



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 388 OF 2011

PETER THURANIRA NDUBAIPLAINTIFF

VERSUS

KIRIINYA MWENDIA MWITHIMBUDEFENDANT

JUDGMENT

1. This suit was commenced by way of a Plaint dated 21st December, 2011. In the Plaint the Plaintiff is seeking for an order of specific performance to compel the Defendant to release the necessary completion documents to complete the sale and effect the transfer of the suit property measuring 8 acres, a sub-division of L.R. No. 14751/3, to him.
2. The Plaintiff has averred in the Plaint that by an agreement dated 1st November, 2011, the Defendant agreed to sell to him land measuring 8 acres being a sub-division of L.R. No. 14751/3 Machakos for Kshs. 4,960,000; that Kshs. 1,500,000 was to be paid upon sub-division of the suit land and that the Plaintiff is ready and willing to complete the transaction.
3. In his Defence, the Defendant averred that it is not true that he had given to the Plaintiff vacant possession of the land; that the land being Trust land, the consent of the entire family was required and that his daughters have since objected to the sale of the suit land.
4. According to the Defendant, he is willing to refund to the Plaintiff the deposit that he was paid by the Plaintiff.

The Plaintiff's case:

5. The Plaintiff, PW1, informed the court that he entered into a Sale Agreement for the sale of 8 acres of land known as L.R. No. 14751/3 at a price of Kshs. 4,960,000; that he paid to the Defendant Kshs. 1,500,000 being the deposit and that the completion period was 120 days.
6. According to PW1, he took possession of the eight (8) acres and fenced it. It was the evidence of PW1 that the Mavoko Land Control Board gave its consent to sub-divide the land on 11th January, 2011 and that the Defendant has declined to give him the completion documents.
7. It was the evidence of PW1 that the Defendant's family was aware of the transaction and that they both attended to the Board before the consent was given. PW1 stated that he received several letters from the Defendant's advocate requesting for the extension of the completion date.
8. Other than the consent of the Board to sub-divide the land, PW1 stated that he was not aware of any other consent that was required from the Board; that the Defendant never informed him that any member of his family was objecting to the sale and that the Defendant has been selling the other sub-divisions to third parties.

The Defence case:

9. The Defendant stated that he is the registered proprietor of L.R. No. 14751/3 measuring 22.22Ha. According to DW1, he entered into an agreement of sale with the Plaintiff in respect of eight (8) acres of the suit land; that he applied to the Board for the sub-division of the suit land and that the Application to sub-divide the land was approved by the Board in November, 2010.
10. However, two of his daughters objected to the sale of the land and that he apologized to his daughters for not consulting them before he entered into the agreement of sale with the Plaintiff. According to DW1, he informed the Plaintiff in writing about the obstacles he had encountered in respect to the transaction. The Defendant denied that the Plaintiff has fenced or developed the suit land.
11. In cross-examination, DW1 stated that all his three children are adults and that he purchased the suit land. According to DW1, none of his

children assisted him in buying the land and that in the year 2011, he sought to sell 40 acres to a third party.

12. DW2 stated that he lives in the neighborhood of the suit land and that he has never seen the Plaintiff develop the suit land. DW2 stated that there is nothing on the suit land and that the Plaintiff has neither fenced it nor planted trees on the suit land.

Submissions:

13. The Plaintiff's advocate submitted that a valid Sale Agreement was entered into between the Plaintiff and the Defendant; that the consent of the Land Control Board was obtained and that the Defendant's daughters could not have legally objected to the sale of the suit land. Counsel relied on several authorities which I have considered. The Defendant's advocates submissions were not on record.

Analysis and findings:

14. It is not in dispute that the Plaintiff entered into an agreement of sale of 8 acres of Land Reference Number 14751/3 with the Defendant. In the said agreement dated 1st November, 2010, the Defendant agreed to sell to the Plaintiff the suit land at a consideration of Kshs. 4,960,000.

15. The agreement provided that the Plaintiff was to pay a deposit of Kshs. 1,500,000. The balance of the purchase price was to be paid to the Defendant's advocates in exchange of the completion documents. The completion date was agreed at 120 days from the date of the agreement.

16. Clause 7 of the Agreement provided that possession of the suit land shall be given to the purchaser upon completion and only after the full purchase price had been paid.

17. By a letter dated 26th October, 2011, the Plaintiff's advocates informed the Defendant's advocate that the Plaintiff was willing to deposit with them the balance of the purchase price notwithstanding that the Defendant had not secured all the completion documents. In response, the Defendant's advocates informed the Plaintiff's advocate that the process of obtaining the completion documents had been hampered by the government's embargo on land transactions in Athi River Land Control Board area of jurisdiction.

18. The Defendant's advocate further informed the Plaintiff's advocate vide a letter dated 17th November, 2011 that some of the Defendant's family members had objected to the sale of the suit land.

19. Although the Defendant informed the court that his two daughters objected to the sale of the suit land, the evidence before me shows that the Defendant was not holding the suit land in trust for his children. Indeed, the Defendant informed the court that he bought the suit land using his money and that he has not put up a matrimonial home on the land.

20. Indeed, although a party can hold land in trust for someone else, the existence of such a relationship has to be proved. Neither the Defendant nor his daughters proved that the Defendant was holding the suit land in trust for his children. In fact, the Defendant's daughters did not testify in this matter to explain and show that the Defendant is holding the title document in respect of the suit land in trust for them.

21. The Defendant admitted that he obtained the consent of the Land Control Board to sub-divide the suit land. However, it was his testimony that he never obtained the consent of the Board to transfer the eight (8) acres to the Plaintiff. This evidence was corroborated by the Plaintiff who stated that the only consent of the Land Control Board that he is aware of is the one approving the sub-division of the land but not the transfer.

22. Section 6(1) of the Land Control Act provides that any transaction involving the sale of agricultural land is void for all purposes unless the Land Control Board has given its consent. Section 7 of the Act provides that if any money has been paid in the course of a controlled transaction that is void under the Act, the money or consideration paid shall be recoverable as a debt by the person who paid it from the person to whom it was paid.

23. The Court of Appeal has on numerous occasions held that the court cannot enforce an agreement for the sale of land which is void for want of the consent of the Board. In the case of *Githu vs. Katibi (1990) KLR 634*, the Court of Appeal held as follows:

“As there was no Application for consent made to the relevant Land Control Board, the Respondent had no legal interest capable of registration under the Registration of Titles Act.”

24. In the case of *Mukota vs. Donati (1987) KLR 280*, the Court of Appeal stated as follows:

“Under the law, the Respondent could not have filed suit for specific performance of the contract of the sale of the land until he obtained the Land Control Board's consent. It is the law of this country that unless the transaction is consented to by the Land Control Board, the would be purchaser will have no claim of title to the land after three (3) months [six (6) months] from the date of the agreement. He will be regarded as a trespasser.”

25. In a more recent decision – *Rose Wakanyi Karanja & others vs. Walter Karanja & others (2016) eKLR*, the Court of Appeal was categorical that the consent of the Land Control Board must be obtained within six (6) months of the date of the Agreement, and that any consent obtained outside the six (6) month's is invalid.

26. Consequently, in the absence of evidence to show that the parties herein obtained the consent of the Land Control Board to transfer the suit land to the Plaintiff, this court cannot enforce the agreement of 1st November, 2010. Indeed, an order of specific performance cannot issue where the agreement of sale is void. The most that the Plaintiff is entitled to is a refund of the money paid to the Defendant.

27. For those reasons, I dismiss the Plaintiff dated 21st December, 2011 but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE