Chege Muthama (DW1) testified on behalf of the defendant. He told the court that his company was acting as an agent for the Catholic Diocese of Nakuru. He said that the plaintiff went to sue that the land in early April but they had not carried the map of the area they did a search and confirmed it was registered in the plaintiff's name. he said that when they saw the land, there was wheat planted on it and it was good land and that they took photographs of it. (DEx.1). Due to transfer of the Bishop from Nakuru they had to wait for the incoming one; that the plaintiff claimed to be buying another property in Nairobi and they paid her Kshs.200,000/- and it is then an agreement was drawn and executed and that balance was payable after 90 days when buyer was ready; that on taking a surveyor to the land, they found that they had been shown a different piece of land. he said that when they took their surveyor to the land when they discovered that most of the land was quarry and only a small portion of it was arable and hence not suitable for the purposes for which they wanted the land. He produced photographs of the land DEx.1 & 2. He informed the plaintiff about their discovery and decision not to take the land. DW1 also told the court that he discovered that it was the plaintiff's husband who had acted as a surveyor and showed them a different piece of land. He said that at first the plaintiff agreed to refund the sum paid to her but later declined and could not be traced.

Having heard the evidence of both parties and the submissions filed by counsel, the issues that seem to arise are:-

- 1. Whether the parties entered into a binding contract;**
- 2. Whether the plaintiff misrepresented facts relating to the land to the defendant;**
- 3. Whether the completion of the contract was conditional;**
- 4. Whether the defendant was justified to repudiate the contract;**
- 5. Whether the reliefs sought can be granted.**

DW1 admitted that he is the one who drew the contract produced in evidence as PEx.1. It was for the sale of plot No.708 Nyandurua/Kaimbogo Block 708 measuring about 40.44 Ha (99.92 Acres), that the balance would be paid within 90 days when Catholic Diocese of Nakuru will be ready to purchase the same. My understanding of that clause is that the Nakuru Diocese would be ready to pay of within 90 days not that Nakuru Diocese may or may not purchase the land. This is because Catholic Diocese of Nakuru was not a party to this contract. PW1 admitted they were acting as agents for the said Diocese and were transacting the purchase of the land on their behalf.

Before committing themselves to purchasing the land and even making part payment, the defendant had a duty to do due diligence as is required of any party entering into a sale agreement. From their name and admission by DW1, the defendant deals in purchase and sale of property and they knew the intrigues in sale and purchase of property and that is why they included clauses 3, 4 and 5. The defendant cannot convince this court that they only relied on a surveyor brought by the plaintiff to determine the suit property and quickly signed an agreement and started making payments. If they did so, they can only be the ones to blame. DW1 did not disclose when their own surveyor went to the land to determine the beacons. The defendant continued to pay the plaintiff even after 90 days had lapsed. PW1 said they kept asking her for more time. It was that by the time 90 days lapsed the defendant had not made this

discovery that the land shown to them was different. By the latter dated 2/10/08 (PEx.7), the defendant was still promising the plaintiff that they were still interested in purchasing the property and the balance would be paid by 30/10/08. It was written 6 months after signing of sale agreement. It is not till 28/1/09 that the defendant wrote to the plaintiff (DEx.8) and intimated their decision to rescind the contract for the first time. This was about 9 months after the signing of the agreement. If what the defendant alleged were true, I believe it would have been found out had the defendant done due diligence and if it did not, then it failed in its duty and cannot blame it on the defendant. I find it hard to believe DW1 that they discovered that the land sold to them was a different parcel of land than what they saw. It is not even believable that the client could start paying money for a land that they had not seen and I do not believe the defence that the plaintiff misrepresented to them and showed them a different parcel of land. the sale price was agreed at Kshs.4,996,362/- at Kshs.50,000/- per acre for 99.92 acres. Upon signing of the agreement, a deposit of Kshs.200,000/- was paid and it was agreed that the balance was to be paid within 90 days. The other term included the purchaser taking possession and the parties taking the necessary steps towards the conclusion of the agreement. Counsel for the plaintiff pointed out the errors in the sale agreement in that the plaintiff was described as the purchaser but the evidence and pleadings herein are clear, that the seller is the plaintiff and the purchaser is the defendant herein.

It is the defendant's submissions that there was no agreement in writing in compliance with **Section 3(3)** of the Law of **Contract Act** since it was ambiguous as to who the vendor and purchaser were. Counsel relied on the case of **Kukal Properties Dev. Ltd v Maloo & 3 Others (1993)KLR** where the court held:-

No suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is grounded is in writing, signed by all the parties and the signature of each party has been attested by a witness who is present when the contract was signed by such parties (**S3(3)** of the **Law of Contract Act**). In this case the contract was witnessed by Wachira Mbuthia Advocate. It clearly shows that purchaser to be the defendant while the seller was the plaintiff. This agreement was preferred by the defendant and he cannot take advantage of his own errors to the detriment of the other party. There is no doubt from the evidence of PW1 and DW1 who the seller and purchaser is.

According to the plaintiff, the defendant was shown the suit property which they liked before the contract was reduced into writing which was executed and part payment of the price paid. Although DW1 tried to justify the payment by alleging that PW1 wanted to purchase some land and they were forced to give her some money, one of the terms of the agreement was payment of deposit of Kshs.200,000/-. That payment was made on 29/4/2008, the date the agreement was executed. Through a voucher (PEx.3), further payments were made on 30/6/2008, (PEx.5) of Kshs.100,000/-, a cheque of Kshs.2000/- dated 29/4/2014 and the last instalment was made on 24/10/2008. By the time these payments were made the defendant had not raised any questions regarding the unsuitability of the land. Infact DW1 accepted in evidence that they did not disclose to the plaintiff the purpose for which the land was required. It is only the agreement which stated that when the defendant was justified in repudiating the agreement of sale.

I have found above that there is no good reason given for the said repudiation. It is the defendant who frustrated the sale agreement. Six months after the agreement on 2/10/2008, the defendant was still asking for indulgence to pay the full purchase price by 30/10/08 and later the story changed that the land was uninhabitable. The defendant has not given any good justification as to why he backtracked from the agreement 9 months after the plaintiff had waited so long.

The above findings notwithstanding, the defendant submitted that the parties had not yet obtained the Land Control Board consent. Section (1) of the Land Control Act provides:-

“(a) the sale, transfer, lease mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area:-

- **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 this Act.”**

The above provision is mandatory. The suit land is agricultural land. The sale transaction was a controlled transaction and it was necessary that the parties to obtain the Board's consent. In **Jacob Michuki Minjire v Agricultural Finance Corporation** Civil Appeal No. 61 of 1982, the Court of Appeal held that if the consent of the Land Control Board is not obtained where necessary the transaction is void and that the duty to obtain consent rests on both parties.

Having found that the contract was void the question is what is the plaintiff's remedy? In **Omuse Onyapu v Lawrence Opuko Kaala CA 21/1992**, the same court held that transaction of sale of controlled transaction involving sale of agricultural land within the meaning of **Section 6 of Cap 302** is null for all purposes and therefore the money or other valuable consideration paid under that land controlled transaction as recoverable as a civil suit.

In the end, I find that the transaction being void, it cannot be enforced and the order of specific performance that the plaintiff sought cannot issue against the defendant nor can an injunction issue against the defendant. The plaintiff cannot also be entitled to any damages under the void contract because the Land Control Board consent was never obtained. In the end, I dismiss the plaintiff's claim against the defendant with costs to the defendant.

DATED and DELIVERED this 3rd day of October, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

N/A for the applicant

Mr. Kahiga for defendant for the defendant

Kennedy – Court Assistant