



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 324 OF 2014

GILBERT MASHETI KHAYATI.....PLAINTIFF

VERSUS

JACOB KIDAHA MAJANI.....DEFENDANT

JUDGEMENT

At all material times relevant to this suit, the defendant was the registered proprietor for the parcels of lands better known as Kakamega/Savane/637 and 644 respectively. That on/or about 27th January, 2014, the plaintiff and the defendant entered into an agreement for the plaintiff's purchase of the defendant's part of land from land parcels No. Kakamega/Savane/637 and 644 respectively measuring 1.4 acres, at a consideration of Ksh. 250,000/= only. It was mutually agreed that the plaintiff will effect the valid transfer in the plaintiff's name the said portion of land upon the plaintiff's making part payment of $\frac{3}{4}$ of the agreed purchase price. The plaintiff has since paid to the defendant a total sum of Ksh. 185,000/= as agreed in the first place. When a balance of Ksh. 65,000/= was due for payment the defendant started being evasive, and has refused and/or failed to sign the transfer instruments in favour of the plaintiff, thus necessitating this suit and breaching the express agreement whereof the plaintiff seeks redress. Despite numerous notices to the defendant to honour his part of undertaking, he has ignored to do so hence rendering this suit necessary. The plaintiff prays for judgment against the defendant for:-

- a. The transfer of part of the land measuring 1.4 acres hived from the defendant's land parcels No. Kakamega/Savane/637 and 644 respectively.
- b. Costs of this suit.
- c. Any other relief this honourable court will deem just and expedient to grant.

The defendant avers that if there was any sale agreement for the sale of part of the defendant's land, the same was for part of the defendant's land Kakamega/Savane/637 at a cost of Ksh. 250,000/= whereby the plaintiff only paid Ksh. 185,000/= and has not paid the balance of Ksh. 65,000/= and hence cannot come to seek orders of transfer when he has failed to pay the balance. The defendant denies being evasive as alleged and avers that it is the plaintiff who has become violent to the defendant and his family members living on the land by threatening dire consequences after the defendant realized that the plaintiff had brought a surveyor secretly in his absence and earmarked to himself almost the whole of the defendant's land. The plaintiff has since then been threatening the defendant and has vowed not to pay the balance and in view of that the defendant does not wish to continue with the transaction since he cannot live with the plaintiff who is threatening his life. The defendant avers that the said land sale transaction has been frustrated and since no consent has been granted or obtained within six months as required by law and the plaintiff is entitled to the refund of the amount paid. The defendant avers that by virtue of the plaintiff's action a violent to the defendant and his failure to pay the outstanding balance the defendant cannot be expected to live with the plaintiff in his land, the plaintiff is only entitled to the refund of part purchase price paid. The defendant shall also pray for an order for eviction from the defendant's land parcel Kakamega/Savane/637.

This court has carefully considered the evidence therein. The plaintiff who was served with the hearing notice failed to attend court nor provide any oral evidence and his case was dismissed for non attendance. The court proceeded with the counterclaim. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the

person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. Hon Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

On the counterclaim, it is a finding of fact that the defendant is the absolute registered owner of the parcel of land known as Kakamega/Savane/644 (DEx 8 & 9 is the search certificate and the title deed). The defendant has produced a land sale agreement (DEx 8 & 9) relating to Kakamega/Savane/637 which is registered in the name of a third party (DEx 7 is the green card). Be that as it may the agreement provides that the balance of Kshs 85000/= was to be paid on August 2014. The same has not been paid. This is not disputed in the plaintiff's pleadings. I find that the plaintiff's case was one of specific performance and the defendant claims that the same has been frustrated and hence cannot be enforceable. Judge Maraga as he then was, in the case of Reliable Electrical Engineers Ltd & Another v Kenya Petroleum Refinery Ltd (HCC 190 of 2005), held that :

“ the jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source.”

DW1 testified that the plaintiff has become hostile and refuses to pay the balance. He has become violent, destroying crops and the matter has been reported to the police. His evidence has not been challenged. I find that the contract has been frustrated and is not enforceable as the land sale agreement (DEx 8 & 9) relates to land parcel Kakamega/Savane/637 which is registered in the name of a third party one Christopher Soreho Ombeva (DEx 7 is the green card). Eviction orders cannot issue in respect of this parcel of land. The defendant has proved his counterclaim on a balance of probabilities and I grant the following orders;

1. The defendant is to refund part of purchase price paid of 165,000/= plus interest to the plaintiff.
2. The plaintiff is to vacate from the defendant's suit land known as land parcel Kakamega/Savane/644 within the next 6 (six) months after the refund of the purchase price and indefault eviction order to issue forthwith.
3. Each party is to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH JUNE 2019.

N.A. MATHEKA

JUDGE