



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 530 OF 2013

NYANGENYA ISABOKE MANIGA (Suing through his

attorney fact JOEL MANIGA).....PLAINTIFF

VERSUS

DR. ANDREW M. I. OCHOKI.....DEFENDANT

JUDGMENT

The Plaintiff's Case

1. Proceedings herein commenced by plaint dated 12th September 2013 and filed in court on the same date. The plaint was subsequently amended on 21st May 2014.
2. The plaintiff is resident in the United States of America. He therefore filed the case through his brother Joel Maniga, to whom he donated a power of attorney which was registered on 21st June 2013 as P.A. No. 1504.
3. The plaintiff's case as pleaded in the amended plaint is that he and the defendant executed a sale agreement dated 24th March 2004 pursuant to which the defendant sold to the plaintiff a parcel of land measuring 1.5 acres to be excised from LR No. 4730/114 IR No. 57554/1 owned by the defendant. The purchase price was agreed at Kshs.1, 500, 000. Despite paying the purchase price in full, the defendant failed to complete the transaction by transferring the property to the plaintiff. Accordingly, the plaintiff sought for judgment against the defendant for:

a) A declaration that, the plaintiff is the owner of 1½ acres of land excised from L.R No. 4730/114 I.R. No.57554/1 vide the agreement made between the parties on the 24th day of March 2004.

b) An order that, the defendant be compelled to execute all the necessary documentation and effect transfer to the plaintiff and ensure issuance of title in the names of the plaintiff as per the sale agreement.

c) In the alternative but without prejudice the prayer (b) above an order that the Executive Officer of this honourable court does execute all the necessary documents on behalf of the defendant to ensure transfer and issuance of title in the name of the plaintiff.

C2) That in the alternative but without prejudice to the foregoing prayers this honourable court be pleased to order that by way of damages and/or compensation the defendant does pay to the plaintiff the current market value of the property i.e. Kenya shillings fourteen million (Kshs.14, 000, 000/=) and/or the current market value as at the time of judgment.

d) Costs and/or interest.

The Defendant's Case

4. In his defence, the defendant admitted the existence of the sale agreement and that he had received the purchase price in full. He however added that he obtained a loan from Agricultural Finance Corporation (AFC) and used the suit property as security. That he defaulted in the repayment of the loan and as a result, AFC issued a foreclosure notice. In the circumstances, he could not transfer the land to the plaintiff and the transaction between him and the plaintiff was void for want of consent of the land control board. He added that he had intended to refund the purchase price but the plaintiff had frustrated that intention.

Evidence tendered by Plaintiff

5. At the hearing, the plaintiff's attorney Joel Maniga testified as PW1. He told the court in his evidence in chief that Nyanginya Isaboke Maniga (the plaintiff) is his brother and that the plaintiff donated to him a power of attorney which was registered on 21st June 2013 as P.A. No. 1504. He further stated that the defendant sold a parcel of land measuring 1.5 acres to the plaintiff. The land was to be excised from a 5 acre parcel known as LR. No. 4730/114 IR No. 57554/1 situated in Free Area behind Shiners Girls High School in Nakuru. The registered owner of the land was the defendant. The sale was pursuant to sale agreement dated 24th March 2004, drawn by defendant's advocate. The purchase price was Ksh.1.5 million and was to be paid in stages. Upon signing the agreement, the plaintiff paid Ksh.200, 000/= in cash and Ksh.800, 000/= by bankers cheque bringing deposit to Ksh.1million in total. The balance was paid on 20th May 2004 through banker's cheque no. 781157 for Ksh.500, 000/= addressed to the defendant.

6. PW1 further stated that the plaintiff was purchasing the property so as to develop a 5 star hotel on it. Upon paying the purchase price the defendant was to clear a loan that he had with AFC and thereafter to transfer the plot to the plaintiff. The defendant did not transfer the plot to the plaintiff as agreed. The plaintiff took possession immediately upon payment of the purchase price and erected a fence and a gate with the assistance of PW1, PW1's brother Jephith Maina Maniga and PW1's in-law Jason Momanyi. PW1 further stated that at the time of his testimony, the 1.5 acres was still occupied by PW1 and Jephith Maina Maniga on behalf of plaintiff. The remaining portion was still owned and occupied by the defendant.

