



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 23 OF 2017

JOSEPH MAKARIOS MASINJILA.....PLAINTIFF

VERSUS

GABRIEL BIWOTT KANDA.....DEFENDANT

JUDGMENT

INTRODUCTION

1. By a plaint dated **14/2/2017** and filed on the same date, the plaintiff sought the following orders against the defendant:-

- (a) **An order for rescission of the sale agreement dated 10th December, 2013**
- (b) **An order directing the defendant to deliver up vacate possession of the land to the plaintiff.**
- (c) **Mesne profits**
- (d) **Damages for fraudulent misrepresentation**
- (e) **The costs of this suit**
- (f) **Interest on (c), (d) and (e) above**
- (g) **Any other relief this Honourable court may deem just to fit to grant.**

PLEADINGS

The Plaintiff

2. The plaint states that the plaintiff was and still is the beneficial owner of **No. 6614/10 Noigam** situate at **Kachibora** in Trans-nzoia County. The defendant represented to the plaintiff that the defendant was ready and willing to purchase a portion of that land and by a sale agreement dated **10/12/2013** the plaintiff and the defendant agreed that the defendant would purchase the land for the sum of **Kshs.1,425,000/=** whereupon the defendant paid **Kshs.700,000/=** being deposit at the execution of the agreement. The plaintiff immediately on execution gave vacant position to the defendant. It was agreed that the balance of **Kshs.725,000/=** would be paid on or before **31/12/2014**. It is the plaintiff case that the defendant has failed to pay the balance and has thus acquired position of the land by way of fraud and misrepresentation hence this suit.

The Defence

3. The defendant filed defence and dated **2nd March, 2017** on **8th March, 2017**. He pleaded that he had not refused to pay the balance as alleged by the plaintiff. He listed four cases in which the plaintiff's extended family have filed a multiplicity of suit and obtained orders seeking to restrain the defendant among other purchasers from using the land hence frustrating the agreement. These are mentioned as **Bungoma Succession Cause No. 119 of 2011**, **Bungoma Misc. Cause No. 55 of 2012**, **Bungoma High Court Succession Cause No. 8 of 2014** and **Kitale ELC No. 63 of 2016**. He pleads that as a result of above suits it is evident that the plaintiff and his family do not intend to transfer the land and in such circumstances the balance of purchase price cannot be paid. He denies breaching or repudiating the agreement or fraudulently inducing the plaintiff to give him vacant position and asks the suit be struck out for being an abuse of the court process.

The Reply to Defence

4. The plaintiff filed a reply to defence on **14/3/2017** and denied the contents of the defence. He stated that the suit pleaded in the defence are extraneous to the facts in issue and do not answer the claim in the plaint. He further states that time was of essence in the agreement dated **10/12/2013**.

The Plaintiff's Evidence

5. The plaintiff testified on **2/7/2018**. He reiterated the matters in the plaint and adopted his statement filed on **14/2/2017**. He stated that the defendant took possession of the land. He produced only a copy of the agreement as the original agreement is said to have been lost. However the existence of the agreement is not denied by the defendant. He averred he has never sued the defendant in any other case; he admitted that though in the agreement he is named as the seller, the land is registered in his father's name Barnabas Masinjila (now deceased). He admitted there is a **Succession Cause No. 118 of 2012 Bungoma** which has not reached the confirmation of grant stage. He admitted that he did not have the title as at the time of the sale, that he was one of the administrators in the succession cause. He denied knowledge of any order in the succession cause that barred the purchasers from using the land. When shown a certificate of urgency in **Bungoma Misc. No. 55 of 2015** and documents in **Kitale ELC No. 16 of 2016**, he denied knowledge of those cases. He denied having obtained any order in **Bungoma Succession Cause No. 119 of 2011**. He testified that the defendant has been on the land since **2013** and that all the cases mentioned by the defendant were commenced after **31/12/2014** the date on which the balance of the purchase should have been paid. He stated that he does not wish to continue with the sale and that he believes that the defendant does not wish to pay the balance.

6. **PW2, Samson Chepkochoi** testified on **4/7/2018**, he produced an Agriculture Officer's reported dated **30/1/2018** which he had prepared which showed that the productivity of the land is **18 bags** per acre and that each bag goes for **Kshs.3,000/=**.

The Defence Case

7. The defendant testified on **17/5/2018**. He admitted having bought the land as per agreement cited by the plaint. He admitted that the balance was to be paid by **31/12/2014** and he never paid the balance though he had taken position. He averred that a court order came from **Bungoma Succession Cause No. 119 of 2011**; that he entered into that succession cause alongside 6 other persons; that the plaintiff, the plaintiff's mother and the plaintiff's brother were part of that succession cause; that from **2013 - 2017** he never used the land, that he first used the land in the year **2018**. He also stated that he was served with **Kitale ELC No. 63 of 2016** in which the plaintiff's mother sued him intending to evict him from the land. He averred that for the last five years he has been obeying court orders issued in the **Bungoma Succession Cause** and relying on the ruling issued this year **2018** he returned to the land. He averred that when he bought the land he was not aware that when he bought it did not belong to the plaintiff but the plaintiff's deceased father. He averred that though the plaintiff stated in the agreement that he could transfer the land the plaintiff was not truthful because it turned out later that the plaintiff did not have the capacity. He averred that he has built a house on the land and stated the agreement between him and the plaintiff should not be rescinded.

Submissions

8. The plaintiff filed his submissions on **13/8/2018**. I perused through the court record and found that no submissions on behalf of the defendants. I have considered the pleadings, the evidence and the filed submissions. The issues that arise in this suit are as follows: -

(1) Is the defendant guilty of any fraudulent of misrepresentation?

(2) Is the defendant in breach of the agreement dated 10/12/2013?

(3) What orders should issue?

(1) Is the defendant guilty of any fraudulent of any misrepresentation?

9. I have examined the pleadings in this matter and the agreement entered into by the parties. It appears that the parties entered into that agreement by consent without any duress, and upon the understanding on the part of the defendant that the plaintiff owned the land and could transfer it to the defendant. The defendant has demonstrated that even now he is still ready and willing to complete the transaction provided the plaintiff can demonstrate that he has capacity to transfer the land. However numerous cases have arisen involving the estate of the plaintiff's father the late Barnabas Imbutsi Masinjila which the defendant was apparently aware of as at the time of the execution of the agreement. The defendant produced a copy of an order issued in **Succession Cause 119 of 2011 - Paul Ambutsi -vs- Eunice Ligatsiba Ambutsi, Joseph Makarios and Bernard Muyeka Masinjila**. That order was issued on **30/1/2013**. It restrains the administrators, the beneficiaries and all other persons from intermeddling or alienating any part of the suit land **Cherangany/Noigam/6614/10**. The order also prohibited any person having a previous lease or purchase from taking possession of the land pending the hearing of the application and pending the confirmation of grant. That is not all. The defendant was sued as the 2nd defendant in **Kitale ELC No. 62 of 2016 Eunice Lugatsiba Ambutsi -vs- Nicholas Kibowen Kigen, Gabriel Kanda and Pauline Jebwambok**. The plaint in that suit was produced as **D. Exhibit 2** by the defendant herein in this case. I have examined **paragraph 5** of that plaint. It alleges that the plaintiff and the other defendants without any right or justification entered and took possession of part of **LR No. 6614/10 (original No. 6614/2/9)** and have threatened to remain in unlawful possession thereof. It is sought in that plaint for a declaration that the land belongs to the estate of Barnabas Ambutsi Masinjila (deceased) and that the defendants their servants or agents are not entitled to remain on the property and that they should be enjoined from interfering with the property and they should also pay damages for trespass. There is a ruling issued in that case which was produced as **D. Exhibit 3** in the instant suit. The application for injunction against the plaintiff and his co-defendants was dismissed on the **15/9/2016**. I therefore believe the plaintiff when he states in his evidence that he resumed possession of the suit land in the year **2018**.

10. It is clear from the plethora of litigation which has been shown to be pending in respect of the land that the defendant was intent of buying the land; that the plaintiff was not the registered owner thereof, and that the defendant had reasonable cause to believe, upon becoming aware of that litigation and upon having been enjoined from taking possession, that the plaintiff did not have the capacity to transfer the land to him.

11. In such circumstances it is only fair that this court accords the defendant a benefit of doubt for the reason that any further repayments of the purchase price may not eventually guarantee value for his money in terms of land.

12. I therefore find that the plaintiff put the defendant into possession and the defendant had reasonable cause to believe that the plaintiff was capable of fulfilling the contract. However when family wrangles arose, and further when the defendant and other buyers were sucked up into them the defendant had reasonable cause to be alarmed to the extent of withholding part of the consideration. Such withholding is only consequence of the events that arose after the sale and therefore the said withholding can not lead to a conclusion that the defendant is guilty of misrepresentation at all.

(2) Is the defendant in breach of the agreement dated 10/12/2013?

13. By the agreement between the parties in this suit it can be deemed that the defendant was to have quiet possession of the suit land. However owing to the lack of title on the part of the plaintiff and the persistent wrangles between the plaintiff's immediate family or relatives over the suit land such quiet possession was not accorded to the defendant. It would be unfair and unconscionable to expect the defendant to pay the balance of the purchase price while the plaintiff had been exposed for his incapacity to transfer the land to the defendant and while the defendant was facing litigation from the plaintiff's kin seeking to bar from entry and utilization on the suit land. Ordinarily, through the eyes of the purchaser, the essence of an agreement for the purchase of land is the ability of the seller to deliver title to him. In this case the plaintiff has been shown to lack that ability. It is the plaintiff who should be held to be in breach for lack of capacity. However it is noted that the plaintiff is a beneficiary and his lack of capacity may be temporal. Nevertheless it is still understandable when the defendant, not knowing what the future may bring through the litigation mentioned above, fails to pay the balance of purchase price. The defendant has already committed himself to his willingness to complete the agreement when the plaintiff finally obtains title to the land. The conclusion of this court is that the defendant is not in breach of the agreement.

(3) What orders should issue?

14. The upshot of foregoing I find the plaintiff's suit has no merit and the same is hereby dismissed with costs.

Dated, signed and delivered at Kitale on this 25th day of October, 2018.

MWANGI NJOROGE

JUDGE

25/10/2018

Coram:

Before Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the plaintiff

N/A for the defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

25/10/2018