



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 10 OF 2012

BINDS WELFARE ASSOCIATIONPLAINTIFF

VERSUS

GREGORY TIMOTHY MUTUKU1ST DEFENDANT

GEORGE MUTHAMA TIMOTHY2ND DEFENDANT

RICHARD MUSYOKA TIMOTHY3RD DEFENDANT

JUDGMENT

Introduction:

1. In the Plaint dated 17th January, 2012, the Plaintiff has averred that it executed a Sale Agreement on 30th July, 2008 with the Defendants for the purchase of a portion of land measuring 31.25 acres for Kshs. 2,062,500; that the Plaintiff paid the Defendants Kshs. 700,000 on execution of the agreement and made a further payment of Kshs. 300,000 on 23rd December, 2008.
2. The Plaintiff has further averred that it was a term of the agreement that the Defendants were to carry out sub-division of the suit land to curve out the sold portion and obtain the consent of the Board and that they made a further payment of Kshs. 1,053,000 to the Defendants' advocates.
3. It is the Plaintiff's case that the Defendants have failed to carry out the sub-division of the land and obtain the consent of the Board to transfer the land.
4. The Plaintiff is seeking for an order of specific performance compelling the Defendants to carry out survey and sub-division of the land and transfer the same to the Plaintiff.
5. In their Defence and Counter-claim, the Defendants have averred that they received Kshs. 1,000,000 from the Plaintiff as agreed on 30th July, 2008; that the Plaintiff was to pay the balance of the purchase price on 28th February, 2009 or upon obtaining the consent to sub-divide or transfer the land and that they never received the money that was purportedly forwarded to J.T. Nzioki advocate.
6. It is the Defendants' case that they applied and obtained the consent of the Land Control Board; that the council approved the sub-division of the land and that although they forwarded the said consents to the Plaintiff, they never received the balance of the purchase price.
7. The Defendants have averred that they served the Plaintiff with two completion notices for failure to

complete the agreement and that the agreement stands rescinded.

The Plaintiff's case:

8. The Plaintiff's Vice-chairman, PW1, informed the court that the Plaintiff executed a Sale Agreement dated 30th July, 2008 with the Defendants for the purchase of land known as Mavoko Town Block 3/3454 measuring 31.25 acres; that the agreed purchase price was Kshs. 2,062,500; that the Plaintiff paid Kshs. 700,000 on the day the agreement was executed and that the Plaintiff made a further payment of Kshs. 300,000 on 23rd December, 2008 and a further sum of Kshs. 9,000.

9. It was the evidence of PW1 that the Defendants were to carry out the sub-division of the suit land before the completion date of 28th February, 2009.

10. According to PW1, the Plaintiff paid to the Defendants' advocate a sum of Kshs. 1,053,500 vide cheque number 116630 dated 10th March, 2009 which was purportedly misplaced by the said advocate and that the Plaintiff has always been willing to pay the balance of the purchase price in full to facilitate the completion of the transaction.

11. It was the evidence of PW1 that upto date, the Defendants have never completed the sub-division of the suit land; that the 1st Defendant was present when they handed the cheque for the balance of the purchase price to Mr. Nzioki advocate and that the cheque was not handed over to the 1st Defendant because he had not finished the sub-division process.

12. According to PW1, the cheque that was handed over to the advocate was misplaced although it was later discovered that it had been cashed; that nevertheless, their advocate informed the Defendants that they were still willing to pay the balance of the purchase price as they pursued the issue of the cashed cheque with the police.

13. PW1 stated that the Defendants only managed to obtain the consent of the Land Control Board to transfer the land on 15th April, 2009, way after the completion date and that the sub-division scheme was approved on 28th March, 2011.

14. PW1 denied that the Defendants gave them the consent of the Board or the sub-division scheme before they filed the suit and that had they been given the documents, they would not have filed the suit.

15. The advocate who acted for both parties, PW2, informed the court that he is the one who drew the agreement of 30th July, 2008 between the parties; that the completion dated was to be on 28th February, 2009 and that a deposit was made leaving the balance of Kshs. 1,053,500.

16. PW2 stated that the balance of the purchase price was to be paid after the Defendants obtained all consents from the Land Control Board and sub-divide the land; that the documents were to be exchanged with the balance of the purchase price and that before the completion date, the 1st Defendant went to his office without the said consents.

17. PW2 informed the court that the Plaintiff drew a cheque for the balance of the purchase price and left it in his office; that by the time the cheque was drawn, he had not received the completion documents from the Defendants and that he did not hand over the cheque to the 1st Defendant.

18. PW2 stated that he realised the cheque was missing from his office after a few months and that he had to refund to the Plaintiff the money.

19. It was the evidence of PW2 that it was the Defendants who breached the agreement because they never availed the completion documents.

20. PW2 stated that he informed the Defendants to complete the transaction and that they asked for more time. It was the evidence of PW2 that after seeing the cheque, the 1st Defendant agreed to avail all the completion documents the following day which he never did and that he has never seen the consents of the Land Control Board to sub-divide and transfer the land neither has he see the approval for sub-division of the land.

21. PW2 stated that he saw the 1st Defendant for the last time on 28th February, 2009 and that the only document he had on that day was the original title deed.

The Defence case:

22. The 1st Defendant stated that the two Defendants are his brother; that they agreed to sell 30 acres out of the 40 acres of the suit land to the Plaintiff and that the completion date was 28th February, 2009 on which date the sub-division of the land ought to have been completed and the consent of the Land Control Board obtained.

23. DW1 stated that they applied to the Mavoko Municipality for the sub-division of the land on 28th February, 2009 and for the consent of the Board on 15th April, 2009.

24. It was the evidence of DW1 that he gave to the Plaintiff all the original consents in July, 2009; that despite several premises, the Plaintiff could not pay the balance of the purchase price and that on 11th September, 2009, he called for the balance of Kshs. 1,052,500 together with interest from the Plaintiff.

25. When the balance of the purchase price was not forthcoming, DW1 stated that he caused a completion notice to issue to the Plaintiff on 22nd June, 2010.

26. When they meet on 12th April, 2011, DW1 stated that the Plaintiff's representative asked for the extension of time which he declined and that he informed the Plaintiff's representative that the agreement stood rescinded.

27. DW1 stated that in the alternative, the court should find that the contract is invalid because six (6) months elapsed without the consent of the Land Control Board.

28. In cross-examination, DW1 stated that the Board gave its consent on 15th April, 2009; that the Application for the sub-division of the land is dated 12th March, 2009 and that the same was approved on 10th July, 2009.

29. DW1 stated that the balance of the purchase price has not been paid to date; that he never saw the cheque that was given to Nzioki advocate and that he only learnt about the issue of the lost cheque when the Plaintiff's Chairman called him and informed him about the same.

30. DW1 stated that he is still holding on the original consents of the Board.

Submissions:

31. The Plaintiff's advocate submitted that there is no evidence to show that the sub-division approval was given; that the Defendants only obtained part of the completion documents after the Plaintiff had issued the cheque and that the 1st Defendant admitted this fact in the statement he recorded with the police.

32. Counsel submitted that the Plaintiff was never in default and in breach of the Sale Agreement.

33. The Defendants' advocate submitted that the Defendants complied with the terms of the agreement; that the completion documents were handed over to the Plaintiff's officers in July, 2009 and that the

cheque for Kshs. 1,053,500 was never handed over to the Defendants.

34. The Defendants' counsel finally submitted that the transaction was void for want of the necessary consent from the Land Control Board and that the consent was given on 28th February, 2009 outside the statutory period of six (6) months.

35. Counsel submitted that it would indeed be oppressive and unjust to order for specific performance and completion of the contract after eight (8) years.

Analysis and findings:

36. It is not in dispute that the Plaintiff's officials entered into a Sale Agreement dated 30th July, 2008 with the Defendants.

37. In the agreement the Defendants agreed to sell to the Plaintiff a portion parcel of land known as Mavoko Town Block 3/3454 measuring approximately 31 acres. The agreed purchase price was Kshs. 2,062, 500.

38. The Agreement provided that a sum of Kshs. 700,000 was to be paid upon execution of the agreement; Kshs. 200,000 was to be paid on or before 31st December, 2008 while the balance of Kshs. 1,162,500 was to be paid on or before 28th February, 2008 (*sic*). The correct date that the balance of the purchase price was to be paid, which was also the completion date, was 28th February, 2009.

39. The Agreement further provided that the Defendants were to settle all the outgoing and obtain all the necessary consents from the Land Control Board and make the appropriate sub-division of the land to facilitate completion. The agreement also provided that the common advocate for the parties was M/S J.T. Nzioki & Co. Advocates.

40. It is not in dispute that on the day the Agreement was signed, the 1st Defendant was paid Kshs. 700,000 vide a cheque. It is also not in dispute that the 1st Defendant was paid a further sum of Kshs. 300,000 making the total amount that was paid directly to the Defendants to be Kshs. 1,000,000. Although the Plaintiff's witness, PW1, stated that the 1st Defendant was paid Kshs. 9,000 in cash, there is no evidence of the said payment.

41. PW1 and PW2 informed the court that the balance of the purchase was supposed to be exchanged with the completion documents, which included the approval for the sub-division of the land and the consent of the Land Control Board to transfer the land.

42. As I have stated above, the agreement stated that the completion date was to be on or before 28th February, 2009, meaning that the Plaintiff should have paid the balance of the purchase price by this date and the Defendants should have sub-divided the land and obtained the consent of the Board to transfer the land on the same date.

43. The evidence of PW1 and PW2 was that on 28th February, 2009, the Plaintiff was ready with the balance of the purchase price. However, the Defendants had not managed to have the suit land sub-divided and had also not obtained the consent of the Board to transfer the land.

44. PW1 stated that they had a meeting with the 1st Defendant in the office of their advocate (PW1) where they agreed that the Defendant should be given time to obtain the necessary completion documents. It was the evidence of PW1 that he was then given the original Title Deed whereupon he left the cheque of Kshs. 1,053,500 being the balance of the purchase price with their common advocate.

45. The cheque that was left behind for Kshs. 1,053,500 is dated 10th March, 2009, which is the same date that PW1 claims that he met the 1st Defendant.

46. Although the cheque was drawn in favour of the 1st Defendant and was left in the custody of their common lawyer (PW2), the cheque seems to have been encashed by unknown people, leading to the advocate being disciplined by the Law Society of Kenya. PW2 informed the court that he has since refunded the Plaintiff the said money.

47. It is therefore obvious that by the time the cheque of Kshs. 1,053,500 was drawn, the completion period had lapsed by a few days. The Plaintiff therefore never completed the agreement within the stipulated period.

48. The evidence before me shows that the Defendants managed to obtain the consent of the Athi River Land Control Board on 15th April, 2009 way after the completion period. Indeed, the Application for the consent of the Board was signed by both parties on 28th February, 2009, which was the same date that the transaction was to be completed.

49. The evidence before me shows that the Application for the sub-division of Mavoko Town Block 3/3454 was submitted to the then Municipal Council of Mavoko on 28th February, 2009 and the same was approved in 2011. Again, the sub-division of the suit land was approved way after the completion period.

50. The totality of the evidence before me shows that both the Plaintiff and the Defendants were in breach of the Agreement of 30th July, 2008. The Plaintiff did not pay the balance of the purchase price on or before 28th February, 2009 and the Defendants did not obtain the approval of the sub-division of the land and the consent of the Land Control Board to transfer the land on or before 28th February, 2009.

51. The evidence before me shows that on 11th September, 2009, the Defendants' new advocate informed the Plaintiff that they had breached the agreement by failing to pay the balance of the purchase price and called for the same monies within seven (7) days.

52. The Plaintiff's new advocate responded to the letter and informed the Defendants' advocate that the said money had been paid to their former advocate and that in any event the Defendants had not sub-divided the land as agreed.

53. Considering that it was the Plaintiff who is seeking for an order of specific performance, they ought to have complied with the agreement by paying for the balance of the purchase price within the stipulated period, or after they received the letter dated 11th September, 2009. Instead, they informed the Defendants vide a letter dated 20th January, 2010 to be "*patient as we sort out the matter of the lost cheque.*"

54. Indeed, even after being given more time, the Plaintiff did not heed the Defendants' letter dated 22nd June, 2010 in which they were to pay the balance of the purchase price within twenty one (21) days.

55. It is trite that one can only succeed in a claim for specific performance where he has complied with the terms of the Agreement. As was held in the case of **Wambugu vs. Njuguna (1983) KLR 172**, a Vendor is entitled to repudiate the contract of sale for failure of performance. The Plaintiff cannot seek for a prayer of specific performance and at the same time argue that they did not meet their part of the bargain because the Defendants had not met their bargain. Indeed, until now, the Plaintiff has not paid the balance of the purchase price.

56. In the case of **Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhbuti**, the court quoted with approval the case of **Thrift Homes Limited vs. Kays Investment Limited (2015) eKLR** where Gicheru JA held as follows:

“When the Appellants came to court seeking the relief of specific performance of the agreement, they had not performed their one essential part of the agreement. Namely: payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In these circumstances, no court of

equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice.”

57. In any event, the Application for the consent of the Land Control Board was only applied for and obtained one (1) year after the signing of the agreement. The period within which the consent of the Board should be obtained is clear: the consent must be obtained within six (6) months from the date of signing the agreement (*See Section 8(1) of the Land Control Board Act*).

58. In the case of ***Bogani Properties Limited vs. Fredrick Wairegi Karuri (2015) eKLR***, the court held as follows:

“The Act stipulates that an agreement for sale of Agricultural land is void after the expiry of six (6) months if the parties do not obtain the consent of the relevant Land Control Board. Consequently, this court cannot insist that the Defendant should transfer the land in question to the Plaintiff when the law stipulates that the Plaintiff is only entitled to a refund of the purchase price and not the land. (See Section 7 of the Land Control Act).”

59. In the case of ***Rose Wakanyi Karanja & 3 others vs. Geoffrey Chege Kirundi & Another (2016) eKLR***, the Court of Appeal held as follows:

“We have therefore come to the conclusion that the consent obtained on 16th December, 1993 was not valid and the purported validation of a consent obtained outside the stipulated period is without the force of law. The upshot of the above is that the sale of the suit property being agricultural land became null and void on expiry of six months from the date of the agreement i.e. 26th October, 1990.”

60. While sympathizing with the Plaintiff in the above case, the court relied on the decision of ***Karuri vs. Gituru (1981) KLR 247*** where it was held as follows:

“The provisions of the Land Control Board Act are of an imperative nature, there is no room for the application of any doctrine of equity to soften its harshness.”

61. This court is not only bound by the provisions of the law, but also by the decisions of the Court of Appeal.

62. Having applied and obtained the consent of the Land Control Board to transfer the suit land to the Plaintiff outside the stipulated period of six (6) months, which period was not enlarged by the court, I find and hold that the Sale Agreement of 30th July, 2008 is null and void. The only remedy that the Plaintiff can pursue is for the refund of the deposit that was paid to the Defendants.

63. For those reasons, I dismiss the Plaintiff’s Plaintiff without costs and allow the Defendants’ Counter-claim dated 5th March, 2012 in the following terms;

a. A declaration be and is hereby issued that the Agreement of Sale dated 30th July, 2008 was lawfully rescinded by the Defendants.

b. A declaration be and is hereby issued that the Sale Agreement of 30th July, 2008 is null and void for want of the consent of the Land Control Board within six(6) months.

c. Each party to bear their own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23RD DAY OF FEBRUARY, 2018.

O.A. ANGOTE

JUDGE