



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 107 OF 2013**

**BARTHOLOMEW W.K. WANYAMA.....PLAINTIFF**

**VERSUS**

**JOHN BARASA WALEKHWA.....1<sup>ST</sup> DEFENDANT**

**LONGIROKWANG NAKORITANG.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The original plaint in this matter which was filed on 5/8/2013 was subsequently amended. On 25/2/2016, the plaintiff filed an amended plaint. In the amended plaint he enjoined the second defendant and claimed against him.

2. The 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant filed their amended defence and defence respectively on 19<sup>th</sup> April, 2016 and 10<sup>th</sup> May, 2016 respectively. The hearing of this suit took place on 17/10/2017. The plaintiff gave evidence in support of his case alone while the defendant testified and called one witness. Only the 2<sup>nd</sup> defendant filed his submissions in the matter on 24/11/2017.

**The Plaintiff's Case**

3. In the amended plaint, the plaintiff avers that he entered into a written agreement with the 1<sup>st</sup> defendant for sale to him of all that land parcel known as **Kwanza/Kwanza Block 3/Luhya/164** measuring **5 acres** at the price of **Kshs.750,000/=**. **Kshs.500,000/=** was paid on or before the signing of the agreement. The balance was to be paid upon a consent to transfer being obtained in the plaintiff's favour and upon a registrable transfer being executed by the 1<sup>st</sup> defendant.

4. The plaintiff took possession of the land immediately after execution of the agreement and invested heavily in the land. It was the duty of the 1<sup>st</sup> defendant obtain the consent and the payment was made on this understanding. "However the 1<sup>st</sup> defendant despite requests by the plaintiff breached the agreement by failing to obtain the consent and failing to transfer the suit land to the plaintiff.

5. Among the amendments is the detail that despite the subsistence of the suit and in disobedience of a consent order recorded in the suit on 25/3/2015, the 1<sup>st</sup> defendant now has made arrangements to sell the suit land to the 2<sup>nd</sup> defendant and has transferred it in order to redeem a loan advanced to the 1<sup>st</sup> defendant by the Agricultural Finance Corporation. It is the plaintiff's case that he had proposed to clear this loan but the 1<sup>st</sup> defendant refused to such payments. The plaintiff's case is that the 1<sup>st</sup> defendant did not have good title that he could pass on to the 2<sup>nd</sup> defendant and that the registration of the suit land in the latter's name is unlawful. He pleads fraud against the 1<sup>st</sup> defendant, and prays for specific performance of the agreement, a declaration that the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendant is null and void, that the title to the 2<sup>nd</sup> defendant be cancelled and general damages for breach of the agreement. He also seeks costs of the suit.

**The Defendant's Case**

6. The 1<sup>st</sup> defendant denied the agreement alleged by the plaintiff. He avers that he does not own the suit land; that since no agreement was ever executed between him and the plaintiff, the issue of consent of Land Board does not arise; that in the alternative, the Land Control Board Consent for the agreement was obtained; that the 1<sup>st</sup> defendant only leased the land to the plaintiff for the planting of trees; that no orders prohibit him from dealing with the land; that the transaction between the two defendants is valid and that the suit ought to be dismissed.

**The 2<sup>nd</sup> Defendant's Defence**

7. The 2<sup>nd</sup> defendant avers that he is the lawful owner of the suit land, and that the agreement between the plaintiff and the 1<sup>st</sup> defendant is null and void for want of consent of the Land Control Board. **Determination**

## The Issues Arising

8. The issues arising in this suit are as follows:

- (1) Was the agreement between the plaintiff and the 1<sup>st</sup> defendant made in 2008 for the lease or sale of the 1<sup>st</sup> defendant's land?***
- (2) Was the agreement null and void for want of the Land Control Board's Consent?***
- (3) Should the title to the 2<sup>nd</sup> defendant be cancelled?***
- (4) What orders should issue?***

### ***(1) Was the agreement between the plaintiff and 1<sup>st</sup> defendant for lease or sale?***

9. The plaintiff testified on 17/10/2017 in this matter and called no witness. According to him, it was the 1<sup>st</sup> defendant who approached him and proposed the sale to him of the suit land for Kshs.750,000/=, whereupon he paid Kshs.500,000/=. According to the plaintiff the agreement was written down, and it got lost in mysterious circumstances while stored in his car which was under the custody of the 1<sup>st</sup> defendant who was his driver at the time of that disappearance. When the plaintiff asked him where it was, the 1<sup>st</sup> defendant denied knowledge of its whereabouts. However the plaintiff took possession of the land in the year 2009 and planted trees on the entire 5 acres.

10. The plaintiff produced no documentary evidence of the agreement for reason of loss of the original agreement as described above. However it is not disputed that he has been in continuous possession since 2009. He also produced no evidence of payment for the land. He did not have any withdrawal slip in respect of the moneys that he paid. He never reported the loss of the agreement to the police. He testified that he paid the Kshs.500,000/= in cash at the farm. He never placed any caveat on the land title. There is evidence of sale of land before me and I have to go by the concession made by the 1<sup>st</sup> defendant that the agreement between him and the plaintiff was for lease of the land to the plaintiff.

11. The 1<sup>st</sup> defendant's evidence is that out of the friendship between the two, grew love and trust which made him release the suit land to the plaintiff for the purpose of planting trees. However the 1<sup>st</sup> defendant also does not have any documentary evidence of the lease agreement. However, in a curious turn of event, the 1<sup>st</sup> defendant acknowledged under cross-examination that he had introduced the plaintiff to the Manager of A.F.C. in connection with the loan from A.F.C.

12. The evidence of the 2<sup>nd</sup> defendant was also that the purchase price for the land was paid on the farm in cash to the 1<sup>st</sup> defendant, just like in the plaintiff's case. There was a confession on the part of the 1<sup>st</sup> defendant that there was a familiar relationship between the plaintiff and the 1<sup>st</sup> defendant and that the plaintiff got the 1<sup>st</sup> defendant employed into the project he was working in. What however strikes me most is the secretiveness with which the 1<sup>st</sup> defendant moved to sell the suit land to the 2<sup>nd</sup> defendant. In my view, the oral evidence of the plaintiff must be weighed against the oral evidence of the 1<sup>st</sup> defendant for none of them produced either the alleged sale agreement or the alleged lease agreement. Leaseholds over land for growing of trees would have to be for long periods as contrasted to leaseholds for the growing of annual or biennial crops. Leaseholds for the growing of trees would, in my view not be popular with land owners who would not predict when they may next need the land for their own purposes. I therefore find it strange that the 1<sup>st</sup> defendant would agree to such a leasehold, arrangement without any written and or registered lease to secure his interest and to provide for a definite term or events such as the number of harvests the plaintiff was entitled to.

13. Therefore the secretiveness with which the 1<sup>st</sup> defendant sold the land to the 2<sup>nd</sup> defendant renders him suspect, and contributes to this court's conclusion that he is concealing something. All this should be viewed against the claim of loss of the original agreement while it was in the plaintiff's vehicle, of which the 1<sup>st</sup> defendant was a chauffeur.

14. The further conduct of the 1<sup>st</sup> defendant, in denying that the plaintiff has possession of the land as at date, was curious. It appears that the defendant was not for some reason able to access the land out of knowledge that some interest thereof had been bought by the plaintiff otherwise he would have confidently commenced on the process of termination of the plaintiff's lease, if any in order to secure the land from the plaintiff's possession and sell it.

15. Further, the 1<sup>st</sup> defendant concealed the true status of the land and relations between him and the 2<sup>nd</sup> defendant who gave evidence as follows under cross-examination:-

***“I bought the shamba from Barasa. He told me the trees are his and he would cut them. He never cut the trees. He said he is far away in Kakamega and so on. If he said the trees are not his, I would not have bought the land. It is possible I was not told the truth. He never told me there is a court case. I would not have bought if he had told me. I would try enter but I would be prevented. I have never used the land”.***

16. From the evidence of the three parties and the conduct of the 1<sup>st</sup> defendant, I am convinced that the agreement between the plaintiff and the defendant, though not produced in court, was more than a lease agreement. It was a sale agreement. Otherwise the 1<sup>st</sup> defendant would not have pleaded an alternative defence of lack of consent.

### ***(2) Was the agreement null for want of a Land Control Board Consent?***

17. No consent of the Land Control Board was produced by any party in respect of the agreement between the plaintiff and the 1<sup>st</sup> defendant. The provisions of Section .....of the Land Control act states as follows:-

“S. 6.....

18. That Section states that a transaction such as a sale of land is void unless the Land Control Board of that area where the land is situated has granted its consent thereto. Section 8 of the Act provides that the application for such consent shall be made within 6 months of the making of the agreement. No application was produced before this court by the plaintiff. I therefore find that the agreement is null and void for want of consent of the Land Control Board.

***(3) Should the title in the 2<sup>nd</sup> defendant's name be cancelled and the land registered in the plaintiff's name?***

19. The plaintiff's claim against the 2<sup>nd</sup> defendant is for fraud. Unfortunately the 2<sup>nd</sup> defendant, according to the evidence in this suit, had no knowledge of the plaintiff's interests in the land as, first the plaintiff was not registered as proprietor and, secondly he never lodged any caution against the suit property. Besides, the 2<sup>nd</sup> defendant purely relied on the representations of the 1<sup>st</sup> defendant whom he had established to be the registered owner of the land. If any claim for fraud could lie in favour of the plaintiff, it would be against the 1<sup>st</sup> defendant only as the latter knew all the terms of his engagement with the plaintiff but proceeded to accept money and to transfer the land to the 2<sup>nd</sup> defendant.

20. However through lack of careful pleading that aspect of the case as against the 1<sup>st</sup> defendant is lost. I find that the 2<sup>nd</sup> defendant was a bona fide purchaser for value without notice and that his interests in the land should not be adversely affected. The claim for cancellation of his title should be denied.

### **Conclusion**

***(4) What Orders should issue***

21. I have found that there was an agreement between the 1<sup>st</sup> defendant and the plaintiff for the sale of land. I have also found that the sale to the 2<sup>nd</sup> defendant was effected without the 2<sup>nd</sup> defendant being notified of the circumstances that surrounded the suit land, that is, the plaintiff's occupation and the existence of this suit. Besides, I have found that the agreement for sale between the plaintiff and the 1<sup>st</sup> defendant was void for want of consent of the Land Control Board. **Section 7** of the **Land Control Board Act** states as follows:-

S. 7.....**Section 7** refers to **Section 22** of the Act which forbids acts in furtherance of a void transaction.

22. The plaintiff has however prayed for an alternative prayer of refund of Kshs.500,000/= being the amount paid to the 1<sup>st</sup> defendant, under the said agreement, plus interest thereon from March 2008 till payment in full. I find that in the circumstances of this case, this is the only proper remedy available to grant to the plaintiff. Consequently I grant judgment in favour of the plaintiff against the 1<sup>st</sup> defendant for refund of Kshs.500,000/= therefor plus interest at court rates from March, 2008 till payment in full. The costs of the plaintiff and of the 2<sup>nd</sup> defendant in this suit together with interest thereon at court rates shall be borne by the 1<sup>st</sup> defendant.

It is so ordered

Dated, signed and delivered at Kitale on this 21<sup>st</sup> day of **March, 2018**.

**MWANGI NJOROGE**

**JUDGE**

**21/3/2018**

Coram:

Before - Mwangi Njoroge - Judge

Court Assistant - Picoty

Mr. Bungei holding brief for Tigogo for 2<sup>nd</sup> defendant

Mr. Ingosi for the plaintiff

Mr. Wafula for 2<sup>nd</sup> defendant - absent

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**21/3/2018**