7. The witness added that at the time of execution of the sale agreement, forms for applying for consent of the land control board were also signed and left with the defendant. Despite follow up by the plaintiff and PW1, the defendant only gave promises that he would transfer the plot. The promises were not fulfilled.

8. Under cross examination, PW1 told the court that he and the plaintiff were farming the land as at the date of his testimony and that the defendant was also farming on his portion. Upon buying the land the plaintiff would have converted it to commercial use. He added that he never attended the Land Control Board or seen consent of the Land Control Board for the transaction.

9. Regarding AFC, PW1 stated that the property had a loan owing to AFC and that he knew about the loan and that the title was with AFC. The plaintiff and the defendant did not seek the consent of AFC at the time of signing the sale agreement. They also neither enquired how much was owing nor conducted a search at the land registry.

10. Jephith Maina Maniga testified as PW2. He told the court that the plaintiff was his brother and that after the agreement dated 24th March 2004 was executed, PW1 and him took possession of the land and fenced it off. He added that he has been occupying the land since the year 2004. He cultivates it and plants maize and vegetables on it.

11. At the conclusion of PW2's testimony, the parties produced a valuation report by Chrisca Real Estate Agents dated 22nd April 2014 by consent as plaintiff's exhibit No. 8. With that, the plaintiff's case was closed.

Evidence tendered by the defendant

12. The defendant closed his case without testifying and without calling any witness to testify on his behalf.

Submissions

13. Parties filed written submissions. The plaintiff filed submissions on 12th October 2017 while the defendant filed submissions much earlier on 29th June 2017.

14. I have considered the pleadings, the evidence and the submissions.

Analysis and Determination

15. The defendant herein did not offer any evidence to challenge the evidence tendered by the plaintiff. Nevertheless, the burden of proof is upon the plaintiff to establish his case. I will begin by analysing the uncontested aspects of the plaintiff's case. I say uncontested not because there exists any evidence from the defendant but because the defendant has in his statement of defence made certain clear admissions.

16. There is no dispute that the plaintiff and the defendant executed a document titled "Agreement for sale of Land" dated 24th March 2004. The terms of the document are not in dispute either. In the transaction the defendant was the owner and seller in respect of land measuring 1.5 acres to be excised from a parcel known as LR No. 4730/114 IR No. 57554/1. The purchase price was KShs 1,500,000 which sum the defendant admits was paid in full. It is further not disputed that the property bought is yet to be excised and transferred to the plaintiff and that no consent of the land control board was obtained in respect of the transaction.

17. The issues that emerge for determination are firstly whether there was a loan from AFC and if so, whether there was foreclosure by AFC; secondly, whether the agreement for sale is enforceable; thirdly and lastly whether the plaintiff is entitled to the relief sought.

18. On the first issue as to whether there was a loan from AFC and if so, whether there was foreclosure by AFC, I note that the agreement a copy of which was produced in evidence by the plaintiff stated in part as follows:

(c) The one and a half acre plot from LR No. 4730/114 is sold to the purchaser on the understanding that the vendor is yet to complete the loan to Agricultural Finance Corporation.

(d) The vendor undertakes to clear the loan with AFC dating back to 28th July 1994 within reasonable time to facilitate transfer of the one and a half acre of land to the purchaser.

(f) The agreement shall remain valid and binding on both parties until registration and transfer of the title in favour of the purchaser.

(g) The vendor sales and the purchaser buys the said plot free from all encumbrances.

19. It is manifest from the above clauses of the agreement that the parties entered into the transaction knowing fully well that there was a loan advanced by AFC to the defendant and that it was necessary for the loan to be cleared so as to facilitate transfer of the property to the plaintiff. It is however unclear whether there was a charge registered against the title in favour of AFC. It would have been very easy to prove existence of such a charge by simply producing a certificate of search. None of the parties did so.

20. In the absence of evidence of a charge, it is not possible to ascertain whether AFC could foreclose as was alleged by the defendant. In fact, other than the allegation of foreclosure, there was no evidence produced to show actual foreclosure. Nevertheless, since the parties admit existence of a loan by AFC, I cannot entirely discount the possibility of a foreclosure. In the circumstances, issue number one is answered partly in the affirmative: there was indeed a loan by AFC. Foreclosure is however not proven though it could have been a possibility.

21. The parties could have done justice to the case by investigating the issue of the alleged charge further and producing more evidence on the matter. For example, if there existed a charge with a covenant in terms of **Section 59** of the **Land Registration Act**, it would be impossible to transfer the property without the consent of AFC. The section provides:

59. Lender's consent to transfer

If a charge contains a condition, express or implied by the borrower that the borrower will not, without the consent of the lender, transfer, assign or lease the land or in the case of a lease, sublease, no transfer, assignment, lease or sublease shall be registered until the written consent of the lender has been produced to the Registrar.

22. The parties themselves in the agreement pegged transfer of the property to clearance of the loan to AFC. The plaintiff has not adduced any evidence on whether the loan was cleared. The defendant has strategically remained silent on the matter. Still, the burden was upon the plaintiff to prove his case. In the absence of evidence of clearance of the AFC loan and in view of the implications of provisions such as **Section 59** of the **Land Registration Act**, I am find that the contract comprised in the sale agreement is unenforceable. It is not possible to compel specific performance of the agreement. That resolves issue number two.

23. There was also some debate on whether the transaction is void for want of consent of the land control board. The requirement of a consent in respect of a transaction on agricultural land is found at **Section 6** of the **Land Control Act**. The Section provides:

6. Transactions affecting agricultural land

(1) Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) 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 less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area,

is void for 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.

24. Pursuant to **Section 8** of the Act, the application for consent is to be made within six months of the making of the agreement. The High Court is given power to extend the six months period even where the period has expired, if sufficient reasons are given.

25. In the context of this case, and in view of my finding that the agreement between the parties is not enforceable, the debate on whether or not absence of consent of the land control board voids the agreement is moot.

26. If I had found that the agreement was enforceable, I would have taken into account that the defendant not only received the full purchase price but also put the plaintiff in possession. Lack of consent of the land control board per se would not in the circumstances void the agreement. The Court of Appeal stated recently in the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** as follows:

A contract for the sale of land to which the Land Control Act applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see Section 9 (2)). The Land Control Act prescribes the time within which the

application for consent should be made to the Land Control Board but does not prescribe the time within which the Land Control Board should reach a decision or the time within which any appeal should be determined. The process from the time of the making the application to the time of the determination of the appeal, if any, may obviously take time. However, the requirement that an application for the consent should be made within six months of the making of the agreement and the provisions of Section 7 of the Land Control Act for recovery of the consideration is an indication that Parliament intended that controlled land transactions should be concluded within a reasonable time.

[23] The Land Control Act does not, unlike Section 3 (3) of the Law of Contract Act and Section 38 (2) of the Land Act save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.

27. Nevertheless as I have already stated, in the context of this case, the debate on whether or not absence of consent of the land control board voids the agreement is not of any practical consequence.

28. The defendant has admitted receiving the full purchase price of Kshs.1, 500, 000. According to the uncontroverted evidence put before the court by the plaintiff, the purchase price was fully paid by 20th May 2004. The defendant has had this amount since then. The plaintiff has prayed in the alternative for an order that by way of damages and/or compensation the defendant be compelled to pay to the plaintiff the current market value of the property being Kshs.14, 000, 000. The plaintiff has relied on a valuation report as a basis for the sum claimed.

29. Since I have already found that the agreement between the plaintiff and the defendant is unenforceable by way of an order of specific performance, there would be no basis upon which to find that the plaintiff is entitled to the market value of the property. Nevertheless, I am persuaded that the plaintiff is entitled to a refund of the amount he paid plus interest thereon.

30. In the end, I order that:

a) Prayers (a), (b) and (c) of the plaint are dismissed.

b) Judgment is entered in favour of the plaintiff for Kshs.1, 500, 000 with interest thereon from the date of filing this suit until payment in full.

c) Costs of the suit with interest thereon are awarded to the plaintiff.

31. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 12th day of October 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff

Mr Kahiga for the defendant

Court Assistants: Gichaba & Lotkomo