



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 32 OF 2017

CONCEPTA NYABOKE.....PLAINTIFF

VERSUS

PETER MUASYA WANGAIKA1ST DEFENDANT

EVA MUTHONI MUCHEMI2ND DEFENDANT

PATRICIA NYAWIRA KAMUNYA.....3RD DEFENDANT

JUDGMENT

1. In the Plaintiff dated 19th January, 2011, the Plaintiff has averred that by an Agreement dated 23rd February, 2010, the 1st Defendant agreed to sell to her land known as Athi River/Athi River Block 1/348 (*the suit property*) at a consideration of Kshs. 600,000; that the 1st Defendant was paid a deposit of Kshs. 300,000 and that the date of completion of the Agreement was to be the 7th day from the date of notification by the 1st Defendant that he had obtained all the completion documents.
2. Although the Plaintiff paid up the balance of the purchase price, she averred that the 1st Defendant has not met his obligations; that she served on the 1st Defendant a completion notice and that having developed the suit land, an order of specific performance should issue.
3. The 1st Defendant filed his Statement of Defence and Counter-claim in which he averred that he never executed the Agreement of 23rd February, 2010 because he had received the said Kshs. 300,000; that the Plaintiff paid the said amount to one Sammy Ndunda Muindi and that his signature on the said Sale Agreement was a forgery.
4. The 1st Defendant finally averred that he only received Kshs. 43,000 from the Plaintiff on the understanding that he would only sign a Sale Agreement upon being paid the sum of Kshs. 300,000; that he sold the suit land on 15th July, 2010 to the 2nd Defendant and that the Agreement referred to by the Plaintiff is invalid and unenforceable.
5. In the Counter-claim, the 1st Defendant averred that the Agreement the Plaintiff is relying on is unenforceable; that in any event, the transaction is unlawful for want of the consent of the Land Control Board and that a declaration should issue that the Agreement of 23rd February, 2010 is unlawful and the caution on the land to be lifted by the court.

The Plaintiff's case:

6. In her evidence, the Plaintiff, PW1, informed the court that she entered into a Sale Agreement dated 23rd February, 2010 with the 1st Defendant at a consideration of Kshs. 600,000 for land known as Athi River/Athi River Block 1/348; that she paid to the 1st Defendant a deposit of Kshs. 300,000 which he acknowledged and that she then took possession of the suit land.
7. PW1 informed the court that he paid to the 1st Defendant the balance of the purchase by instalments and that the 1st Defendant has since refused to transfer the suit land to her. The Plaintiff produced in evidence acknowledgement slips and photographs showing the developments that she has made on the land.
8. In cross-examination, PW1 stated that she was introduced to the 1st Defendant by Mr. Sammy; that she has paid the 1st Defendant a total of Kshs. 343,000 and that they agreed that she will settle the balance of the purchase price after receiving the completion documents from the 1st Defendant.
9. DW2 informed the court that he is the one who introduced the Plaintiff to the 1st Defendant who was selling the suit land; that the Plaintiff

and the 1st Defendant entered into the Sale Agreement of 23rd February, 2010 and that after paying the deposit of the purchase price, the Plaintiff took possession of the suit land which she has developed.

10. In cross-examination, PW2 stated that the 1st Defendant is his brother-in-law (*having married his sister*); that he witnessed the Plaintiff and the 1st Defendant sign the Agreement of 23rd February, 2010 and that the 1st Defendant was paid a deposit of Kshs. 300,000.

The Defendants' case:

11. The 1st Defendant, DW1, informed the court that in December, 2009, he instructed Sammy Muindi Ndunda (PW2) to get for him a purchaser in respect of the suit land; that when he found a purchaser, he purported to sell the land without informing him and that he only learnt later that his land had been sold.

12. It was the evidence of DW1 that he later on agreed with the Plaintiff that he would sell to her the suit land upon being paid Kshs. 300,000 in addition to the Kshs. 43,000 which the Plaintiff had paid him and that in August, 2010, he informed the Plaintiff that having failed to pay him Kshs. 300,000, he would not sell to her the land. The 1st Defendant denied having signed the Agreement of 23rd February, 2010 or having obtained the consent of the Board to transfer the land.

13. DW2 informed the court that he was involved in the business of buying and selling land; that the Plaintiff was introduced to him by the 1st Defendant and that when he showed the Plaintiff the suit land, she told him that she had already bought the same land from one Sammy Ndunda Muindi. It was his evidence that after that, he sold the land on behalf of the 1st Defendant to a different person.

14. DW3 informed the court that she purchased the suit land from the Plaintiff vide an Agreement dated 15th November, 2010; that after paying the deposit of the purchase price of Kshs. 200,000, they attended the Land Control Board on 2nd September, 2010 and that she later learnt that the Plaintiff had registered a caution against the suit land.

