

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 861 OF 2015

BETHUEL NJUGUNA M. KEINAMMA.....PLAINTIFF

=VERSUS=

JOHN WABURI KIBERA.....DEFENDANT

JUDGMENT

The plaintiff brought this suit against the defendant on 9th September, 2015 seeking a sum of Kshs.600,000/= being a refund of part of the purchase price which the plaintiff paid to the defendant pursuant to an agreement for sale dated 8th April, 2011 entered into between the plaintiff and the defendant in respect of a portion of L.R No. Gatamaiyu/Kagwe/220 (hereinafter referred to as “the suit property”). Under the said agreement for sale, the defendant had agreed to sell to the plaintiff a portion of the suit property measuring 3 acres at a consideration of Kshs.2,400,000/= on terms and conditions which were set out in the agreement. Pursuant to the terms of the said agreement, the plaintiff paid to the defendant a sum of Kshs.600,000/= as part payment pending the subdivision of the suit property and the issuance of the land control board consent to transfer the said portion of the suit property to the plaintiff.

In his plaint dated 7th September, 2015 the plaintiff averred that the defendant frustrated the said agreement for sale by failing to obtain land control board consent to transfer the property to the plaintiff so that the plaintiff could pay the balance of the purchase price. The plaintiff averred that as a result of this frustration, he rescinded the said agreement for sale and demanded a refund of the sum of Kshs.600,000/= that he had paid to the defendant which amount the defendant declined to pay making the filing of this suit necessary.

The defendant filed a defence and counter-claim against the plaintiff on 29th September, 2015. In his defence, the defendant admitted that he had entered into an agreement with the plaintiff to sell to him a portion of the suit property measuring 3 acres which agreement was rescinded by the plaintiff. The defendant averred that the plaintiff lodged a complaint against him with the police which led to his arrest and arraignment in court to answer a charge of obtaining money by false pretence. The defendant averred that he was acquitted of the said charge by a Limuru Court in Criminal Case No. 250 of 2012. The defendant averred that his prosecution was malicious and that before he was taken to court, he was confined at a police station illegally and was thereafter made to incur legal expenses in defending himself in the criminal case. The defendant claimed from the plaintiff unspecified sum incurred as legal fees in defending the criminal case and general damages for illegal confinement and malicious prosecution.

At the trial, the plaintiff gave evidence and called one witness. The defendant did not tender any evidence in his evidence. The plaintiff adopted the contents of his witness statement filed in court on 9th September, 2015 as his evidence in chief. He told the court that he was seeking a refund of Kshs.600,000/= which he paid to the defendant as purchase price for a portion of the suit property together with interest from 4th November, 2011 until payment in full. The plaintiff produced as exhibits among others, copies of the Agreement for sale dated 8th April, 2011 between him and the defendant, a cheque for Kshs.505,000/= dated 8th April, 2011 made out in favour of the defendant, an acknowledgment of receipt of Kshs.100,000/= by the defendant dated 4th July, 2011, judgment in Criminal Case No. 250 of 2012 and a letter dated 23rd August 2011 by the plaintiff to the defendant’s advocates G. K. Gatere & Co. Advocates confirming the rescission of the agreement and demanding a refund of Kshs.600,000/=. The plaintiff’s witness Joseph Burugu Mbugua was the plaintiff’s brother. He told the court that he was present and witnessed the plaintiff paying the defendant a sum of Kshs.505,000/= by way of a cheque.

As I have stated, the defendant did not give evidence. At the close of the plaintiff’s case, the parties relied on the evidence on record and did not make any closing submissions. I have considered the pleadings and the evidence tendered by the plaintiff in proof of his case. I am satisfied that the plaintiff has proved his claim against the defendant. In his defence, the defendant did not deny that he entered into an agreement for a sale with the plaintiff in respect of a portion of the suit property and that he was paid a sum of Kshs.600,000/= by the plaintiff. The defendant did not also deny that the plaintiff rescinded the agreement and demanded a refund of the said sum of Kshs.600,000/= and that he did not comply with the demand. The plaintiff contended that he rescinded the agreement because the performance thereof was frustrated by the defendant who failed to apply for land control board consent. The defendant did not deny this fact. From a copy of the letter dated 23rd August, 2011 by the plaintiff to the defendant’s advocates, the defendant appears to have accepted the rescission and agreed to refund the purchase price that had been paid to him by the plaintiff. In his defence, the defendant did not contest the rescission and did not state that he was willing to complete the agreement. By the time this suit was brought in 2015, the agreement between the parties had become void under Section 6 of the Land Control Act, Chapter 302 Laws of Kenya for want of land control board consent. The agreement for sale between the plaintiff and the defendant dated 8th April, 2011 provided that in the event of a breach thereof by the defendant, the defendant was liable to refund all payments made to him together with interest at bank rate.

The defendant having accepted the rescission of the agreement for sale aforesaid and the said agreement having become void under the Land Control Act, Chapter 302 Laws of Kenya, the defendant had an obligation to refund the purchase price that was paid to him by the plaintiff. The defendant did not give any explanation in his defence as to why he failed or refused to refund the sum Kshs.600,000/= paid to him by the plaintiff. The only issue that was raised by the defendant in his defence was a counter-claim that he claimed to have against the plaintiff for legal fees that he incurred in defending the criminal case at Limuru and general damages for malicious prosecution. The defendant did not

tender any evidence at the trial. His counter-claim was therefore not proved. It follows therefore that the defendant had no defence left to the plaintiff's claim.

In the final analysis and for the foregoing reasons, I find the plaintiff's claim proved. I therefore enter judgment for the plaintiff against the defendant in the sum of Kshs.600,000/= together with interest at court rates from the date of this judgment until payment in full. The defendant's counter-claim is dismissed. The plaintiff shall also have the costs of the suit and the counter-claim.

Delivered and Dated at Nairobi this 26th day of September 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

N/A for the Plaintiff

Mr. Irumba h/b for Mr. Kuria for the Defendant

C. Nyokabi-Court Assistant