



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 350 OF 2017

REUBEN MUSYOKI MULI.....PLAINTIFF

VERSUS

PETER MUTUA KANYI.....DEFENDANT

JUDGMENT

1. In his Complaint dated 23rd June, 2014, the Plaintiff alleged that the Defendant was and is a member of Konza Ranching and Farming Co-operative Society Limited; that the Defendant was allocated Plot No.004 by the said Society and that in the year 2013, the Defendant offered to sell plot number 004 measuring approximately 7.8 acres to him.
2. The Plaintiff has further averred in the Complaint that on 10th April, 2013, he entered into a Sale Agreement with the Defendant in which the Defendant agreed to sell to him Plot No. 004 (*the suit land*) at an agreed price of Kshs. 13,000,000; that he paid to the Defendant the purchase price in full and that the Defendant has declined to deliver to him the duly signed transfer forms to effect the transfer of the land in his favour.
3. Having performed his obligations under the Agreement, the Plaintiff is praying for an order of specific performance compelling the Defendant to effect the transfer of Agricultural Plot No. 004 at Konza Ranching and Farming Co-operative Society Limited in his favour. In the alternative, the Plaintiff is seeking for a refund of Kshs. 13,000,000 with interest at current bank rates from 10th May, 2013 until payment in full.
4. In his Defence, the Defendant averred that the purported Agreement did not materialize because the Plaintiff did not pay him a single cent.
5. In his evidence, the Plaintiff, PW1, informed the court that in February, 2013, the Plaintiff, who was well known to him, sold to him "Agricultural Plot No. 004 situated at Konza Ranching and Farming Co-operative Society (*the suit land*); that the two of them entered into an Agreement of Sale dated 10th April, 2013 and that the agreed purchase price was Kshs. 13,000,000.
6. It was the evidence of PW1 that after executing the Agreement of Sale, the Defendant handed to him the copy of the letter of allotment and the original plot allotment card; that the Defendant was required to execute the transfer document which was to be presented to the Society and that the Defendant has declined to fulfil his obligations.
7. PW1 informed the court that the Defendant should be compelled to effect the transfer of the suit land to him and in the alternative, to refund the Kshs. 13,000,000 that was paid to him, together with interest.

8. In cross-examination, PW1 stated that the Agreement between him and the Defendant was witnessed by a lawyer; that none of the Defendant's family members witnessed the signing of the Agreement and that the Agreement did not state the mode of payment. It was the evidence of PW1 that the Agreement shows that the Defendant acknowledged receipt of Kshs. 13,000,000.

9. The advocate who prepared the Agreement of 10th February, 2013, PW2, informed the court that he was approached by the Plaintiff to prepare an Agreement of Sale of Agricultural plot number 004; that the agreed purchase price was Kshs. 13,000,000 and that it was an express term of the Agreement that the Defendant would have received the full purchase price by the time of signing the Agreement.

10. It was the evidence of PW2 that having signed the Agreement, the same was binding on the parties. It was the evidence of PW2 that other than drawing the Agreement and witnessing its execution, he did not witness the payment of Kshs. 13,000,000 by the Plaintiff.

11. The Defendant, DW1, informed the court that he is a member of Konza Ranching and Farmers Co-operative Society; that he is the registered proprietor of the suit land; that he was issued with an allotment letter and membership card and that although he entered into a Sale Agreement with the Plaintiff, he never received a cent from him.

12. It was the evidence of DW1 that after signing the Agreement of 10th February, 2013, the Plaintiff promised to bank the money in his account. However, this never happened. DW1 stated that he only gave the Plaintiff a copy of the ballot paper, and not the original.

13. The Plaintiff's advocate submitted that the Plaintiff proved he had released to the Defendant the purchase price of Kshs. 13,000,000; that the Defendant released to the Plaintiff the completion documents after the said payment and that there is no law barring someone from buying land in cash.

14. The Plaintiff's advocate submitted that the Defendant confirmed entering into the Sale Agreement and that no evidence can be adduced to vary the terms of the contract. The Plaintiff's counsel submitted that it is the Defendant who breached the Agreement by failing to provide duly signed Transfer forms in favour of the Plaintiff despite having received the entire purchase price. Counsel relied on several authorities which I have considered.

15. The Defendant's advocate submitted that the Plaintiff did not call any witness to support the allegation that he paid the Defendant Kshs. 13,000,000.

