



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 108 OF 2013**

**JANE WAMBOI MWANGI.....PLAINTIFF**

**VERSUS**

**DAVID K. MUGE.....DEFENDANT**

**JUDGMENT**

1. In her plaint filed in this suit on the 7<sup>th</sup> August 2013 the plaintiff seeks the following prayers:-

- (a) Refund of Kshs.142,000/= being the purchase price of the land sold by the defendant to the plaintiff.
- (b) Costs of this suit
- (c) Interest at court rates from the date of filing of this suit.
- (d) Any other relief that this court may deems fit to grant for the best interest of justice.

2. The plaintiff's case is that on the 31/1/2011 the defendant entered into a written agreement whereby the defendant sold to the plaintiff 50ft x 100ft (Plot No. 15) in the proposed sub-division out of Title No. Kwanza Scheme/Namanjalala Block 4 Kapsitwet/303 which was by then registered in the name of the defendant. The agreed purchase price between the defendant and the plaintiff was Kshs.140,000/= (One hundred and forty thousand only) which the plaintiff paid on the date of the signing of the sale agreement.

3. The plaintiff states that two months after the aforesaid sale agreement, the Agricultural Finance Corporation hereinafter called the (AFC) auctioned the land comprised in the title deed Kwanza Scheme/Namanjalala Block 4 Kapsitwet/303 for loan of over Kshs.1,000,000/= hence frustrating the sale agreement.

4. It is the plaintiff's contention that at all times prior to the sale agreement the defendant was aware that he owned A.F.C. an outstanding loan and that he failed to disclose the indebtedness to the plaintiff when she entered in a sale of land agreement herein. The plaintiff's claim against the defendant is refund of Kshs.140,000/= being the purchase price of the land measuring 50ft x 100ft (Plot No. 15 on the proposed sub-division) which land was part of title deed No. Kwanza Scheme/Namanjalala Block 4 Kapsitwet/303, being the land that Agricultural Finance Corporation sold to recover its loan secured by the plaintiff's land.

5. The defendant filed his written statement of defence dated 3/2/2014 on 4/2/2014.

6. In that statement of defence the defendant denied the claim and averred that prior to the execution of the agreement the plaintiff was duly informed of the proper position as regarding all the encumbrances on the land sold and that she agreed to the terms and conditions and took up possession of the land and that she is in occupation thereof to date. The defendant states that the loan was his obligation and the plaintiff was not under any obligation to repay it. He avers that the loan has so far been substantially repaid and thus the plaintiff can continue to peacefully occupy the land she purchased. He does not give any further details as to who paid the loan and when.

7. In her reply to the defendants statement of defence the plaintiff avers that her taking up of possession and occupation of the land was temporary and that the land in question was sold by a public auction by the AFC after the defendant failed to pay the loan arrears and now that it belongs to a person other than the plaintiff the chances of obtaining title thereto are slim. She avers that she is residing outside the plot following directions by the new owner.

8. The hearing of the suit took place on the 13<sup>th</sup> January 2018 when the plaintiff testified. She reiterated the matters contained in the plaint. She reiterated that the defendant only stated that he owned the land and he never informed her about the loan amount owed to the AFC. She produced the agreement between them and indicated that the defendant showed her the land on which she erected a fence and built a house. Later she got a notice saying that the land was scheduled to be sold on 3/2/2012. She produced the notification of sale dated as evidence in

the matter. She testified that the land was sold but could not recall when it was sold. It was advertised for sale on Friday the 13<sup>th</sup> January 2012 in a local daily newspaper at page 49. She produced an extract of the Standard newspaper in evidence. She stated that when they learnt that the land was to be sold she and others who had purchased portion from the plaintiff went to the AFC and paid the 25% and got 30 days to clear the balance. She testified that she is in occupation of the land. It would appear, at least from her evidence that one able person paid the sums demanded by the AFC and the buyers refunded him the paid sum in instalments later on. The plaintiff stated that she called the defendant and informed him of the need to refund the amount. She wrote a letter to the defendant on the 2/9/2013 but the defendant never repaid the Kshs. 140,000/=.

9. PW2 testified in support of the plaintiff's case. He stated that the plaintiff is his neighbour and that he was aware that the plaintiff had purchased land from the defendant. He identified the sale agreement between the parties herein. He witnessed the execution of the agreement and testified that the seller never stated that the land was charged to the AFC. Later on in the year 2012 PW2 saw posters advertising the land for sale over a loan of Kshs. 1,000,000/=.

10. He also contributed to the payment of the loan amount to save the land. He testified that he paid over Kshs. 100,000/=.

11. The defendant never attended court to give evidence in this case. In my view it has been established by way of evidence by the plaintiff and her witness that the land was sold without any notice of the encumbrance over the same. It has also been established that the plaintiff came to learn of the sale later on when the land was advertised by the auctioneers in order to recover the loan that the defendant owed to the AFC. The defendant does not deny the said loan but he states that it was not the responsibility of the plaintiff to repay the loan monies to the AFC. However he is silent on whether the land was sold or not.

12. It is the position that the land was sold. It matters not that the person who bailed out the plaintiff and others was known to them. It is the element of non-disclosure by the defendant that matters to this court in this issue.

13. It is possible that by conducting an official search the plaintiffs may have known that the land was charged to the AFC but there is no bar in this country that prohibits purchase of charged land.

14. In my view when a chargor is aware that he is about to sell land to an innocent purchaser who had nothing to do with the repayment of the loan, he ought to disclose that first, the land is charged and secondly he ought to ensure that the status of the loan account is such that it will not incommode upon the transaction that he is about to enter into with the purchaser. Taking the purchase price and later on allowing the same land that he has sold to be auctioned by the chargee is in my view misconduct bordering on fraud.

15. The defendant herein does not even bother to give a history of the loan account in his defence or witness statement. Further the defendant failed to attend court to give evidence in his defence or call witnesses.

16. The moment the land was advertised and sold by the chargee, the defendant was deprived of anything to sell and the plaintiff had to deal with an entirely new situation she had not foreseen courtesy of the defendant's negligence or craftiness. The title was now being offered for sale by the chargee and the plaintiff had to pay other monies despite having already paid the whole of the purchase price that she had agreed with the defendant. This is in my view unacceptable in contractual relations.

17. If the chargee successfully sold the land without demur on the defendant's part, it meant that the defendant had no capacity to dispose of the same from the beginning and that all that money paid to him by the plaintiff was in vain. The defendant can not be allowed to benefit from the proceeds of such an agreement while he had no capacity to dispose of the land in the first place.

18. In my view the evidence of the plaintiff and her witness is sufficient to establish, and has so established the plaintiff's claim against the defendant on a balance of probabilities.

19. I therefore enter judgment for the plaintiff against the defendant and issue the following orders against the defendant:-

**(a) The defendant shall refund to the plaintiff the sum of Kshs.142,000/= being the purchase price of the land sold by the defendant to the plaintiff;**

**(b) The defendant shall pay interest on the amount in (a) above at court rates from the date of filing of this suit till the said amount is paid in full;**

**(c) The defendant shall bear the costs of this suit.**

It is so ordered.

**Dated, signed and delivered at Kitale on this 11<sup>th</sup> day of July, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**11/7/2017**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Chebii holding brief for Kaosa for plaintiff

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**11/7/2018**