



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 7 OF 2014

TIMOTHY KADAGI UMBASU.....PLAINTIFF

VERSUS

JOHN ANDAYI OMENDA.....DEFENDANT

JUDGMENT

1. By an amended plaint dated **2nd March 2015**, the Plaintiff filed suit against the Defendant seeking for an order for eviction of the defendant, his servants and/or agents from Land Parcel No. **KIMININI/KINYORO BLOCK 3/ MATISI/1561**.
2. The basis of his claim is stated to be that he is the registered proprietor of the suit land and that he intended to sell a portion thereof to the defendant but the defendant breached the contract. It is the plaintiff's case that the suit land is agricultural land and the agreement is void for want of land control board consent and that the defendant is unlawfully occupying the plot.
3. The Defendant on his part filed an amended *Defence and Counter-claim* on **14th April 2015** and admitted to have entered into a *Sale Agreement* with the Plaintiff. However, according to the defendant, he lawfully bought **2 plots** vide an agreement entered into between **19th January 1994** and **14th April 1997**, at an agreed price of **Kshs. 30,000/=** for a plot measuring **36 x 70 x 36 x 48**, and **Kshs. 35,000/=** for the other measuring **60 x 49 x 29 x 60** as part of **plot No. 8812/246** from the plaintiff.
4. Further, the Defendant averred that sometimes in 2012, vide a court order, the plaintiff was compelled to transfer part of Plot No. 8812/246 to another buyer hence giving rise to the new **L.R NO. KIMININI/KINYORO/ BLOCK 3/ MATISI/1561**. The defendant's case is that he has been in quiet possession of the aforesaid plots for a period of over 20 years with the knowledge of the plaintiff.
5. Therefore, the Defendant claims in his counterclaim a declaration that he is the lawful owner of suitlands measuring 36 x 70 x 36 x 48 and 60 x 49 x 29 x 60 respectively. He also claimed for an order that the plaintiff do execute the transfer of the suit land. In the alternative, the Defendant prays that the Deputy Registrar be authorized to execute the same on his behalf. Therefore, the Defendant prayed for the dismissal of the Plaintiff's case and Judgement be entered in terms of his Counterclaim.
6. The Plaintiff filed a Reply to the amended defence and defence to Counter-claim and denied each and every allegation contained in the Counter-claim. Further that the Plaintiff averred that the orders sought in the counterclaim are not merited due to lack of Land Control Board Consent.
7. The matter proceeded for *viva-voce* evidence as from 10th July 2018, wherein the Plaintiff gave evidence for himself. On his part, the Defendant gave evidence and called two more witnesses. The parties in their evidence reiterated on what they had pleaded and further relied on their written statements which this Court adopted as part of their evidence.
8. The facts of the case are that sometimes in the year **1994** and **1997** the Plaintiff and the Defendant entered into a *Sale agreement* for sale to the defendant of two plots of land from *Plot No. 8812/246*. The Plaintiff is the owner of the said parcel of land and thus the vendor and the Defendant was the purchaser. It is contended that the Defendant paid what was due but consent from the Land Control Board was not obtained hence making the whole transaction null and void.
9. After the *viva-voce* evidence, the parties herein did file their respective rival written submissions which this Court has carefully read and considered. The Court has also considered the entire pleadings and the exhibits attached thereto. The Court has considered the available evidence and the relevant provision of law and the Court finds that the issues for determination herein are as follows:-

(a) Was there a valid Sale Agreement between the parties herein?

(b) Was the said Sale valid without the Land Control Board Consent?

(c) Is the Plaintiff entitled to the prayers sought in the Plaintiff?

(d) Is the Defendant entitled to the prayers sought in the Counter-claim or set off?

(e) Who is to bear the costs of the suit?

(a) Was there a valid Sale Agreement between the Parties herein?

10. Section 3(3) of the Law of Contract Act provides:-

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

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party”

11. The above provision of law is also supported by **Section 44 (1)** of the Land Registration Act which provides that every instrument affecting the disposition under the Act shall be executed by each of the parties consenting to it and in accordance with the provisions of the said Section.

12. There is no doubt that the Plaintiff herein is the registered owner of Land Parcel No. **Kiminini/Kinyori Block 3/1561** which was arose as a result of sub division of plot No. **8812/246**. Both parties are in agreement that indeed they entered into a written Sale Agreement which agreement was signed by both the Vendor and the Purchaser (parties herein). The said *Sale Agreement* drawn on 19/1/1994 and produced in court as **D. Exhibit 1** was witnessed by Henry Karani and Julius Mukanda while the 2nd sale agreement dated 14/1/1997 produced as **D. Exhibit 2** was witnessed by H. Mukolwe. Therefore as provided by **Section 3 (3)** of the *Contract Act*, a valid *Sale Agreement* was entered between the parties herein as it was a written agreement.

