



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 109 OF 2011

AMBROSE OKANGA LUSENO.....PLAINTIFF

VERSUS

LEONARD KIBIKU MASAFU (*Suing as personal representative of the estate of*

AINEA WAFULA MASAFU (deceased).....DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiff commenced these proceedings by a plaint dated 19th December 2011 which was filed on the same day. He sought the following orders:

- a) **Specific performance of the agreement dated 18/8/2009 compelling the defendant to transfer the suit property to the plaintiff and in default the deputy registrar do sign the relevant documents of transfer on behalf of the defendant;**
- b) **a permanent injunction restraining the defendant from in any manner interfering with the plaintiff's possession and occupation of the suit land;**
- c) **Costs;**
- d) **Interests.**

2. The defendant filed his defence on the 27th January 2012. The plaintiff replied to that defence on 3rd February 2012 and later amended his plaint on 2/7/2014.

THE PLEADINGS

The plaintiff's Case.

3. The plaintiffs' case is that on or about 1/8/2008 he and the defendant entered into a written sale agreement for sale of one acre of land to the plaintiff from all that land known as **Kitale Municipality Bidii Block 14/43** at a consideration of Kshs. 420,000/= whereupon the plaintiff paid a down payment of Kshs. 180,000/= and further payments amounting to Kshs. 143,000/=. The plaintiff took possession of the suit land immediately upon execution of the agreement and developed the same. However some time later the defendant refused to accept the plaintiff's instalments and returned Ksh 43,000/= to the plaintiff and threatened the plaintiff with eviction and he started fencing off the land hence the suit.

The Defendant's Defence.

4. The defendant denied the plaintiff's claim. He specifically denied executing the agreement on 1/8/2008. However in the same breath he avers that the plaintiff was to complete payment of the purchase price by December 2009 which he failed thus breaching the agreement. On the basis of the foregoing the defendant avers that he rightfully rejected the sum of Kshs. 43,000/= submitted late. Further the defendant states that the agreement is null and void for want of consent of the Land Control Board, and also denies that the plaintiff had taken possession of one acre as alleged.

The Plaintiff's Reply to Defence.

5. The plaintiff in reply to the defence of the defendant joined issues with him and averred that the suit land is situate within the municipality hence there is no need of the consent of the Land Control Board.

THE EVIDENCE OF THE PARTIES.

The plaintiff's Evidence

6. PW I the plaintiff, testified that the defendant sold him the land which measures one acre and produced the agreement dated 1/8/2008. He also produced a receipt of Ksh 180,000/= which he termed as the down payment. According to him the parties agreed that the balance be paid by way of 3 instalments of Kshs. 80,000/= each in 3 months. He was however not able to obtain the money for the first instalment and communicated this to the seller. He accepted the money that the plaintiff had. The plaintiff produced more receipts for money paid to the defendant.

7. He used the land for 2 years between 2009-2010. However in the year 2011 he failed to get salary due to illness and failed to pay the money whereupon he received a letter from the seller's advocate saying that the seller no longer wished to sell the land due to the plaintiff's default. According to the plaintiff the debt then stood at Ksh 75,000/= but the advocates were claiming Ksh 100,000/=. He claims that he was not issued a receipt for Ksh 37,000/= which he gave to the deceased who was seriously ill then. It was after the deceased died that a person called Leonard took over the land and though he did not reside on the land, he worked on a portion thereof measuring approximately half an acre forcefully. The plaintiff was informed by his advocate that some money had been rejected but he never got it back. The plaintiff prays for full ownership of the land or a refund. Upon cross examination the plaintiff agreed that he paid the monies comprising the purchase price in sums smaller than the agreed instalments, but avers that he apologized for the delay. He avers that his advocates admitted receiving a refund cheque but it bounced. He also admitted that the transaction required the Land Control Board's consent.

8. PW2 testified that the plaintiff is his nephew and that the late Ainea Wafula sold the plaintiff a one acre parcel of land. He witnessed the making of the agreement and signed as a witness. He corroborated much of the plaintiff's evidence. However he never witnessed payment of the instalments. Upon cross examination he agreed that the plaintiff never paid the purchase price as stipulated in the sale agreement.

The Defendant's Evidence.

9. The defendant testified that he is the administrator of the estate of the late Ainea Wafula Masafu who was the original defendant in this case. He admitted the sale agreement. Regarding one acre of land and the payment of Kshs. 180,000/= at the date of execution. He admitted that the plaintiff made some payments in the years 2010 and 2011 regarding the land but averred that these payments were not in accord with the terms of the agreement. He produced a letter, "D.Exh 1" as evidence of the plaintiff's acknowledgement of default. He testified that the deceased never accepted the Kshs. 43,000/= deposited with his advocate as a further payment but instructed the advocates to return the money to the plaintiff's advocates. He produced a letter dated 18/3/2011 to support the allegation that the money was indeed refunded. According to the witness the plaintiff only paid Kshs. 256,000/=. He produced the original records book that the deceased kept in respect of the payments. To him, it was the plaintiff who breached the agreement and as the land is of agricultural use, the agreement was subject to a consent from the Local Land Control board which was never obtained by the parties. The plaintiff also occupies half an acre of land due to the breach. According to the defendant the defendant's father gave the plaintiff half an acre due to the plaintiff's default. In cross examination the defendant averred that B.N. Muniolo Advocates were not acting for his father and that she had no instructions to receive the Kshs. 43,000 on his behalf. However, the advocate had the authority from his late father to refund the money to the plaintiff.

The Parties' Submissions

10. The plaintiff filed his submissions on 27/3/2018. The defendant had filed his earlier on 19/3/2018. I have perused and considered those submissions.

DETERMINATION

Issues for Determination

11. The issues that arise in this suit are as follows:

- a. *Whether the plaintiff is entitled to orders of specific performance of the sale agreement entered into on 1/8/2008;*
- b. *Was the consent of the Land Control Board necessary for the transaction?*
- c. *What orders should issue?*

a) Whether the plaintiff is entitled to orders of specific performance of the sale agreement entered into on 1/8/2008;

12. It is now settled that there was an agreement between the parties and that part of the consideration changed hands. Some of the consideration was paid within schedule while some was paid belatedly. The plaintiff accepted some of the belated payments for some time.

13. It is also agreed that the plaintiff took possession after the agreement was executed and was in possession for some time until either the deceased or his son pushed him out of half an acre, leaving him with half an acre.

14. According to the plaintiff this was the deceased's son's doing while according to the defendant his father fenced off half acre portion

from the land the plaintiff had originally purchased leaving the plaintiff with half an acre. However, the claim that the sons of the deceased invaded the land came up in the plaintiff's statement and I believe it to be true for even at that time, the deceased who according to the Grant exhibited in this suit died on 10/3/2012, was then said to be seriously ill. What is not stated expressly is whether such invasion was with their father's knowledge and or consent.

15. The plaintiff submits that the deceased took payments long after the date of completion, (that is December 2009) was past. The plaintiff thus avers that he is entitled to be awarded a portion of 1 acre and not merely the half acre portion that he is currently utilising. The plaintiff relies on the case of *Mangi Vs Munyiri & Anor 1991 eKLR* for the proposition that the conduct of parties is of great importance as a court considers whether to grant or not to grant orders of specific performance.

16. The plaintiff also cites the *Case of Nbi Elc 191 of 2007 - John Miriti Kiraithe Vs Kabubura Kibururu Muchiri*; The defendant on the other hand submits that time was of essence in the agreement as a specific period had been set for its completion and cites the case of *Thrifty Homes Vs Kays Investment Limited NBI HCCC No 1512 Of 1998*.

17. The defendant avers that the plaintiff having breached that contract is not entitled to the prayer sought.

18. The question that arises is whether the conduct of the parties waived the completion date such that time became not of essence as it had been at the execution stage and subsequently altered the agreement in any other way.

19. In this case the defendant is said to have merely ceased accepting further payments and informed the plaintiff that he no longer wished to sell the land. However instead of obtaining vacant possession of the entire parcel from the plaintiff he wrote to the plaintiff through his advocates on 3/7/2010 proposing that the plaintiff should be content with being allocated a parcel of land equivalent to the sum he had paid by then if he was unable to make further payments.

20. It should be noted that the plaintiff took possession of the suit land long after he had defaulted on the terms of the agreement dated 1/8/2008. This could not have been by use of force for that is not pleaded by the defendant.

21. It is noteworthy that even when the plaintiff's sons invaded the sold land, they obtained vacant possession of only half an acre of the land and left the plaintiff in possession of half an acre which he is said to be still occupying to date.

22. Despite these facts the defendant pleads and submits that the agreement was invalid by reason of the plaintiff's breach. But is it?

23. In the case of *Lucy Njeri Njoroge v Kaiyahe Njoroge [2015] eKLR* the Court of Appeal stated as follows:

“For frustration to be held to exist, there are certain factors that require to be taken into consideration. One factor is whether the frustration was caused by the default of the parties. It is trite that the frustrating event cannot arise from default of the parties. In Maritime National Fish vs Ocean Trawlers [1935] AC 524., self-induced frustration was held to have occurred where a party elected to allocate a fishing licence to three of their other trawlers leaving no licence to operate the contracted trawler.

In Davis Contractors Ltd vs Farehum U.D.C. (supra), it was stated thus,

“The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party, that is, the event which a party relies upon as frustrating his contract must not be self-induced”. (Emphasis ours).

