



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 7 OF 2016**

**ELIZABETH WAMBUI MAINA.....PLAINTIFF**

**VERSUS**

**BEATRICE WANGARI.....DEFENDANT**

**JUDGMENT**

1. The plaintiff filed a plaint dated 15/1/2016. She sought an order of specific performance to compel the defendant to transfer to her one acre out of title No. **Kiminini/Kapkoj Sisal Block 1/Wamuini 'A'/141** to the plaintiff and in the alternative the Deputy Registrar do execute all documents to effect the transfer. She also sought a permanent injunction against the defendant or her agents restraining them from interfering with her right of possession, use and occupation of the suit property.

2. The plaintiff's claim is that the defendant being the registered proprietor sold her one acre out of the suit land for the sum **Kshs.1,300,000/=** whereupon she paid **Kshs.1,050,000/=** upon the execution of the agreement leaving the balance which was to be paid on **22/10/2013**. She maintains it was an express terms of the agreement that the defendant would execute all necessary documents to facilitate the subdivision and effect the transfer of the suit property. Upon part payment of the consideration she took physical possession but the plaintiff failed to subdivide the land and transfer her portion to her. She maintains that the defendant has refused to fulfil her obligation under the sale agreement.

3. The defendant filed defence and subsequently amended it. In the amended defence the defendant averred that she has not frustrated the plaintiffs; that the covenant between them is unenforceable for the reason that the land in question has a charge registered against it and therefore the covenant is void *ab initio* by operation of the law.

4. In the reply to the amended defence the plaintiff denied that the agreement is void and maintained that the suit land has already been discharged. The plaintiff also amended her plaint with leave of court to include an alternative prayer for refund of the current market value of the one acre and all the developments thereon.

5. Hearing proceeded on **26/2/2019** and **13/3/2019**. At the hearing the plaintiff reiterated the contents of her plaint. She produced the original agreement dated 14/2/2015 vide which she bought the land from the defendant. She stated that the balance of the purchase price was to be paid after 6 months but she cleared the same on 22/10/2013 when she sold the defendant plot No. 71 for Kshs.400,000/=. The two parties made an agreement stating that Kshs.250,000/= was to be deducted from the value of the plot and balance was to be paid to the plaintiff. She produced the agreement dated 22/10/2013 between her and one Stephen Njoroge Mbono as **P. Exhibit 2**. According to her the defendant has never given her title to the suit land. She testified that the land had been charged and that the outstanding bank loan amount of Kshs. 406,0000/= by the time she purchased it. She had been in occupation of the land for 5 years by the date of the hearing of the suit. She maintained that when she conducted a search she found that the land was charged for Kshs.1,500,000/= and she could not therefore develop it. She maintained that she had borrowed the monies vide which she funded the purchase price from a bank, that she had paid survey fees and that a surveyor had demarcated the land for her. On cross-examination she stated that the parties never attended the Land Control Board for consent as required.

6. The defendant testified on **13/3/2019**. Her evidence is that she sold the land to the plaintiff because she had a pressing problem; that she knew that the land was charged by then; that she knew she would clear the loan which was owed to the bank and would thereafter transfer the land to purchaser; that she had not cleared the balance outstanding at the date of the hearing; that by 2014 the loan amount outstanding was Kshs.1,500,000/= and she has never paid a single cent towards clearance since then. She produced a copy of certificate of official search dated 2/9/2014 and another one dated 1/3/2019 both which reflect a charge to the bank registered against the land securing the sum of Kshs.1,500,000/=. She maintains that the original title is still held by the bank the chargor and she is thus unable to transfer the land before clearing the loan. She stated categorically that she is ready to refund the purchase price and that her failure to transfer the land to the plaintiff was not wilful. She prayed that she be allowed to refund the purchase price paid by the plaintiff. She maintained that she did not know at the time of the sale that she was not in a position to transfer the land.

7. Upon cross-examination by Mr. Waweru she stated that she had informed the purchaser that the loan balance with the bank in respect of the suit land was Kshs.400,000/= and that she intended to clear it using the proceeds of the sale and subsequently transfer the land. She also

agreed that the purchaser paid all the agreed consideration and that she owes the purchaser Kshs.1,300,000/=.

8. On re-examination by Mr. Wafula she maintained that she was ready to refund the purchaser their money.

9. This claim is virtually unopposed. The defendant's pleading and oral evidence raise no plausible defence to the plaintiff's claim. The defendant had admitted that she knew the land was charged at the time of sale. She undertook to have the land discharged after the sale. She never did so even though the amount she got from the plaintiff as purchase price was more than double the loan amount said to be outstanding. The equitable remedy of specific performance is not available to the plaintiff in view of the pre-existing rights of the chargor, which were disclosed to the plaintiff at the time of making of the sale agreement. It may also be said that the purchaser trusted the seller on an excessive scale. Why there was no agreement to pay part of the consideration directly into the bank to liquidate the loan and secure the land from the bank's statutory power of sale and thereby deprive the defendant of the defence of "*the land is charged*" is not clear. It is clear that the land cannot be transferred to the plaintiff.

10. From what I have stated above it is clear that the only remedy available to the plaintiff is a refund and that has been sought in the amended plaint. I find that her claim must succeed. I therefore enter judgment in favour of the plaintiff against the defendant and I order as follows:-

**(a) The defendant shall refund the plaintiff the full purchase price of Kshs. 1,300,000/= with interest at court rates from 22/10/2013 till date of payment in full.**

**(b) The defendant shall pay the costs of this suit with interest thereon till date of payment in full.**

**Dated, signed and delivered at Kitale on this 23<sup>rd</sup> day of October, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**23/10/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga holding brief for Wafula for defendant

N/A for the plaintiff

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**23/10/2019**