13. Therefore the Court finds that the parties herein did enter into a valid *Sale Agreement* for sale and purchase of a portion of land from **plot No. 8812/246**

(b) Was the Sale Agreement binding without the Land Control Board Consent?

14. The plaintiff has alleged that the suit land in issue is an agricultural land. I have looked at the hand written agreement and there is no mention that the parties were in agreement that consent of Land Control Board was required, or the manner in which the same, if necessary, would be sought or by whom. It is trite law that Courts cannot rewrite contracts of the parties, the role of the Court is to interpret the contracts and determine the rights of the parties therein.

“26. The defendants aver that there was no land control board consent and the application form exhibited by the plaintiff is a forgery. Nevertheless, no evidence to support that claim of forgery was presented to court by the defendants and the plaintiff did not also exhibit any land control board consent showing that the transaction had been approved as per the relevant law. However, it is clear that the land in question is agricultural user. Even assuming this suit is premised on the agreements which it is not, would the lack of a Land Control Board consent defeat the agreement?”

27. In my view it would not. There is a string of decisions that have been rendered on this matter to that effect including Court of Appeal decisions (see the cases of Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR. and Joseph Mathenge Kamutu -vs- Joseph Maina (2015) eKLR, Macharia Mwangi & 87 Others -vs- Davidson Kagiri (2014) eKLR.

28. This ground is not therefore of any aid to the defendants and it must be dismissed.”

15. The plaintiff cannot therefore be heard to say that the transaction was null for lack of the said consent.

(c) Is the Plaintiff entitled to the prayers sought?

16. The Plaintiff has sought for an order of specific performance which is an equitable relief granted when the party to the contract who is seeking it has fulfilled all the terms of the contract. See the case of **Gladys Marjorie Akinyi v Dorcas J Jahenda & Another [2015] eKLR Nairobi Milimani Commercial Court Civil Case No. 619 of 2004** the Court observed that:

“[20] The yardstick in a claim for specific performance is as was reiterated in *Masha v Tol Ltd (supra)*, which made reference to the case of *Coker v Ajewole (1976) 1 ALR Comm 230 at 235;*

“It is settled law that a person seeking to enforce a contract must show that all the conditions precedent have been fulfilled and that he has either performed or is ready and willing to perform all the terms which ought to be performed by him...”

17. In the instant case, it is evident that the defendant has been in occupation in the suit land since when he bought it to date and no evidence has been tendered to challenge the same. In my view the plaintiff’s claim has no merit and the defendant is entitled to the land he seeks.

(d) Is the Defendant entitled to prayers sought in the Counter-claim?

18. In his counterclaim the Defendant has sought various orders.

19. In my view, having found that the plaintiff’s claim has no merit and the defendant having established his counterclaim claim on a balance of probabilities by way of evidence, the latter is entitled to some relief.

20. In the end I find that the plaintiff has failed to prove his claim on a balance of probabilities and that the defendant has proved his claim against the plaintiff on a balance of probabilities.

21. I therefore dismiss the plaintiff’s claim against the defendant and I enter judgment in favour of the defendant against the plaintiff on the counterclaim and issue the following orders:-

(a) The plaintiff’s suit is dismissed with costs.

(b) The defendant’s counterclaim is allowed in the terms below:-

(i) A declaration that he is the lawful owner of suit lands measuring 36 x70 x 36 x 48 feet and 60 x 49 x 29 x 60 feet respectively being parcels located within L.R NO. KIMININI/KINYORO/ BLOCK 3/ MATISI/1561 which main parcel is registered in the plaintiff’s name.

(ii) Order that the plaintiff do excise the suit lands in (a) above, and at the discretion of the defendant as to their consolidation or otherwise during the process, thereafter execute the transfer or transfers, as the case may be of the suit lands to the defendant.

(iii) In the event of default on the part of the plaintiff in carving out and transferring the suit lands to the defendant the Deputy Registrar shall execute all documents necessary to effect such excision and transfer.

(iv) The plaintiff shall pay to the defendant the costs of the counterclaim.

Dated, signed and delivered at Kitale on this 19th day of November, 2019.

MWANGI NJOROGE

JUDGE

19/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi holding brief for Arunga for plaintiff

Mr. Bisonga holding brief for Nyakundi for defendant

COURT

Judgment delivered in open court.

MWANGI NJOROGE

JUDGE

19/11/2019.