REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 163 OF 2017

(Formerly Machakos ELC Case No. 184 of 2011)

JOSEPH KIRUMBA NDUNGU (Suing on his own and on behalf of all members of the MUUGI & NGANGA FAMILY WELFARE ASSOCIATION).....PLAINTIFF

VERSUS

WAKAKORO OLE SAKUDA.....DEFENDANT

JUDGEMENT

By an Amended Plaint dated the 28th November, 2005 the Plaintiff seeks for judgement against the Defendant in the following terms:

a) A declaration that the Defendant is in breach of performance and is liable to make specific restitution of the consideration together with interest thereon at court rates.

b) Specific performance and or restitution of the consideration with interest at court rates since the date of payment and Damages for non – performance of contract.

c) Any other relief this Honorable Court may deem fit.

The Defendant filed a Defence dated the 10th November, 2005 where he admits being the owner of the suit land but denies that the said parcel was subdivided for purposes of selling them to any one including the Plaintiff. He denies that any negotiations subject to the contract were ever entered into between him and the Plaintiff for purchase of the parcels of land. He denies receiving any purchase price nor executing any application to the Land Control Board. He contends that he never authorized any person including the Plaintiff to collect title documents from the Agricultural Finance Corporation (AFC) and denied owing the said corporation any monies. The Defendant states that he only negotiated with the Plaintiff to restore his title deed, which the Plaintiff had illegally and/or unlawfully taken from him. He denies ever negotiating or renegotiating any terms to sell his land and denies the particulars of breach enumerated in paragraph 9 of the Plaint. He insists that the suit is time barred and the Plaintiff has no *locus standi* to sue.

The matter proceeded for hearing where the Plaintiff called three witnesses while the Defendant had two witnesses.

Evidence of the Plaintiff

The Plaintiff is a registered Community Based Organization (CBO), which draws its membership from the families of MUUGI and NGANGA of Kiambu District. PW1 Joseph Kirumba Ndungu testified that on 17th May, 1987 they entered into negotiations to purchase 130 acres of land to be hived from land parcel number Kajiado/ Ntashart/ 43. The negotiations culminated in the subdivision of the land into two portions of Kajiado/ Ntashart/ 1781 and Kajiado/ Ntashart/ 1782 respectively. The Plaintiff paid the purchase price of the 130 acres for Kshs. 3000 per acre. Further, that the Application for Consent of the Land Control Board was duly made, signed by the parties and lodged. It was the Plaintiff's evidence that the Defendant had taken a loan with AFC and provided title to land parcel number Kajiado/ Ntashart/ 1781 as security. Further the Defendant authorized the plaintiff to be released to the said title for the said parcel of land upon payment of the outstanding loan balance, which the Plaintiff's witnesses contend they did. The Defendant failed to attend the meeting at the Ngong Land Control Board, which could enable the said Board issue consent to transfer the suit land.

The Defendant reneged on his agreement to transfer land to the Plaintiff, which culminated in a meeting convened on the 26th April, 2003 between the Plaintiff's and Defendant's families to deliberate on the issue. In the said meeting the Defendant then offered to give the Plaintiff only 30 acre of land at a renewed rate of Kshs. 20, 000 per acre which the Plaintiff declined. There were various meetings held where both

the representatives of the Plaintiff and Defendant attended to deliberate on the dispute but no resolution was arrived at. The Defendant's promised to refund the purchase price to the Plaintiff but never did so.

Evidence of the Defendant

The Defendant who is now deceased was the proprietor of land parcel number Kajiado/ Ntashart/ 43, which he subdivided into Kajiado/ Ntashart/ 1781 and Kajiado/ Ntashart/ 1782 respectively. The Defendant denies selling the suit land to the Plaintiff nor receiving the purchase price. The Defendant's two witnesses stated in court that they were ready to refund the purported purchase price in accordance with Maasai culture so as to live in peace. The Defendant denied having a loan with the AFC, which the Plaintiff had paid. The Defendant claimed the Plaintiff took his title deed for land parcel number Kajiado/ Ntashart/ 1781 but they were compelled to return it to him by the local DO called Okello.

Both the Plaintiff and Defendant filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the materials including pleadings filed in respect of the suit herein and upon hearing testimonies from the witnesses, the following are the issues for determination:

· Whether the Plaintiff's claim is statute barred.

· Whether the Plaintiff is entitled to order of specific performance.

· Who should bear the costs of the suit.

