



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

ENVIRONMENT AND LAND COURT

ELC CASE NO. 78 OF 2017

(Formerly Kisii ELC case no.464 of 2015)

KRISANTUS ODERO.....PLAINTIFF

-VERSUS-

BHAVIN ASHWIN GUDKA

ASHWIN RAMJI GUDKA.....DEFENDANTS

JUDGMENT

1. The plaintiff namely KRISANTUS ODERO has sued the defendants namely **BHAVIN ASHWIN GUDKA** (1st defendant) and **ASHWIN RAMJI GUDKA** (2nd defendant) jointly and severally by way of a plaint dated 9th October 2015 and filed in court on 13th October 2015. He is seeking the following orders:-

- a) **An order directing the respondent to remit the title deed to LR. KANYAMWA/KABONYO/KWANDIKU/1515 (the suit property) to Krisantus Odero, the plaintiff herein who is the registered and legal owner of the said property.**
- b) **An order directing the Land Registrar –Homa Bay Land registry to remove the caution on the suit property.**
- c) **Costs of this suit.**
- d) **Interest in (a) and (b) at court rates.**

2. By a statement of defence and counter claim dated 14th December 2015, the defendants denied the claim by PW1 and sought dismissal of the suit with costs. The 1st defendant who is the counter claimer has sought the following reliefs against PW1:-

- a) **Declaration that PW1 is bound by the terms of the sale agreement dated 4th March 2014 over and in respect of the suit property and hence enjoined to specifically perform his (PW 1) part of the bargain.**
- b) **An order to compel the PW 1 to facilitate the transfer and registration of the suit property in favour of the counter claimer and in default, the honourable court to direct to the procurement and execution of the transfer instrument by the Executive officer or such other authorized officer of the court, to enable the completion of the transaction.**
- c) **Permanent injunction restraining PW 1 either by himself, agents servants and/or anyone claiming under PW1 from selling alienating, disposing of, charging transferring and/or otherwise interfering with the title over and in respect of the suit property whatsoever and/or howsoever.**
- d) **Costs of the cross suit be borne by PW 1.**
- e) **Such further and/or other relief as the honourable court may deem fit and expedient.**

3. PW1 filed a defence to counter claim dated 30th March 2016 whereby he denied the contents of the counter claim. He sought dismissal of the counter claim with costs and that Judgment be entered in terms of the reliefs sought in the plaint.

4. Learned counsel Mr. H.Obach of H.Obach and partners advocates represents the plaintiff PW1. The defendant are represented by M/s Ogututu, Ochwangi, Ochwal and Co. advocates formerly Ogututu Mboya & Co. Advocates.

5. The summary of the claim by PW1 is that he is the registered proprietor of the suit property which he decided to sell due to his failing health and financial problems. In that regard, on 4th March 2013, the defendants sent their employees/agents namely JOSEPHAT OSUMBA KUNGU (PW2) and GEORGE OPANY (PW3) to PW1, who showed them his title deed to the suit property (PExhibit 1.) PW1 accompanied them to the office of the defendants in Kisii town where PW1 signed a land sale agreement dated 4th March 2013 (PExhibit 3) without knowing that it was an agreement for sale of the suit property. They did not agree on the purchase price in respect of the property as the defendants offered kshs. 1,500,000/= which was far below the expectation of PW1, who left Exhibit 1 with the 2nd defendants for safe custody..

6. PW1 stated that his family made reservation on the purchased price offered by the defendants. Later the defendants' agents including PW3, picked up PW1 and went to the Land Control Board, Ndihiwa which declined to grant consent for the transfer of the suit property on the basis that the defendants had not made any payments for the purchase of the suit property. The land control board declined so on three occasions citing the same reason. The defendants never made the requisite payment to PW1.

7. PW1 further stated that he was forced to scout for another purchaser who gave him a better deal for the suit property. The land control board gave consent to the sale of the property to the 2nd purchaser hence the purported land transaction between PW1 and the defendants aborted. The defendants refused to surrender PExhibit 1 to PW1 rendering the filing of the present suit necessary.

8. On 19th June 2017, parties consented in the following terms :-

a) List of documents dated 4th November 2016 filed in court on 29th November 2016 by PW1 be admitted as PExhibits 1 to 5 respectively.

b) Documents No.3 on the list in (a) herein above to read that :-

“Sale agreement dated 4th March 2013 in lieu of 4th March 2015.”

