



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 589 OF 2013**

**KOYUMKEI MULTIPURPOSE CO- OPERATIVE**

**SOCIETY LIMITED AND 17 OTHERS.....PLAINTIFFS**

**VERSUS**

**RAEL CHEPNG'ETICH KOECH.....DEFENDANT**

**JUDGMENT**

***(Suit by plaintiffs seeking to enforce an agreement for sale; agreement vague on terms of payment; defendant claiming that payment was not made as expected and refunding the purchase price; no consent of Land Control Board given; suit dismissed).***

1. This suit was commenced through a plaint which was filed on 12 November 2013. The 1<sup>st</sup> plaintiff is a cooperative society and the 2<sup>nd</sup> to 18<sup>th</sup> plaintiffs are members of the 1<sup>st</sup> plaintiff. It is pleaded that on 23 July 2012, the 1<sup>st</sup> plaintiff purchased from the defendant and her late husband, Kipyegon Ezekiel Koech, 6 acres out of the land parcel Njoro/Ngata Block 2/26 (Kirobon) at a consideration of Kshs. 6,600,000/=. It is averred that all money save for a sum of Kshs.100,000/= was paid, despite their agreement stating that Kshs. 4,800,000/= was to be paid after obtaining the Land Control Board consent, and that Mr. Kipyegon Koech died before consent could be procured. In the meantime the 1<sup>st</sup> plaintiff took possession and subdivided the land into 23 plots which it distributed to its members who settled on the same. The suit was filed because the defendant started obstructing them from developing their parcels of land. It is further pleaded that the defendant purported to refund some of the money paid from the account of the deceased, which is pleaded to be unconscionable and illegal, as she holds no letters of administration for the estate of Mr. Kipyegon Koech. It is averred that some of the members of the 1<sup>st</sup> plaintiff have extensively developed their plots and the action of the defendant will impoverish them. In the suit, the plaintiffs have asked for the following orders (slightly paraphrased as there are obvious errors of description) :-

*(i) A declaration that the 1<sup>st</sup> plaintiff complied with the sale agreement dated 23 July 2012 and is entitled to specific performance, and that the defendant be compelled as a co-vendor to procure all the consents and the transfer and give to the 1<sup>st</sup> plaintiff within 30 days, and in the alternative the Deputy Registrar Nakuru to sign the transfer on behalf of the defendant.*

*(ii) An order that the defendant be permanently restrained from dealing or interfering with the 23 demarcated plots belonging to the plaintiffs contained in the 6 acres of the land parcel Njoro/Ngata Block 2/26 (Kirobon).*

*(iii) A declaration that the defendant is in breach of the sale agreement and should pay the 1<sup>st</sup> plaintiff 30% of the purchase price.*

*(iv) Costs of the suit.*

2. In her statement of defence, the defendant pleaded inter alia that her late husband and the officials of the 1<sup>st</sup> plaintiff had a verbal discussion for the sale of 6 acres of the suit land. It was then agreed that full payment of the purchase price will be made before the 1<sup>st</sup> plaintiff took possession. It is contended that on 23 July 2012, the officials of the 1<sup>st</sup> plaintiff took them to the 1<sup>st</sup> plaintiff's offices and gave them some documents to sign, and being illiterate, they did not understand the contents. They were then taken to the bank and paid Kshs. 1.8 Million with a verbal promise that the balance will be paid the next day. To their consternation, on the following day, a surveyor came and hived out 6 acres before full payment was made, and the 1<sup>st</sup> plaintiff's officials started selling plots from this portion. She has admitted that Kshs. 6.5 Million was paid, but in instalments, each time a plot was sold, which was detrimental to their intention of selling the land and that this brought her husband great loss. She has pleaded that she refunded the 1<sup>st</sup> plaintiff the purchase price save for an outstanding amount of Kshs. 1.8 Million and she has asserted that this was done legitimately. She has averred that the plaintiffs are not entitled to specific performance since they chose to subdivide the property without the consent of the Land Control Board and did not pay as agreed. It is also pleaded that the sale agreement is ambiguous, one sided and defective.

