



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 144 OF 2014

THERESA MUKAMI NJUGUNA.....PLAINTIFF

VERSUS

DORIS MUSALIKU MONARI.....1ST DEFENDANT

ANGELA MORAA MONARI.....2ND DEFENDANT

ZEBEDIAH EVANS NYAMONGO ACHIRA....3RD DEFENDANT

JUDGMENT

1. In her Further Amended Plaintiff in court on 2/3/2015 the plaintiff seeks the following reliefs against the 1st and 2nd Defendants jointly and severally:-

(a) An order for specific performance against the defendants to effect transfer of ½ of KITALE MUNICIPALITY BLOCK 18/BIDII/211 to the plaintiff;

(b) In the alternative, an order that Deputy Registrar of the High Court to be empowered to execute all the documents and papers necessary for the effectual transfer of the suit property to the plaintiff;

(c) A permanent injunction against the defendants, their agents, legal representatives, workers or in any other person from interfering with the plaintiff's right of possession, use and occupation of the suit property.

(d) Costs and interest of the suit.

2. According to the plaint the plaintiff purchased ½ an acre from the 1st and 2nd defendants for **Kshs.800,000/=** vide a sale agreement dated 27/05/2012 and paid for the said land. That she paid **Kshs. 785,000/=** of the purchase price on the date the agreement was executed and the balance of **Kshs. 15,000/=** was to be paid later. Subsequently the plaintiff took physical possession of the suit land and started farming and has made several developments therein.

3. The plaintiff's claim against the 1st and 2nd defendants is for an order of specific performance and the defendants to effect transfer of the suit property to the Plaintiff's name.

4. The Plaintiff avers that she has no claim against the 3rd defendant who was enjoined in this suit pursuant to the court's ruling delivered on 3/12/2014.

5. The 1st and 2nd defendants are sued as administratrix of the estate of **Dismas Monari Onsongo** (deceased).

The 1st and 2nd Defendants' Defence

6. The 1st and 2nd defendants filed a joint defence and counterclaim dated 30/9/2014 on 10/10/14. In their defence the 1st and 2nd defendant averred that the plaintiff has no cause of action against them as they are the bona fide and lawful owners of **Plot L.R. No. Kitale Municipality Block 18/Bidii/211**.

7. In their counterclaim, they reiterate the contents of their defence and add that it is the plaintiff who breached the agreement by refusing to pay the balance of **Kshs. 15,000/=**. They state further that the plaintiff frustrated the efforts to have the transfer process finalized by registering caution on the suit parcel. They pray for a declaration that the sale agreement entered into with the plaintiff on 27/05/2012 is null

and void for all purposes for want of Land Control Board Consent. They also seek that the caution registered on **Parcel No. Kitale Municipality Block 18/Bidii/211** be removed, general damages for breach of contract and costs.

8. The 3rd Defendant filed his defence and counter claim dated **26/01/2015** on **27/1/2015**. He emphasized that the plaintiff is fully aware that he is in possession and actual occupation of the suit land that is part of land **Parcel No. Kitale Municipality Block 18/Bidii/211** measuring $\frac{1}{2}$ of an **acre**. He avers that he bought the disputed land from the 1st and 2nd defendants for value and an agreement was executed. He also, avers that in compliance with **Land Control Act**, he obtained consent to transfer the disputed land to his name only to find out that the plaintiff had registered a caution. In his counterclaim, the 3rd defendant prays for a declaration that he is the rightful and legal purchaser for value without notice of any earlier transaction hence the caution registered by the plaintiff be removed to enable the 3rd defendant complete registration and obtain title deed.

9. The hearing of this suit took place on **17/5/2016, 3/7/2018, 23/10/2018** and on **24/10/2018**.

10. The plaintiff, the 1st and the 2nd defendant did not file their submissions. The 3rd defendant filed his submissions on the **29/10/2018**.

Determination

11. The agreement between the plaintiff and the 2nd defendant is admitted. The 1st and 2nd defendants also admit the agreement between them and the 3rd defendant. There is no doubt that there was no consent of the Land Control Board issued for the transaction between the plaintiff and the 1st defendant.

12. Upon an examination of the pleadings the issue that arise for determination in this suit are as follows:-

(1) Was there a breach of the terms of the Sale Agreement by the plaintiff?

(2) Was transaction between the Plaintiff and the 1st and 2nd defendants null for want of consent of the Land Control Board?

(3) Was the registration of the caution over the suit land proper?

(4) What orders should issue?

(1) Who breached the terms of the sale agreement between the plaintiff and the 1st and 2nd defendants?

13. The plaintiff avers in her plaint that she observed her obligations under the terms of the agreement dated **27th May 2011 (P.Exh 1)**. According to the agreement Kshs. 600,000/= was already paid as at the time of execution; Kshs. 185,000/= was to be paid on execution; Kshs. 15,000/= being the final balance was to be paid upon the finalization of the succession cause in **Kitale HCP&A 213 of 2009**. Vacant possession was to be given to the plaintiff upon execution. The allegation of the defendants is that the plaintiff breached the agreement when she failed to pay the **Kshs. 15,000/=** balance.

14. The plaintiff testified that the 1st and 2nd defendants asked her for money from time to time and she cleared the balance. However the 1st and 2nd defendants did not inform the plaintiff when the succession cause was completed. They kept telling her that the succession cause was still pending. Meanwhile she had planted trees, and cultivated crops on the suit land. In 2013 when she went to prepare the land she found beacons placed on the portion of the land that she was utilizing. When she asked the 1st defendant, she merely responded that she had seen a surveyor surveying the neighbouring land and she called him in to assist here subdivide the land but she never informed the plaintiff that she had sold the land to someone else. She became suspicious and searched at the lands office where she discovered that the 1st and the 2nd defendants had obtained title to the land without informing her. She learned from the neighbours that the land she bought had been sold afresh to another person. When her husband went to plough the 1st defendant chased him away. It was after this that the 1st defendant informed her that they had decided to sell the land to someone else and the plaintiff thereafter caused a caution to be registered over the land. According to the plaintiff she is a pensioner and so is her husband, and in addition, she has rental houses and her children are employed and it was not true that she could not afford Kshs. 15,000/=, however she produced no documentary proof that she paid the defendants that sum.

15. In this case it was the 1st and 2nd defendants who were parties to the succession cause and therefore they were under obligation to inform the plaintiff of the finalization thereof to enable the plaintiff pay the balance as required by the agreement if she had not already paid it as she alleges. This is all the more true when one considers that the 1st defendant stated under cross examination by Mr. Waweru that the plaintiff did not assist them with the succession proceedings and that they were in constant touch. The defendants did not call evidence to show that it was not true that the 1st defendant lives about one kilometre away from the plaintiff's residence. That supports the plaintiff's allegation that their homes are a short distance apart and that they were in constant touch.

16. The 1st defendant testified that succession proceedings were completed in February 2012 whereupon the plaintiff was informed albeit verbally that the defendants had obtained a grant and that she did not respond to that communication. She produced a copy of a letter (**D.Exh3**) dated 1/3/2012 addressed to the plaintiff and stating that a certificate had been issued and another buyer would be sought if payment was not made.

17. However she produced nothing in evidence that the letter had been served upon the plaintiff. **D.Exh 3**, the letter allegedly sent to notify the plaintiff of the completion of the succession proceedings has a curious sentence: "*By a copy of this letter the buyer is accordingly notified*". It seems as if the decision to resell the land had already been made by the time **D.Exh 3** was written. If that letter was genuine,

why does it talk of another buyer? Paragraph 5 of the 1st and 2nd defendants defence speaks of several reminders. Why they were not produced in evidence by the 1st defendant?

18. In my view the 1st defendant has failed to establish by way of evidence that she informed the plaintiff that the succession proceedings were concluded and that she should now pay the balance to enable subdivision and transfer. She is not truthful in her evidence. The cheque that she wrote the plaintiff in an attempted refund which the plaintiff rejected, was made after she had received payment from the 3rd defendant. I read an intention on the part of the 1st defendant to sidestep and breach her agreement with the plaintiff in favour of a new agreement with the 3rd defendant who had offered her more money in terms of purchase price for the same land she had sold the plaintiff earlier.

