



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 399 OF 2016

EVANS NJOROGE KIMANI.....PLAINTIFF

VERSUS

MAINA MURIUKI.....DEFENDANT

JUDGMENT

(Suit by plaintiff seeking ownership of certain land sold to him by defendant; not clear what the land claimed is; not clear who holds the title; no evidence that defendant has capacity to sell this land; plaintiff cannot therefore get judgment for the land but orders made that he be refunded the purchase price).

1. This suit was commenced by way of a plaint which was filed on 27 September 2016. In the plaint, the plaintiff pleaded that he purchased from the defendant land described as Plot No. 8 situated in Menyerera Farm in Nakuru County which land is measuring $\frac{1}{2}$ of an acre hived off the land parcel LR No.10445/7. He pleaded that the purchase price was of Kshs. 1,100,000/= which he paid in full. Despite making full payment, it was averred that the defendant has refused to give vacant possession. In the suit, the plaintiff has sought the following orders :-

(i) A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of Plot No. 8 situated at Menyerera Farm in Nakuru County, and measuring $\frac{1}{2}$ an acre hived off from land parcel LR No. 10445/7.

(ii) A declaration that the continued occupation on the suit property by the defendant is unlawful, and that the same constitutes illegal trespass.

(iii) Orders that the defendant be evicted from the suit property forthwith.

(iv) Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.

(v) Any such other or further relief as this Honourable Court may deem appropriate.

2. The defendant filed defence vide which he refuted the allegations of the plaintiff. He averred that he is a stranger to the plaintiff's claim and denied ever receiving the sum of Kshs. 1,100,000/= or any sum of money in respect of the alleged transaction. He asked that the plaintiff's suit be dismissed.

3. Only the plaintiff testified, and in his evidence, he produced a sale agreement to support his case. In his oral evidence he did mention that what he purchased was LR No. 10441/7(not LR No.10445/7 as pleaded) and did aver that he paid the money in cash. He stated that to date the defendant has not given vacant possession despite demand having been made. Cross-examined, he testified that what he purchased has no title and that the whole of Manyenye Farm has no title. He was questioned on the discrepancy between the description of the land between what is pleaded and what he gave in his evidence in chief, but he was not really clear on what the correct description of what he may have purchased was.

4. The defendant did not offer any evidence. I invited both Mr. Ombati, learned counsel for the plaintiff, and Mr. Keboga, learned counsel for the defendant, to make submissions and they both filed written submissions. I have taken these into account in arriving at my decision.

5. The plaintiff asserts to have purchased some land from the defendant and in this case he wants vacant possession. Now, it is not very clear to me what exactly the plaintiff may have purchased. In the plaint, he described the land as Plot No. 8 measuring $\frac{1}{2}$ acre to be hived off the land parcel LR No. 10445/7. In his evidence he did mention the land LR No. 10441/7. The description given in the sale agreement is not clear either for there is typed the number "1" after 44 then the same is cancelled and a number, probably "5", written. There is no

countersigning of this alteration and it is not clear to me when this alteration was made. Be that as it may, neither party offered to me a copy of the title, whether it is LR No. 10445/7 or LR No. 10441/7. I therefore do not know under whose name this land parcel is. The plaintiff himself in his evidence did state that what he purchased has no title, but even then, I have no evidence of any demarcation of LR No. 10445/7 or LR No. 10441/7 as the case may be, so that there is a Plot No. 8 that can be sold. I am afraid that without these particulars, I cannot make any declaration of ownership in favour of the plaintiff for the land being claimed in this case. If I proceed to do so, I may very well go to affect the title of a person who has absolutely no knowledge of these proceedings. In any event, his description of the land is so vague as to make this court not clear of what land he is claiming. I also have no evidence that the defendant owned the land being sold so that he may have capacity to sell it.

6. That said, I have seen from the sale agreement dated 6 June 2016, that the sum of Kshs. 1,100,000/= was paid to the defendant by the plaintiff. This is apparent from the agreement itself which provides that the vendor acknowledges receipt of this money. The defendant has not come to court to state that he never signed that agreement or that he never received the sum of Kshs. 1,100,000/=. My finding therefore is that a sum of Kshs. 1,100,000/= was paid to the defendant by the plaintiff but that the defendant either had no land to deliver, or has failed to deliver any land to the plaintiff. Given that I am unable to declare the plaintiff as owner of what he is claiming, justice demands that the plaintiff be refunded back this sum of Kshs. 1, 100,000/= or else the plaintiff will have lost both his money and land. The plaintiff is therefore entitled to judgment for this sum of Kshs. 1,100,000/= as refund for what he paid, the consideration having clearly failed. This sum will attract interest from the date that this case was filed till the time that payment will have been effected in full.

7. On costs, there was no reason for the defendant to collect the sum of money if he had no land to deliver. He will therefore shoulder the costs of this suit.

8. I believe that I have dealt with all issues in this case and now make the following final orders :-

(i) That this court for reasons given in this judgment is unable to make a declaration in favour of the plaintiff for ownership of the land Plot No.8 in the land parcel LR No. 10045/7.

(ii) That instead, the plaintiff be refunded the sum of Kshs. 1, 100,000/= by the defendant and this sum to attract interest at court rates from the time this suit was filed till payment in full.

(iii) That the plaintiff shall have the costs of this suit with interest at court rates.

9. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 24th day of October 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Ombati for the plaintiff.

No appearance on the part of M/s Keboga & Co. Advocates for the defendant.

Court Assistants : Nelima/Carlton.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU