



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 147 OF 2017

JOSEPH NZUVE MUSAU.....PLAINTIFF/APPLICANT

-VERSUS-

MBUKI KIALA.....DEFENDANT/RESPONDENT

JUDGEMENT

1. Joseph Nzuve Musau, the Plaintiff herein, is a resident of Kyandue village, Kitaingo sub-location in Mukaa District of Makueni County. He has sued the Defendant for breach of sale agreement in respect of the portion of land plot number 3199 Mbukuni village, Upete Adjudication Section.

2. By his plaint dated 30th November, 2016 and filed in court on 01st December, 2016, the Plaintiff prays for judgment against the Defendant for:-

i. Refund of the sum of Kshs.52,000/= together with interest thereon from the date of payment to date of the current commercial rates.

i. A sum of Kshs.411,980/= being the assessed value of the damaged crops.

iii. Costs and interest.

iv. Any other relief this Honourable court may deem fit.

3. On the 20th January, 2017, the Defendant was served with summons to enter appearance and to file his defence as can be seen from the affidavit of service dated 13th June, 2017. The Plaintiff ought to have filed the affidavit of service on 11th July, 2017. However, he filed the same on 24th January, 2018. This matter, therefore, proceeded as undefended.

4. During the hearing of the Plaintiff's suit on the 09th November, 2017, the Plaintiff adopted his statement dated 30th November, 2016 as his evidence.

5. His case was that he and the Defendants entered into a land sale agreement (P.Exhibit No.1) concerning an acre of land. He disclosed that he paid the consideration of Kshs.52,000/= upon which he took possession of the land. He added that he put up development on the land by erecting terraces, water drainage, nappier grass and fruits such as bananas, mangoes and pineapples. That in 2014 the Defendant drove her cows into his land. He said that the Defendant did not give him an answer when he approached her to find out why she did so. The Plaintiff said that he decided to report the matter to the OCS Kilome whereupon he and the Defendant were summoned by the OCS. He said that before the OCS, the Defendant claimed that she wanted to reclaim the land in question even though the Plaintiff had paid

the purchase price.

6. The Plaintiff went on to say that he requested the chief and the village elder to settle the dispute between him and the Defendant. He disclosed that the chief and the elders visited the land in dispute where the Defendant insisted on reclaiming it. He added that the Defendant asked him to value the investments he had put on the land and promised to compensate him and hence his decision to approach the Ministry of Agriculture. According to him, the ministry valued his investment on the land in dispute at Kshs. 411,980/= which he now claims from the Defendant together with the purchase price of land amounting to Kshs.52,000/=.He produced the crop valuation report as P.Exhibit No.5. He also produced the proceedings before the Assistant Chief and the demand letter as P.Exhibit Nos. 3 and 6 respectively.

7. The Plaintiff's counsel filed his submissions on 5th December, 2017, the same being dated 4th December, 2017.

8. The counsel framed the issues for determination as:-

i. Whether there was a valid sale in law between the Plaintiff and the Defendant;

ii. Whether the agreement is enforceable as against the Defendant;

iii. Whether the Plaintiff is entitled to the remedies sought.

9. On the issue of whether or not there was a valid sale, the counsel submitted that the same was duly executed by both the Defendant and the Plaintiff. He added that the agreement was dated 01st October, 2010. The counsel went on to correctly submit that the contract meets the criteria of a valid agreement stipulated under *Section 3(3) of the Law of Contract*.

10. It is worthy noting that the Plaintiff is not claiming for specific performance as this would brought a plethora of issues under the *Land Control Act Chapter 302 of the Laws of Kenya*. I shall deal with this issue later in my judgement. However, I am satisfied that both parties entered into a binding contract capable of being acted upon.

11. Regarding the issue of whether or not the agreement between the parties herein is enforceable against the Defendant, the Plaintiff's counsel submitted that the Plaintiff is bonafide purchaser for value, having entered into a valid sale agreement and paid the purchase price of Kshs.52, 000/= in full. He added that the Plaintiff acquired an equitable beneficial interest and took vacant possession over the suit property and developed the same. He correctly submitted that since the suit property is agricultural land subject to the *Land Control Act, Chapter 302 of the Laws of Kenya*, failure to obtain consent from the Land Control Board is required under *Section 6(1) of the Act* rendered the sale agreement void and unenforceable against the Defendant. He added that though unenforceable until the consent of the Land Control Board is obtained, the contract is binding upon the parties herein and as such, the Defendant must be called to account for the loss suffered by the Plaintiff as was stated by **Lord Reid in Steadman vs- Steadman [1976] AC 536 at page 540**. Lord Reid held,

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable”

12. The counsel submitted that the Plaintiff claims for refund of the consideration paid to the Defendant and the cost incurred in developing the suit property whose remedy the counsel stated that it lies in *Section 7 of the Land Control Act*. The counsel cited the case of **Emily Chonge Wanyama -vs- Patrick Mangeni Yusto [2014] eKLR** where the court found that the Plaintiff was entitled to a refund of not just the sum paid as consideration of Kenya shillings seventy (70,000/=) only but at the current value of the property plus the developments therein pleaded and proved.

13. And finally on the issue of whether the Plaintiff is entitled to remedies sought the counsel submitted

that the Plaintiff has established a prima facie case for the recovery of the amounts stated in prayers (a) and (b) of the plaint as a debt against the Defendant as well as costs and interest and urged the court to rely on the authority of **Emily Chonge Wanyama –vs- Patrick Mang’eni Yusto [2014] eKLR**.

14. Having read the submissions and the evidence, my finding is as follows:-

On the issue of whether or not the sale agreement is enforceable against the Defendant, I fully associate myself with the holding of my sister A. Omollo J. It is clear that the Plaintiff in the suit before me paid the Defendant the consideration of Kshs.52,000/=. He went further to make some developments on the suit land amounting to Kshs.411,980/=. The Defendant is duty bound to refund the consideration plus the developments thereon.

15. I have no doubt in my mind that the Plaintiff has on a balance of probabilities satisfied this court that he has a cause of action against the Defendants. In the circumstances, **I hereby proceed to enter judgment for the Plaintiff and against the Defendant in terms of prayers (a) (b) & (c) of the plaint. It is so ordered.**

Signed, Dated and Delivered on this 29th Day of January, 2018.

MBOGO C.G.,

JUDGE.

In the presence of:

Mr. Mulwa for the Plaintiff - Absent

Mr. Kwemboi – Count Assistant

MBOGO C.G.,

JUDGE.