16. It is not in dispute that on 10th April, 2013, the Plaintiff entered into an Agreement of Sale for a parcel of land described as Agricultural Plot No. 004, Konza Ranching Farming and Co-operative Society (*the suit land*). According to the Agreement, the Defendant agreed to sell to the Plaintiff the suit land for Kshs. 13,000,000.

17. Although the Defendant has admitted that he signed the said Agreement, he has denied receiving the Kshs. 13,000,000. The only issue for determination is whether the purchase price of Kshs. 13,000,000 was paid, and if so, whether the Defendant should be ordered to transfer the suit land to the Plaintiff or refund the money.

18. The advocate who drew the Agreement, PW2, informed the court that he was instructed to draw the Agreement of 10th April, 2013 and that the terms of the Agreement provided that the Defendant had already been paid the purchase price of Kshs. 13,000,000. The terms of the Agreement were as follows:

"1. The Purchase Price

The Vendor shall sell and the Purchaser shall purchase the property for the sum of Kenya Shillings Thirteen Million only (Kshs. 13,000,000).

2. Payment of the Purchase Price

2.1. The full purchase price has been paid and confirmed by execution of this Agreement by both parties.

3. Completion Date

The date of completion shall be within fifteen (30) [sic] days of execution of the Agreement for purposes of transfer (hereinafter called “the Completion Date”).

4. Advocates

The Advocates for the Purchasers shall be J.A. Makau & Co. Advocates, Main Building, 1st Floor P.O. Box 312-90100, Machakos (hereinafter called the “Purchaser’s Advocate”).

19. The Agreement provided that the Vendor shall be deemed to have fulfilled his obligations, if, on or before the thirty (30) days or the Completion Date, whichever comes earlier, he delivers to the Purchasers all the original documents, including the membership card; the duly signed application forms for transfer signed by all parties; copies of the national identify card and PIN certificate; two coloured passport size recent photographs; and any such other documents relating to the suit property in the Vendor’s possession that the Purchaser’s advocate may require.

20. The evidence of the Plaintiff was that upon executing the Sale Agreement, *“the Defendant surrendered to me a copy of the letter of allotment and original plot allotment card to the said plot issued by the Co-operative Society and three size passport size photographs.”*

21. However, according to the Defendant, he only gave to the Plaintiff a copy of the letter of allotment and the ballot card, and not the originals. Although the Plaintiff stated that he was given the original plot allotment card and the letter of allotment, he only produced the copies in evidence.

22. The Plaintiff claimed that he paid the Defendant Kshs. 13,000,000 before the Agreement of 10th February, 2013 was signed in the advocate’s office. The advocate, PW2, informed the court that he did not witness the payment of Kshs. 13,000,000 and that the Agreement provided that the Defendant had already been paid.

23. If that is so, it is not clear to this court why the advocate did not indicate in the Agreement the mode of payment of the Kshs. 13,000,000 for clarity. Indeed, it is inconceivable that the Plaintiff could have paid a whopping Kshs. 13,000,000 to the Defendant in cash before the Agreement was signed and in the absence of a witness. Considering that PW2 was the Plaintiff’s advocate, what was so difficult with the Plaintiff, upon execution of the Sale Agreement, to pay the Defendant the said Kshs. 13,000,000 in cash in the presence of his advocate? That is the most logical thing that should have happened.

24. The Plaintiff in this matter did not inform the court why he paid, if at all, the entire purchase price before obtaining all the completion documents, including the Defendants’ national identity card (*a copy*), the PIN (*a copy*) and the duly executed transfer document. Indeed, the Plaintiff could not have trusted the Defendant with Kshs. 13,000,000 before signing an Agreement and releasing to him the completion documents. That being the case, it is highly unlikely that the Plaintiff paid to the Defendant Kshs. 13,000,000 as claimed.

25. The mere fact that the Agreement provided that the full purchase price had been paid, cannot be in itself be conclusive. The circumstances of this case only leads me to one conclusion, that the Plaintiff was to pay the Defendant the purchase price after obtaining all the completion documents or immediately after signing the Agreement, which he never did.

26. Notwithstanding the fact that there is nothing unlawful to pay a seller of land Kshs. 13,000,000 in cash, I am not convinced that this amount was ever paid by the Plaintiff. That being the case, the issue of

an order of specific performance being granted or a refund of the said Kshs. 13,000,000 does not arise.

27. For those reasons, I dismiss the Plaintiff's Complaint dated 23rd June, 2014 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF APRIL, 2019.

O.A. ANGOTE

JUDGE