



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO 440 OF 2017

WATSON MUTAHI MWANGI.....PLAINTIFF

VS

KIMANI KARIU.....DEFENDANT

JUDGMENT

1. The Plaintiff claims a Purchaser's interest over 0.6 acres out of Land Parcel No. LOC.6/MUTHITHI/231 having purchased the same from the Defendant for a consideration of Kshs. 60,000/-.

2. The Plaintiff by a plaint filed on 29/08/2017 sued the Defendant herein for specific performance of the contract and sought an order to compel the Defendant to transfer 0.6 acres out of land parcel No. LOC.6/MUTHITHI/231 to the Plaintiff and also prays for costs of the suit.

3. The Plaintiff's claim is that he and the Defendant herein entered into a sale agreement for purchase of 0.6 acres of land out of Land parcel No. LOC.6/MUTHITHI/231 owned by the Defendant. That the consideration for that parcel of land was agreed at Kshs. 60,000/-. That the Plaintiff paid a sum of Kshs. 26,000/- and is able and willing to pay the balance of the purchase price.

4. The Plaintiff claims that the Defendant failed to transfer the 0.6 acres to him despite several demands to do so. He now seeks the intervention of the Court to compel the Defendant to discharge his obligations under the contract.

5. The Plaintiff states that the Defendant was served with the summons to enter appearance on the 13.9/2017 and has attached an affidavit of service dated 22.9.2017 to support the averment.

6. The Defendant did not enter appearance neither did he file any response to the claim. The Plaintiff filed a request for interlocutory judgment on 11.10.2017. The same was granted on 23.10.2017.

7. The matter then proceeded to formal proof on 23.1.2018. The Plaintiff testified that he is a civil servant and that he had entered into an agreement for purchase of land with the Defendant vide an agreement dated 04.03.2014 which was signed by him and the Defendant in the presence of an Advocate. That upon signing the agreement he paid a deposit of Kshs.22, 000/- to the Defendant and has so far paid a sum of Kshs. 26,000/-. He produced a copy of the sale agreement, the mutation form and a copy of the demand letter in support of his case. He informed the Court that the Defendant was in possession of the suit land and that the 0.6 acres was never excised from the main land. That the land is agricultural land therefore subject to the Land Control Board and that the Defendant never applied for the consent to transfer the said land to him.

8. The Plaintiff submitted that his claim is well anchored in law because there is on record a sale agreement signed by both parties in the presence of an Advocate. That the Defendant even proceeded to receive the deposit of the purchase price hence demonstrating his intention to be bound by the terms of the agreement. That the Defendant failed or refused to defend the suit despite being personally served with the summons. That the suit proceeded ex-parte and the Plaintiff adduced evidence to show that he is entitled to 0.6 acres from the suit land. The Plaintiff is of the view that the failure on the part of the Defendant to defend the suit would only be interpreted to mean that the Defendant has no viable defence to the suit or if he filed any papers the evidence would tilt heavily against him. The Plaintiff maintains that he has discharged the evidential burden as required in law and prays for his prayers to be granted as sought.

9. It is trite law that Courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of **Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592**, Scrutton L.J. held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract.”

10. In the case of **Attorney General of Belize et al Vs Belize Telecom Ltd & Another (2009), 1WLR 1980** at page 1993, citing Lord

Person in **Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973) 1 WLR 601 at 609**, held as follows:

“The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the Court thinks some other terms could have been more suitable.”

11. The import of the above legal authorities is to show the role of the Court which is to interpret the contract as written and agreed upon by the parties. The Plaintiff’s claim is mainly founded on the sale agreement between him and the Defendant. The agreement captures the usual clauses in a general sale agreement of land while its default clause indicates that the party in default shall pay the party not in default 100% of the monies paid. It is also a term of the agreement that the balance of the purchase price was to be paid by the Plaintiff after the transfer is done. The terms of the agreement between the parties herein is therefore very clear and binding upon the parties.

12. The agreement between the parties was agreed upon on 04.03.2014 after which the Defendant was expected to proceed to subdivide the land and excise 0.6 acres to be transferred to the Plaintiff. It is the testimony of the Plaintiff that that was never done.

13. Section 6 of the Land Control Board states as follows;

“Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act. **(emphasis mine)**.

14. The subject land being agricultural land is subject to the land control board, the Defendant ought to have proceeded to obtain consent of the land board within six (6) months after the making of the agreement as required under the Land Control Act failure to which the agreement becomes void and the Plaintiff would only be entitled to a refund of the monies paid towards the purchase price. Reference is made to section 6,7 and 8 of the Land Control Act Cap 302.

15. Section 22 of the said Act even criminalizes the transaction as follows;

“Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6 of this Act, and any person—

(a) pays or receives any money; or

(b) enters into or remains in possession of any land,

in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment”.

16. In the case of **Hirani Ngaithe Githire v Wanjiku Munge [1979] KLR 50**, Chesoni, J (as he then was) stated at page 52:

“Section 6 of the Land Control Act is an express provisions of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The Court cannot do that; for it is not for us to legislate but to interpret what parliament has registered. So in this case that agreement between the parties having being entered in June 1969 became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it; and since no consent had been obtained within that time, nothing can revise or resurrect such an agreement. Failure to obtain the necessary Land Control Board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a land control area unless the consent of the Land Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes.”

17. Similar sentiments were expressed in the case of **Onyango & Another v Luwayi [1986] KLR 513** at page 516 Nyarangi, J stated:

“The appellants admitted that no consent for the proposed transaction concerning agricultural land had been given by the Divisional Land Control Board. The transaction was therefore void for all purposes under Section 6(1) of the Land Control Act, Cap 302 because the transaction was not excluded by Section 6(3). An application for consent in respect of the proposed sale of the material parcel of land had to be made to the appropriate Land Control Board within six months of the making of the agreement ... No such

application was made. That agreement therefore is of no effect and no question of specific performance can lawfully arise.”

18. In view of the agreement being void for all purposes, specific performance, included, it follows that the claim of the Plaintiff cannot succeed. Specific performance is an equitable remedy and cannot be granted where there is apparent illegality such as in this case. In any event specific performance is granted interalia when monetary damages are inadequate or the damages cannot be possibly established. In this case the contract is void and section 7 prescribes the remedy in a case such as this, which is payment of refunds. The Plaintiff however has not sought refunds of the purchase price paid to the Defendant todate.

19. The Plaintiff’s claim fails and is dismissed with costs.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 19TH DAY OF APRIL 2018.

J.G. KEMEI

JUDGE