



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU**

**ELC NO. 417 OF 2016**

**JESSE WARUI CHEGE.....PLAINTIFF**

**VERSUS**

**SIMON NJOROGE KARIUKI.....DEFENDANT**

**JUDGMENT**

***(Suit by plaintiff seeking enforcement of a sale agreement; defendant having sold the land while it was still in the name of his late father and the estate was yet to be distributed; plaintiff causing the defendant to be charged and convicted of the offence of obtaining money by false pretences; antithetical for the plaintiff to now seek enforcement of the same agreement that he claimed in the criminal case to be a fraud; court declining to grant the order of specific performance; remedy of plaintiff lies in a refund.)***

1. This suit was commenced through a plaint which was filed on 23 June 2004 in the Chief Magistrate's Court of Kenya at Nakuru and registered as Nakuru CMCC No. 1372 of 2004. It was transferred to the Environment and Land Court after its creation following the Constitution of 2010, and was re-registered as ELC No. 417 of 2016. In all respects it is an old matter.

2. In his plaint, the plaintiff pleaded that he purchased from the defendant a portion of land measuring 1 ½ acres out of the land parcel Bahati LR No. 6746/15 at a consideration of Kshs 182,000/= plus survey fees and other related charges of Kshs. 5,000/=. It is averred that at the time of sale, the defendant warranted that he is the legal owner of land measuring 10 acres to be excised from the said land parcel Bahati LR No. 6746/15. He has pleaded that he thus became owner of the 1 ½ acre that he purchased from the year 1994. The plaintiff has pleaded that the defendant was to do all that is necessary to transfer to him the portion of 1 ½ acres and that the defendant instructed a surveyor who carried out a mutation but the defendant did not allow him to complete the exercise. It is averred that on 23 March 2004, the defendant attempted to take back the plaintiff's portion which the plaintiff resisted vigorously. In the suit, the plaintiff has asked for the following orders :-

*(a) An injunction restraining the defendant by himself, his servants or agents or otherwise whosoever from interfering with the plaintiff's portion measuring approximately 1 ½ acres to be excised from all that parcel of land known as LR No, 6745/15 in any way whatsoever.*

*(b) A declaration that the piece of land measuring approximately 1 ½ acres to be excised from LR 6745/15 is the property of the plaintiff and the defendant to be compelled to execute all the relevant documents for effective transfer- failure the executive officer to sign the same. Alternatively a refund of all the monies paid to the defendant.*

*(c) Costs*

*(d) Any other relief that this Honourable Court may deem fit and convenient to grant.*

3. The defendant filed a defence vide which he pleaded that at all material times the land Bahati LR No. 6745/15 was registered in the name of Jonah Kariuki Gakuo, the defendant's late father. He averred that the transaction was initiated in the hope that the defendant would be made the sole administrator of the estate of the deceased. He has contended that the transaction is null and void ab initio for want of capacity and that the plaintiff's claim lies in a refund. He has further pleaded that no consent to transfer was obtained and that a survey could not be carried out. It is his view that the order for specific performance cannot lie. He has also pleaded that the claim is time barred.

4. The hearing was conducted on 13 February 2019 but only the plaintiff and his counsel were present. Neither the defendant nor his counsel presented themselves despite being duly served. The plaintiff testified as the sole witness and in his evidence he produced the sale agreement that he had with the defendant which is dated 11 August 1994 alongside a copy of the banker's cheque for Kshs. 178,000/= being part of the purchase price. He stated that the balance of Kshs. 2,000/= was paid in cash. He explained that what the defendant sold to him was 1 ½ acres from 10 acres that he was entitled to inherit from his late father from the land parcel LR No. 6746/15. He took possession of the land in the year 1995, put up a fence and starting cultivating crops. However, from the year 2000, the defendant started interfering with his possession and he was charged with several criminal offences. His children were also charged in Nakuru CMC Criminal Case No. 427 of 2007 for

malicious damage to property and were found guilty and jailed. In another case, Nakuru CMC Criminal Case No. 745 of 2007, the defendant and another of his son, and one of his employees, were charged with creating disturbance for threatening to cut one of the plaintiff's employees. He testified that on 25 November 2017, one of his female employees was killed by the defendant and because of that incident, the defendant was arrested and is in custody. He testified that he is still in occupation of the land and has built a 2 bedroomed permanent house. He also produced a confirmed grant to show that the defendant was indeed bequeathed 10 acres of the suit land and a survey receipt being money paid to excise his portion. He does not understand why the defendant has caused him so much trouble.

5. I invited counsel to file written submissions, but only Ms. Nancy Njoroge, learned counsel for the plaintiff, filed submissions. I have taken these into account in arriving at my decision.

6. It is apparent that the plaintiff and defendant entered into a written agreement for the sale of 1 ½ acres out of the larger land parcel LR No.6746/15 on 11 August 1994. It is common ground that at the time the sale agreement was entered into, the land was registered in the name of the defendant's father who was then deceased. I have no doubt that the defendant was paid the purchase price. It however seems to me that at some point, the parties had differences and the defendant opted not to proceed with the transaction.

7. The defence of the defendant is founded on the argument that he had no capacity to sell at the time that he did since the land was registered in the name of his father who was then deceased. It is actually the position in law that the defendant had no capacity to sell. I have seen that the estate was distributed on 16 July 2004 and I have no evidence that before that time, permission had been granted by court to enable the defendant sell a portion of the estate. It is probably because of this legal reality that the defendant was charged with the offence of obtaining money by false pretences.

