



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 124 OF 2017

JOHAN MWANGI WANDETTO.....PLAINTIFF

VERSUS

JOHN KIGOI NDUATI..... DEFENDANT

JUDGMENT

1. By a plaint dated **10/7/2017** and filed in court on the same date, the plaintiff sought the following orders against the defendant:-

- (a) **A declaration that the defendant is in breach of the sale agreement of 26/4/2016**
- (b) **An order that the defendant do surrender, vacate and give vacant possession of the property and house (under the conditions/status it was at time of sale) comprised in title no. Kitale Municipality Block 15/Koitogoss/633 to the plaintiff, in default to be evicted therefrom.**
- (c) **Costs.**
- (d) **Any other relief this Honourable court may deem just to fit to grant.**

The Plaintiff's Case

2. According to the plaint the plaintiff and the defendant entered into an agreement for sale dated 26/4/2016 for the sale of the suit land at **Ksh.4,000,000/=**; the sum of **Kshs.500,000/=** was paid upon execution; the balance of **Ksh.3,500,000/=** was to be paid within 90 days from the date of the agreement; that the defendant took possession of the suit premises but has not paid the latter amount; that

The Defendant's Defence and Counterclaim

3. The defendant filed a defence and counterclaim dated **1/8/2017** on **30/8/2017**. In that defence and counterclaim he states as follows: that there was a mutual understanding that the payment of the balance would be effected after the plaintiff applied for the consent of the land control board to transfer the land and that the suit is premature. In the counterclaim the defendant states that it was an express term of the agreement that the plaintiff would apply for the consent of the land control board to transfer and also pay the outgoings in respect of the suit land to facilitate its transfer in favour of the defendant; that the defendant failed to apply for such consent; that the plaintiff has failed to seek an extension of the completion period to enable him obtain the consent of the land control board and that the defendant is and has always been willing to fulfil his obligations under the agreement. The defendant prays for orders of specific performance.

Reply to Defence and Defence to Counterclaim

4. The plaintiff filed reply to defence and defence to counterclaim on **7/9/2018** and joined issue with the defendant on the contents of his defence and counterclaim. He pleaded that the agreement did not set a precondition that the land control board consent be obtained before the completion period and urged that the defence contained no triable issues; that the defendant has never served him with any notice of breach and that after his expression of notice to rescind; the defendant requested for a meeting which mutually resolved that the agreement be cancelled. In the same breath the plaintiff pleaded that the agreement was void and unenforceable for want of the land board's consent.

The Plaintiff's Evidence

5. The suit came up for hearing on **31/5/2018** when the plaintiff testified. He adopted his witness statement dated **10/7/2017** filed in the suit. He reiterated the contents of the plaint. He stated that a demand letter was written to the defendant on **5/8/2016** demanding payment within **14** days failure to which rescission would result and the defendant did not respond. The plaintiff added that a meeting was held at the offices of Kiarie & Co Advocates between the parties and their advocates on **27/9/2016** and in the discussions it was agreed that the

agreement be cancelled but the defendant failed to sign the formal document cancelling the agreement. Instead when that document was sent to his advocates later he stated that he wished to continue with the transaction. Thereafter he never paid the balance of the purchase price. A letter dated 20/1/2017 was then written to the defendant informing him that the agreement had been rescinded and he should vacate the premises but he never responded.

The Defendants' Evidence

6. **DW1, John Nduati**, the defendant testified on **11/10/2018**; he admitted the agreement and that he had not paid the balance as alleged in the condition was that his suit but averred that the vendor was to seek a land control board consent but he never did so or explained to him why he never applied for it. According to the defendant the plaintiff also never applied to the defendant for an extension of the agreement's completion period. He denied that there was any consensus to rescind the agreement. He alleged that when he asked the plaintiff for a consent the plaintiff asked for more money. He acknowledged receipt of **PExh 2** a letter dated **5/8/2016** from CK Yano Advocates demanding payment of the balance within **14** days failure to which the agreement would be treated as repudiated and the property would be repossessed. He testified that if he got the consent of the board from the plaintiff he would pay the balance within **90** days.

Submissions

7. The plaintiff filed his submissions on **30/10/2018** and the defendant filed his on **2nd November 2018**. I have considered the pleadings the evidence and the submissions of the parties.

Determination.

8. The issues that arise in this suit are as follows:-

(1) Who between the plaintiff and the defendant is in breach of the agreement dated 26/4/16?

(2) What orders should issue?

(1) Who between the plaintiff and the defendant is in breach of the agreement dated 26/4/2016?

