



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 286 OF 2012

JOTHAM TARACHA MAFUNGA.....PLAINTIFF

VERSUS

JOHN NANDI.....1ST DEFENDANT

INDUSTRIAL & COMMERCIAL

DEVELOPMENT CORPORATION.....2ND DEFENDANT

JUDGEMENT

The plaintiff's case is that, on or about the 7th June, 1996 the plaintiff and the 1st defendant entered into a sale of land agreement in respect of land parcel No. N. KABRAS/SURUNGAI/402 measuring approximately 4 acres herein referred to as the suit land for a consideration of Ksh. 142,000/=.By virtue of the terms and conditions of the above mentioned agreement the plaintiff paid the 1st defendant's loan arrears together with the accrued interest with the 2nd defendant in respect of title No. KABRAS/SURUNGAI/402 which title had been charged with the 2nd defendant as security.Pursuant to the said agreement, the plaintiff duly paid a deposit of Ksh. 117,000/= and completed the loan arrears of approximately Ksh. 140,000/= in favour of 2nd defendant in respect of the purchase price which security was to be discharged by the 2nd defendant for transfer in favour of the plaintiff. On or about the 6th January, 2001 the 1st defendant entered into a further agreement for transfer of 4 acres in favour of the plaintiff and subsequently the plaintiff obtained consents from the land control board for transfer in his favour which the defendants have refused to surrender original title for subdivision and transfer.At all material times relevant to this suit the plaintiff has been and is ready, willing and able to perform his outstanding obligations under the said agreements which obligations have been curtailed by the defendants jointly and severally.Despite of demand and notice of intention to sue having been served upon the defendants have failed to perform their part of the bargain hence necessitating to this suit. The plaintiff's claim against the defendants jointly and severally is for specific performance of the contract by discharge title and surrender of original title deed for subdivision and transfer of part of L.R. NO. KABRAS/SURUNGAI/402 measuring approximately 4 acres in favour of the plaintiff. The plaintiff prays for judgment against the defendants jointly and severally for:-

- (a) Specific performance of the contract.
- (b) Costs of the suit.
- (c) Interest on b above at court rates.
- (d) Any other relief this honourable court may deem fit and just to grant.

PW1 testified that, on or about the 7th June, 1996 the defendant had agreed to sale part of his land LR. NO. N/KABRAS/SURUNGAI/402 measuring approximately 4 acres to him and which land had been charged by the 1st defendant with Industrial & Commercial Development Corporation the 2nd defendant herein for loan facility of Ksh. 60,000/=. The 1st defendant had defaulted payments hence crystallization of public auction.The defendant agreed with him in writing that the purchase price of the said 4 acres was Ksh. 142,000/= and had acknowledged receipt of Ksh. 117,000/= remaining balance of approximately Ksh. 25,000/= which he agreed to offset the loan arrears together with interest and thereby have the security with the 2nd defendant discharged.He paid the entire loan balance together with the calculated interest as per the agreement. The 1st defendant duly applied to the Land Control Board for a consent in his favour but has refused to get the discharge registered and or transfer the required portion in his favour. He therefore pray for a relief of specific performance of the contract together with costs and interest.

The 2nd defendant states that he is not privy to any agreement for sale of land in respect of Land parcel number N/Kabras/Surungai/402

measuring approximately 4 acres and herein referred to as the suit land for a consideration of Ksh. 142,000.00 at all. The 2nd defendant states that the plaintiff has never been paid Ksh. 142,000.00 as consideration for Land parcel number N/Kabras/Surungai/402 measuring approximately 4 acres and herein referred to as the suit land. Save for the fact that Land Parcel Number N/Kabras/Surungai/402 had been charged to the 2nd defendant to secure the repayment of a certain loan facility issued to the 1st defendant, the 2nd defendant states that the 2nd defendant does not know the terms and conditions mentioned in the alleged agreement for sale of land in respect of Land parcel Number N/Kabras/Surungai/402 at all. The 2nd defendant states that once the 1st defendant's land account with the 2nd defendant was fully settled, the 2nd defendant duly, and in accordance with the applicable law, discharged the charge over Land Parcel Number N/Kabras/Surungai/402 in favour of the chargor who is now the 1st defendant herein. The 2nd defendant states that the 2nd defendant is not privy to any further agreement for transfer dated 6/1/2001 in favour of the plaintiff in respect of Land Parcel Number N/Kabras/Surungai/402 or any other land whatsoever. The 2nd defendant avers that, once the 1st defendant's loan account with the 2nd defendant was fully settled, the 2nd defendant had no legal duty at all to transfer Land Parcel Number N/Kabras/Surungai/402 to the plaintiff or any other person whatsoever. Further, and without prejudice to the foregoing averments, the 2nd defendant states that the plaintiff is not entitled to any of the reliefs prayed for in the plaint because the plaintiff's entire claim is legally barred by operation of section 8 of Land Control Act, chapter 302 of the Laws of Kenya. If it is true the plaintiff is aggrieved by fact that the 1st defendant has refused to surrender the original title over Land Parcel Number N/Kabras/Surungai/402 to the plaintiff, then the plaintiff's remedy is in a separate action against the 1st defendant only without joining the 2nd defendant in the action.

This court has carefully considered the evidence and the submissions by the plaintiff and the 2nd defendant in this case. The 1st defendant was served but failed to attend court or file any papers. The plaintiff's case is that, on or about the 7th June, 1996 the plaintiff and the 1st defendant entered into a sale of land agreement in respect of land parcel No. N. KABRAS/SURUNGAI/402 measuring approximately 4 acres herein referred to as the suit land for a consideration of Ksh. 142,000/= (PEX 1). By virtue of the terms and conditions of the above mentioned agreement the plaintiff paid the 1st defendant's loan arrears together with the accrued interest with the 2nd defendant in respect of title No. KABRAS/SURUNGAI/402 which title had been charged with the 2nd defendant as security. Pursuant to the said agreement, the plaintiff duly paid a deposit of Ksh. 117,000/= and completed the loan arrears of approximately Ksh. 140,000/= in favour of 2nd defendant in respect of the purchase price which security was to be discharged by the 2nd defendant for transfer in favour of the plaintiff (PEX 3). On or about the 6th January, 2001 the 1st defendant entered into a further agreement for transfer of 4 acres in favour of the plaintiff and subsequently the plaintiff obtained consents from the land control board for transfer in his favour which the defendants have refused to surrender original title for subdivision and transfer (PEX 4). PEX6 confirms that, Land Parcel Number N/Kabras/Surungai/402 and Land Parcel Number Kakamega/Surungai/402 were one and the same parcel.

The 2nd defendant's case is that as at the time of filing this in 2012 the loan given to the 1st defendant had been fully paid and an instrument for discharging the charge in its favour plus the original title deed for Kakamega/Surungai/402 given to the 1st defendant as far back as 11th December, 2000. The suit against the 2nd defendant was clearly unnecessary as what it is asking the 2nd defendant to do had already been done as far back as 11th December, 2000. The plaintiff has only himself to blame for including the 2nd defendant in this suit. If he had cared to check with the 2nd defendant as he had done in the demand letter to the 1st defendant on 14/12/2009 before filing this suit he could have found out the truth and avoided this unnecessary joinder. I find that the title as per the documents on record was discharged way back in 2000 to the defendant who was the loanee and it is true that the 2nd defendants have no contact with the plaintiff. This court cannot make orders in vain and the plaintiff should now pursue the 1st defendant. I find that the plaintiff has establish his case on a balance of probabilities against the 1st defendant and the evidence was unchallenged. I therefore grant the following orders;

1. Specific performance of the contract dated 7th June 1996 between the plaintiff and the 1st Defendant.
2. No orders as to costs of the suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 11TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE