



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 232 OF 2009**

**LETTY GRACE O. ALUOCH.....PLAINTIFF**

**-VERSUS-**

**PETER NYAMAI NZUKI.....DEFENDANT**

**JUDGEMENT**

1. The plaintiff brought this claim vide her plaint dated 10<sup>th</sup> July 2009 seeking to be granted the following reliefs: -

**a. A declaration that the Plaintiff is the rightful owner of the parcel of land known as Kwale/Ukunda/304.**

**b. An order of specific performance directing the Defendant to complete the sale and transfer of the parcel known as Kwale/Ukunda/304 failing which an officer of this Court to sign the same.**

**c. An order of injunction restraining the Defendant by himself, agents and or servant from selling, offering for sale, alienating, disposing, interfering or in any manner dealing with the property known as Kwale/Ukunda/304 other than to transfer it to the Plaintiff.**

**d. Costs and interest.**

2. Alongside her plaint she also filed a list of documents dated 25<sup>th</sup> October 2012 in which she annexed the following documents in support of her case.

1. Sale Agreement dated 27<sup>th</sup> February, 2008.

2. Acknowledgement of payment dated 27<sup>th</sup> June, 2008.

3. Photographs of the construction of a church in suit premises.

4. Surveyor's Report on Kwale/Ukunda/304 prepared by Seline Consultant Limited of February, 2008.

5. Application for consent of the Land Control Board.

6. Letter of consent dated 5<sup>th</sup> March, 2008.

7. Witness statement with regard to Criminal complaints about the Defendant.

8. Letter dated 18<sup>th</sup> December, 2008 regarding the Defendant to execute the transfer forms.

3. The defendant opposed the suit by filing a defence and counter – claim dated 14<sup>th</sup> July 2009 and filed on 23<sup>rd</sup> July 2009. In paragraph 4 of the defence, it is pleaded that:

**“It is admitted that the Plaintiff and Defendant entered into an Agreement for Sale of Land Kwale/Ukunda/304 dated 27.2.2008. It is also admitted that the said Agreement has not been revoked nor terminated by either of the parties. It is**

**further admitted that the Defendant received Kshs. 730,000/= as consideration”.**

4. The defendant however contends that the agreement of 27.2.2008 was varied by another agreement of 27.6.2008 and or by express conduct of the parties to the extent that the defendant refunded the plaintiff Kshs 20,000= on understanding that he would retain an agreed portion of the suit land defined by the parties. The defendant also declined breaching his part of the agreement. He also pleaded that the sale agreement is null & void by dint of section 6 & 7 of the Land Control Act. Consequently, he urged the Court to allow the prayers as per paragraph 12 of the counter – claim pleaded as follows:

**i. A declaration that the plaintiff is only entitled to a refund of the monies paid as consideration in view of the fact that the Agreement for Sale of Land dated 27.2.2008 is Null and Void by virtue of Section 6 & 7 of the Land Control Act, Cap 302, of the Laws of Kenya.**

**ii. In the alternative, a declaration that in any event, the Defendant is the owner of a defined portion of LR NO. KWALE/UKUNDA/304 in terms of the Agreement dated 27.6.2008.**

**iii. An Injunction to restrain the plaintiff from constructing and/or continuing to construct a perimeter wall/fence around the Suit Property and/or barring or in any way continuing to bar or deny the Applicant access onto and out of that portion of the Suit Property belonging to the Defendant or in any way interfering with the said portion of Land.**

5. Each of the parties called one witness. The plaintiff’s evidence confirmed what is pleaded i.e. that she entered into a sale agreement for the purchase of land Kwale/Ukunda/304 for a consideration of Kshs 730,000= . She paid the whole amount of money but to date the defendant has failed to execute the transfer to enable her register the land in her name. She produced the sale agreement, letter of consent, photographs of the developments he has undertaken on the plot and the surveyor’s report. She urged the Court to grant her the prayers sought in the plaint.

6. The defendant on his part also admitted there was a sale agreement. The defendant contends the sale agreement was varied by the second agreement of 27.6.2008. Consequently the plaintiff is only entitled to a refund of the purchase price. The defendant denied not co-operating with the plaintiff to complete the transaction. The defence case was thereafter closed.

7. Both sides filed their written submissions. The plaintiff’s submissions were filed on 18<sup>th</sup> January 2018 while the defendant’s on 19<sup>th</sup> February 2018. Some of the issues picked by the defendant is that the plaintiff did not produce her documents filed as exhibits thus relying only on her oral evidence. This is however untrue as from the proceedings recorded on 30.10.2017, the plaintiff in her closing remarks in her evidence in chief said she is producing the documents as per the list dated 25.10.2012. She also asked the Court to execute the documents in her favour in case the defendant fails to comply with directives given by the Court. The defendant did not object to the production of these documents during the hearing and which were already in the Court records.

8. The other issue raised by the defendant is that the sale agreement of 27.2.08 was null and void by virtue of the provisions of section 6 (1) (a) & 7 of the Land Control Act. Section 6 of the Land Control Act Cap 302 states thus:

“the sale, transfer...or other dealing with any agricultural land which is situated within a land control area is void for all purposes unless the Land Control Board for the land control area in which the land is situated has given the consent in respect of that transaction in accordance with this Act.”

Section 7 provides thus:

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

9. For the plaintiff’s case, amongst the documents produced and listed at No 5 & 6 in her list of documents dated 25.10.2012 is an application for consent to the Land Control Board (Msambweni) and letter of Consent issued on 5<sup>th</sup> November 2008 respectively. The defendant did not question the signature appearing on the application for consent form. The balance of the purchase price was paid on 27.6.2008. Section 8 of the Land Control Act requires the consent to be obtained within a period of 6 months from the date of the transaction. In my opinion, the time commenced running for purposes of obtaining the consent on 27.6.2008 when the balance of the purchase price was paid. Consequently the consent issued on 5.11.2008 was obtained before the expiry of the six months and was thus obtained within the stipulated period. The decision in **David Sironga Ole Tukai vs Francis Arap Muge & 2 others (2014) eKLR** is not therefore applicable to this case. Once the plaintiff produced the application for Consent and the Land Control Board letter of Consent, the burden of proof shifted on the defendant to show whether the same was obtained inappropriately. In any event, the issue of fraud or inappropriateness of acquiring the letter of consent was not pleaded in the defence & counter – claim. The same cannot be introduced at the submission stage as the defendant has attempted to do in paragraph 14 & 15 of his submissions. This is because it denies the plaintiff the opportunity to explain how she obtained the consent. It is too late to raise allegations of fraud without proof.

10. In the defendant’s evidence, he said the transaction between him & the plaintiff was to be a demarcation not a transfer. At one point the defendant said the agreement of 27.2.08 was for sale of plot No 304. He admits not interfering with the plaintiff’s portion. I have read the agreement of 27.6.2008 which the defendant states allowed him to retain a portion of the land. This agreement is titled as “**acknowledgment agreement**” where the defendant acknowledges receipt of the balance of the purchase price. It also indicates he has surrendered the original title deed to the plaintiff. Nowhere does it state that the defendant is to retain a portion of the sold land neither does the document state that it is varying the first agreement executed between the parties.

11. The plaintiff explained that she was allowed to retain the sum of Kshs 20,000= to provide a path for the neighbouring plots thus

necessitating the location of the gate to be changed. If the defendant was to retain a portion of the sold land then he would not have surrendered the original title deed to the plaintiff before his defined portion was curved out. Lastly the defendant denied receiving any demand to sign the transfer documents. If he did not receive any demand then upon being served with summons to enter appearance he would have executed the documents in favour of the plaintiff. He chose not to and even raised a counter – claim. This in my view demonstrates his unwillingness to execute the transfer documents which refusal this Court finds to be without any reasonable cause. The defendant cannot state he has no claim to the portion occupied by the plaintiff and on the hand seek to have the transaction nullified. He is not being candid to the Court.

12. In conclusion I find that the plaintiff has proved her case on a balance of probabilities and is deserving grant of the orders sought in the plaint. Accordingly I allow her suit with costs. The defendant shall execute the transfer documents as well as avail any other requisite documents to facilitate the transfer of the sold plot No Kwale/Ukunda/304 in the plaintiff's name within 30 days of this date. In default, the Deputy Registrar shall execute all the requisite documents in favour of registration of the plaintiff as owner of land title No Kwale/Ukunda/304.

**Dated, signed & delivered at Mombasa this 19<sup>th</sup> June 2018**

**A. OMOLLO**

**JUDGE**