9. A copy of the agreement was produced in court as **PExh 1**. Under "other terms and conditions" on page 1 the agreement provides as follows:

"3. The vendor shall apply and attend land control board for consents and transfer of the sold plot; though he has deposited the original title documents with the advocates witnessing this agreement."

10. No other term of the agreement refers to the issue of consent of the land control board to transfer. On the other hand the agreement provides as follows under the heading "Balance":

"Kshs 3,500,000/=shall be paid on or before ninety days (90) in Acc. No. (Account number withheld) (KCB Bank) of Acc No. (Account number withheld) (Standard Chartered Bank)."

11. It is agreed by both parties that the defendant never paid the balance as stipulated.

12. In the defence the defendant's reason for non-payment was that there was an understanding between the parties that the payment of the balance would be effected upon the plaintiff applying for the consent of the land control board to transfer the property to the defendant.

13. In the counterclaim the defendant's reason was that there was an express term of the agreement that the plaintiff would apply for the consent of the Board for the transfer of the suit land in favour of the defendant before the completion period.

14. I find no express condition in the agreement that the plaintiff would apply for the consent of the Board for the transfer of the suit land in favour of the defendant before the completion period.

15. The burden of proof lay on the defendant to demonstrate that the express terms of the agreement were altered by another agreement, either written or oral between the parties that provided for consent to be obtained before payment of the balance.

16. However the defendant has not brought any evidence to court to demonstrate that there was any oral agreement that altered the terms and conditions of the agreement dated **26/4/2016**. He is therefore bound by the express terms of the agreement dated **26/4/2016**.

17. This court must examine how the provisions of the Land Control Act may affect the sale transaction and the issue of rescission.

18. In my view since the provisions of the **Land Control Act (Cap 302)** stipulate that consent must be applied for within **6 months** of the making of an agreement to a controlled transaction the plaintiff had six months to apply for the consent.

19. The plaintiff could only be deemed to be in breach if those six months expired before he applied for the same. The six months have expired.

20. It is noted however, that the plaintiff produced a demand letter which was written to the defendant on **5/8/2016** demanding payment within **14** days failure to which rescission would result and another dated **20/1/2017** rescinding the agreement and demanding vacant possession.

21. The first letter was written within six months of the transaction. The letter was thus a proper notice which the defendant acknowledged receipt of and failed to comply with in that he failed pay the balance.

22. The court having already found that the defendant had not paid the balance as per the agreement or within 14 days from the date of receipt of the letter dated 5/8/2016 the rescission contained in that letter must be construed to have taken effect.

23. I have found that after 14 days from the date of receipt of that letter the notice would take effect. Since the date of receipt of the letter is not stated, this court must estimate the date of receipt.

24. That letter instigated the meeting of 27/9/2016, which meeting is admitted by both parties to have taken place. Therefore, the letter must be deemed to have been received by the defendant by the date of the meeting, 27/9/2016.

25. To be on the better side of caution the 14 days given in the letter may be counted from **27/9/2016**. That brings us to about **12/10/2016**. By the latter date therefore, the plaintiff was entitled to repudiate the contract. He later purported to do so by his letter dated **20/1/2017**.

26. However this court deems the letter dated **5/8/2016** to have already taken effect as outlined above. By the letter dated **5/8/2016**, the agreement is deemed to have been rescinded within the **6 months** within which the consent of the land control board could have been applied for.

27. There is no need for this court to pronounce itself on the issue of whether the agreement was void for want of a Land Control Board consent in view of the timelines examined herein before as that issue is irrelevant now in the light of the accomplished act of rescission.

28. Owing to the analysis above I find that it is the defendant who was in breach of the agreement dated **26/4/2016**.

CONCLUSION

(2) What orders should issue?

29. The plaintiff's claim therefore has merit. I enter judgment in favour of the plaintiff against the defendant and issue the following orders:

(a) A declaration that the defendant is in breach of the sale agreement of 26/4/2016;

(b) The defendant's counterclaim is dismissed.

(c) The defendant shall surrender, vacate and give vacant possession of the property and house (under the conditions/status it was at time of sale) comprised in title no. Kitale Municipality Block 15/Koitogos/633 to the plaintiff and in default to be evicted therefrom;

(d) The defendant shall bear the costs of this suit and of the counterclaim.

Dated, signed and delivered at Kitale on this 27th day of November, 2018.

MWANGI NJOROGE

JUDGE

27/11/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the Plaintiff

Mr. Kraido holding brief for Waweru for the defendant

COURT

Judgment read in open court.

MWANGI NJORGE

JUDGE

27/11/2018