



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.514 OF 2017

JAMES NJUGUNA MWAURA.....PLAINTIFF

-VERSUS-

PAUL WANDATI MBOCHI.....DEFENDANT

JUDGEMENT

By a **Plaint** dated **20th July 2015**, the Plaintiff herein **James Njuguna Mwaura** sought for the following prayers against the Defendant:-

- a. Part performance or in the alternative Deputy Registrar to sign all necessary transfer forms.**
- b. That a portion of ¼ acres from Limuru/Ngecha/2153 be transferred and be registered in Plaintiff's name.**
- c. Costs and interest of the suit.**

The Plaintiff alleged in the **Plaint** that on or around the **year 2009**, the Plaintiff bought a portion out of a piece of land from the Defendant for a consideration of **Kshs.650,000/=**. The piece of land bought was **¼ acre** from **Limuru/Ngecha/2153**, which is registered in the name of the Defendant herein **Paul Wandati Mbochi**. That the Plaintiff partly paid for the said land and a Sale Agreement was drawn and signed by both parties to that effect. Upon signing the said Sale Agreement and upon paying part of the purchase price, the Plaintiff took possession of the said portion of land and started cultivating. Further that the Plaintiff signed the **Land Control Board Forms** and gave them to the Defendant to forward to the **Land Control Board** but the Defendant failed to turn up at the **Land Control Board** office for purpose of effecting the transfer. Further that in the **year 2012**, the Plaintiff discovered that the said land was under a mortgage with the Bank and therefore in the **year 2015**, the Plaintiff placed a **caveat** on the said land. The Plaintiff claims that the Defendant has refused, neglected, failed and/or refused to transfer the said portion of land to the Plaintiff despite receiving party payment of the purchase price and also demand and Notice to sue. Therefore the Plaintiff's claim against the Defendant is for transfer of a portion of land (**1/4**) from the suit property **Limuru/Ngecha/2153** to the Plaintiff.

The Defendant on his part filed a **Defence** and **Counter-claim** on **26th August 2015** and admitted to have entered into a **Sale Agreement** with the Plaintiff. However, the Plaintiff failed to perform his part of the Sale Agreement as stipulated and therefore no transfer document could be signed nor any consent to transfer obtained due to failure on the part of the Plaintiff to perform his part of the Sale Agreement. Further, the Defendant averred that he has severally attempted to refund the deposit of the purchase price which the Plaintiff has declined to accept. Indeed, the Defendant admitted that the Plaintiff has been tilling the said portion of land until **January 2015**, when the Defendant denied him access and therefore the Plaintiff's caveat on the Defendant's parcel of land is uncalled for, unwarranted and the Defendant is entitled to damages for loss of bargain as well as mesne profits.

Therefore, the Defendant claims in his Counterclaim mesne profit of **Kshs.134,000/=** for unwarranted occupation of the said portion of land from **November 2009** to **11th July 2015** at a rate of **2000/= per month**. He also claimed for damages for loss of bargain for the period the Plaintiff as unjustly maintained caveat on the suit property. In the alternative, the Defendant also claims for a set off of the Counter-claim from the deposit of **Kshs.400,000/=** which the Defendant has made attempt to refund to the Plaintiff but the Plaintiff has declined to accept it. Therefore the Defendant prayed for the dismissal of the Plaintiff's case and Judgement be entered in terms of his Counterclaim set off.

The Plaintiff filed a **Defence** to the Counter-claim and denied each and every allegation contained in the Counter-claim. Further that the Plaintiff is still the **bonafide** owner and occupier of the said portion of land as per the Sale Agreement and hence the Defendant is not entitled to any mesne profits. The Plaintiff further alleged that he has paid more than **Kshs.400,000/=** to the Defendant for the sale and purchase of the said portion of land and the Plaintiff is not ready for refund as once a sale always a sale. The Defendant also filed a **Reply** to the **Counter-claim** and set off and reiterated all the contents of his **Counter-claim** and set off. He further contended that the Plaintiff has no proprietary or occupation rights over the Defendant's property and hence the said **Defence** to **Counter-claim** and Plaintiff's suit is misconceived and devoid of merit. Further that there was no valid contract for sale of the said portion of land between the parties herein. He further urged the Court to dismiss the Plaintiff's suit with costs and allow the **Counter-claim** and/or **set off** as prayed by him.

The matter proceeded for viva-voce evidence as from **19th July 2017**, wherein the Plaintiff gave evidence for himself and called one witness. On his part, the Defendant gave evidence and called two more witnesses. The parties in their evidence reiterated on what they had pleaded and further relied on their written statements which this Court adopted as part of their evidence.

The facts of the case are that sometimes in the **year 2009**, specifically **16th November 2009**, the Plaintiff **James Njuguna Mwaura** and the Defendant **Paul Wandati Mbochi** entered into a **Sale agreement** for sale and purchase of **¼ acre** from **Limuru/Ngecha/2153**. The Defendant is the owner of the said parcel of land and thus the vendor and the Plaintiff was the purchaser. The **Sale Agreement** was agreed at **Kshs.650,000/=** and at the time of signing the **Sale Agreement**, the Vendor /Defendant acknowledged receipt of **Kshs.400,000/=**. As per the Sale Agreement, the balance of **Kshs.250,000/=** was to be paid by **31st December 2009**.

Further, the purchaser(Plaintiff) was given vacant possession and he started utilizing the same. It was also a term of the agreement that the Vendor(Defendant) was to release to the purchaser (Plaintiff) all documents of titles relating to the said property and duly executed transfer form immediately upon obtaining **Consent** from the **Land Control Board**.

The **Sale Agreement** also contained a default clause. However, the sale was not completed since the Plaintiff has alleged that the Defendant failed to forward the relevant documents to the **Land Control Board**. The Defendant on his part alleged that the Plaintiff did not complete payment of the purchase price as agreed in the Sale Agreement and he thus rescinded the agreement. Defendant also alleged that he has severally tried to refund the purchase price but the Plaintiff has declined to accept the same.

After the *viva-voce* evidence, the parties herein did file their respective rival written submissions which this Court has carefully read and considered. The Court has also considered the entire pleadings and the exhibits attached thereto. The Court has considered the available evidence and the relevant provision of law and the Court finds that the issues for determination herein are as follows:-

- i. Was there a valid Sale Agreement between the parties herein.**
- ii. Was the said Sale valid without the Land Control Board Consent.**
- iii. Was there a breach of contract by either of the parties herein.**
- iv. Is the Plaintiff entitled to the prayers sought in the Plaint.**
- v. Is the Defendant entitled to the prayers sought in the Counter-claim or set off.**
- vi. Who is to bear the costs of the suit?**

i. Was there a valid Sale Agreement between the parties herein?

There is no doubt that the Defendant herein is the registered owner of **LR.Limuru/Ngecha/2153**, as from **31st August 2006**, in which he intended to sell **¼ acre** to the Plaintiff from the said land parcel. As a proprietor of the said parcel of land, the Defendant had a right to deal with it as he so wished even selling the same to other parties as he attempted to sell to the Plaintiff herein. See **Section 24(a)** of the **Land Registration Act** which provides:-

Subject to this Act—

a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

Further, the Vendor and the Defendant entered into a written Sale Agreement which agreement was signed by both the Vendor and the Purchaser (parties herein). The said **Sale Agreement** was witnessed by **E. M. Wachira & Co. advocates**. Therefore as provided by **Section 3(3)** of the **Contract Act**, a valid **Sale Agreement** was entered between the parties herein as it was a written agreement. **Section 3(3)** of the **Contract Act** provides:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party”

The above provision of law is also supported by **Section 44(1)** of the **Land Registration Act** which provides that every instrument affecting the disposition under the Act shall be executed by each of the parties consenting to it and in accordance with the provisions of the said Section. Therefore the Court finds that the parties herein did enter into a valid **Sale Agreement** for sale and purchase of a portion of land

from *Limuru/Ngecha/2153*.

ii) **Was the Sale Agreement binding without the Land Control Board Consent?**

It is not in doubt that this parcel of land *Limuru/Ngecha/2153* was an agricultural land. The parties were also in agreement that for the sale to go through, they required **Consent** from the **Land Control Board**. Therefore, it is evident that the portion to be purchased by the Plaintiff fell under the provisions of the **Land Control Act, Cap 302 Laws of Kenya**. Being an agricultural land, then the **Consent** of the **Land Control Board** was necessary and both parties are in agreement that no such Consent was obtained. Each of the party herein blame the other for failure to obtain such **Consent**. The Plaintiff alleged that the Defendant failed to forward the application for such **Consent** to the **Land Control Board** and the Defendant alleges that the Plaintiff failed to pay the full purchase price as agreed. The bottom line is that there was no **Consent** obtained from the **Land Control Board** and failure to do so rendered the transaction between the Plaintiff and the Defendant void for all purposes and therefore not binding. **Section 6** of the **Land Control Board** provides:-

“the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of, is void of all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

Though the Plaintiff submitted that **Section 8(1)** of **Cap 302** grants the court powers to extend the period within which the Consent was to be obtained, there was no evidence that such application was made and extension given. Therefore the transaction between the Plaintiff and the Defendant was void for lack of **Land Control Board Consent** and consequently, the same is not binding on the parties herein. See the case of *Elizabeth Chebo...Vs...Mary Chebo Gimnyigei, Civil Appeal No.40 of 1978*, where the Court held that:-

“Failure to get Land Control Board consent renders the agreement void and no specific reference can be granted.”

Further in *Mbuthia Charagu ...Vs...Kiarie Kaguru, Civil Appeal No.87 of 1986*, the Court held that:-

“Unless there is a consent of Land Control Board all the transactions relating to the transfer are null and void.”

The remedy upon the Plaintiff herein is **Section 7** of **Cap 302** where he can recover the money paid as a civil debt. It provides as follows:-

“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to Section 22”.

iii) **Was there a breach of contract by the parties herein?**

The Court has considered the **Sale Agreement** entered by the parties herein and has found it void for lack of **Land Control Board Consent**. However, supposing such Consent had been obtained, is there evidence that the said Sale Agreement was breached and if so by which party?

The Court has considered **Clause 2** of part 2 of the **Sale Agreement**. The purchase price was **Kshs.650,000/=** in which the Plaintiff/Purchaser had paid **Kshs.400,000/=** at the time of executing the Sale Agreement. The balance of **Kshs.250,000/=** was payable by **30th December 2009**, upon the parties obtaining **Consent** from the relevant **Land Control Board**.

As submitted by the Plaintiff, parties are bound by the terms of the contract and it is not the duty of the court to rewrite a contract for the parties. See the case of *Emo Investment Ltd...Vs...Stephanus Petrus Kiinge (2010) eKLR*, which quoted the case of *National Oil...Vs...Pipeplastic Samkolit (K) Ltd & Prof Samson K. Ongeru (CA No.95 of 1999*, where the Court held that:-

“A court of law cannot rewrite a contract between the parties. The parties are bound by their contract, unless coercion, fraud or undue influence are pleaded and proved”.

It was clear that by **30th December 2009**, the parties ought to have obtained the relevant **Land Control Board Consent**. It is also clear that by the same time, the purchaser ought to have completed payment of the purchase price.

However, the Court has seen a document titled **‘Deed of acknowledgement’** dated **28th June 2010**, which shows that by the said date, the Plaintiff had only paid a further **Kshs.50,000/=** to the Defendant. The Plaintiff therefore did not honour the terms of the **Contract** of paying full purchase price by **30th December 2009**. There is also no evidence that the Defendant had applied and obtained the relevant **Consent** from the **Land Control Board**. Therefore both parties were in breach of their agreement that they entered on **16th November 2009**. However, there is a Default Clause provided in the said **Sale Agreement** which was entered by the parties herein and they should have resorted to it. But that would have been applicable if the **Contract** was binding and enforceable after obtaining the **Consent** from the relevant **Land Control Board**. For now the said **Sale Agreement** is **void**.

iv) **Is the Plaintiff entitled to the prayers sought?**

The Plaintiff has sought for an order of specific performance which is an equitable relief granted when the party to the Contract who is seeking it has fulfilled all the terms of the Contract. See the case of *Masha...Vs...Tol Ltd (2003) 2 EA 593 (SCU)*;

“It is settled law that a person seeking to enforce a contract must show that all the conditions precedent have been fulfilled and that he has either performed or is ready and willing to perform all the terms which ought to have been performed by him....”

The said relief is also available in a *Contract* that is enforceable. However, in this matter, the Court finds that the Sale Agreement is void due to failure to obtain the Consent from the relevant Land Control Board. Therefore the Plaintiff is not entitled to a remedy of specific performance. His recourse lies in Section 7 of Land Control Act, Cap 302 wherein he is entitled to recover the money paid as a *Civil Debt*. Section 7 of Cap 302 Laws of Kenya provides as follows:-

“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to Section 22”.

v) Is the Defendant entitled to prayers sought in the Counter-claim/set off?

The Defendant has sought for payment of mesne profit of **Kshs.134,000/=** and damages for loss of bargain. However as the Court stated earlier, parties are bound by the terms of their Contract. The Defendant is the one who allowed the Plaintiff to take possession of the suit property. He was and is still in possession of **Kshs.450,000/=** paid to him by the Plaintiff as part of the purchase price. He cannot claim any mesne profit from the Plaintiff as he allowed him to take possession of the land and use it. He admitted that he disallowed the Plaintiff access to the said portion of land *since 2015*. He has not yet refunded the purchase price. The Defendant is not entitled to any payment of mesne profit or damaged for loss of bargain.

On the claim that **Kshs.400,000/=** should be used as set off for the *Counter-claim*, the Court finds that the Defendant was also in breach as he did not obtain the *Consent* from the relevant *Land Control Board* as stated in the Sale Agreement. Therefore, the Court finds that the Defendant is not entitled to the set off as claimed by him.

v) Who is to bear costs of the suit?

Ordinarily, costs do follow the event. Cost is normally awarded to the successful litigant. The Plaintiff herein had a claim and the Defendant also

filed a *Counter-claim* and/or set off. The Court found and held that both of the parties herein were in breach of Contract and they brought about the current state of affairs. Therefore none of these parties is the successful litigant as the Court has found that they are not entitled to their claims. For the above reasons, the Court finds and holds that each of the parties herein should bear its own costs.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has not proved his claim on the required standard as stated in the claim and the same is consequently dismissed entirely.

Equally, the Court finds that the Defendant has failed to prove his claim as stated in the *Counter-claim* and/or set off. Consequently, the said Counter-claim and/or set off is dismissed entirely.

However, the Court finds that though the Defendant had not sought for any other relief as the court deems fit to grant, the Court has inherent power/discretion under Section 3A of the Civil Procedure Act to make such orders that are necessary for ensuring the end of justice is met. For the above reasons, the Court directs and orders the Plaintiff to remove the caution that he lodged on the Defendant's parcel of land *Limuru/Ngecha/2153* on *11th May 2015*. The *Land Registrar, Kiambu* is directed and/or ordered by this Court to remove such Caution as provided by Section of the Land Registration Act. However, the Defendant should refund the purchase price already paid to him before the above stated caution is removed, for justice to be seen to have been done.

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of October 2018.

L. GACHERU

JUDGE

In the presence of

M/S Karwitha holding brief for M/S Njoroge for the Defendant

M/S Mwangi holding brief for D. K. Wanyoike for the Plaintiff

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Judgement read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

19/10/2018