9. The defendants' case in brief is that the claim by PW 1 is denied. They stated that PW1 approached them with a view of selling the suit property whose purchase price was negotiated and settled at Kshs. 1,800,000/= which the PW1 duly admitted, conceded and acknowledged. That PW1 met and transacted with the 1st defendant leading to the execution of the land sale agreement dated 4th March 2014 (PExhibit 3) and transfer instrument in favour of the 1st defendant. They further stated that PW1 did obtain the Land Control Board consent in respect of the sale transaction. The defendants lodged a caution to vindicate their rights over the property.

10. The 2nd defendant (DW1) referred to title deed issued on 22/12/2009- PExhibit 1, Certificate of Official Search dated 12/3/2015- PExhibit –Pexhibit 2, Land sale agreement dated 4/3/2013-PExhibit 3, Ndihiwa Land Control Board proceedings of 19/3/2014 –Pexhibit 4. He produced the following documents;

(a) A land transfer of 21/3/2015 –(Dexhibit 1) and

(b) A caution dated 20/1/2015 (Dexhibit 2) .

11. The 1st defendant/counter claimer stated that PW1 voluntarily entered into PEXhibit 3 and the consideration of kshs. 1,800,000/= was to be paid upon the transfer and registration of the suit property in favour of the 1st defendant/counter claimer. That PW1 failed, neglected and or refused to honour the terms of PExhibit 3. He pleaded particulars of breach of contract on the part of PW1 which include:-

a) Failing and/or refusing to surrender the Land Control Board Consent.

b) Failing and/or refusing to surrender a copy of the Pin Certificate.

c) Attempting to resile and/or renege on the terms of PExhibit 3.

d) Misrepresenting facts pertaining to the circumstance leading to the execution of PExhibit 3.

e) Attempting to sell the suit property to a third party.

f) Acting and/or attempting to act in a fraudulent manner.

g) Resorting to evasive and criminal tactics to defeat the sale agreement(PExhiit 3).

12. Learned counsel for PW1 filed a 16 paged submissions dated 2nd February, 2018. The submissions exceeded 10 pages contrary to practice direction No. 33(b) of the Environment and Land Court Practice Directions dated 23rd July,2014 which provides:-

“Parties shall submit written submission that summaries their arguments, and which do not exceed 10 pages (unless the

Judge certifies the matter as complete and parties are granted leave to file lengthy submissions owing to the nature of the case)” (Emphasis added)

13. Be that as it may, I bear in mind that the ultimate goal of this court is to dispense substantive justice in consonant with **Articles 50(1) and 159 (2) (d) of the Constitution of Kenya 2010**. Therefore the relevant submissions in 10 pages are considered accordingly.

14. In his submissions, learned counsel for PW1, provided the background and brief facts of the plaintiff and the defendants cases. Counsel identified issues for determination and analysed them. The issues are;-

i. Whether the sale agreement entered by the parties herein on the 4th March, 2013 was null and void ab initio for the failure to seek the consent of the land control board.

ii. Whether the lack of consideration and uncertainty rendered the contract unenforceable.

iii. Whether specific performance can be ordered.

iv. Whether the caution registered by the 2nd defendant was properly registered.

v. Who is liable for damages if at all?

15. Learned counsel further cited authorities, among them as hereunder:-

a) Clause 16 of the Law Society conditions of sale (1989 Edition) Law Society of Kenya Act.

b) Section 6 of the Land Control Act, Cap 302 Laws of Kenya.

c) Hirani Ngaithe Githire –v- Wanjiku Munge (1979)KLR 50,

d) Onyango & Anor –v- Luwayi , (1986) KLR 513.

e) Mucheru –v- Mucheru (2002) 2EA 456

f) Section 3 of the Law of Contract Act Cap 23

g) Muchira –v- Gesima Power Mills Ltd (2004) 2EA 168.

h) Halsbury’s Laws of England,4th Edition Vol. 9 paragraphs 566,568 and 569.

16. Learned counsel for the defendants filed submissions dated 27th February 2018 giving background of the case, orders sought, evidence adduced including particulars of breach of contract on the part of PW1 and analysis of the evidence on record. Counsel relied on the case of **National Bank of Kenya Ltd –v- Pipeplastic Samkolit (K) Ltd & anor. Civil Appeal No. 95 of 1999, Court of Appeal at Nairobi.**

17. PW1 called PW2 and PW3 as his witnesses. He identified P Exhibits 1 to 5 in his evidence. The 2nd defendant (DW 1) testified in regard to the statement and counter-claim, referred to PExhibits 1 to 5 and produced DExhibits 1 & 2 in evidence.

18. I have considered the pleadings, evidence of PW1, PW2, PW3, and DW1 as well as submissions in this matter. In the case of **Galaxy Paints Co. Ltd –v- Falcon Grounds Ltd (200) 2 EA 385,** it was stated that issues for determination in a suit generally flow from the pleadings or such other issues as the parties had framed for the courts determination. The statement of agreed issues (defendants version dated 10th March 2016 and five (5) issues framed by the plaintiff counsel in the submissions, dated 2nd February , 2018, boil down to the following issues for determination by this court;-

a) Are the parties legally bound by the terms of land sale agreement dated 4th March 2014?

b) Is the PW1 entitled to the orders sought in his plaint dated 9th October 2015?

c) Is the 1st defendant/counter claimer entitled to the reliefs sought in the counter claim dated 14th December 2015?

19. It is the duty of the court to evaluate and analyse all evidence, see **PIL Kenya Ltd –v- Opong (2009) KLR 442.**

20. PW1 stated that he entered into negotiation with the defendants for the sale of the suit property, but the 2nd defendant/DW 1 gave him a very low offer that was way too below his expectation. That he was made to sign PExhibit 3, and transfer form in ignorance. He left DW1 with PEXhibit 1 for safe keeping pending the conclusion of the sale transaction and that DW1 never made any payment or deposit for the transaction. As the defendants failed to make requisite payment, the transaction aborted and the defendants lodged a caution (DEXhibit 2) on the suit property.

21. PW1 further stated that he never signed an agreement of sale of the suit property. He testified, inter alia :-

“The defendant gave me an agreement written by themselves. I signed it without knowing what it was. I was not with any member of my family. I signed it before I went home to inform my family members. I did not sign an agreement of sale of the suit land at purchase price of Kshs. 1,800,000/=.”

22. In cross exam, PW1 denied knowledge of PExhibit 3. He stated in part thus :-

“I don’t know agreement between the defendants and myself dated 4/3/2013..... I am not bound by it. I did not sign any agreement and transfer thereof. The signature of transfer dated 4/3/2013 looks like mine. It is not mine. I have not reported the incident to the Criminal Investigation Department.....”

23. PW2 testified that he was together with PW2 when DW 1 sent them to get a piece of land for purchase in Homa- Bay County. PW2 and PW3 saw the land and that PW1 and DW1 discussed the proposed transaction in the absence of PW2. Therefore PW2 did not witness PExhibit3.

24. According to PW3, PExhibit 3 was signed by PW1 in his (PW3) presence. This witness identified PExhibit 3. He reiterated his evidence in chief during cross examination that;-

“PW1 and 2nd defendant signed PExhibit 3 in my presence. I saw PW1 sign it. He signed it voluntarily.”

25. In the words of DW1, the 1st defendant and PW1 signed PExhibit 3. He stated that the agreed consideration for the sale of suit property was Kshs. 1,800,000/=. That he paid Kshs. 50,000/= for PExhibit 1 which was in the custody of G.S. Okoth Advocate. He further stated that PW1 signed PExhibit 3 and DExhibits 1. He also identified PExhibits 1 to 5 and DExhibits 1& 2.

26. In cross-examination DW1 denied that PExhibit 3 is frustrated and that the contract (PExhibit 3) cannot be rescinded. He stated, inter alia;-

“It is not true that DExhibit 3 is frustrated. I don’t possess the land and contract can’t be rescinded as shown at paragraphs 10 & 13 of PExhibit 3.”

27. PExhibit 3 appears to have been drawn by E. J.M. Masese Esq Advocate. The same was signed by PW1 and the 1st defendant. DW 1 stated that he paid 1st instalment of Kshs. 450,000/= to PW1 as per clause No. 4 of PExhibit 3 and he retained(PExhibit 1) thereof.

28. At clause 9 of PExhibit 3 the completion of PExhibit 3 was expressly stated as follows;-

“The completion date shall be within three (3) months from the execution hereof or such earlier date as the parties may in writing agree or upon successful registration of the duly executed transfer in the purchaser’s name, whichever is earlier, and the said completion shall take place at the office of M/S G.J.M. MASESE ESQ, ADVOCATE.” (Emphasis added)

29. The defendants had the liberty to rescind PExhibit 3 and get a full refund of the amount paid to PW1. PExhibit 3 at clause 12 provides as follows:-

“In the event that the Vendor fails to complete the transaction in accordance with the terms and conditions of this agreement, the purchaser shall have the option to rescind the contract and get a full refund of their monies paid.” (Emphasis provided).