15. The Plaintiff's advocate submitted that the Plaintiff had demonstrated that she had entered into an Agreement of Sale with the 1st Defendant; that the 1st Defendant did not demonstrate that the Agreement of 23rd February, 2010 was a forgery and that no expert evidence was tendered to show that the Agreement of 23rd February, 2010 was forged. Counsel submitted that pursuant to Section 8 of the Land Control Act, the court should extend the time for the Application of the consent of the Board.

16. The Plaintiff's advocate finally submitted that the 1st Defendant did not issue to the Plaintiff with a completion notice before purporting to sell the land to the 2nd Defendant; that the sale of the suit land to the 2nd Defendant was procured through deceit and that the sale of the suit land to the 2nd Defendant was null and void.

17. The 1st Defendant's advocate submitted that there was no evidence to show that the Plaintiff paid to the 1st Defendant Kshs. 300,000; that it is normal for Vendors to receive money in anticipation of entering into a final Agreement and that an Agreement for Sale in which the consent of the Board has not been obtained is null and void for all purposes.

18. The 1st Defendant's advocate finally submitted that the Plaintiff failed to prove his case on the required standards and that the 1st Defendant had proved on a balance of probabilities that he never sold the suit land to the Plaintiff.

19. The Plaintiff is claiming for an order of specific performance compelling the 1st Defendant to complete the Sale Agreement dated 23rd February, 2010. According to the Plaintiff, upon signing the Agreement of 23rd February, 2010, he paid to the 1st Defendant Kshs. 300,000 and thereafter paid him a further sum of Kshs. 43,000 for the purchase of land known as Athi River/Athi River Block 1/348. It was the evidence of PW1 that although the purchase for the said land was Kshs. 600,000, he was required to pay the balance of the purchase price upon being given the completion documents by the 1st Defendant.

20. The Agreement dated 23rd February, 2010 was produced in evidence by the Plaintiff. The said Agreement shows that the purchase price for the suit land was Kshs. 600,000 out of which a deposit of Kshs. 300,000 was to be paid upon execution of the Sale agreement. The Agreement further provided that the completion date will be the 7th day from the date of notification by the Vendor that he had obtained all the completion documents.

21. The completion documents that were purportedly supposed to be delivered by the 1st Defendant included the original Title Deed, the executed Transfer forms and the letter of consent of the relevant Land Control Board. These documents have never been supplied by the 1st Defendant.

22. Although the 1st Defendant denied having signed the Sale Agreement of 23rd February, 2010, she did not tender any evidence from a document examiner to show that the signature on the Agreement of 23rd February, 2010 was not his. I say so because it is only the 1st Defendant who knows how he signs documents. Indeed, it is only the 1st Defendant who can provide to the document examiner with samples of his known signature or specimen signature to enable him (*the document examiner*) compare it with the questioned signature, and not the Plaintiff.

23. Indeed, Section 122 of the Evidence Act provides that when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. Being the only person who is knowledgeable of his signature, the burden of proving that the signature on the Sale Agreement of 23rd February, 2010 was not his was on the 1st Defendant and not the Plaintiff.

Having not done so, I find that the 1st Defendant signed the Agreement of 23rd February, 2010,

24. Other than the Kshs. 300,000 which was paid on execution of the Agreement, the 1st Defendant received a further sum of Kshs. 43,000 on different dates. Notwithstanding the receipt of the said sum, the 1st Defendant never obtained the requisite consent of the Land Control Board to transfer the suit land to the Plaintiff.

25. Section 6(1) (a) of the Land Control Act provides as follows:

“6(1) Each of the following transactions-

(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;

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.”

26. The Court of Appeal has made it clear in many decisions that where a statute declares a transaction to be void, a party who relies on the provision of the Act, cannot be accused of committing fraud, and that the only recourse that is open to the purchaser was refund of the purchase price under Section 7 of the Land Control Act (*See Leonard Njonjo Kariuki v. Njoroge Kariuki alias Benson Njonjo, Civil Appeal No. 26 of 1979 and David Sironga Ole Tukai vs. Francis Arap Muge & 2 others*).

27. Having not obtained the requisite consent of the Land Control Board within six (6) months, and the Plaintiff having not sought for the extension of the period within which to obtain the consent of the Board, the Agreement of 23rd February, 2010 is not enforceable. The only recourse that the Plaintiff has to recover the amount paid to the 1st Defendant.

28. Considering that the Plaintiff did not seek for a prayer of the refund of the purchase price in his Plaint, and having found and held that the order of specific performance cannot issue in a situation where the Agreement of Sale is void for want of the consent of the Land Control Board, I find and hold that the Plaintiff has not proved his case on a balance of probabilities.

29. For those reasons, I dismiss the Plaintiff's Plaint but with no order as to costs.

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

O.A. ANGOTE

JUDGE