3. PW-1 was Mr. James Patrick Cheruiyot, the Chairman of the 1<sup>st</sup> plaintiff. He stated that the main object of the Society is to buy land for its members. He testified that on 14 July 2012, the defendant and her late husband, came to their offices and requested the Society to purchase 6 acres out of their 18 acre parcel of land. He informed them that he will need to discuss their proposal with the directors. The directors did meet the defendant and her late husband on 21 July 2012 at the 1<sup>st</sup> plaintiff's offices at KFA Building in Nakuru town, and they agreed to purchase the land. They then visited the land on 23 July 2012 and were shown the land by the defendant and her late husband (vendors). They agreed that they would pay Kshs. 1.8 Million on that day and they came to KCB Nakuru, Flamingo Branch where the Kshs.1.8 Million was handed over and the vendors deposited the same into the account of the defendant. After this, they proceeded to their advocate, Mr. Simiyu, who drew the sale agreement, which was signed. He testified that on 31 July 2012, they took a surveyor to the land and both vendors pointed out to the surveyor where the location of the 6 acres was to be. They then demarcated the 6 acres into 23 plots. These plots were allocated to the 2<sup>nd</sup> to 18<sup>th</sup> plaintiffs and allotment letters issued to them.

4. The next payments were made on 2 October 2012, when Kshs. 1,050,000/= was paid; then Kshs. 1,150,000/= was paid on 26 November 2012; then on 23 December 2012, Kshs. 1,500,000/= was paid; then on 31 January 2013, Kshs. 1,000,000/= was paid. This brought the amount paid to Kshs. 6,500,000/=, leaving a balance of Kshs. 100,000/=.

5. He later got complaints from the members that the defendant was obstructing them from the land. They wrote to her and also went to see her but she was not cooperative. They later found that a sum of Kshs. 4,700,000/= was transferred into their account on 31 October 2013 from the account of Mr. Kipyegon Koech. They discovered this on 6 December 2013 when they went to check on their account. He stated that Mr. Koech had died sometimes in March 2013. He testified that some members have done developments on the land and some have built permanent houses.

6. He stated that according to their agreement, it was the vendors who were to obtain the Land Control Board consent and hand over title in the name of the 1<sup>st</sup> plaintiff. He denied that he forced the defendant and her husband to execute the agreement or that they did not know what they were signing. He stated that they went together to the offices of the Advocate and it is there that the agreement was signed. He denied that they paid intermittently as they sold the plots and averred that they were awaiting title before they could pay in full; that is why the Kshs. 100,000/= is yet to be paid. He denied that they took advantage of the alleged illiteracy of the vendors and pointed out that it is the vendors who came looking for them. He stated that they were ready to return the Kshs. 4,700,000/= deposited into their account so that they may get title to the land.

7. Cross-examined, he stated that they told the vendors that they could come for the balance when they needed money, but that the final payment will only be made after they get the title deed. They would thus pay when the seller called on them in need of money. He agreed that Clause 2 (c) of the agreement provided that payment was to be made after consent of the Land Control Board (LCB). The land was agricultural land. He stated that they agreed possession could be taken immediately. They demarcated the land on the ground although they were yet to obtain consent of the LCB as this was with the permission of the vendors. He testified that Mr. Koech did not inform them why he was selling the land and he did not know that he intended to buy land elsewhere. He stated that the society resold the land to its members and any person who had completed payment could take possession. He mentioned that the refund of Kshs 4,700,000/= took him by surprise as Mr. Koech had already died and they did report this issue to the police.

8. PW-2 was Mr. Jimmy Aggrey Simiyu, an advocate of the High Court of Kenya. He testified that on 23 July 2012, he prepared the sale agreement in issue and the same was executed in his presence. He testified that the parties had already agreed on the terms of sale and his role was to reduce what they had agreed into writing. He denied that the agreement was drawn by the plaintiff at their office in KFA Building and that the parties only appeared before him for execution. He also denied that the document was prepared very late in the evening.