19. Besides, paragraph 3 of the counterclaim dated 30/9/2014 alleges that the plaintiff herself frustrated the transfer processes by lodging a caution against the title. In my view this allegation rings hollow in view of the non production of any transfer signed by the defendants in favour of the plaintiff in respect of a portion of the said land.

20. The 1st defendant appears to have been in dire need of finances and hence her decision to resell the same land. For this reason I find the evidence of the plaintiff that she had paid the balance of Kshs. 15,000/= in bits at the defendant's request even before the succession cause was over to be credible. I therefore find that the plaintiff was not in breach of the agreement.

(2) Was the agreement between the plaintiff and the 1st and 2nd defendants null for want of Consent from the Land Control Board?

21. The 1st and 2nd defendants raised the issue of want of Land Control Board Consent to transfer in their statement of defence. I have found that the 1st and 2nd defendants received the entire purchase price and placed the plaintiff into possession of the suit land. The suit land in this case is agricultural land. For transactions over this kind of land a consent of the land control board is normally required.

22. In the case of *John Simiyu Ndalila -vs- Francis Soita 2014 eKLR* this Court stated as follows:-

“It is without a doubt that the defendant having received the purchase price in full is estopped from relying on the defence that their agreement is void for non-compliance with section 6 of Land Control Act”.

23. In the case of is *Joseph Mathenge Kamutu -vs- Joseph Maina (2015) eKLR, Macharia Mwangi & 87 Others -vs- Davidson Kagiri (2014) eKLR* the court also held that the appellant's action of receiving the full purchase price and putting the respondent in possession created a constructive trust in favour of the respondent, dismissed the appellant's claim and granted an order of specific performance in favour of the respondent.

24. In the Court of Appeal decision in *Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR* it was held that want of the Land Control Board consent was not fatal to the transaction in that matter.

25. The requirement of a Land Control Board Consent has therefore progressively been brushed aside in our jurisprudence where it appears that the seller wishes to take advantage of the lack of consent to thwart the transaction for his own mischievous ends to the detriment of an innocent purchaser who has performed his part of the contract. This is more so when the seller's avoidance of liability under the agreement by invoking lack of a Land Control Board consent under the agreement appears to further fraud on his part.

26. In view of the decisions mentioned above, this court finds that the 1st and 2nd defendants created a constructive trust in favour of the plaintiff by their conduct of receiving the purchase price and placing the plaintiff into possession. The want of Land Control Board Consent would not operate to negate the plaintiff's her accrued rights. The defendants are estopped from claiming so.

(3) Was the registration of the caution over the suit land proper?

27. On the issue of the caution placed by the Plaintiff, the same was justified in that she was attempting to safeguard her interest in the suit land and that is the only legal protection immediately available to a party to a contract that is about to be breached.

Conclusion

(4) What orders should issue?

28. I find that the plaintiff has proved her case on a balance of probabilities against the defendants I therefore enter judgment in her favour against the defendants jointly and severally and issue the following orders:

(a) An order for specific performance against the 1st defendant ordering her to execute all documents necessary to effect excision and transfer of a portion measuring half an acre ½ from Kitale Municipality Block 18/Bidii/211 to the plaintiff in default of which the Deputy Registrar of this Court shall execute all the documents necessary for the excision and effectual transfer of the suit property to the plaintiff;

(b) An order that the excision shall abide as much as practicable to the extent of the portion of Kitale Municipality Block 18/Bidii/211 that the plaintiff was put into possession of by the 1st and 2nd defendants;

(c) A permanent injunction against the defendants, their agents, legal representatives, workers or in any other person from interfering with the plaintiff's right of possession, use and occupation of the suit property.

(d) The defendants' counterclaim dated 30/9/2014 is hereby dismissed.

(e) The 1st and 3rd defendants shall pay to the plaintiff the costs of the suit and the costs of the counterclaim.

Dated, signed and delivered at Kitale on this **31st** day of **January, 2019.**

MWANGI NJOROGE

JUDGE

31/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kaosa for 3rd defendant

N/A for the plaintiff

Mr. Kaosa holding brief for Tigogo for 1st defendant

Mr. Karani holding brief for Waweru for plaintiff

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

31/01/2019