



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 52 OF 2009

JOEL NGUI MWEU.....PLAINTIFF

VERSUS

GITHIGA MUIRI COMPANY LIMITED.....DEFENDANT

JUDGMENT

1. This suit was commenced by the Plaintiff vide his Plaint dated 5th March, 2009. In the Plaint, the Plaintiff averred that he is the registered proprietor of agricultural land known as Donyo Sabuk/Komarock Block 1/261; that by a written Agreement dated 13th July, 2001, the Plaintiff agreed to sell the suit land to the Defendant at an agreed price of Kshs. 3,500,000 payable within six (6) months and that after signing the said Agreement, the Defendant's advocate took custody of the title document.

2. It is the Plaintiff's case that the Defendant paid Kshs. 1,250,000 and failed to pay the balance of Kshs. 2,300,000; that the Agreement of 13th July, 2001 became null and void for want of the Land Control Board consent and that the Defendant has since the year 2006 refused to hand back to the Plaintiff the title documents.

3. The Plaintiff is seeking for a declaration that the Sale Agreement dated 13th July, 2001 relating to the suit land has become null and void for lack of the consent of the Land Control Board; for a mandatory order of injunction compelling the Defendant to return to the Plaintiff the title document relating to the suit land and for the Defendant to accept the payment of his refund of Kshs. 1,250,000 which was paid in respect of the voided Agreement of Sale.

4. In his Statement of Defence and Counter-claim, the Defendant admitted that there was in existence the Agreement of 13th July, 2001 between himself and the Plaintiff; that the agreed purchase price was Kshs. 3,550,000 which was enhanced by consent to Kshs. 6,500,000 and that the payment period was also enhanced.

5. The Defendant averred in his Defence that he paid to the Plaintiff a deposit of Kshs. 1,650,000 leaving a balance of Kshs. 4,850,000; that he has all along been ready, able and willing to pay the outstanding balance and that it is the Plaintiff who has failed to facilitate the obtaining of the consent of the Land Control Board.

6. In his Counter-claim, the Defendant averred that the Plaintiff and his two grandsons have acted fraudulently and that this court should enforce the Agreement of Sale of 13th July, 2001 which was subsequently amended and re-amended.

7. This matter proceeded for hearing on 26th August, 2009 before Lenaola J. (*as he was then*). On the said date, the Plaintiff, PW1, informed the court that he is the registered owner of land known as Donyo Sabuk/ Block 1/261 measuring 100 acres; that he agreed to sell the suit land to the Defendant for Kshs. 3,550,000 which was to be paid in installments, and in any event within six (6) months.

8. PW1 stated that the purchase price was to be deposited into his grandsons' account; that the Defendant only deposited Kshs. 1,650,000 into the said account and that he never instructed his grandsons to re-negotiate the Agreement. PW1 denied having signed any subsequent Agreement with the Defendant and that the Land Control Board never gave its consent for the transfer of the suit land.

9. PW1 stated that he received a letter dated 9th August, 2006 from the Defendant's advocate demanding for the refund of the deposit paid; that he agreed to refund the money in writing and that his grandsons attempted to fraudulently obtain his land.

10. The Machakos Land Registrar, PW2, informed the court that the Plaintiff is the registered proprietor of the suit land and that he was registered as the owner of the land on 23rd September, 1993.

11. The Plaintiff's grandson, PW3, stated that he lives with PW1; that on 18th February, 2009, three (3) men visited the Plaintiff and told him they wanted to buy the suit land for Kshs. 6.5 million; that the Plaintiff informed them that he was willing to sell the land for Kshs. 12 million and that the Plaintiff did not sign any Agreement agreeing to sell the suit land for Kshs. 6.5 million.
12. PW3 stated that neither him nor the Plaintiff signed the alleged Agreement showing that the purchase price for the suit land is Kshs. 6.5 million and that Richard Nzomo Mutisya has since died.
13. DW1 informed the court that he was the chairman of the Defendant in the year 2001; that currently, he is a Director in the Defendant's company and that Mr. Nzomo informed them that his grandfather, the Plaintiff, was willing to sale the suit land.
14. It was the evidence of DW1 that after confirming that the suit land was registered in favour of the Plaintiff, they entered into a Sale Agreement of 13th July, 2001 with the Plaintiff; that they banked a deposit of Kshs. 1,000,000 by way of a cheque and Kshs. 250,000 in cash and that the balance of the purchase price was to be settled within six (6) months.
15. DW1 stated that after the end of six (6) months, the Plaintiff had not obtained the consent of the Board to have the suit land transferred; that they paid the Plaintiff's grandsons, Richard Nzomo and Eliud Mutisya and their mother Kshs. 100,000 to cater for expenses and that later on, they paid them an additional sum of Kshs. 300,000. It was the evidence of DW1 that the Plaintiff later on adjusted the purchase price to Kshs. 6.5 million.
16. In cross-examination, DW1 stated that the suit land is agricultural land; that the consent of the Board was never obtained and that they paid a total of Kshs. 1,650,000 to the Plaintiff. It was the evidence of DW1 that it was the responsibility of the Plaintiff to obtain the consent of the Board.
17. The Defendant's other Director, DW2, informed the court that he has been a shareholder in the Defendant's company since 1990; that he was one of the Directors of the Defendant who met the Plaintiff in the year 2001 and that they agreed with the Plaintiff to purchase his land for Kshs. 3,550,000. It was the evidence of DW2 that they paid the Plaintiff an initial deposit of Kshs. 1,250,000 upon signing the Agreement of 13th July, 2001 and agreed to pay the balance thereof within six (6) months.
18. It was the evidence of DW2 that later on, they paid to the Plaintiff's grandsons Kshs. 400,000 and that the Plaintiff adjusted the purchase price to Kshs. 6.5 million. DW2 informed the court that they are ready and willing to pay the balance of the purchase price.
19. The Plaintiff's advocate submitted that according to the Sale Agreement of 13th February, 2001, the payment of the purchase price was to be completed within six (6) months; that the Defendant did not pay the balance of the purchase price within six (6) months and that the Plaintiff refused to apply for the consent of the Land Control Board because the Defendant did not pay the balance of the purchase price.
20. Counsel submitted that the controlled transaction became void for all purposes for lack of the requisite Land Control Board's consent; that no such application was made within six (6) months and that the Defendant is only entitled to a refund of the purchase price paid to the Plaintiff.
21. The Defendant's advocate submitted that the balance of the purchase price was supposed to be paid upon the Plaintiff obtaining the consent of the Land Control Board; that the Defendant performed its obligation as per the Agreement of Sale and that a party who has performed his part of the bargain may be assisted by the court to enforce the contract against the defaulting party.
22. The Defendant's counsel finally submitted that it was the obligation of the Plaintiff to obtain the Land Control Board consent and that the Defendant should not be penalized for such failure. Counsel submitted that although this court cannot enforce the Agreement until the consent of the Board is obtained, it cannot relieve parties from the obligations of the Agreement. Counsel submitted that the parties herein are bound by the terms of their contract.
23. It is not in dispute that the Plaintiff entered into an Agreement of Sale with the Defendant dated 13th July, 2001 in respect of a parcel of land known as Donyo Sabuk/Komarock Block 1/261. According to the terms of the said Agreement, the Defendant paid to the Plaintiff a deposit of Kshs. 1,250,000 on the day the Agreement was signed. The Defendant was required to pay the balance of the purchase price within six (6) months. The total purchase price was Kshs. 3,550,000.
24. The Agreement further provided that the completion period was to be six (6) months from the date of the Agreement and the purchase price was to be paid to one Richard Nzomo, the Plaintiff's grandson. The Agreement further provided that "if for any reason other than default on the part of the purchasers the transaction is not concluded all deposits paid shall be refunded within thirty (30) days of demand."
25. The Defendant informed the court that in addition to the Kshs. 1,250,000 which was paid on the date the Agreement was signed, the Defendant made a further payment of Kshs. 400,000 to the Plaintiff's grandsons. The total amount that the Defendant admitted as having paid was therefore Kshs. 1,650,000, leaving a balance of Kshs. 1,900,000 unpaid. Indeed, no effort was made by the Defendant to pay the said balance within six (6) months as had been agreed upon.
26. On his part, the Plaintiff (PW1) informed the court that he never applied for the consent of the Land Control Board to have the suit land transferred to the Defendant. According to PW1, he could not apply for the consent of the Board before being paid the full purchase price.
27. From the documents produced by the Defendant, the first time the Defendant informed the Plaintiff that it was ready to complete the Agreement was on 20th December, 2005, which was more than four (4) years down the line. In the Defendant's advocate letter dated 20th December, 2005, the Defendant inquired from the Plaintiff's advocate if his client had acquired the consent of the Board.

28. When the Plaintiff's advocate failed to respond to the Defendant's advocate letter of 20th December, 2005, the Defendant's advocate did another letter dated 9th August, 2006 in which he stated as follows:

“It is now common ground that the sale Agreement is void by virtue of Section 8 of the Land Control Act Cap 302 of the Laws of Kenya and our instructions are to demand from you, which we hereby do that you either appear and/or attend before the Land Control Board as is required for purposes of giving the consent to facilitate the transfer of land or refund the sum of Kshs. 1,250,000 with interest being deposit received towards the purchase price within seven (7) days...”

29. It will appear that after that letter, the parties entered into another round of negotiations. PW1 informed the court that he informed the Defendant that he could only sale the suit land for Kshs. 12,000,000 and not for Kshs. 6,500,000 as requested by the Defendant. It was his evidence that he declined to sign the Agreement of 18th February, 2009 that was drafted by the Defendant's representatives.

30. Indeed, the handwritten Agreement of 18th February, 2009 that was produced by the Defence shows that the same was never signed by the Plaintiff. The Plaintiff also declined to apply for the consent of the Land Control Board to transfer the suit land. To date, no consent of the Board has ever been obtained.

31. The Defendant produced in evidence the Agreement dated 12th November, 2007 which was signed by Richard Nzomo Mutisya in which he acknowledged receipt of Kshs. 300,000. Consequently, the documentary evidence before me shows that the Defendant made a payment of Kshs. 1,550,000 towards the purchase of the suit land.

32. Having admitted that it never paid to the Plaintiff the balance of the purchase price within the requisite period of six (6) months, I find that it is the Defendant who was in breach of the Agreement of 13th July, 2001.

33. The provisions of Section 6(1) of the Land Control Act states as follows:

“6(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

c. Deleted by Act No. 22 of 1987, Sch. 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.”

35. Section 8 of the Act provides that 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 (6) months of the making of the Agreement of the controlled transaction.

36. The Defendant admitted that the suit land measuring approximately 100 acres is agricultural land. A consent for the transfer of the same was therefore required to be obtained from the Land Control Board within six (6) months. That never happened in this particular case, thus rendering the Sale Agreement of 13th July, 2001 void.

36. Section 7 of the Land Control Act provides that if any money has been paid in the course of a controlled transaction that becomes void under the Act, the money paid shall be recoverable as a debt by the person who paid it from the person to whom it was paid.

37. The transaction between the Plaintiff and Defendant having become void, the Defendant is only entitled to the deposit paid. The Defendant will then have to return the title that his advocate admitted in writing of holding. For those reasons, I allow the Plaintiff's claim and dismiss the Counter-claim as follows:

a. The Defendant to return to the Plaintiff the original Title Deed that it is holding in respect of parcel of land known as Donyo Sabuk/Komarock Block 1/261.

b. The Plaintiff to refund to the Defendant Kshs. 1,550,000 being the deposit that the Defendant paid for the suit land.

c. The Plaintiff to pay interest on the above amount at court rates from the date of filing this suit until payment in full.

d. The Defendant to pay the costs of the suit and the Counter-claim.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF FEBRUARY, 2019.

O.A. ANGOTE

JUDGE