9. With the above evidence, the plaintiffs closed their case.

10. The defendant in her evidence, stated inter alia that he came to know of the Society when her husband informed her that he was selling land to them. They came to their home and her husband showed them the land; this was on a Friday. They later went to their offices at KFA Building and agreed to sell 6 acres for Kshs. 6.6 Million. They agreed that they would meet again on Monday, 23 July 2012, and that the whole of the Kshs. 6.6 Million was to be paid on this day. On the said day, they went to the 1<sup>st</sup> plaintiff's offices at around 8.00am and they were given some documents to sign and they were then informed to go to the bank. They first went to Trans National Bank where the 1<sup>st</sup> plaintiff had an account; and they were there upto 3pm when they went to Kenya Commercial Bank, and some money was deposited into their account. She stated that her husband complained that they have only paid Kshs. 1.8 Million instead of Kshs. 6.6 Million. PW-1 then explained to them that there was a cheque which had bounced and that they would pay the balance the following day which her husband agreed. They were then taken to another office where they just sat, and PW-1 went into an inner office. She stated that they never signed any documents here and that all documents were signed at KFA Building. The next day, PW-1 came with a surveyor and demarcated the land. This took her husband aback as he had not been paid, and he confronted PW-1 who asked him to get ready so that they may go to town to make the payment. However when her husband later emerged, PW-1 had left. It is after 4 months that another instalment was made. This caused her husband to suffer from stress as they had intended to buy another parcel of land in Keringet area from one Mary Chelangat, and had already given her the sum of Kshs. 1.8 Million which had been deposited by the Society. When more money was not forthcoming, Ms. Chelangat repudiated their agreement and refunded Kshs. 1 Million.

11. Mr. Koech died on 27 February 2013 by which time some members of the 1<sup>st</sup> plaintiff had started developing and others cultivating. The defendant then chose to return their money from a joint account held by herself and her husband. She opted to return the money since there was no consent of the Land Control Board and her children had not consented to the sale. No application for consent had been done. She blamed the society for the demise of her husband and now that she had lost him, she was not ready to lose the land as well.

12. Cross-examined, she stated that she refunded Kshs 4.7 Million as she had not been refunded by Mary Chelangat, all the money that they had paid to her. She stated that this has been refunded and is now available. She stated that if all the money had been paid at once, by the Society, they would not have been in this situation as they would have purchased the other land in Keringet. The problem is that they were paid in bits and they lost the other land.

13. With the above evidence, the defendant closed her case.

14. I invited both Mr. Kipkoech, learned counsel for the plaintiffs, and Mrs. Wanderi, learned counsel for the defendant, to make written submissions which they both did. I have taken these into account in arriving at my decision. I take the following view of the matter :-

15. It is common ground that the parties herein had an agreement for the sale of 6 acres out of the suit land. In as much as the defendant claimed that they were illiterate and did not know what they were signing, I am not persuaded that this was the case. Indeed, the defendant herself did admit that they were intent on selling the land, and that the only problem that they had, was with the manner in which the payments were made. It is trite law that parties ought to be held to the terms of contract that they enter into and it is therefore imperative that there be an analysis of the terms of the contract between the parties.

16. I have seen the sale agreement which is dated 23 July 2012. The vendors are said to be Kipyegon Koech (now deceased) and the defendant, and the purchaser is the 1<sup>st</sup> plaintiff. The agreement provides that 6 acres out of the land parcel Njoro/Ngata Block 2/26 (Kirobon) is what is being sold. I do note that this land is registered in the name of Ezekiel Koech, whom I presume to be Kipyegon Koech (deceased). The purchase price is of Kshs. 6,600,000/=. The contract provides that the said amount was to be paid as follows :-

*(a) Kshs. 1,800,000/= to be paid on 23 July 2012 and the balance is Kshs. 4,800,000/=.*

*(b) Any money at any day needed by the vendors shall be paid by the purchaser.*

*(c) The final payment shall be paid to the vendors by the purchasers after land control board when purchaser gets its title deed within four months (sic).*

17. Other terms of the contract provide that possession shall be given to the purchaser and the purchaser shall subdivide the 6 acres to its members; that the vendor will execute the transfer documents and obtain the necessary consents to facilitate a smooth transfer of the land in favour of the purchaser; and that any party in breach of the agreement will pay 30% of the purchase price as penalty.

18. Now, my first impression of the sale agreement is that it is pretty vague on the payment of the balance of the purchase price. Clause (b) of the payment clause provides that *"any money at any day, needed by the vendors shall be paid,"* but this begs the question, does a demand need to be made in writing, or was a verbal demand sufficient? I would suppose that all the subsequent instalments that were paid were made on demand, but I have not seen any written demand, and I wonder to myself what would inform me of the frequency and time the payments were required to be made. I in fact do not know, or at least have no concrete evidence, what informed the payments that were made, and whether these payments were made, because they were demanded, or indeed, if they were made within the time that they were demanded. Even clause (c) of the payment clause does not help matters. What is this final payment? how much is it? is it to be paid within 4 months of the agreement or 4 months of obtaining the consent of the Land Control Board; or is it 4 months of the transfer of the land?

19. With utmost respect to Mr. Simiyu, this is not the sort of sale agreement that one would expect from a qualified advocate of 13 years standing. In as much as Mr. Simiyu stated that this is a format that the society has, for sale agreements, and he only followed it, you would expect an advocate to point out some flaws and remedy them, so that the intention of the parties is adequately captured in an agreement that is practical, easy to interpret, and with terms that are measureable in terms of whether or not they have been implemented.

20. I have great difficulty in deciding whether or not the vendors asked for money which they needed and they were not paid when requested. The only conclusion I can come to is that the agreement presented to me is too vague on the terms of payment and it is not possible for one to tell whether its terms were complied with as drawn or not.

21. The one important term that is clear to me and which I can make sense of, is that the agreement was subject to consent of the Land Control Board. Both vendors and the purchaser appreciated that they were dealing with agricultural land and that they required the consent of the Land Control Board. This is indeed the law as stipulated by Section 6 of the Land Control Act, Cap 302, which provides as follows :-

*Transactions affecting agricultural land*

*(1) Each of the following transactions that is to say—*

*(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;*

*(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;*

*(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land 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.*

22. The law above speaks for itself; consent of the Land Control Board is required for subdivisions and sales of agricultural land. In the instance of this case, there was to be a subdivision of the land, so as to carve out 6 acres. This needed the consent of the Land Control Board. There was also to be the sale of this 6 acres; this again needed the consent of the Land Control Board.

23. The Land Control Act, does provide at Section 8, that the application for consent of the LCB is supposed to be made within 6 months of the agreement. That provision of the law is drawn as follows :-

*Application for consent*

*8(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:*

*Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.*

24. The agreement herein was made on 23 July 2012, and it follows that within 6 months of this period, that is by 23 January 2013, an application needed to have been made. There is provision for extension of this period of time but I am not persuaded that the circumstances of this case should allow me to exercise my discretion to extend the time. Firstly, we are dealing with a rather vague sale agreement and it is not clear if the parties abided by their terms. Secondly, the registered proprietor of the land is deceased. Finally, I do not have any application before me for extension of the time, so that the other party may respond to such request.

25. The purchaser herein is not a stranger to the requirements of the Land Control Act as it is a land buying society. It was indeed aware of the requirement for consent and that is why the same was inserted in the sale agreement. The Land Control Act, is indeed very strict on the issue of consent, such that it provides for an offence for any person taking possession before the said consent is issued. This is provided at Section 22 of the Act which states as follows :-

*Section 22 : Acts in furtherance of void transaction*

*Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by [section 6](#) of this Act, and any person—*

*(a) pays or receives any money; or*

*(b) enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.*

26. I am aware that there is debate within the Court of Appeal as to whether or not a transaction that required consent but none was given, should be permitted to continue, despite there not being consent. Mr. Kipkoech in his submissions referred me to the cases of ***Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri (2014) eKLR*** and ***Willy Kimutai Kitilit vs Michael Kibet (2018)eKLR***. In these two cases, the Court of Appeal opted to allow a contract of sale of land to be performed despite there not being any consent from the LCB. In contrast there is the case of ***David Sironga ole Tukai vs Francis arap Muge & 2 Others (2014)eKLR***, where a different bench of the court of appeal arrived at a contrary decision and asserted that consent of the LCB must be granted as required by the Land Control Act.

27. In answer to Mr. Kipkoech's submissions, Mrs. Wanderi submitted that the creation of a constructive trust, which the Court of Appeal did in the two decisions, was aimed at serving justice and that is a maxim of equity that he who seeks equity must come with clean hands and she did not think that the plaintiffs have come to court with clean hands.

28. On my part, I opt to follow the decision of ***David Sironga Ole Tukai***. I think there is a purpose to the Land Control Act. If one looks at Section 9 of the Act for example, the LCB can allow or decline to give consent, based on factors such as the economic development of the land concerned or on the maintenance or improvement of standards of good husbandry. Generally, consent ought to be denied where the subdivision of the land would likely reduce the productivity of the land.

29. The sale herein would have led to further subdivision of the land to 23 small plots which would most likely have been used for residential and not agricultural purposes. That would have affected the productivity of the land. We cannot tell whether or not the LCB would have denied consent given this situation and I cannot speak for the LCB. We are thus not dealing with a clear cut scenario where there is no change of user of the land, and no issue arising out of the intended transfer of land. If I am to allow the transaction herein to proceed, I will be usurping the powers of the LCB, and override a specific provision of statute. I will be giving a go ahead when there is a possibility that consent would have been denied by the LCB. The parties needed to present their transaction before the LCB so that the LCB can either allow or deny them consent. I therefore hold that the agreement in issue is void for want of consent of the Land Control Board and unable to be enforced.

30. The circumstances of this case are pretty different from the circumstances in the two cases cited by Mr. Kipkoech, such that even if I was persuaded to imply a trust, I do not think that this is a fit case to imply one. Firstly, not all the money has been paid, and it is also not clear, as I have pointed out before, whether payments were made as directed by the vendors. Secondly, we are not dealing with ignorant persons who need to be aided by equity. I have already mentioned that the 1<sup>st</sup> plaintiff is a land buying entity; it knows the requirements of the law and ought to have followed the same. They in fact had counsel who would have properly advised them of what is required of them.

31. But let us assume that I am wrong in my above analysis, and take it that I can ignore the requirement for LCB consent. Can the plaintiffs still succeed on their claim for specific performance? I do not think so. The suit land is still registered in the name of Ezekiel Koech. He is now deceased. The only person who could have signed transfer for the land is Mr. Koech. After his demise, those powers would be handed

over to his legal representative. If the plaintiffs wanted specific performance, they needed to sue the legal representative of Mr. Koech, which they have not done so. They have only sued his wife, but his wife has no powers to transfer the land to them, as it has not been shown to me that she is the legal representative of Mr. Koech. That claim for specific performance therefore has to fail on this basis.

32. Where then does this leave the parties? As I have said, the agreement is null and void pursuant to the provisions of the Land Control Act. I have also pointed out that the claim for specific performance cannot be made for the reason that the legal representative of the registered proprietor was not sued. The result is that the claim for specific performance must fail whichever way one wants to look at it. There is the other claim for damages of 30% of the purchase price. The sale agreement provided that any party in breach of the agreement will pay this penalty. I am unable to tell, as I have explained above, given the vague nature of the sale agreement, whether it was the vendors or purchaser who breached the agreement, in so far as payments were concerned. I am therefore unable to make an award for damages against the defendant. In any event, as I have said before, the legal representative of the registered proprietor is not a party to this case. It is the registered proprietor who needed to ensure that the terms of the agreement are adhered to and not necessarily the defendant. I am thus unable to make any award in favour of the plaintiffs for the claimed 30% damages.

33. The only remedy left for the plaintiffs is that provided at Section 7 of the Land Control Board, which provides as follows :-

*Section 7 : Recovery of consideration*

*If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to [section 22](#).*

34. I have already set out the provisions of Section 22 above, and they do not assist the plaintiffs. What the plaintiffs are entitled to is a refund of what they have paid under the contract. I have evidence that they paid Kshs. 6,500,000/= . Out of this amount of money, Kshs. 4,700,000/= was refunded. That leaves a balance of Kshs. 1,800,000/=. The best I can do is enter judgment for the plaintiffs against the defendant for this sum of Kshs. 1,800,000/= as the defendant has admitted receiving this money. If the defendant had not admitted it, again, this would have needed to be a claim against the estate of the deceased.

35. Given the above, the plaintiffs cannot therefore succeed in their quest to keep possession of the land. They have to vacate the land and cede possession forthwith for they have no right over the 6 acres that they claim to have purchased. I sympathise with those who moved in and developed their property, but they should have known better. They never held any title and simple prudence would have dictated that they await the settlement of the transaction between the 1<sup>st</sup> plaintiff and the vendors, or the conclusion of this case, before proceeding to embark on serious developments. I see some parties thinking that the court will be inclined to give them land because they have developed it. That is a notion that people need to get rid off. Rights over land are granted and guided by law, and these are not thrown away because one imagines that he can get an advantage by quickly developing the land. There is therefore not really much that I can do to help the 2<sup>nd</sup> – 18<sup>th</sup> plaintiffs. Maybe they can square out with the 1<sup>st</sup> plaintiff on how they will be compensated, if at all.

36. The only issue left is costs. To me, this case was not necessary if the plaintiffs had diligently assessed their position vis-à-vis what is provided for in law. Their remedy was in a refund, which the defendant was already doing. I will therefore award costs to the defendant.

37. Judgment accordingly.

**Dated, signed and delivered in open court at Nakuru this 26<sup>th</sup> day of February 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Mr. B.N. Kipkoech for the plaintiffs.

Mrs. Karen Wanderi for the defendant

Court Assistant :Nelima Janepher.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**