As to whether the Plaintiff's claim is statute barred. The Defendant contends that the Plaintiff's claim is statute barred since the alleged agreement which forms part of the dispute was entered into in 1987. PW1 testified that on 17th May, 1987 they entered into negotiations with the Defendant for the purchase of 130 acres of land to be hived from Kajiado/ Ntashart/ 43. He stated that the Plaintiff paid to the Defendant kshs. 3000 per acre as purchase price. It was PW1's testimony that land parcel number Kajiado/Ntashart/43 was later subdivided into 1781 and 1782 respectively. Further that the title 1781 was held by AFC as security for a loan until the Plaintiff had paid for the same, after which the title was released to the Plaintiff as authorized by the Defendant. The Plaintiff's witnesses averred that they negotiated with the Defendant to transfer land to them in vain and had to even involve the local DO to resolve the dispute. Further, that at one point the Defendant wanted them to increase the purchase price or take less acreage of the land they had purchased but they declined. All these events occurred between May 1987 upto 5th March, 2003 when a meeting was held at the DO 's office to deliberate on the dispute. The Defendant relied on section 7 of the Limitation of Actions Act as well as cases of **IGA versus Makerere University; Gathoni Vs Kenya Cooperative Creameries Ltd: and Hilton V Sultan S. Team Laundry** to support his argument. The Plaintiff insisted the suit herein was not statute barred as from 1987 they continued negotiating with the Defendant and on 26th April, 2003 the Defendant acknowledged that he would refund the purchase price which it had been paid. It relied on section 23 of the Limitation of Actions Act to buttress its arguments and argued that the said section conferred a fresh accrual of right of action on the date of acknowledgment on the existence of a claim.

Further Section 7 of the Limitation of Actions Act provides that:' **An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.'**

Section 23 (1) of the Limitation of Actions Act stipulates that:' **(1) Where— (a) a right of action (including a foreclosure action) to recover land; or (b) a right of a mortgagee of movable property to bring a foreclosure action in respect of the property, has accrued, and— (i) the person in possession of the land or movable property acknowledges the title of the person to whom the right of action has accrued; or (ii) in the case of a foreclosure or other action by a mortgagee, the person in possession of the land or movable property or the person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest the right accrues on and not before the date of the acknowledgement or payment.'**

While Section 24 of the Limitation of Actions Act further states that:' **(1) Every acknowledgement of the kind mentioned in section 23 of this Act must be in writing and signed by the person making it. (2) The acknowledgement or payment mentioned in section 23 of this Act is one made to the person, or to an agent of the person, whose title or claim is being acknowledged, or in respect of whose claim the payment is being made, as the case may be, and it may be made by the agent of the person by whom it is require by that section to be made.'**

As per the minutes of the meeting held on 26th April, 2003, between representatives of the Plaintiff and Defendant at the clause on conclusion it stated as follows:' **Wakakoro's family disagreed with the acres demanded by the Mugi & Nganga Association because (a) This land is a family asset; (b) the cost is very low and in response advised Mugi and Nganga Association to inform its members that the Wakakoro's family can only release 30 acres as stated earlier at a cost of Kshs. 20,000/= ; (c) That if they disagree, then the Wakakoro family have no choice but to give back the Kshs. 390, 000/= which was the payment the association made to the family.'**

A reading of this excerpt confirms there was an acknowledgement of payment made to the Defendant's family on 26th April, 2003. The said

minutes were recorded by DW1 a representative of the Defendant's Family, who confirmed doing so, in his testimony. The minutes were signed by Francis Ole Sakuda who represented the Defendant while Joseph Kirumba Ndungu was a representative to the Plaintiff. The Court can hence infer that there was indeed an acknowledgement made by a representative of the Defendant in writing and signed by the person making it. Further, from the said minutes there was an acknowledgement made by representatives of the Defendant to the Plaintiff's representatives in respect of the land transaction. It is against the foregoing and in relying on the legal provisions cited above that I hold that the claim herein is not statute barred by virtue of sections 23 and 24 of the Limitation of Actions Act.

