



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 143 OF 2013

FRANCIS K. C HEPKURUIPLAINTIFF

VERSUS

PATRICK NOLAN NEYLAN.....1ST DEFENDANT

KEVIN IAN NOLAN NEYLAN.....2ND DEFENDANT

JOSEPH KAMIRA WANJAU.....3RD DEFENDANT

JUDGMENT

(Suit by plaintiff seeking orders of specific performance; plaintiff and another person having agreed to jointly purchase land and share it equally; plaintiff's partner paying his share of purchase price; no proof that plaintiff paid his part of the purchase price; property being subdivided and plaintiff's partner getting transfer for half the share; other share due to plaintiff being sold to a 3rd party; since plaintiff did not pay his share, vendor entitled to sell this portion of land; 3rd party getting good title; plaintiff cannot seek relief as he did not pay the purchase price in full; plaintiff's suit dismissed with costs)

1. This suit was commenced by way of a plaint which was filed on 23 July 2012. In his suit, the plaintiff has pleaded that on or about the 27th day of May 1993, the 1st and 2nd defendants, sold the land parcel LR No. 4730/144 measuring about 2 hectares to the plaintiff and one Mr. M.K. Kiguru (proper name being Kiguru) at a price of Kshs. 500,000/= where each of the two purchasers was to contribute the sum of Kshs. 250,000/=. It is averred that on 12 January 2004, the 1st defendant confirmed in writing to the plaintiff that their instructions to their advocate, M/s Cresswell, Mann & Dodd, to transfer the land to the plaintiff was still intact and that the 2nd defendant was dealing with the matter. It is pleaded that the plaintiff and his co-purchaser, Mr. Kiguru, agreed with the concurrence of the defendants to have the land parcel LR No. 4730/144, subdivided into two equal portions and the plaintiff's plot was designated as Plot No. 170, whereas Mr. Kiguru's plot was designated as Plot No. 169. It is pleaded that without the knowledge of the plaintiff, the 1st and 2nd defendants fraudulently conspired with the 3rd defendant to deprive the plaintiff of the Plot No. 170. In the suit, the plaintiff has asked for the following orders :-

(a) That the registration of the 3rd defendant to LR No. 4730/144 Plot No. 170 be cancelled.

(b) Specific performance directing the defendants to transfer LR No. 4730/144 Plot No. 170 to the plaintiff.

(c) Mesne profits from 1993 to the time of transfer of the suit land to the plaintiff to be assessed by this Honourable Court.

(d) In the alternative and without prejudice to prayer (a) and (b) above, an order that the defendants jointly and severally do pay to the plaintiff a sum equal to the value of LR NO. 4730/144 Plot No. 170 measuring one hectare or thereabout at current market rates to be determined by a valuer appointed by this Honourable Court.

(e) Costs of this suit.

(f) Interest at court rates.

(g) Such further or other relief this Honourable Court may deem fit.

2. In their statement of defence, the 1st and 2nd defendants, pleaded that in the year 1992, they subdivided their land parcel LR No. 4730 into several 2 hectare plots which were put up for sale at Kshs. 1,000,000/= each. It is averred that the plaintiff and Mr. Moses K. Kiguru, approached them to jointly purchase one of the 2 hectare plots, identified as LR No. 4730/144. They reached an oral understanding that each of the two purchasers would pay 50% of the purchase price through the vendor's lawyers upon which a formal sale agreement would be drawn for execution and a transfer instrument to follow. It is pleaded that the 1st and 2nd defendants only received payment of 50% from Mr. Kiguru and no payments were received from the plaintiff. They aver that on the instructions of Mr. Kiguru, they subdivided the property into two equal parts in the year 1997 which subdivision resulted into the Plots No. 169 and 170. It is pleaded that Mr. Kiguru completed his purchase of the Plot No. 169 but the plaintiff failed to complete payment for the Plot No. 170 and they decided to sell it to the 3rd defendant in the year 2000. It is pleaded that the plaintiff's case is time barred as his cause of action accrued in the year 1992 and that orders of specific performance cannot be granted as no agreement for sale ever existed. It is averred that no payment was made by the plaintiff and he is thus not entitled to any refund or compensation.

3. On his part, the 3rd defendant pleaded that the plaintiff is aware that he (the 3rd defendant) purchased the disputed property in December 1997 and that the same was transferred to him on 6 April 2000. He has pleaded that the suit is statutorily time barred. He has also raised issue that nothing specific has been pleaded as mesne profits which in any event, he has pleaded that the plaintiff does not deserve.

4. In his evidence, the plaintiff testified inter alia that he came to know the 1st defendant when he worked as Branch Manager of Standard Chartered Bank Limited, in Nakuru. In the course of their interactions, he and his colleague at the bank, Mr. Moses Kimani Kiguru, came to learn that the 1st and 2nd defendants were subdividing their land in Lanet area into 5 acre plots and selling the same at the sum of Kshs. 1,000,000/=. They agreed to purchase one plot and share it equally with each purchaser owning 2.5 acres. He stated that they identified the plot LR No. 4730/144 for purchase and that the 1st defendant informed them to make payments to the law firm of M/s Cresswell, Mann & Dodd Advocates. He testified that on 31 August 1992, they prepared two banker's cheques each of Kshs. 50,000/= payable to M/s Cresswell, Mann, & Dodd Advocates, for the initial deposit, and they handed the two cheques to Mr. Githua Advocate, the proprietor of the law firm. He stated that on 30 September 1992, he retired from the bank, and left Mr. Kiguru, to follow up on the purchase and advise him of what may be required of him. He testified that on 16 June 1993, Mr. Kiguru forwarded a further sum of Kshs. 200,000/= through the bank, and he himself received a demand for the sum of Kshs. 200,000/= in October 1994. He stated that upon receiving this demand, he came to Nakuru and paid this sum of Kshs. 200,000/= to the law firm of Cresswell, Mann & Dodd, but he could not recall whether he paid the money in cash or by cheque. Upon payment, he stated that an agreement for sale was drawn by the law firm and that he and Mr. Kiguru signed the agreement which was witnessed by Mr. Githua. The sellers were not present to sign it and it was agreed that after they executed their part, Mr. Kiguru would collect the agreement and take it to a surveyor to subdivide the land into two portions of 2.5 acres. He himself never got hold of a copy of the agreement. He stated that the subdivision was done and two plots being LR No. 4730/169 and LR No. 4730/170, were created, with Mr. Kiguru taking the plot No. 169 and he (the plaintiff) entitled to the plot No. 170. It happened that Mr. Kiguru retired from Standard Chartered Bank in the year 1996 and died in

the year 2005. However, in the year 2001, the two met and Mr. Kiguru informed him that subdivision was done a while back and he had got his Plot No. 169 which he later sold. He referred the plaintiff to their surveyor, Mr. Wahome Werugia on the whereabouts of his Plot No. 170. The plaintiff stated that he came looking for Mr. Werugia and they met and the latter gave him a copy of the subdivision plan. He went to the land but found it developed and after doing a search he found that his plot had been transferred to the 3rd defendant on 6 April 2000. He tried contacting the 1st and 2nd defendants and several correspondences were exchanged but nothing came out of the same.

5. In cross-examination, he inter alia conceded that between the years 1992 and 2002, he never visited the land, never wrote any correspondence, nor reported to the police. He admitted that a letter dated 29 October (year not clear), he had been asked to pay a balance of Kshs. 200,000/=. He claimed to have paid this money but left the payment voucher with Mr. Kiguru. He was not present when subdivision was done into two portions and he did not make payment for the subdivision of the land which was done in the year 1994. He did not contact the surveyor until the year 2002. He stated that it is Mr. Kiguru who held all the documents including the sale agreement and payment vouchers. He admitted not having any evidence that he paid the sum of Kshs. 250,000/=. He testified that it was in January 2002 that he discovered that the plot he is claiming was occupied by the 3rd defendant. He never registered any caveat or caution and he agreed that when the 3rd defendant purchased the land, there was no restriction against the title. He testified that he has no problem with the 3rd defendant and does not want the suit land from him but his issue is with the Neylans (1st and 2nd defendants).

6. PW-2 was Mr. Gibson Wahome Werugia who is a licenced land surveyor based in Nakuru. He testified that Mr. Kiguru approached him and informed him that he had bought 5 acres together with the plaintiff and he requested him subdivide it into two equal portions. He did the survey work in the year 1994 and the two plots came to be identified as LR Nos. 4730/169 and 170. He drew the deed plans which were approved and requested the Director of Surveys to release them to Mr. Kiguru. In cross-examination, he confirmed that it is Mr. Kiguru who instructed him and stated that Mr. Kiguru had a sale agreement although he did not keep a copy of it.

