



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC NO. 8 OF 2017

SAMUEL MAINA NJUGUNA.....PLAINTIFF

VERSUS

FREDRICK MWANGI NYAGA T/A KILIMAMBOGO

HOUSING TRADERS.....1ST DEFENDANT

JAMES IRUNGU NGUGI.....2ND DEFENDANT

JUDGMENT

By a **Plaint** dated **20th January 2017**, the Plaintiff herein brought a suit against the Defendants for the following orders;

- a) The Defendants be ordered to transfer Plot No.39 Thika Municipality Block 29/262 measuring 40 by 80 feet and Plot No.40 Thika Municipality Block 29/262 measuring 40 by 80 feet to the name of the Plaintiff.***
- b) Alternatively, the Defendants be ordered to refund to the Plaintiff the sum of Kshs.800,000/= paid as consideration, a sum of Kshs.240,000/= being the penalty for breach as stipulated in the agreement and interest on the principal at Court rate (14%) from 25th January 2012 as the date of advancement.***
- c) Costs and interest of the suit from the date of agreement.***
- d) Any other or better relief the Honourable Court may deem fit to grant.***

In his statement of Claim, the Plaintiff averred that on or about the **25th of January 2012**, he entered into a sale agreement with the Defendants for purchase of **Plot No.39, Thika Municipality Block 29/262 measuring 40 by 80 feet and Plot No. 40 Thika Municipality Block 29/262 measuring 40 by 80 feet** at a total consideration of **Kshs. 800,000/=** which sum was paid to the Defendants vide Equity **Bank Account No. xxxxxxxxxxxx**. It was his contention that prior to payment of consideration, the Defendants Physically showed and pointed to him the two plots and despite being a term of agreement that the suit properties would be transferred to him within six months from the date of the agreement, it has been impossible as the suit land is owned by a third party one **Nyaga Magu**, thereby resulting to a criminal case.

He alleged that it was also a term of agreement that in case of default, the Defendants would have to pay to him a sum equivalent to **30%** of the consideration as penalty for breach.

Despite the Defendants being duly served, they failed to enter appearance and file any Defence. The matter proceeded by way of *viva voce* evidence to which the Plaintiff testified on the **9th of July 2018**, and called no other witness,

PLAINTIFFS CASE

PW1 - Samuel Maina Njuguna testified that the Defendants sold to him **Plot No. Thika Municipality Block 29/262**. It was his testimony that they entered into a sale agreement dated **25th January 2012**, wherein he bought **Plots No.39 & 40** for **Kshs.400,000/=** each amounting to **Kshs.800,000/=**. He further testified that the Defendants had informed him that the Company was selling the Plots and even given him share certificates promising him to transfer the suit lands to him after subdivisions and then issue him with the Title deeds.

It was his testimony that the defendants later disappeared after showing him the suit property and the plots were never transferred to him as

the two did not have any authority to transfer the suit land as the same belonged to one **Nyaga Magu**. He produced the Agreement as **Exhibit 1**, the **Share Certificates** of **No.513 & 514** as **Exhibit 2** and further testified that he paid **Kshs.800,000/=** to the Vendors and produced the deposit slip as **Exhibit 3**. He later got a copy of the **Certificate of Title** that showed the registered owner of the suit property and he produced it as **Exhibit 4**.

He urged the Court to order for the refund of consideration and interest thereof and the Costs of the suit.

The Plaintiff through the **Law Firm of Kirubi Mwangi Ben & Co. Advocates** filed his submissions on the **26th October 2018**, to which the Court has now carefully read and considered.

The Court has also considered the pleadings, the evidence adduced and the exhibits thereto 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. However, has the Plaintiff proved his case on the required standard? 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 Plaint 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 exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of **Kenya Power & Lighting Company Limited... Vs...Nathan Karanja Gachoka & another [2016] eKLR**, where the Court 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 the case of **Gichinga Kibutha...Vs...Carooline Nduku (2018) eKLR**, where 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 he entered into a sale agreement with the Defendants 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 that;

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 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 the 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 Defendants and therefore the sale agreement between the two is valid.

Having found and held that the sale agreement is valid, the Court further holds that the Defendants were bound by the terms of the said

Agreement. However, the Plaintiff gave evidence that when he later learnt that the suit properties did not belong to the Defendants and to this effect he produced as evidence in court the title document indicating that one **Nyaga Magu** is the registered owner of the said suit properties and the Defendants had no legal interest in the suit property. The Court therefore finds that the Defendants misrepresented facts to the Plaintiff.

The Plaintiff has sought for an order requiring the Court to order the Defendants to transfer the suit properties to him. As already noted above and testified by the Plaintiff, the suit properties do not belong to the Defendants. There is further evidence of title indicating that the Defendants do not own the suit land. This Court will therefore not grant the said prayer as the same will amount to dispossessing another party who is the legal and registered owner of the suit property and is not a party to this suit. The said prayer is therefore not merited and it is disallowed.

On **prayer No.b** of the **Plaint**, the Plaintiff has sought for a refund of the purchase price together with **Kshs. 240,000/=** being equivalent to the 30% penalty for breach of the said agreement as provided in the Sale Agreement. The Plaintiff produced in evidence a **Share Certificate** and the sale agreement in which it was indicated that the vendor had acknowledged receipt of the purchase price being **Kshs.800,000/=** and the Court is therefore not in doubt that the purchase price was fully paid. 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 held and noted by this Court, the Defendants committed fraud when they misrepresented to the Plaintiff that they could sell him the suit property but failed to do so and knowing very well that they did not own it. This therefore means that the Defendants were in breach of the said Agreement. The Plaintiff having already paid moneys to the Defendants with no fruitful gain in return is entitled to the interest as sought. The Plaintiff's prayer is therefore merited and the same is allowed.

Having carefully considered the available evidence, the written submissions and the relevant provisions of law, the Court finds that the Plaintiff has proved his case on a balance of probabilities against the Defendants herein. Consequently, the Court enters Judgment for the Plaintiff against the Defendants jointly and severally as prayed in prayers **No.(b) & (c)** of the **Plaint**.

It is so ordered.

Dated, Signed and Delivered at Thika this 21st day of June 2019.

L. GACHERU

JUDGE

21/6/2019

In the presence of

M/S Njoki Mwaura holding brief for Mr. Kimbi for Plaintiff

No appearance for Defendants

Lucy - Court clerk

Court –Judgment read in open court in the presence of the above advocate.

L. GACHERU

JUDGE

21/6/2019