



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE 192 OF 1987

ALBERT MURUNGI..... PLAINTIFF

Versus

1. MOSES KIMATHI RINKANYA

2. M'RUTERE M'MUGWIKA.....DEFENDANTS

19/9/1989:

CORAM:

S. O. Oguk - Judge.

Mr. M.M. Kioga for the Plaintiff.

Mr. A. Mbaya for the Defendant.

Court Interpreter - Murungi.

JUDGEMENT:

The Plaintiff, ALBERT MURUNGI, has sued the 1st Defendant, MOSES KIMATHI RINKANYA and the 2nd Defendant M'RUTERE M'MUGWIKA asking for a transfer to him, of land parcel Number NTIMA/IGOKI/3749 which he claims has been fraudulently transferred by the 1st Defendant to the 2nd Defendant after *the same* had been previously sold to him by the 1st Defendant. In short, the Plaintiff is asking for orders that the registration of the suit land in the name of the 2nd Defendant be declared as null and void.

The facts of this case are very simple. The 1st Defendant, was the first registered owner of land parcel Number NTIMA/IGOKI/3749 measuring 0.194 hectares (approximately half an acre) situate within the Meru Municipality. The 1st Defendant was his neighbour owning an adjoining land parcel Number NTIMA/IGOKI/2890 measuring also approximately half an acre. This land, according to the 1st Defendant, did not have a suitable site for building a residential house. He therefore approached the 1st Defendant with a view to negotiating with him the purchase of his adjoining land, parcel Number NTIMA/IGOKI/3749 hereinafter referred to as "the suit land."

By a written agreement dated 9th of March, 1987, (Exhibit 1), the 1st Defendant agreed to sale and the

Plaintiff agreed to buy to suit land at agreed price of Shs.50,000/-. This land had some 150 coffee trees which were not well cared for. Besides the coffee trees, the 1st Defendant had also planted some Makadania trees, cedar trees, graveria trees and there were also some indigenous trees on the land.

The land appears not to have been completely fenced with barbed wires but at least there was some fence on certain parts. The Plaintiff did not appear to have ready money for the purchase of the said land, as according to his evidence and that of his wife NAOMI KANANA w/o MURUNGI (P.W.I), they had to sell off their own land where they had settled, namely, parcel Number, NKUENE/KATHOKA/99 to be able to raise the money for the purchase of the suit land. But even after the alleged sale of the said land which is till in the plaintiff's name, they still would not raise the full purchase price of Shs.50,000/- for the suit land. Be it as it may, the agreed that the Plaintiff will pay the 1st Defendant Shs.10,000/- upon the signing of the agreement which he duly paid. The next payment of Shs.20,000/- was to be made by the Plaintiff on the 16th of March, 1987 which he admittedly paid on the 20th of March, 1987. There then remained a balance of Shs.20,000/- which according to the agreement (Exhibit 1) was to be paid after the 31st of December, 1987 and thereafter the 1st Defendant was to sign the transfer forms and transfer to the 1st Defendant the suit land. That was as far as the written agreement goes.

The 1st Defendant does not dispute that he had agreed to sell to the Plaintiff the suit land for Shs.50,000/- and that he had been paid a total of Shs.30,000/- and there remained a balance of Shs 120,000/-. However, he alleges that the agreed purchase price of Shs.50,000/- did not include the value of his developments on the land. It is his contention that they had agreed verbally that he would be paid Shs.30,000/- for his developments on the land, but that a formal agreement would be drawn after the full purchase price for the land had been completed. The Plaintiff on the other hand disputed that there was a separate verbal agreement to cover the developments on the land. It is his contention that the agreement sum of Shs.50,000/- included the price of the land and everything on that land. He agrees that there were some mature trees on that land which as soon as he had been put into possession by the 1st Defendant on the 12th of March, 1987, he started cutting down so as to split them into timber for building a house on the land. Once in possession, he entered on development of the said land by turning off the remaining position of the land, planting some bananas, planting more coffee on the land, nappier grass, maize and some cyder trees. He even brought to the land some 2 lorry loads of building stones for purposes of building on the land.

The Plaintiffs rediness to settle on the suit land cannot be disputed. This is because he was just living at the back of his business premises in Meru town and the land which he had bought, parcel Number NTIMA/IGOKI/2890 was not suitable for the building of a good residential house. He had only put some house there for purposes of housing his workmen.