8. From the record, I have seen that the defendant was charged with this offence in the case Nakuru CMC Criminal Case No 2375 of 2006, the particulars of the offence being as follows :-

*'On the 10<sup>th</sup> day of August 1994 at Engushura farm in Nakuru District within the Rift Valley Province, with intent to defraud obtained from Jesse Warui Chege sum of Kshs. 182,000/= by falsely pretending that you will sale (sic) a piece of land namely BAHATI LR No. 6746/15 a fact he knew to be false'.*

9. I have seen an affidavit sworn by the plaintiff on 24 May 2011 which deposes that the defendant was convicted of this offence and sentenced to two years in jail.

10. Ms. Njoroge in her submissions, referred me to the case of **Jackson Kamau Kanyuru vs Stephen Githinji Weru, Nyahururu ELC No. 428 of 2017**. The facts of the case were that the plaintiff purchased a portion of land from the defendant while the land was registered in the name of the defendant's deceased father. The plaintiff paid the full purchase price and some additional money to assist in the succession case. The defendant however refused to complete the transaction and disappeared. The court found the defendant's conduct to be inequitable if not outrightly fraudulent. The court appreciated that the defendant had no capacity to sell, but looked into the fact that the completion date for the sale agreement was after the confirmation of the grant of letters of administration and that part of the purchase price was also paid after confirmation of the grant. The court also applied the court of appeal decision in the case of **Willy Kimutai vs Michael Kibet (2018) eKLR**, to waive the requirement for Land Control Board consent and imply a trust. It ultimately granted the order for specific performance.

11. I acknowledge the reasoning in the said decision but I think the facts of that case are distinguishable from this one. Firstly, the defendant in that case did not contest the suit as he did not enter appearance nor file defence. Secondly, part of the transaction was done when there was already a confirmed grant of letters of administration and the defendant's portion was ascertained. The defendant was therefore selling land that he actually owned, for upon confirmation of the grant, the land ceased to vest in the estate of the deceased. In addition, the plaintiff in that case continuously acknowledged the transaction which does not appear to be the case in this matter.

12. I find it curious and indeed antithetical to the plaintiff's claim herein, for him to have complained that the defendant obtained money by falsely pretending that he could sell land, when in fact he could not, and proceeding to have the defendant charged with that offence for which he was convicted. Now, if the defendant was convicted of obtaining money by false pretences, how can that be reconciled by the fact that in this matter, the plaintiff wants to enforce the very same agreement for which it is said money was received by false pretences. The plaintiff cannot complain about that agreement, claiming that it is a conduit for receiving money falsely, then again try to enforce it, now of course asserting that it is a good agreement which should be given effect. When he complained that he had been defrauded his money by false pretences, that was an acknowledgement from him that the defendant had received money, but had no land to sell to him. The conviction of the defendant for that offence further buttressed the position that he had nothing to sell, for it cannot not be that he could be convicted of that offence when in fact he had something that he could sell and transfer title to. In so complaining, the plaintiff was clearly asserting the position that the defendant could not sell to him the land, and his remedy, upon that acknowledgement, lay in a refund. The plaintiff cannot have his cake and eat it. I am afraid that he cannot keep shifting goal posts depending on what suits him. Even if I was to construe a trust, specific performance is an equitable remedy, and I am afraid that the said remedy cannot be available to the plaintiff, given that he has in other proceedings claimed that the same agreement that he is now trying to enforce was a fraud. He is now estopped from claiming the benefit of it, save for a refund.

13. The agreement between the plaintiff and defendant had a clause (clause 9) which stipulated that in case a party backs out of the agreement, then such party will pay the innocent party a fee equivalent of 20% of the agreed purchase price. To me, the agreement is self executing. The defendant backed out of the agreement at a stage when specific performance could not take place as the estate was yet to be distributed. Given the foregoing, all that the plaintiff is entitled to is thus the refund of Kshs. 180,000/= and the penalty of 20% which is Kshs. 36,000/=, in total Kshs. 216,000/= and nothing more. I note that at some point, the defendant offered the plaintiff a banker's cheque to refund the plaintiff the purchase price which was rebuffed. The plaintiff ought to have received the refund of Kshs. 180,000/= and asked for the Kshs. 36,000/= damages. Doing the best that I can, I enter judgment for the plaintiff for his alternative claim to a refund of Kshs. 180,000/= and damages of Kshs. 36,000/= in total, Kshs. 216,000/=.

14. On costs, I have already mentioned that the plaintiff was given a refund and thus there was no need to pursue this case. I therefore make

no orders as to costs.

15. Before I close, I would wish to offer my sympathies to the plaintiff. I truly empathise with what he may have gone through in trying to enforce the sale agreement. But the law and his conduct are not on his side. I am aware that he has made some investments in the land, but given the fact that the defendant consistently refused to transfer title to him, and in face of the dispute herein, it was unwise for the plaintiff to have made the said developments. I am also alive to the claim that someone was killed in the land. I also offer my sympathies to the plaintiff for this tribulation. I trust that justice will be done in relation to that incident.

16. Judgment accordingly.

**Dated, signed and delivered in open court at Nakuru this 13<sup>th</sup> day of June 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Ms. Matu holding brief for Ms. Nancy Njoroge for the plaintiff.

No Appearance on the part of M/s Mongeri & Company Advocates for the defendant.

Court Assistants: Janepher Nelima/Patrick Kemboi.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**