



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MAKUENI**

**E.L.C. CASE NO. 8 OF 2017**

**JOSEPH M. KYENGO.....PLAINTIFF**

**VERSUS**

**MUTUNGI NDONYE.....DEFENDANT**

**J U D G E M E N T**

1. By his plaint dated 22<sup>nd</sup> January, 2016 and filed in court on 28<sup>th</sup> January, 2016, Joseph M. Kyengo, the Plaintiff herein, prays for judgement against the Defendant for: -

**a. Recovery of parcel of land No.463 MUUSINI DIVISION, Kathonzweni from the defendant and refund of Kshs. 211,000/= to the defendant.**

**b. Cost of this suit.**

2. The Plaintiff has averred in paragraphs 3, 4, 5 and 6 of his plaint that he and the Defendant entered into a sale agreement to purchase the Plaintiff's plot No.463 Muusini Division, Kathonzweni District measuring 10 acres at a price of Kshs.276,000/=, that the Defendant paid part of the purchase price leaving a balance of Kshs.65,000/= which remains unpaid, that as per the sale agreement, the contract ought to have been completed in three (3) years and as such, the Defendant is in breach of the said contract and hence the Plaintiff has no choice but to refund the money that the Defendant paid, that the Defendant has entered into the suit property to graze his livestock (emphasis are mine) despite letters from the Plaintiff.

3. The Plaintiff's claim is denied by the Defendant vide his defence and counterclaim dated 25<sup>th</sup> February, 2016 and filed in court on even date. The Defendant has averred in paragraphs 5 and 6 of his defence that it was a term of the agreement that the Plaintiff would procure the services of a surveyor who was to excise the 10 acres so as to enable the Defendant secure a title and pay the balance of the purchase price, that the final payment was made on the 18<sup>th</sup> September, 2004 leaving a balance of Kshs.25,000/= which the Defendant has all along been willing and able to pay save that the actual delineation has never been shown to him. And in paragraph 17 of the counterclaim, the Defendant has averred that the Plaintiff should be compelled to deliver vacant possession of 10 acres sold to the Plaintiff with immediate effect and or surrender the surplus amount of money paid over and above what was payable for 7.2 acres of land.

4. Arising from the above, the Defendant prays for judgment against the Plaintiff for: -

**a. An order of specific performance compelling the plaintiff to deliver vacant possession of 10 acres of land to the defendant in accordance with the sale agreement dated 8/2/2004.**

**b. In the alternative to 1 above an order compelling the plaintiff to refund to the defendant the surplus sum of money over the above what was payable for 7.2638 acres that is now available to the defendant.**

**c. An order that a valuation report to be done by the government valuer under the ministry of Lands to establish the sums payable for 7.2638 acres as at 8/2/2004.**

**d. Costs of this suit.**

**e. Any other relief as this honourable court may deem fit and just to grant.**

5. On the 11<sup>th</sup> April, 2017 the Defendant filed his reply and defence to counterclaim dated 10<sup>th</sup> July, 2017.

6. By consent of both the Plaintiff and the Defendant, the court directed on the 26<sup>th</sup> February, 2019 that this application be disposed off by way of written submissions. Both parties have since then filed their respective submissions.

7. The submissions by the Plaintiff's Counsel are that the agreement dated 08/02/2009 is not capable of being implemented as it does not define the land that was to be sold. The Counsel further submitted that the land that was to be sold is owned by two brothers in undivided shares. The Counsel went on to submit that when the surveyor delineated the portion that the Plaintiff sold, the surveyor should have extracted the Plaintiff's share of land so that it could be registered in order for it to be further delineated to cater for what was sold. That the omission by the surveyor is fatal as it is against the provisions of Section 42 of the Land Registration Act. That neither the Plaintiff nor the Defendant was present when the surveyor visited the site.

8. It was also the Counsel's submissions that the agreement offends the provisions of the Land Control Act chapter 302 of the Laws of Kenya specifically Section 6(2) in that consent of the Land Control Board was not obtained. That the prayer of specific performance in the counterclaim cannot hold since the agreement is null and void. The Counsel relied on the case of **Hirani Ngaithe Githire vs. Wanjiku Munge (1976-80) 1KLR 1132 at 1134** letters C and D where **Chesoni, J** (as he then was) held that;

“Section 6 prohibits any dealing with agricultural land in a land control area unless the consent of the land control board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes. This means that by virtue of section 6(2) of the Act, an agreement in respect of a controlled transaction, where the necessary consent of the land control board has not been obtained within the stipulated time, becomes an illegal contract for all purposes. No specific performance can be ordered in respect of an illegal contract. As the agreement between the parties in this case had become an illegal contract the trial magistrate grossly erred in law in ordering specific performance, and his order cannot stand. In his ruling the trial magistrate said, “To invoke section 6 of the Land Control Act would be most unjust and (the respondent) cannot be compensated.”

The Counsel further submitted that the Defendant has pleaded that there is a balance of Kshs.25,000/= which remains unpaid and as such specific performance cannot be allowed due to the provisions of the law.

9. Lastly, the Plaintiff's Counsel submitted adverse possession cannot arise since his possession of the suitland is by virtue of agreement.

10. On the other hand, the Defendant's Counsel submitted that it is not in dispute that the agreement was executed by both parties herein and that the Defendant took possession and occupation of the land for 13 years. That the Defendant admits that there is a balance of Kshs.25,000/= which he has been willing to pay to the Plaintiff. That possession has created a constructive trust in favour of the Defendant. The Counsel cited the case of **Macharia Mwangi Maina & 87 Others vs. Davidson Mwangi Kagiri (2014) eKLR** where the Court of Appeal sitting in Nyeri held thus: -

“...The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Act is enforceable. Our view on this aspect is guided by the overriding objectives of this court and the need to dispense substantive and not technical justice.... The totality of our re-evaluation of the facts and applicable law in this case leads us to conclude that the Honourable Judge erred in failing to consider that the appellants were in possession of the suit property, that the respondent had created a constructive trust in favour of all individuals who had paid the purchase price for respective plots and the trial court erred in failing to note that the consent of the Land Control Board is not required where a trust is created over agricultural land. We do find that the possession and occupation by the appellants of the subject property is an overriding interest attached to the property.....”

The Counsel further cited the case of **Willy Kimutai Kitilit vs. Michael Kibet (2018) eKLR** where the Court of Appeal sitting in Eldoret held thus:-

“...As we have held in essence, the lack of consent of the Land Control Board does not preclude the court from giving effect to the equitable principles, in particular the doctrine of constructive trust, we find that the trial court reached the correct decision and therefore the appeal has no merit.

It is also the Counsel's submissions that **Section 3 of the Law of Contract Chapter 23** of the Laws of Kenya provides as follows: -

“No suit shall be brought upon a contract for the disposition of an interest in land unless;

- a. The contract on which the suit is founded is in writing; -
- b. Is signed by the relevant parties thereto and; -
- c. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

Arising from the above, the Counsel submitted that the sale transaction between the parties is based on contract which is valid and ought to be enforced.

11. It was also the Counsel's submissions that the surveyors report dated 01<sup>st</sup> August, 2018 expressly indicates that the portion occupied and used by the Defendant is 7.79 acres and not the agreed 10 acres. That the only inference to be drawn is that the Plaintiff seeks justice with unclean hands.

12. Lastly, the Counsel cited the case of **Mary Wairimu Dames vs. Langata Development Co. Ltd (2016) eKLR** and urged the court to take into consideration the contents of the surveyor's report that the Defendant is in occupation of less acreage than what was agreed upon by the parties.

13. Having considered the submissions by both parties as well as the pleadings herein, my finding is that from the surveyor's report dated 01<sup>st</sup> August, 2018, the Defendant herein is in possession and use of 7.79 acres out of the 10 acres that was the subject of the agreement between him and the Plaintiff. There is no denial that the purchase price of 10 acres out of what the Plaintiff has referred to as plot No.463 Musiini Division, Kathonzi District was Kshs.276,000/=. The Defendant paid the sum less Kshs.25,000/= which he is still willing and able to pay to the Plaintiff. Whereas, the transaction or sale agreement between the two is yet to obtain consent from the relevant Land Control Board, that does not preclude this court from giving effect to the equitable principle of constructive trust as was held by the Court of Appeal in the aforementioned case of **Willy Kimutai Kitilit vs. Michael Kibet (2018) eKLR**. The Plaintiff herein accepted the purchase price of the suit property and therefore he cannot be heard to say that the suit land is owned by him and his brother which information was all along in his knowledge and ought to have shared with the Defendant notwithstanding the Defendant's obligation to carry out due diligence before entering into the sale agreement. What comes out from the submissions is that the Plaintiff received money which was far in excess of 7.79 acres that he put the Defendant into possession and occupation. There is nothing to show that the remaining balance of the purchase price is Kshs.65,000/= as the Plaintiff would want this court to believe.

14. **Section 42 of the Land Registration Act No.3 of 2012** provides as follows: -

**42. Transfer of part**

**“No part of land comprised in a register shall be transferred unless the proprietor has first subdivided the land and duly registered each new subdivision.”**

15. My reading of the above section is that the obligation to subdivide land and duly register each new subdivision lies on the proprietor. Whereas the Plaintiff says that the exercise conducted by the surveyor that led to the report dated 01<sup>st</sup> August, 2018 offends the provisions of the aforementioned Section 42 of the Land Registration Act, the Plaintiff has not shown the steps, if any, that he took to subdivide the suitland and duly register each new subdivision. I would agree with the Defendant's Counsel that the Plaintiff has approached this court with unclean hands.

16. The upshot of the foregoing is that his claim against the Defendant must fail. I will, therefore, proceed to dismiss his suit against the Defendant with costs. The end result is that I am satisfied that the Defendant has on a balance of probabilities, a cause of action against the Plaintiff. The Plaintiff has an obligation to deliver vacant possession of 10 acres of land to the Defendant in accordance with the sale agreement dated 08<sup>th</sup> February, 2004. In the alternative, he should refund to the Defendant the surplus of money over what was payable 7.2638 acres that is now available to the Defendant. Both parties should be able to agree on what sums of money the Defendant ought to have paid the Plaintiff for 7.2638 acres as at 8<sup>th</sup> February, 2004 failure of which a government valuer under the Ministry of Lands ought to do the same. In the circumstances, I hereby proceed to enter judgment for the Defendant and against the Plaintiff in terms of prayers (a) (b), (c) and (d) of the defence and counterclaim.

**Signed, dated and delivered at Makuani this 22<sup>nd</sup> day of July, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Masaku for the Defendant

Mr. Kisongo for the Plaintiff

Ms. C. Nzioka – Court Assistant

**MBOGO C. G. (JUDGE),**

**22/07/2019.**