



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 292 OF 2017**

**FREDRICK KIMEU KITWA.....PLAINTIFF**

**VERSUS**

**JAMES KALOKI.....DEFENDANT**

**RULING**

1. This Ruling is in respect to the Application dated 25<sup>th</sup> January, 2018 in which the Plaintiff is seeking for the following orders:

***a. That an interlocutory mandatory injunction do issue to compel the Defendant/Respondent to deliver and/or tender to the Plaintiff/Applicant the Title Deeds for parcel numbers Kangundo/Kyevaluki/5 and Kangundo/Kyevaluki/7 which are in possession of the Defendant by virtue of an Agreement dated 29<sup>th</sup> October, 2016 which has become void by operation of the law.***

***b. The costs of this Application be borne by the Defendant/Respondent.***

2. According to the Plaintiff's Affidavit, he is the registered proprietor of parcels of land known as Kangundo/Kyevaluki/5 and 7 (*the suit properties*); that the suit properties are agricultural parcels of land and that on 29<sup>th</sup> October, 2016, he entered into an Agreement with the Defendant for the sale of the suit properties for Kshs. 2,100,000.

3. Although he handed to the Defendant the original Title Deeds, the Plaintiff deponed that no consent of the Land Control Board has ever been applied for or obtained; that the Sale Agreement became null and void under the provision of the law and that he is willing to refund the Defendant the purchase price paid.

4. According to the Plaintiff, he has since paid in court a sum of Kshs. 1,600,000 which constitutes the total amount which was paid to him by the Defendant.

5. The Defendant filed a Replying Affidavit in which he deponed that in his Counter-claim, he has sought for an order of specific performance of the contract he entered into with the Plaintiff; that he has not accepted the payment that the Plaintiff paid to court and that he is in possession of the Title Deeds lawfully having paid to the Plaintiff more than 10% of the purchase price.

6. The Defendant finally deponed that the prayer being sought in the current Application is identical to the substantive prayer in the Plaintiff and that the Plaintiff has not shown the prejudice he shall suffer unless the orders being sought are granted.

7. Both the Plaintiff's and the Defendant's advocates filed submissions which I have considered. I have also considered the filed authorities.

8. In his Plaintiff dated 20<sup>th</sup> June, 2017, the Plaintiff has prayed for a declaration that the transaction contained in the Sale Agreement made between the Plaintiff and the Defendant is void pursuant to Section 6(1) of the Land Control Act and for an order for the return of the original Title Deeds for the two suit properties that the Defendant is holding.

9. In the current Application, the Plaintiff is seeking for a mandatory order to issue compelling the Defendant to return the original Title Deeds to him. To show that the Sale Agreement cannot be performed, the Plaintiff deposited in court Kshs. 1,600,000 pursuant to the provisions of Order 27 Rule 1(3) of the Civil Procedure Rules.

10. On the other hand, the Defendant has filed a Counter-claim in which he is pursuing for an order of specific performance of the Agreement of 29<sup>th</sup> October, 2016. In the alternative, the Defendant is seeking for a declaration that it is the Plaintiff who is in breach of the Agreement and that he should refund the purchase price with an interest of 2% per month.

11. The impugned Judgment between the Plaintiff and the Defendant is dated 29<sup>th</sup> October, 2016. The Agreement provides that the

completion period shall be 90 days from the date of receipt by purchaser's lawyer of the original certificate or within fourteen (14) days of the successful registration of the Transfer in favour of the purchaser. The seller was under an obligation to facilitate the obtaining of the Land Control Board consent to transfer the land which he has not done.

12. Although the Plaintiff is seeking to rescind the contract on the ground that the same is null and void, the issue of what is refundable will have to be dealt with at trial, if at all. Indeed, if the court finds that it is the Plaintiff who was unable to complete the transaction, then the Plaintiff will have to refund all the monies paid by the Defendant with interest at 2% per month from the date of the completion.

13. Other than the issue of refund of the purchase price, the court will still have to consider whether indeed the transaction can still be completed under the doctrine of constructive trust, notwithstanding the want of the consent of the Board.

14. Consequently, the issues raised in the Plaintiff and the Counter-claim cannot be said to be simple and straight forward to warrant the issuance of an order of a mandatory injunction whose effect is to conclude the matter.

15. In any event, the payment of Kshs. 1,600,000 in court may not have met the requirements of Order 27 Rule 1 of the Civil Procedure Rules considering that the Defendant's Counter-claim is not for that sum. Consequently, the issues raised in the Plaintiff and the Counter-claim should proceed for hearing to enable the court determine who between the Plaintiff and the Defendant breached the Sale Agreement of 29<sup>th</sup> October, 2016 and the appropriate orders to be made thereof.

16. For those reasons, I dismiss the Application dated 25<sup>th</sup> January, 2018 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26<sup>TH</sup> DAY OF OCTOBER, 2018.**

**O.A. ANGOTE**

**JUDGE**