



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 12 OF 2015

LUCY NJERI ELIUD.....1ST PLAINTIFF

DAVID MUTUKU KIHUITHIA....2ND PLAINTIFF

VERSUS

NANCY WAMORO GITHUA..... DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiffs commenced this suit against the defendant by way of Plaint dated 25th January, 2015 seeking orders against the defendant as follows:-

- a. **A declaration that the purported sale agreement dated 28/2/2011 between the plaintiff and the defendant is invalid and not binding on the 1st plaintiff.**
- b. **An order ordering the defendant to vacate the 2nd plaintiff's parcel of land on Kitale Municipality Block 1/Lessos/733 situated in Lessos in Kitale town and in default an eviction order to issue**
- c. **Costs of this suit.**
- d. **Any other relief this Honourable court shall deem fit to grant.**

THE PLEADINGS

The Plaintiff

2. According to the plaint the defendant advanced to the 1st plaintiff a friendly loan of **Kshs.110,000/=** on **28/2/2011** and the defendant executed a written undertaking to repay. On the same day the 1st plaintiff was made to sign in an advocate's office in Kitale town a document which she says was later purported to be a land sale agreement between her and the defendant by which she was purported to be selling to the defendant a parcel of land at Lessos in Kitale town measuring 25 feet by 100 feet being part of **Kitale Municipality Block 1/Lessos/733**. The 1st plaintiff avers that she was misled to signing that document believing it was a continuation of another document and avers that it was fraud in that it was blank in crucial parts. The 1st plaintiff avers that she paid in full the friendly loan advanced to her by the defendant on **28/2/2011** but the defendant without any legal justification or lawful excuse entered upon the plaintiff's residence on **Kitale Municipality Block 1/Lessos/733**, demolished houses structures worthy **Kshs.150,000/=** confiscated household properties worthy **Kshs. 60,000/=** and evicting the 1st and 2nd plaintiffs therefrom hence this suit.

The Defendant's Defence

3. The defendant filed a defence dated **13/8/2015** on **18/8/2015** and later filed amended defence and counterclaim dated **27/2/2017** on **1/3/2017**. In that document it is averred that the 1st plaintiff agreed to sell to the defendant part of **Kitale Municipality Block 1/Lessos/733** and the 1st plaintiff duly executed the sale agreement fully knowing the contents and effect upon being paid the consideration thereof. She denied the particulars of fraud set out in the plaint and avers that the 1st plaintiff's execution of the sale agreement was without any misrepresentation. She admitted having taken possession of the land subject matter of this suit and averred that the 1st plaintiff still owes her

Kshs.63,000/=.

4. In the counterclaim, the defendant reiterates the matter in the plaint and adds as follows that the 1st plaintiff presented herself as the owner and beneficiary of **Kitale Municipality LR No. 17 Block 1/Lessos/1372** situate at **Lessos Centre**. She pleads that the agreement was erroneously dated **28/2/2007** instead of **28/2/2011** and that the consideration for the part of **Kitale Municipality LR No. 17 Block 1/Lessos/1372** which she was purchasing from the 1st plaintiff vide that agreement was **Kshs.200,000/=** which was paid by the defendant to the 1st plaintiff on or before the signing of the agreement. She avers that she has been in exclusive occupation and use of the said property; that the 1st plaintiff has failed to take any step to effect its transfer to her thus frustrating the completion of the transaction.

5. In addition she avers that the property was sold by the plaintiffs without her knowledge to one **Francis Kigotho Waithaka** yet the plaintiffs did not have capacity to dispose of the same and the 1st plaintiff is not ready to refund the whole of purchase price paid to her. She pleads owing to the 1st plaintiff's actions the agreement of **28/2/2011** has been repudiated, and that she is no longer bound by it and therefore she seeks a refund of the entire of purchase price with interest at commercial rate from the date of agreement till payment in full, cost of the suit and counterclaim

The Plaintiff's Reply to Defence and Counterclaim

6. The plaintiff's filed a reply to amended defence and defence to amended counterclaim on **16/1/2018** denying the contents of those documents and reiterating the matters contained in the plaint.

The Defendant's Reply to Defence and Counterclaim

7. The defendant filed reply to defence and counterclaim on **26/1/2018** joining issues with the plaintiff on his defence to counterclaim.

THE EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

8. The suit came up for hearing on **5/7/2018** when **PW1 Lucy Njeri Eliud** testified and adopted her statement as evidence-in-chief. She reiterated the matters in the plaint. Her evidence is that she was evicted by the defendant in **April, 2014** yet she had not sold her the plot and the defendant had lent her **Kshs.110,000/=** which was to repay. She produced the agreement between her and the defendant as **P. Exhibit 1**. She produced a notice to vacate within **7 days** as **P. Exhibit 2**. she testified that she went to Kidiavai & Co. Advocates and enquired as to the reason for the notice and she was informed of an agreement she had signed stating that she had sold the land; she avers that that was the first time to see the agreement dated **28/2/2017**; she denied having made such an agreement which she produced as **P. Exhibit 3** and stated that it was not genuine; she maintains they only agreed on repayment of the money and that **P. Exhibit 1** was the only agreement that she executed. However she admitted that the agreement and the undertaking to repay were executed on the same day and that she has repaid the defendant all the money she owes under the agreement by way of deposits into her bank out with Co-operative Bank (account number withheld) which was in defendant's name. She produced **5** deposits slips as **P. Exhibit 4(a) - (e)**. She averred that the land was purchased by her husband but it belongs to both of them and produced a sale agreement as **P. Exhibit 6** in support of the statement. The 2nd plaintiff never testified in this suit.

9. With that the plaintiffs closed their case.

The Defendant's Evidence

10. DW1 Nancy Wamoro Githua testified on **30/7/2018**. She adopted her statement dated **27/2/2017** as evidence-in-chief. She averred that she has known the 1st plaintiff for a long time; that they had a sale agreement in respect of a plot; that the consideration was **kshs.200,000/=** which she paid to the 1st plaintiff and the 1st plaintiff left the plot to her and she is now in possession of the land. She produced the sale agreement as **D. exhibit 1**. She later came to know that the land was sold to one Francis Waithaka and now she seeks a full refund of the purchase price and cost of the suit.

11. According to her witness statement the 1st plaintiff only paid **Kshs.48,000/=** out of the money advanced and whatever deposits she made into defendant's account were in respect of monies that came to her as the defendant's employee.

12. DW2 Aggrey Kidiavai an advocate practicing in Kitale under the name Kidiavai & Company testified on **16/10/2018**. He admitted having prepared the agreement dated **28/2/2011** between the 1st plaintiff and the defendant; that it was a land purchase agreement in respect of a parcel of land measuring 50 x 100 feet for consideration of **Kshs.200,000/=** which was paid to the 1st plaintiff; that at the time of the agreement the land did not have a parcel number and a blank space was left on the agreement upon the understanding that the number would be inserted into the agreement once it was obtained with that the defendant closed her case.

Submissions

13. The plaintiffs filed their submissions on **27/11/2018** and the defendant filed his on **28/11/2018**. I have considered those submissions. The issues that arise in this suit are as follows:

(1) Did the 1st plaintiff voluntarily enter into an agreement for the sale of part of her land to the defendant?

(2) If so, did the defendant pay the entire sum of consideration required of the agreement?

(3) What orders should issue?

(1) Did the 1st Plaintiff voluntarily enter into an agreement for the sale of part of her land to the defendant?

14. It is not in dispute that a certain transaction occurred in an advocates' office and that it was between the 1st plaintiff and the defendant.
15. It is also not denied that the 1st plaintiff was advanced money, that is **Kshs. 111,000/=** by the defendant. It is also not disputed that in the year **2014** the defendant took possession of the suit land.
16. It is in dispute as to whether an agreement for the sale of land was entered into at the offices of Ms. Kidiavai Advocates and whether the loan advanced to the 1st plaintiff was ever repaid in full or at all.
17. The written undertaking to repay the loan signed by the 1st plaintiff is acknowledged as genuine. What is disputed is the purported agreement produced by the plaintiff as **PEXh 3**. The plaintiff's evidence is that she was made to execute a dubious document which she later came to know as **PEXh 3**, an agreement for sale of a portion of **Kitale Municipality Block 1/Lessos/733 for Ksh. 200,000/=**.
18. So did the plaintiff execute that document?
19. This court must take note that the Advocate who drew the agreement orally testified to seeing the parties thereto signing the same in his office.
20. First, she has produced as **PEXh 3** the very document she signed. Secondly, in her own statement filed in court on **10/2/2015** in which she states that :

“On the same day 28/2/2011 I was made to sign, in the office defendant's advocate(sic) Kidiavai & Company Advocates in Kitale town, a dubious document which the defendant and her said advocates have later purported to be a sale of land agreement between me and the defendant by which it was purported I was selling to the defendant a parcel of land at Lessos in Kitale town measuring 25 x 100 feet part of Kitale Municipality Block 1/Lessos /733, a fact that is untrue.”

21. The plaintiff takes exception with the date of the agreement, but that is easily explained away both by her statement and the defendant and her advocate's evidence as an error, and that the proper date of that agreement was supposed to be **28/2/2011** and the Advocate stated in cross examination that he takes responsibility for the said error, which explanation I find plausible enough in the circumstances of this case.
22. The plaintiff also takes issue with the fact that the document **PEXh 3** was missing some crucial parts and that she was misled into signing it believing it was a continuation of another document. She does not state, though, which other document she could have reasonably have expected to execute in that office on that day, which she could have genuinely mistaken the document she executed to be a continuation of. When I examine the acknowledgement she signed in the same office on the same day in my view it is apparent that the acknowledgement **PEXh 1** can not be that other unidentified document, for indeed the acknowledgement bears only one page and she could not have expected to sign any other page thereof. In my view thereof the allegation that the plaintiff was misled into executing the agreement produced as **PEXh 3** is not correct.
23. I have stated that the plaintiff has produced the very document she signed. In my view it is identical to the document produced by the defendant as **DEXh 1** save for the fact that in **DEXh 1**, the complete number of the land from which a portion was purportedly being sold by the plaintiff to the defendant was issued, while an incomplete number is found in **PEXh 3**.
24. This implies two things: first, that there was a discussion concerning sale of land. Secondly, that the evidence of the Advocate who prepared the agreement that the plot number was not available at the time of execution and would be inserted later when it was found, was correct. However it is clear by the plaintiff's production of **PEXh 3** that by virtue of that incomplete number reading **“LR No. 17 Block 1 Lessos measuring 50x 100 feet within Trans Nzoia County”** parties must have been in agreement that the land was situated in Lessos. The full particulars later set out in **DEXh 1** did not disappoint: those particulars indicate that the land is in Lessos in Trans Nzoia County, and it was referred to as **“LR No. 17 Block 1 Lessos/1372 measuring 50x 100 feet within Trans Nzoia County”**. That is not the same land reference number that the plaintiff has issued in her pleadings, for she has given the number **“Kitale Municipality Block 1/ Lessos /733”**, alleging that this is the land that the defendant invaded and which she is in occupation of to date. I find that is that is the case, then even the land reference number on **DEXh 1** is incorrect. However, in my view, the plaintiff and the defendant voluntarily executed the two original sale agreements produced as **DEXh 1** and **PEXh 3**.

(2) Did the Defendant pay the entire sum of consideration required of the Agreement?

25. The most important detail of **PEXh 3** and **DEXh1** is that though the plot number is omitted and is said to have been filled in by typewriter, the consideration and the names of the transacting parties were computer printed on the document. I do not hear the plaintiff to say that she suffered illiteracy at the time of the execution of the agreement or at any other time.
26. **Clause 2** of the agreement the agreement states that the vendor acknowledges receipt of the purchase price upon execution of the agreement.
27. Having executed the said document she must be taken to have been acknowledging every detail on it as correct save the Land reference

number which was not fully inserted therein.

28. I have observed that the advocate who drew up the sale agreement testified that the consideration was paid to the plaintiff. He stated as follows:

“The only money I saw pass in my office was Kshs. 200,000/= paid in full.”

29. It is therefore my opinion that the defendant paid to the plaintiff the whole of the consideration on the said agreement and that she was entitled to vacant possession of the land so purchased by **1/12/2012**.

30. In my view the plaintiff's suit must fail.

31. However though the agreement may be not binding in so far as the transfer of the suit land to the defendant is concerned, the same is binding in so far as the exchange of monies is concerned and as the defendant has sought in the counterclaim a refund of the entire purchase price paid, it is apt to issue such an order of refund.

(3) What orders should issue?

32. In the end I dismiss the plaintiff's plaint in the main suit and enter judgment for the plaintiff in the counterclaim against the 1st plaintiff in the main suit and I issue the following orders:

(a) The 1st plaintiff in the main suit shall refund the sum of Kshs. 200,000/= being the amount due and owing from the 1st plaintiff to the defendant in the main suit plus interest thereon at court rates.

(b) The 1st plaintiff shall meet the costs of both the suit and the counterclaim.

It is so ordered.

Dated, signed and delivered at Kitale on this 28th day of March, 2019.

MWANGI NJOROGE

JUDGE

28/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Prof. Sifuna for plaintiff

Mr. Ingosi for defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

28/03/2019