In Howard & Company (Africa) Ltd vs Burton [1964] EA 157 this Court concurred with Lord Sumner in Bank Line Ltd vs Arthur Capel & Company(26) [1919] AC p. 425 who stated,

“It is now well established that the doctrine of frustration cannot apply where the event is alleged to have frustrated the contract arises from the “act or self-election of the party” who seeks to invoke it. Reliance cannot be based on a self-induced frustration”.

In the circumstances, it is evident that, in the appellant's case, the alleged failure to complete the purchase was not capable of frustrating the contract.”

24. Drawing from the Court of Appeal dicta in the above case I should therefore decline the argument that the failure to settle the consideration sum by December 2009 made the agreement invalid for the reason that having proceeded with the agreement and granted possession to the plaintiff after the completion date, the defendant could not just simply walk out of it by relying on a bygone completion date.

25. According to the submission of the plaintiff the sum paid so far is Kshs. 382,000/=. This includes the disputed refund of Kshs. 43,000/= and the amount said not to have been acknowledged by the deceased when he was seriously ill that is Kshs. 37,000/=.

26. The agreement states that the plaintiff would occupy the piece of land sold to him starting January 2009. The plaintiff states, in his statement and it is not controverted, that he occupied the land in March 2009. The purchase price had not been paid in full by then. The question would be then why the deceased allowed the plaintiff vacant possession of the entire parcel before the full payment of the purchase price by December 2009.

27. It appears to me that the intent of the deceased was not to rescind the contract and refund the entire purchase price; he appears to have not sought to refund the purchase price paid except the Kshs. 43,000/=, which in any event the plaintiff disputes having received.

28. In my view that act of putting the plaintiff into possession despite lapsed timelines did away with the limitations as to time and the defendants averment that time was of essence is not valid in this suit.

29. In contrast to the facts in the case of *Case of Nbi ELC 191 of 2007 - John Miriti Kiraithe Vs Kabubura Kibururu Muchiri* (supra) I note that the defendant herein has not demonstrated his willingness to continue with the agreement for purchase of the whole one acre originally contracted for by depositing the full balance of the purchase price in court; he is still in occupation of land half the original size of what he had intended to purchase.

30. From the facts, the instant case is one in which desire for partial performance of the contract in satisfaction of what the parties were able to give and take can be implied.

31. These observations above bring this court to one conclusion: that the deceased was still willing to sell and the plaintiff was still willing to purchase the land despite the date of completion having passed and that the adjustment made to the contract was to the effect that the purchaser should have whatever he had managed to pay for. The restriction of the plaintiff's activities to half an acre renders it possible that this is the size of land that the deceased was willing to release to the plaintiff.

32. I therefore find that the plaintiff is entitled to specific performance in respect of a portion of half an acre out of Land Reference No. **Kitale Municipality Bidii Block 14/43.**

b. Was the consent of the Land Control Board necessary for the transaction?

33. The plaintiff submits that the consent of the Boards was not necessary. He cites the interpretation Section to the Land Control Act Cap 302 which defines agricultural land to mean:

34. The plaintiff submits that there is no evidence provided by the defendant to prove that the land herein was agricultural land and that the land is located within the Kitale Municipality. The plaintiff submits in the alternative that even if the land transaction required consent of the Land Control Board he relies on the case of *Nyeri ELC No 102 Of 2014 Joseph Mathenge Kamutu Vs Joseph Wainaina Karanja & Another*. I agree with the holding in that case save that in the present case it was the duty of the defendant to prove that the land is agricultural land, which burden he has not discharged. I will therefore decline to hold that the agreement is invalid for want of consent of the Land Control Board.

CONCLUSION

35. I therefore find that the plaintiff's claim has merit and I hereby enter judgment in favour of the plaintiff against the defendant in the terms hereinbelow:

a) **Specific performance of the agreement dated 18/8/2009 compelling the defendant to transfer the half acre piece currently occupied by the plaintiff in Land Reference No. Kitale Municipality Bidii Block 14/43 to the plaintiff and in default the Deputy Registrar of this court do sign on behalf of the defendant all the relevant documents needed for the effecting of transfer of the half acre piece currently occupied by the plaintiff in Land Reference No. Kitale Municipality Bidii Block 14/43 of land to the plaintiff;**

b) **A permanent injunction restraining the defendant from in any manner interfering with the plaintiff's possession and occupation of the half acre portion of suit land that he occupies;**

c) **Costs.**

Dated, signed and delivered at Kitale on this 31st day of May, 2018.

MWANGI NJOROGE

JUDGE

31/5/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Arunga for defendant

Mr. Ingosi holding brief for Bett for plaintiff

COURT

Judgment read in open court.

MWANGI NJORGE

JUDGE

31/5/2018