7. PW-2 was Mr. Nathaniel Githua, an Advocate of the High Court of Kenya since the year 1972. He testified that he was involved in the transaction by the Neylan brothers to subdivide their land parcel LR No. 4730/49 into 5 acre portions which were to be sold. Through a letter dated 27 May 1993, written by Patrick Neylan, the 2nd defendant, he was instructed to transfer to the plaintiff and Mr. Kiguru one portion on payment of Kshs. 500,000/=. He testified that given correspondences made from Standard Chartered Bank, his firm may have received a sum of Kshs. 250,000/= from Mr. Kiguru and Kshs. 50,000/= from the plaintiff. He could not do the transfer because the plaintiff never paid the sum of Kshs. 200,000/=. Mr. Kiguru then asked that the plot be subdivided so that he can get his share and the land was subdivided into two portions. One portion was then transferred to Mr. Kiguru and the second plot was transferred to another person. He stated that if the plaintiff had completed payment for his share, this second portion would have been transferred to him.

8. In cross-examination, he testified that the parties must have had their own private arrangements and no formal agreement was drawn. He only received a letter informing him to transfer one parcel of land to the two purchasers upon payment of the sum of Kshs. 500,000/=. He was categorical that he never received Kshs. 200,000/= from the plaintiff and that Mr. Kiguru completed paying for his share and that is how he got title to the portion of 2.5 acres. The other portion due to the plaintiff remained unsold for some time until it was later transferred to the 3rd defendant.

9. With the above evidence, the plaintiff closed his case. The defendants on their part opted not to testify nor call any witness. I invited counsel to submit and they all filed their written submission. Mr. Onyinkwa, for the plaintiff, and Mr. Karanja Mbugua, for the 3rd defendant supplemented these written submissions by making brief oral submissions. I have taken note of all of these submissions. There was a wealth of submissions on whether there is a contract which is enforceable, the effects of Section 3 (3) of the Law of Contract Act, CAP 3, Laws of Kenya, whether there was Land Control Board consent, and whether the suit by the plaintiff is time barred, but I think the case of the plaintiff turns on a very simple issue, that is whether or not he performed his part of the bargain.

10. There is no question that the 1st and 2nd defendants (the Neylan brothers), owned a certain fairly large parcel of land which they wished to subdivide into 5 acre portions and sell them. The plaintiff and his bank colleague, Mr. Kiguru, got interested in purchasing one of the portions and they engaged the Neylan brothers to purchase the same. I do not think that any formal sale agreement was drawn and indeed, none was presented before me, but there is no dispute that an offer was made to the plaintiff and Mr. Kiguru, for them to purchase one of the plots. What is not very clear to me, is the consideration that the two purchasers were required to make for the 5 acre plot. While the pleadings of the Neylan brothers mention the sum of Kshs. 1,000,000/= for each 5 acre plot, it does appear to me that the purchasers herein were offered one 5 acre plot if they paid the sum of Kshs. 500,000/= as borne out in the letter dated 27 May 1993 written by Patrick Neylan, the 2nd defendant. That letter is addressed to Mr. Githua of the law firm of M/s Cresswell, Mann & Dodd and it states as follows :-

RE : Plot No. LR 4730/144 Mr. F.K Chepkurui & Mr. M.K. Kiguru

You may proceed with the transfer of this plot to the above who will pay Kshs. 500,000/= through your office. They settled with us on the outstanding balance.

*Yours
P.N. Neylan*

Faithfully,

CC. Mr. F.K Chepkurui

Mr. M.K Kiguru

11. It will be seen in the above letter that Mr. P.N Neylan, mentioned that they had settled on the outstanding balance and that all that the purchasers were required to pay was the sum of Kshs. 500,000/= for the plot of 5 acres to be transferred to them. It is not clear to me whether the Neylans waived payment of any other money beyond the sum of Kshs. 500,000/= or whether there was some other consideration that was given for the Neylans to accept the mentioned sum of Kshs. 500,000/= as making up full payment for the plot or what this "outstanding balance" may have been. I have no evidence before me that there was any other consideration that was meant to exchange hands other than the demanded sum of Kshs. 500,000/= and despite there being no formal agreement, the parties had an understanding and consensus that if the sum of Kshs. 500,000/= was paid, the plot of 5 acres would be transferred to them. I am prepared, for the special purposes and facts of this case, to hold that the parties herein had an agreement, or understanding, that upon payment of the sum of Kshs. 500,000/=, they would be entitled to land measuring 5 acres.