As to whether the Plaintiff is entitled to order of specific performance. It is the Plaintiff's claim that they indeed entered into a Sale Agreement with the Defendant in 1987 to purchase 130 acres to be hived off from land parcel number Kajiado/ Ntashart/ 43. The Plaintiff's three witnesses testified that there was indeed an agreement to purchase 130 acres from the Defendant who upon receipt of the purchase price failed to transfer the land to them. They stated that they had agreed with the Defendant to repay his loan at Agricultural Finance Corporation after which the title deed would be released to them. The Plaintiff's witnesses stated that the documents in respect of the transaction including sale agreement were burnt down in the Treasurer's shop as evidenced by the Police Abstract reference number 15th January, 1993 which was produced as an exhibit. The Defendant through his witnesses denied selling the 130 acres to the Plaintiff nor receiving the Kshs 390, 000/ = as purchase price. There were however copies of the Acknowledgment for Payment which were produced indicating there was a transaction to purchase land from the Defendant. Insofar as the Defendant' witnesses denied receiving any monies from the Plaintiff, what is baffling it why they accepted vide the minutes dated the 26th April, 2003 to refund the purchase price that had been received. Further, why did they accept to renegotiate the terms of the transaction with the Plaintiff, if indeed there was no Sale Agreement. From the minutes of the meeting held on 26th April, 2003 the Defendant's representatives admitted at clause (a) that the land was not purchased through the normal procedure as family consent was not granted in 1986. The Defendant's family further admitted that they could only release 30 acres at a cost of Kshs. 20,000/= and if the Plaintiff's refused, they could only refund Kshs. 390, 000/= which the Plaintiff had paid to the Defendant. This admission was made two years before the suit was filed. The meeting at the DO's office on 5th March, 2003 also resolved that the title deed for Kajiado/ Ntashart/ 1781 was to be returned to the Defendant and further meetings including consultations from family members of both parties were to be held to enable them settle the land transaction in dispute. There were acknowledgement of payments in Kiswahili dated the 18th June 1989 and 21st December 1989 whose copies were produced in court and it indicated that the Plaintiff and Defendant entered into a transaction over land parcel number 43 Ntashart Kajiado. Both DW1 and DW2 despite denying their father sold land to the Plaintiff, confirmed that they were not always with their father whenever he undertook transactions to land. DW2 even testified that they were ready to refund the purchase price as per Maasai culture. It is the Defendant's contention that they never had a loan with AFC but as per the Green Card for Kajiado/ Ntashart/ 43 it indicates there was a Charge registered on 28th February, 1983 to secure a loan of Kshs. 44,000/= to AFC and the said Charge was discharged on 19th May, 1988. Further, there was no explanation issued by the Defendant's witnesses on why the Plaintiff's representative was holding the title deed of their father's land and only surrendered the same after being compelled by the local DO.

The Defendant relied on Section 3(3) of the Law of Contract Act which provides that: **'No suit shall be brought upon a contract for the disposition of an interest in land unless— (a) the contract upon which the suit is founded— (i) is in writing; (ii) is signed by all the parties thereto; and (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:'** to support his argument. The Defendant also relied on the cases of **Silverbird Kenya Limited Vs Junction Ltd & 3 others and Margaret Muthoni Wanyee V Mukenia Cooperative Limited** to buttress his arguments.

In the case of **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR**, the Court of Appeal while dealing with an issue as to whether there was a Sale Agreement or not observed as follows: '**We are of the view that the learned judge did not err in finding that a valid sale agreement existed. We are fortified in this view because the letter dated 18th August, 1978, from Karuga Wandai & Co. Advocates on behalf of the appellant stated that the appellant had deposited Ksh. 300/= for transmission to the plaintiff because he had changed his mind to sell the land; we find that this letter is corroborative evidence illustrating that a sale agreement had been entered into between the parties and purchase price had been paid. On the strength of this corroborative evidence, we are convinced that the learned Judge did not err in finding that there was a sale agreement……. It is our view that Section 3 (7) of the Law of Contract Act makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3 (3) of the Law of Contract Act came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force. The proviso to Section 3 (3) of the Law of Contract Act applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the Law of Contract Act.'**

In the circumstances and in relying on the above cited Court of Appeal decision, in so far as the Plaintiff failed to produce the Sale Agreements which they claimed to have been burnt in the treasurer' house, I find that since it commenced purchasing the suit land in 1987 before the commencement of Law of Contract Act and by an admission by the Defendant to refund the purchase price, it is indeed corroborative proof that there was a land transaction between them where the Defendant was paid Kshs. 390,000. I opine that since the transaction was not completed, it is just and equitable for the Plaintiff to be refunded the purchase price that it paid. I further find that the said purchase price should attract an interest but since the Sale Agreement was not produced in court, I will peg it on the 26th April, 2003 which is the date the Defendant's representatives admitted that the land was purchased through a wrong procedure and were ready to refund the said purchase price.

As to who should bear the costs of the suit. Since the Plaintiff had been inconvenienced by the Defendant' actions, I find that it is entitled to the costs of the suit.

It is against the foregoing, I find that the Plaintiff has proved its case on a balance of probability and will proceed to enter judgement for it, against the Defendant in the following terms:

a) A declaration be and is hereby entered that the Defendant is in breach of performance and is liable to make specific restitution of the consideration together with interest thereon at court rates.

b) The Defendant be and is hereby directed to refund to the Plaintiff Kshs. 390,000 that it paid as consideration with interests at court rates from 26th April, 2003 until payment in full.

c) The costs of the suit is awarded to the Plaintiff.

Date signed and delivered in open court at Kajiado this 25th day of April, 2019

CHRISTINE OCHIENG

JUDGE