



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 8 OF 2016**

**SAMUEL MBUTHIA MACHARIA .....PLAINTIFF**

**VERSUS**

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

**JUDGMENT**

1. The plaintiff filed a plaint dated **18/1/2016**. He sought an order of specific performance to compel the defendant to transfer to him one acre out of title No. **Kiminini/Kapkoï Sisal Block 1/Wamuini 'A'/141** to the plaintiff and in the alternative the Deputy Registrar do execute all documents to effect the transfer. He 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. Later he amended the plaint to include a claim for refund.
2. The plaintiff's claim is that the defendant being the registered proprietor sold him one acre out of the suit land for the sum **Kshs.650,000/=** whereupon she paid **Kshs.450,000/=** upon the execution of the agreement leaving the balance which was to be paid within **45 days** after execution. He maintains that despite his performance of his part of the contract the defendant has failed to execute all necessary documents to facilitate the subdivision and effect the transfer of the suit property. He further states that upon part payment of the consideration he took physical possession but the defendant failed to subdivide the land and transfer his portion to him.
3. The defendant filed a 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 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 his 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 his plaint. He produced the original agreement dated 14/2/2015 (**P. Exhibit 1**) vide which the land was bought. He also produced an acknowledgement signed by the defendant in respect of receipt of **Kshs.200,000/=** as **P. Exhibit 2**. He stated that he first paid **Kshs. 450,000/=** and that the balance of the purchase was to be paid after **2 months** but he cleared the same on **26/3/2015**. After clearing the whole balance the defendant asked him for a grace period of **90 days** to enable her process title for him.
6. According to him the defendant has never given him title to the suit land. He testified that the defendant claimed that there was an impediment, a charge over the suit property. He recalled that at the time of purchase the defendant had stated that she needed to go and redeem the title and had indicated that the loan outstanding by then was **Kshs.400,000/=**. He claimed that the defendant had however, upon being pressed admitted that she had redeemed the title. He maintained that he has built a permanent building on the suit land.
7. 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 Barclays Bank and would thereafter transfer the land to purchaser; that she had not cleared the loan at the date of the hearing; that by 2014 the loan amount outstanding was **Kshs.1,500,000/=** and that 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 a second one dated 1/3/2019 both which reflect a charge to Barclays Bank for 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 maintain that she did not know that she could not transfer the land as at the time of the sale.
8. 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 to the purchaser. She also admitted that the purchaser paid all the agreed consideration and that she owes the purchaser Kshs.650,000/=.

9. On re-examination by Mr. Wafula she still maintained that she was ready to refund the purchaser his money.

10. This claim is as good as unopposed. The defendant's pleading and oral evidence raise no plausible defence to the plaintiff's claim. The defendant 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 the loan amount said to be outstanding.

11. 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.

12. 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 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. 650,000/= with interest at court rates from 14/2/2015 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 NJOROGI**

**JUDGE**

**23/10/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Waweru for the plaintiff

Mr. Bisonga holding brief for Wafula for defendant

**COURT**

Judgment read in open court.

**MWANGI NJOROGI**

**JUDGE**

**23/10/2019**