



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 332 OF 2017**

**NAOMI WANJIRU MWANGANGI.....PLAINTIFF**

**VERSUS**

**GABRIEL NJUGUNA NDUNGU.....DEFENDANT**

**JUDGMENT**

By a Plaint dated 15<sup>th</sup> February 2017 the Plaintiff herein brought a suit against the Defendant for the following orders;

- a) **The Defendant be ordered to transfer Plot No. 6 Block A (Share certificate number 0.36).**
- b) **Alternatively the Defendant do pay Kshs.375, 000/= plus interest at Court rate (14%) from the date of advancement being 4<sup>th</sup> December 2010.**
- c) **Costs of the suit.**
- d) **Any other or better relief the Honourable Court may deem fit to grant.**

In her statement of claim the Plaintiff averred that she entered into a sale agreement wherein the Defendant was selling to her Plot number **6 Block A (share certificate number 036)** at an agreed consideration of **Kshs.250,000/=**. She further averred that the Defendant was to execute all transfer documents in her favour. Further that it was a term of the agreement that any party in breach shall be liable to pay to the innocent party 50% of the consideration being penalty for breach.

She also contended that despite various demands the Defendant did not transfer the suit property and she has since discovered that he did not own it and therefore his conduct is illegal and fraudulent. She particularized fraud by the Defendant as; Misrepresenting to her that he had a plot to sell and/or convey to the Plaintiff, receiving and /or accepting money knowing that he had no interest to convey, uttering suspect documents to support an invalid and fraudulent claim,

Despite being served with the suit Summons to Enter Appearance the Defendant failed do so nor file any Defence. The matter proceeded for formal proof hearing, wherein the Plaintiff gave evidence for herself and called no witness.

**PLAINTIFFS CASE**

**PW1 Naomi Wanjiru Mwangangi** adopted her witness statement and the list of documents as **Exhibit 1**. She testified that she entered into a sale agreement for purchase of **plot no. 6 at Kiangombe** in Thika for **Kshs.250,000/=** to which she paid the full purchase price and a formal agreement was drawn by **Gathogo Wairegi Advocate**. It was her testimony that the Defendant sold the land on behalf of **Wandunja Commission Agencies**. She further testified that the Defendant presented to her a **Certificate No. 036 for plot No. 36 Kiangombe**, and as such she believed she had purchased the plot. However, she later realized that the certificate was fake when she went to the site and noted that the Defendant did not own the land and therefore he did not have any title to pass to her.

It was her testimony that the Sale Agreement had a default clause requiring the party in default to **pay 50% of** the purchase price. She sought for refund of the **Kshs. 250,000/=** plus penalty of **Kshs.175, 000/=** with costs and interest. She also testified that the Defendant signed a consent to which they filed in court but he failed to appear for adoption.

The Court then directed the Plaintiff to file written submissions to which the Court has now carefully read and considered.

The Court has also considered the pleadings and the exhibits produced by the Plaintiff and renders itself as follows:-

The Defendant failed to enter appearance and thereby defending the suit. The fact that the suit has not been opposed means that the Plaintiff's evidence remained unchallenged and uncontroverted and there would be no reason as to why the Court should not believe it. See the case of Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR, where the Court cited the case of Karuru Munyororo.....Vs....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988, where the Court held that:-

**“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaintiff and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”**

Even with the above, the Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with logical conclusion as the evidence is not automatic since the Plaintiff has to discharge the burden of proof. See the case of Kenya Power and Lighting Company Limited...Vs...Nathan Karanja Gachoka & another [2016] eKLR stated:

**“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”**

Further in the case of Gichinga Kibutha...Vs... Carooline Nduku (2018)eKLR, the Court held that:-

**“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”**

It is therefore the Court's opinion that the issue for determination is whether or not the Plaintiff is entitled to the orders sought. The

Plaintiff has alleged that she entered into a sale agreement with the Defendant for the purchase of the suit property. Further that the same was reduced into writing and signed by all the parties. Section 3 (3) of the Contract Act provides;

**3(3)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:**

**Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.**

The Court has carefully perused the sale agreement produced as Exhibit by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of Contract Act. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. See the case of Nelson Kivuvani....Vs....Yuda Komora & Another, Nairobi HCCC No.956 of 1991, where the Court held that:-

**“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.**

All the above ingredients are met in the instant sale agreement entered between the Plaintiff and the Defendant and therefore the sale agreement between the two is valid.

Having found and held that the sale agreement is valid the Court therefore holds that the Defendant was bound by the terms of the said Agreement. However, the Plaintiff gave evidence that when she visited the suit land she discovered that the same did not belong to the Defendant. As already held above by this Court the testimony by the Plaintiff is uncontroverted and without any rebuttals it remains the gospel truth and as such having alleged that the Defendant's conduct was **fraudulent** by selling to her land that did not belong him this Court will be inclined to believe the same. Fraud has been defined in Blacks Laws Dictionary as;

**“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”**

Further *Black Laws Dictionary Ninth Edition at Page 731* also defines fraud as;

**“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”**

With the definition of Fraud in mind and the testimony by the Plaintiff this Court therefore holds that the actions of the Defendant were fraudulent.

The Plaintiff has sought for an order requiring the Court to order the Defendant to transfer plot **No. 6 Block A** (Share Certificate No.36). As already noted and testified by the Plaintiff the suit property does not belong to the Defendant. There is no evidence of title indicating that the Defendant owns the suit land. This Court will therefore not grant the said prayers as the same will amount to dispossessing another party who is the legal and registered owner of the suit property. The said prayer is therefore not merited and it is disallowed.

On prayer no. b of the Plaintiff, the figure indicated is **Kshs. 385,000/=**. However, when the matter came up for hearing on **10<sup>th</sup> of**

**July 2018**, the Plaintiff's Advocate sought to amend the said prayer to read **Kshs.375,000/=** and the Court allowed the amendment. The Plaintiff has sought for a refund of the purchase price together with **50% penalty** for breach of the said agreement totalling to **Kshs. 375,000/=**. The Plaintiff produced in evidence receipts from **Wandunjas Commission Agencies** together with a share Certificate evidencing that

she had paid the purchase price. The Sale agreement produced in evidence also provides for the said penalty as alleged by the Plaintiff. There would therefore be no reason as to why this prayer should not be allowed. As already found and held by this Court the Defendant committed fraud when he misrepresented to the Plaintiff that he could sell her the suit property but failed to do so and knowing very well that he did not own it. This therefore means that he is in breach of the said agreement. The Plaintiff having already paid moneys to the Defendant with no fruitful gain in return, is entitled to the interest as sought.

Having now carefully considered the available evidence and the exhibits thereto together with the written submissions, the Court finds that the Plaintiff has discharged her duty of proof of her case on the balance of probabilities in respect of the alternative prayer sought in the Plaintiff. For the above reasons the Court enters Judgment for the Plaintiff against the defendant in terms of prayer no. **(b) and (c)** as sought in the Plaintiff

It is so ordered.

**Dated, Signed and Delivered at Thika this 21<sup>st</sup> day of **June** 2019**

**L. GACHERU**

**JUDGE**

**21/6/2019**

**In the Presence of**

**Ms. Njoki Mwaura H/B for Mr. Kirubi for the Plaintiff**

**N/A for the Defendant**

**Lucy Court Assistant**

**Judgment read in open Court**

**L. GACHERU**

**JUDGE**

**21/6/2019**