12. It appears to me that the two purchasers had a separate understanding, or agreement, that each person would independently raise the sum of Kshs. 250,000/= to reach the amount of Kshs. 500,000/=. That is why, when the initial payment of Kshs. 100,000/= was made through Standard Chartered Bank, where the two purchasers worked, the Bank was careful to forward the same in two cheques, each of Kshs. 50,000/=. and it was mentioned that each was from the two purchasers. When the Bank forwarded a further sum of Kshs. 200,000/=. through its letter dated 16 June 1993, the Bank did specify that this money was the contribution of Mr. Kiguru, and that Mr. Chepkurui (the plaintiff) would himself forward "in due course" his cheque for Kshs. 200,000/=. It is therefore apparent that Mr. Kiguru finalized payment of his share of Kshs. 250,000/= and the plaintiff needed to make good a further sum of Kshs. 200,000/= on his part to complete payment of his share.

13. Although the plaintiff contends that he did tender the sum of Kshs. 200,000/= to the vendor's lawyers, I have absolutely no evidence of this. I have no cheque, no payment voucher, no receipt, no acknowledgment...nothing. I do not even have corroborating oral evidence. In fact, it is denied that he ever paid this sum, and given that denial, it was incumbent upon the plaintiff to adduce evidence to prove that he indeed paid this money.

14. On my part, I am afraid that I am not convinced that the plaintiff ever paid this sum of money. I think if he had paid, he would have received some sort of acknowledgment, for this was a significant amount of

money in the year 1994, and further, he would have actively followed up on the transfer of the portion of land to himself. I have seen absolutely no activity from the plaintiff from the year 1993 to the year 2002, which is a bit unusual for a person who has fully paid for land. He did not follow up on his registration and did not even visit the land. It is also informing that the behavior of Mr. Kiguru was that of a person who is apprehensive that he may lose land because his co-purchaser has not raised his share of the money. That to me explains why he requested for the land to be subdivided into two portions and for his portion to be transferred to him. It seems to me that he did not want the failure by the plaintiff in paying for his share to complicate any transfer to him. He actively pursued a subdivision of the land and actively pursued the transfer of his half share to himself and left the plaintiff to carry his own cross. I reach the conclusion that the plaintiff was required to pay the sum of Kshs. 200,000/= which he never did and for that reason the half share comprising of the land LR No. 4730/170 was never transferred to him.

15. I do not therefore see how the plaintiff can now claim to be entitled to this parcel of land as he never paid for it. Save for a sum of Kshs. 50,000/= which was forwarded by the Bank, no other payment was ever made by the plaintiff. I do not see how the plaintiff can now claim that the transfer of the land to the 3rd plaintiff was done fraudulently. The vendors had not been paid and no money was forthcoming. There was no formal agreement which the plaintiff can claim that the vendors breached, and as unpaid sellers, to me, the vendors had every right to dispose of the suit land. The plaintiff failed to perform his part of the bargain and cannot now claim an order of specific performance.

16. If I was convinced that the plaintiff had paid this balance, then maybe I would have considered whether his case is defeated by the provisions of Section 3(3) of the Law of Contract Act, which requires contracts to be in writing, or defeated by the Land Control Act which requires consent of the Land Control Board, or defeated by limitation of time under the Limitation of Actions Act. I find it unnecessary to consider these as I am convinced that the plaintiff never made good the payment of Kshs. 200,000/=.

17. I see no fraud in the manner in which the 3rd defendant obtained title. He acquired his title lawfully and I am unable to allow the prayer of the plaintiff that his registration be cancelled. Neither do I see how the plaintiff can be entitled to any mesne profits as claimed, or the current value of the land in question.

18. It could be that the plaintiff is entitled to a refund of Kshs. 50,000/= which he appears to have paid but I have no case before me seeking refund of this money so that the defendants can either contest or concede to it. I will therefore not make any orders regarding this sum of Kshs. 50,000/= for I have no pleadings before me claiming this sum. It is upon the plaintiff to see if he has any legal basis to claim it.

19. Given the above, I find no merit in the plaintiff's suit and it is hereby dismissed with costs.

20. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 24th day of January 2018.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -