



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. 26 OF 2017

DENNIS KAMUKWA JOSEPH.....PLAINTIFF

VERSUS

MWANDO MUTHENGLI.....DEFENDANT

JUDGEMENT

INTRODUCTION

The plaintiff herein has instituted this suit against the defendant for the following orders:

- (i) A declaration that plaintiff owns a portion of land containing by measurements 72 feet by 64 feet by 86 feet within the parcel number Mwingi/Mwingi/3986.
- (ii) THAT a portion of land measuring 72 feet by 64 feet by 86 feet be curved from land parcel number Mwingi/Mwingi/3986 and be transferred to the plaintiff herein.
- (iii) THAT the executive officer to execute documents to effect transfer of the said parcel to the plaintiff.
- (iv) In the alternative that the defendant do refund the purchase price with an interest of 14% per annum from the 09/04/2016 till payment in full.
- (v) The costs of this suit be provided.

In a plaint dated 2nd May, 2017, the plaintiff averred that by an agreement dated 09/04/2017. The defendant sold him a portion of land from parcel No. Mwingi/Mwingi/3986 measuring 72 feet by 64 feet by 86 feet at a consideration of Kshs. 320,000/= which he paid in full.

The plaintiff further averred that after completing the sale transaction and applying and booking for consent from the Land Control Board, the defendant changed his mind and wrote to him purporting to cancel the contract.

In his statement of defence dated 3rd July, 2017 and filed the same date, the defendant averred that he did not change his mind on the sale of the suit property but that some controversy by his family arose over the land in question rendering him incapable of transferring the same. The defendant further averred that since consent to transfer the suit property has been denied by the beneficiaries of the suit property, he could not be able to transfer the same to the plaintiff.

PLAINTIFF'S CASE

The plaintiff contends that the defendant sold him a portion of his land measuring 72 x 86 and 64 feet by 86 feet at a consideration of Kshs. 320,000/=. Thereafter he bought materials which he deposited on site. Before he could start construction, the defendant told him that he wanted to refund the deposit and have his land back. He referred to his witness statement filed on 5th May, 2017 which was adopted in his evidence. According to the statement the plaintiff averred that in October 2016, the defendant failed to attend the Land Control Board arguing that his wife had not consented to the sale of the parcel of land. He stated that the defendants wife one Alice K. Mwando is aware of the sale transaction and that she even acknowledged receipt of the purchase price of Kshs.30,000/= paid on 9/4/2016. The same was produced as P Exhibit no. 4.

He also stated that the defendant wanted to refund him the purchase price but he refused to take it back.

The plaintiff also called one Patrick David Mutambo who is the Assistant Chief of Kyanika Sub-location within the jurisdiction of the suit property. He recalled that on 18/10/2016 the plaintiff came to his office with an agreement for the sale of plot. After reading the agreement he signed. Later he heard that the vendor went to the chief's office seeking to be added some money saying that the land they sold to the plaintiff was too big. The defendant was also complaining that she was not consulted before the sale transaction was conducted.

DEFENDANT'S CASE

The defendant admitted having agreed to sell to the plaintiff a portion of land to be carved from his land parcel No. Mwingi/ Mwingi/3986 measuring approximately 50 x 100 ft at a consideration of Kshs. 320,000. However a controversy arose from his second wife one Constance Mgangha who objected to the sale transaction. They held a meeting with his family and together they agreed to stop the sale transaction and to refund the plaintiff the purchase price but the plaintiff refused.

They also wrote to him a letter dated 28/10/2010 which was produced in evidence as D Exhibit No. 1. The plaintiff refused. They even agreed to enhance the interest rate to 14% per annum but the plaintiff declined.

PLAINTIFF'S SUBMISSIONS

The plaintiff through the firm of Kinyua Mwaniki & Wainaina Advocates filed their submissions on 6th March 2018 in which they submitted that the defendant's spouse one Alice Mwando did consent to the sale transaction. It is also submitted that the said Alice Mwando did sign an acknowledgement dated 18/10/2016. The alleged second wife living in Mombasa was not called as a witness and that she is an afterthought. The plaintiff's counsel also submitted that none of the defendant's family members and relatives were not aware of the defendant's second wife as alleged. Finally the plaintiff's counsel submitted that failure by the vendor to complete and perform his part of the sale transaction entitles the buyer to either take out proceedings for specific performance in which the vendor can be ordered to effect a transfer and complete the sale transaction as pleaded in the plaint.

Alternatively, the buyer can rescind the contract and sue for refund of deposit and amounts paid or seek damages for non-performance, interests, cost including legal costs and expenses.

DEFENDANT'S SUBMISSIONS

The counsel for the defendant represented by the firm of Raballa & Co. Advocates submitted that the plaintiff never showed any sale agreement between the plaintiff and the defendant. He referred to Section 3 of the Contract Act Cap. 23 Laws of Kenya which makes it a mandatory requirement that any disposition of interest in land must be evidenced in writing and signed by all the parties and their signatures certified by a witness. The defendant also submitted that the suit land has not been sub-divided and the consent to transfer which was obtained was superfluous as it does not indicate which parcel of land was to be transferred. On the issue of spousal consent the defendant submitted that section 5.6 of the Matrimonial Property Act of 2013 provides that in disposition of matrimonial properties there must be written spousal consent.

The defendant submitted that his second wife Constance Zighe Mgangha and who was estranged at the time of the said transaction declined to give consent.

The learned counsel cited the following cases in support of the defence.

1. Esther Njeri Mwangi –Vs- Equity Bank Ltd & Another ELC Case No. 91 of 2017
2. Lucy Njeri Nduta –Vs- Stephen Ngungi Kihara & Another ELC No. 3 of 2015

ANALYSIS AND CONCLUSION

The plaintiff in his case has sued the defendant for a declaration that he is the bonafide purchaser for value of a portion of land measuring 72 feet by 64 feet by 86 feet to be carved from land parcel No. Mwingi/Mwingi/3986. The land has not been sub-divided and no consent has been sought and obtained to sub-divide the same. The defendant in his defence has pleaded frustration due to failure to obtain consent from his second wife namely Constance Zighe Ngagha who lives in Mombasa.

I have also noted that there is no sale agreement produced by the plaintiff as required under Section 3 of the Law of Contract Act (Cap. 23) Laws of Kenya.

I agree with the submissions by counsel for the defendant that Section 6 of the Matrimonial Property Act of 2013 as read with Section 28 of the Land Registration Act requires spousal consent before disposal of any interest in matrimonial property. The defendant has stated that he had two wives and that one of them only consented to the sale transaction.

Since there is no consent to sub-divide and survey of the portion sought to be sold measuring 72 feet by 64 feet by 86 feet, it is superfluous to obtain a consent to transfer a portion of land that has not been sub-divided. Since the plaintiff in prayer No. (iv) of his plaint has sought the refund of the purchase price with interest of 14% per annum from the 09/04/2016. I find that to be the prudent order to issue at the moment.

For the aforesaid reasons, I find that this suit has no merit and the same is hereby dismissed. In the alternative, I order for the refund of Kshs. 320,000/= to the plaintiff plus interest at 14% per annum from the 09/04/2016 until payment in full. The defendant shall also bear the costs of this suit. It is so ordered.

Read, delivered and signed in the open court this 30th day of April, 2018.

Hon. E. C Cheronno (Mr.)

ELC Judge

In the presence of:

1. Mr. Kinyua for plaintiff
2. Plaintiff
3. Mr. Munyoki for defendant
4. Ijabo-Court Clerk