30. After the making of PExhibit 3, there was an attempt to obtain consent of the land control board by way of PExhibit 4 and transfer the suit property through (DExhibit1). The land control board of the land control area did not give consent to PExhibit 3.

31. Section 6(1) of the Land Control Act Cap 302 Laws of Kenya provides;-

“Each of the following transactions that is to say (a) the sale or other disposal of or dealing with any agricultural land..... is void for all purposes unless the land control board for the land control area..... has given its consent in respect of that transaction.....”(Emphasis supplied).

32. Furthermore, under **Section 8(1) of the Land control Act (Cap 302)**, an agreement to a controlled transaction becomes void for all purposes at the expiration of six months after the making of the agreement if application for the appropriate land control board’s consent has not been made within that time.

33. Since the land control board of the area did not grant consent, the transaction in terms of PExhibit 3, is void; see **Hiran Ngaithe Githire case (supra)**.

34. Nonetheless the 1st defendant/counter claimer can recover valuable consideration or money paid in the course of the controlled transaction pursuant to **Section 7 of the Land Control Act** which provides;

“if any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22”.

35. In **Kariuki –v- Kariuki (1983) KLR 227**, it was held that the only remedy open to a party to a transaction which has become void under the Act is that he can recover any money or consideration paid in the course of the transaction under Section 7 of the Land Control Act (Cap 302).

36. This court is aware of **Section 97 (1) of the Evidence Act (Cap 80 Laws of Kenya)** on proof of terms of contract. The contract (PExhibit 3) stands rescinded for nonperformance or completion within three months as per clause 12 of it. It is legally sound as judicially recognized in the case of **Miriti (Supra)** and **Sumaria & Anor –v- Allied Industries Ltd (2007) 2 KLR** on part performance doctrine.

37. Clearly PW1 cannot be forced to transact over his property. The defendants who have no constitutional right to retain PExhibit 1, as the right of PW1 to the suit property is jealously protected under **Article 40(1) of the Constitution of Kenya, 2010**. PExhibit 3 was not performed. There was no meeting of minds between PW1 and the defendants see **Muchira –v- Gesima Powers Mills case (Supra)**.

38. In the counter claim, the 1st defendant/counter claimer sought among other reliefs;-

“such further and or other relief as the court may deem fit and expedient.”

39. The defendants have tried to demonstrate inconvenience they have suffered in attempts to obtain the suit property. I find the case of **Eric Adome & anor (supra)** a useful guide on entitlement of a party to minimum amount in respect of a claim for general damages bearing in mind the circumstances of the case. PExhibit 3 was rescinded for non- performance. If the 1st defendant/counter claimer were to succeed in his claim against PW1, I would have awarded him an approximate sum of Kshs 100,000/= as general damages in the circumstances of the case in lieu of the reliefs sought in the counter claim: see **Femandes –v- Rosterman Gold Mines (1954) 21 EACA97**.

40. In the present case, no general or special damages are recoverable in respect of a transaction which is void for all purposes for want of consent, see **Kariuki case (supra)**.

41. In the upshot, the plaintiff case is proved on a balance of probability against the defendants jointly and severally. The 1st defendant/counter claimer is entitled to the consideration of kshs. 500,000/= paid to the plaintiff (PW1).

42. Accordingly the suit and the counter claim be and are hereby determined in the following terms;-

a) I enter judgment in favour of the plaintiff against the defendants in terms of orders, (a) and (b) of the plaint dated 9th October 2015.

b) I enter judgment for the 1st defendant/counter claimer against the plaintiff for a refund of Kshs. 500,000/= together with interest at court rates from the date of filing the counter claim in lieu of orders sought in the counter claim dated 14th December 2015.

c) Orders (a) and (b) herein above to be complied within ninety (90) days from the date hereof.

d) On costs, the proviso to **Section 27(1) of the Civil Procedure Act (Cap 21)** and the case of **Samwel Kamau Macharia & Anor –v- KCB & 2 Others (2012) eKLR** are relevant. Parties are represented by counsel and have incurred costs. The plaintiff and the 1st defendant/counter claimer shall bear their own costs of the suit and the counter claimer respectively.

DELIVERED, DATED and SIGNED at MIGORI this 11th day of APRIL 2018.

G. M.A. ONGONDO

JUDGE

In presence of :-

Mr. Ochwangi learned counsel for the defendants/counter claimer

Tom Maurice – Court Assistant.