Coming back to the issue of whether or not the agreed purchase price of Shs, 50,000/- included the value of 1st Defendant's developments on the suit land, I find that the written agreement signed between the parties is silent on this. Agreeably, the 1st Defendant's 150 coffee trees on the land was not well maintained, but still they had some value. His mature trees on the land which the Plaintiff immediately started to split into timber had also some value leave alone other trees that were still on the land. The 1st Defendant when entering into the written agreement of sale (Exhibit 1) knew of his valuable developments, if any on the land. There was nothing to prevent him if he wanted to be paid Shs.30,000/- seperately for them from putting that agreement into writing or incorporating it into the written agreement (Exhibit 1), An agreement for the payment of 30,000/- for the value of developments was so significant, that the parties could not have failed to reduce it into writing and none especially so, when the Plaintiff was immediately put into possession of the land. Land as we know in law, includes all that is permanently affixed to it which in this case includes the trees be they coffee or otherwise, growing thereon. I think that the Plaintiff is right when he says that the agreed purchase price of Shs.50,000/- covered the land and everything therein. It is also trite law that no oral agreement can be adduced to contradict the clear words in a written contract.

I hold that there was no separate oral agreement between the Plaintiff and the 1st Defendant that a part from the sum of Shs,50,000/- which was the agreed purchase price, the 1st Defendant would be paid a further sum of Shs.30,000/- for the developments, if any, on the suit land. The 1st Defendant is therefore

telling a lie that his reason for depriving the 1st Defendant of the suit land was because he had failed to pay him for the development on the land. My view that this was so, has been confirmed by the terms of the 2nd sale agreement which the 1st Defendant made with the 2nd Defendant dated 5th of October, 1987 (Exhibit A). On the agreement, the purchase price of the land is shown as Shs.80, 000/-. There is no mention therein of what part of that sum represents the developments on the land. Like, the Plaintiff, the 2nd Defendant also says that he had bought the said land at agreed price of Shs.80,000/- which included everything on the land. I am therefore certain in my mind, that Plaintiff re-sold the suit land to the 2nd Defendant, not because the Plaintiff had failed to pay him for the value of his developments on the land, but simply because he had found a man who was willing to pay him more for the same land. If he wanted to be paid separately for his developments on the land, then his second written agreement (Exhibit A) which was drawn by a lawyer would certainly have referred such developments, but this was not done.

By the time the 1st Defendant re-sold the suit land to the 2nd Defendant vide their sale agreement dated 5th of October, 1987 (Exhibit A), he had already sold that land to the Plaintiff and had put him into possession thereof. During that time, the Plaintiff had not taken into any arrears with the agreed instalment payments for the land (see Exhibit 1). The next payment was not due until the 31st of December, 1987 when according to the agreement, the 1st Defendant would then have transferred the land to the Plaintiff.

When he re-sold the said land to the 2nd Defendant, the 1st Defendant was clearly in breach of his agreement with the Plaintiff.

The 2nd Defendant claims to be an innocent purchaser for value of the suit land without any prior knowledge of the earlier sale to the Plaintiff. This has been strongly refuted by the Plaintiff, his wife (P.W.1) and his workman (P.W.2). They all say that before the 1st Defendant re-sold the said land to the 2nd Defendant, both of them had visited the suit land in the month of September, 1987 and found the Plaintiff and his family working on the land. Having looked round the land, the 1st Defendant then told the Plaintiff that the 2nd Defendant was looking for some land to buy and the Plaintiff replied that he was not aware of any land around that place up for sale. The Plaintiff and his witnesses goes on to say that before the Defendants left, the 1st Defendant told the 2nd Defendant at their hearing that he was the one who had sold to them the said piece of land. The two men then went away.

Both Defendants have now vehemently denied having been to the suit land together before the sale and transfer of the said land to the 2nd Defendant. It is the 2nd Defendant's contention that once he heard that the Plaintiff was selling his land, he was willing to buy it as he was aware of the said land at the time when the 1st Defendant and others had bought it before they later sub-divided it and he needed not to visit the land before buying it. All that he did was to confirm from the Lands office that there was no restriction on that title. He then entered into a sale agreement for that land with the 1st Defendant on the 5th of October 1987 and on the following day, 6th October, 1987, got the land transferred to him and on the following day, 7th of October, 1987, collected his title deed for the land in all in 3 days.

The learned counsel for the Plaintiff submitted that the speed within which the land was sold to the 2nd Defendant and transacted through the lands office was reflecting the actions of a man who was aware that he was committing some fraud against someone, and in this case, the Plaintiff, he submits that the speed with which this transaction went through is consistent with the evidence of the Plaintiff and his witnesses that the 2nd Defendant had been to that land in September, 1987 and had seen them working therein and had been informed by the 1st Defendant in their presence that he had sold to them the said land. The transfer was therefore speeded up so as to defeat the Plaintiff's claim to the said land. This has again been denied by the Defence

However, the 1st Defendant is caught up with his own evidence before the District Officer who' was at first appointed as an arbitrator in this case by consent of the parties.

According to the records of the arbitrator filed in court for what it is worth, the 1st Defendant is recorded to have stated as follows in page 5 of the proceedings-

"In September, 1987, I saw the 2nd Defendant who wanted to buy the land. I took him to my land, we met the Plaintiff and his wife therein, I showed the 2nd Defendant this land and informed the Plaintiff,

The Plaintiff told me to refund his money and I agreed.

The 2nd Defendant checked in the Lands Office and I

sold the land accordingly and I deposited the Plaintiff's money with the Lawyer and asked the Plaintiff to collect it.

As for the 2nd Defendant, he stated as follows Before the arbitrator:-

"During the month of September, 1987, the 1st Defendant came and I was summonsed to go. 1st Defendant told me there was land. I asked the price and we discussed, he came and took me to the land, he showed me the whole land. We discussed the sale. I told him that I will pay him in the month of October, that year. The price was Shs.80,000/."

The evidence of the 2nd Defendant before the Arbitrator contradicts his own evidence in court that he had never been to that land till after the land was transferred to him. His evidence and that of the 1st Defendant that they visited the said land in September, 1987, clearly confirms the evidence of the Plaintiff and his witnesses that both Defendants had come to the said land in September, 1987 pretending that the 2nd Defendant was looking for some land to buy but ostensibly as it later emerged, to show him the land which he was re-selling to him. The 1st Defendant then told the 2nd Defendant in their presence that he was the one who had sold to them the land where they were then working.

On the preponderance of evidence before me as a whole, I cannot help reaching the inescapable conclusion on such evidence, that the 2nd Defendant was not an innocent purchaser for value of the suit land. I am satisfied that it has been established on a balance of probabilities that he was very much aware when he entered into a written agreement with the 1st Defendant (Exhibit A) on the 5th of October, 1987 for the purchase of the suit land that the said land had then been sold to the Plaintiff who was already in possession thereof but he was nevertheless willing to offer the Plaintiff more money so as to sell to him the same land as he had checked the Lands office and found that the 1st Defendant had not yet transferred the land to the Plaintiff.

Having found as I have done, that the 2nd Defendant was not an innocent purchaser for value of the suit land and was very much aware of the previous sale to the Plaintiff and the fact that the Plaintiff was already in possession of the said land, what then is the effect of the transfer of the suit land to the 2nd Defendant viz -a-viz the previous sale of the same to Plaintiff?

Before answering the above question, I think that this Court has first to consider, whether the transaction between the Plaintiff and the 1st Defendant was in law, enforceable.

As I have already stated, there was a binding contract of sale of the suit land between the Plaintiff and the 1st Defendant whose terms were quite clear and spelt out in the sale agreement (Exhibit 1). This agreement was duly signed by the 1st Defendant and the Plaintiff and so it complies with the terms of sec. 3(3) of the Contract Act (Cap.23) which provides as follows:-

" (3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded or some memorandum or note thereof, is in writing and is signed by the party to be charged or some person authorized by him to sign it. Provided that such a suit shall not be prevented by reason of only of the absence of writing, where an intended purchaser or lessee who has performed or is willing to perform his part of a contract -

(i) has in part performance of the contract taken possession of the property or any part thereof; or

(ii) (not applicable)".

(see: MIRONGIA ARUMHA-v- MIRUKA MBEGA & OMWACHA MBEGA (Kisumu C.A. Civil Appeal No. 114/86 - un-reported).

so in this case, the contract was duly signed by the 1st Defendant and he put the Plaintiff in possession thereof on the 12th of March, 1987 and he is still in possession up to this day. In part performance of this contract, the Plaintiff paid the 1st Defendant Shs.30,000/- and there remained a balance of Shs.20,000/- only to be paid by the 31st of December, 1987 which date had not reached when the 1st Defendant in breach of the said agreement, re-sold the said land to the 2nd Defendant and transferred to him (2nd Defendant) the said land on the 6th of October, 1987.

The land, the subject matter of this suit, was then an Agricultural land within the working of the Land Control Act (Cap. 302). It was land falling within the Municipality of Meru and by then no sections of the Municipal Boundary had been declared to control by the provisions of the Land Control Act as is now the case. Indeed the 2nd Defendant did not have to seek the consent of the Land Control Board to have the land transferred to him as was done. The transaction which the Plaintiff and the 1st Defendant entered was therefore one that could be enforced by the courts as it did not need the consent of the Land Control Board.

Notwithstanding the fact that the 1st Defendant has now divested himself of the suit land to the 2nd Defendant whom I have found, was not an innocent Purchaser for value, the issue which now falls for determination is whether, the court can still take the 1st Defendant back to his contract with the Plaintiff and order specific performance of that contract.

It is trite law as was stated by Platt J.A in the case of SAMUBL KANOGO RUTHO-v- JADIBL MACHARIA KARIITHI (Nairobi C.A. Civil Appeal No. 65 of 1982 un-reported); that it is usual in the case of contracts for sale of immovable property for the court to hold that damages is not an adequate remedy and to order specific performance. Of this type of contract, the learned author - Snells Principles of Equity 28th Edn. at page 570 stated that:-

"The commonest case in which the Court specifically enforces a contract, is where the contract is for the sale of land or granting of a lease. Contracts relating to land differ greatly from contracts respecting most goods because the land may have a peculiar value to the purchaser where conditions are satisfied - the court will therefore almost invariably decree specific performance of a contract regarding land even if the interest to be protected is no more than a licence for a short duration".

I think that a court of equity, will not normally withhold the remedy of specific performance from an applicant seeking to enforce a contract relating to land or interest in land unless there is anything in the contract or anything appertaining to it, that is offensive to equity principles. parcel Number NKUENE/KATHUKA/99 with some 200 tea plants and a residential timber house to be able to purchase the 1st Defendant's land. Clearly he is exposed to double jeopardy through no fault of his own.

I think that this being a court of equity, it can properly order that the contract of sale between the Plaintiff and the 1st Defendant regarding the sale of the suit land, NTIMA/IGOKI/3749 be specifically performed. At the time the 1st Defendant transferred the suit land to the 2nd Defendant, he had no better title to this land that he could transfer to the 2nd Defendant. Furthermore, the 2nd Defendant not being an innocent purchaser for value, acquired title to that land, whatever interest it was, subject to the overriding interests of the Plaintiff over the said land to which he was aware of. In fact he acquired no interest in this land a part from the bare certificate of title dated 7th of October, 1987 (Exhibit 7) bearing his name. He has never been in possession of this land and in my Judgment, he will never be in possession of this land as this land has to revert to the Plaintiff the moment he deposits with the 1st Defendant's lawyers the balance of the purchase price amounting to Shs.20,000/-. The Plaintiff will have an order for specific performance of his contract of sale with the 1st Defendant.

All in all, I am satisfied that the Plaintiff's suit against the Defendants has been proved on a balance of probability ties. I declare that the purported sale of land parcel Number NTIMA/IGOKI/3749 to the 2nd

Defendant by the 1st Defendant is a nullity as the 2nd Defendant is not an innocent purchaser for value of the said land. He will have the claim back from the 1st Defendant the money that he had paid him for this land. As the Plaintiff was still holding some Shs.20,000/- due to the 1st Defendant before the 1st Defendant fell in breach of the contract, that money will now be paid direct to the lawyers for the 1st and 2nd Defendants Upon payment of that sum being made by the Plaintiff, I order that the 2nd Defendant do transfer the suit land, NTIMA/IGOKI/ -3749 to the Plaintiff, Should he (2nd Defendant) fail or refuse to sign all such necessary forms or documents for the transfer of the said land to the Plaintiff after the Plaintiff has deposited Shs.20,000/- with their lawyer, then, I empower the Executive Officer of this court, to sign all such documents on his behalf to enable the Plaintiff to obtain his right title to land parcel Number NTIMA/IGOKI/3749. The sum of Shs.30,000/- deposited with the counsel for the Defendants together with the further sum of Shs.20,000/- to be paid to him by the Plaintiff all amounting to Shs.50,000/-to be paid back to the 2nd Defendant, It will then be up to him to follow the 1st Defendant for the balance of Shs.30,000/-which he had paid him. These be the orders of this court.

The Plaintiff will have his costs of this suit against the 1st and 2nd Defendants jointly and severally.

Order accordingly.

Dated and delivered at Meru this 19th day of September, 1989.

S. O. G. OGUK

JUDGE.

Orders Before the conditions set out in this Judgment are complied with, I issue an order of inhibition to be registered on land Title Number NTIMA/IGOKI/3749 so as to preserve the said

land from changing hands to any third parties other than to the Plaintiff. Order accordingly.

S. O. G. OGUK

JUDGE