



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 479 OF 2017

IRUNGU GACHAGO.....PLAINTIFF

VS

JOYCE WATIRI MACHARIA.....1ST DEFENDANT

NELSON NJUGUNA KAMAU.....2ND DEFENDANT

JUDGMENT

1. cvcThe Plaintiff filed suit against the Defendants on the 17/10/2017 seeking the sole order that the Defendants do vacate the first plot known as LOC8/KANDEGENYE/1301 and move to the second plot from the road heading to Githigara shopping centre that is to say LOC8/KANDEGENYE/1300. The cause of action arose from a contract of sale of land in which the Plaintiff agreed to sell and the Defendants agreed to buy the second plot from the road. It is the Plaintiff's case that the Defendants, in breach of contract have forcefully taken possession of the first plot from the road and developed it without the consent and or notice of the Plaintiff at all.

2. The Defendants have resisted the Plaintiff's claim and have filed a counterclaim seeking a declaration that the 1st Defendant is the proprietor of LOC8/KANDEGENYE/1301 and urged the Court to order that land control board consent be given to facilitate the transfer of the said plot to her.

3. At the trial the Plaintiff gave evidence and stated that he was the registered owner of LOC8/KANDEGENYE/1082 which he subdivided into 4 portions; LOC8/KANDEGENYE/1298-1301. That the subdivisions were concluded in or around April/May 2017 and titles of the 4 parcels were issued to him 5/6/17 in his name.

4. On the 4/5/2011 he sold a portion the Defendants vide the agreement of sale executed on even date at the purchase price of Kshs 300,000/- out of which Kshs 200,000/- was paid. Another installment of Kshs 45,500/- was paid in installments leaving a balance of Kshs 45,500/- outstanding. That on the ground, he showed the Defendants the second plot that they had purchased.

5. It is his case that the Defendants forcefully took possession of the wrong plot to wit the first plot from the road instead of the second plot and started development without his consent involvement and or notice. This they did well aware that their plot was the second one and not the first. That his house is about 260 feet from the 1st plot and when he noticed that, the Defendants had taken possession he warned them but they remained adamant. That on 23/2/17 his Advocate on record wrote to the Defendants asking them to consult and check the agreement for sale so that they construct the right portion to avoid confusion and conflict. Despite being cautioned that they had taken possession of the wrong plot and reporting the matter to the area chief they ignored it. That several meetings have been held at attempting a resolution of the dispute in vain. He stated that a meeting that was scheduled at his Advocate's office on 16/5/17 to resolve the matter was ignored by the Defendants who did not turn up. On the 16/5/17, his Advocate wrote a letter to the Defendants asking them to vacate and settle on the second plot as provided for in the agreement for sale to avoid breach of contract, which could force the Plaintiff to cancel the agreement of sale and penalize them for breach. Further, they were informed that the Plaintiff could only transfer the first plot if they were agreeable to paying the purchase price of Kshs 1.2 million.

6. He informed the Court that the first plot was sold to a third party namely Paul Mugo Kamau on 26/7/17 at the costs of Kshs 1.0 million out of which Kshs 400,000/- has been paid leaving a balance of Kshs 600,000/-. The Defendant's unlawful occupation of the plot is hindering the transfer of the said plot to the purchaser.

7. Peter Mwangi Murimi – PW2 -informed the Court that land was subdivided by a Surveyor called Wangechi before the agreement was entered into between the parties however, the plots had not been given numbers. However, the beacons had been affixed on the ground. He was present and witnessed the of sale between the parties in 2011. Later the plots were given plot Nos.1298-1301 starting from the road. The plot sold to the Defendants was the second plot from the road or plot No 1300 but they have built plot No 1301, which is the 1st plot from the road. He stated that he was present when the plot was being shown to the 1st Defendant in 2017 by the Chief. He stated that he was not present when the Defendants were showed the plot by the Plaintiff. That the Chief of the area got involved in the dispute before the house was built. He could not however recollect when the Defendant built a stone house on the suit land

8. The 1st Defendant testified before the Court that she runs a small hotel at Kahuro market where she derives her living. She stated that the Plaintiff showed her the plot in the presence of the 2nd Defendant whereupon she fenced it and planted a life hedge and nappier grass and dug a latrine in August 2011. At that time, the plot did not have survey numbers. That the Plaintiff informed her at the Advocates office that the plot was no. 2 however where he showed her is where she have built. That the beacons were affixed in 2018 after she had already constructed the house in 2016. That the Plaintiff never raised any complaint when she was constructing and only raised the issue when he obtained titles to the plots when he decided to evict her. That the distance between her house and that of the Plaintiff is 100 meters and in any event, the Plaintiff and his wife would come to site to receive the money, which was part of the instalments of the purchase price.

9. On cross-examination, she confirmed that she attended the Plaintiffs Advocates office to execute the agreement in 2011. That the agreement of sale was read to them and being in agreement with the terms, they signed. That she has so far paid Kshs 245,500/- leaving a balance of Kshs 45,500/-. She stated that at the time of signing the agreement of sale the plots had not been assigned land reference numbers. Upon being shown the contents of Clause No 4 in which the description of the plot read second plot from the road, she disputed the contents, as the plot had not been shown to her on the ground. She confirmed that she built on the land touching the road (to Githagira market) which the Plaintiff did show to her. She testified that the Plaintiff did not stop her from constructing the plot notwithstanding that he used to come to the construction site. That the Plaintiff did not report him to the chief to stop construction instead she reported to him to the chief seeking her title.

10. The 2nd Defendant filed a witness statement on the 11/12/17 wherein he adopted the 1st Defendant's evidence as his evidence. In addition, he added that they bought the plot jointly and the Plaintiff showed them the place where the 1st Defendant has built.

11. Parties filed written submissions, which I have read and considered.

12. As to whether the Defendant was in breach of the sale agreement dated the 4/5/11, the 1st Defendant confirmed that she had not concluded paying the purchase price and further that she constructed on the 1st plot contrary to clause 4 of the agreement for sale and without the consent of the Plaintiff. That on the other hand the Plaintiff performed his part of the agreement by ensuring that he subdivided the plots into 4 plots to facilitate the transfer of the same to the Defendants and other persons he had sold the portions to.

13. As to whether the Defendants have proved their counterclaim, the Plaintiff submitted that the Defendants' counterclaim is asking the Court to rewrite a contract for the parties by awarding to her the property for which they did not buy in the first place.

14. The Defendants submitted that they took possession of the plot that had been shown to them by the Plaintiff upon signing the agreement of sale, fenced it grew nappier grass and built a latrine. That in 2016 she developed her house and the Plaintiff who lives around 100 meters did not raise any complain. The Defendant attributed the Plaintiff's reluctance to transferring to them the first plot on the road to the fact that the said plot has been sold to a third party. She averred that the land was subdivided on 6/5/17 and the titles issued on the 5/6/17 and prior to this period there are no maps beacons or evidence to show that the Plaintiff wrongfully occupied the portion she had developed. She further submitted that the Plaintiff received part of the purchase price whilst she was in possession of the 1301 and therefore the Plaintiff cannot evict them after making implied misrepresentations they are in occupation of the wrong plot. They relied on the case of **Benjamin Ayiro Shiraku Vs Fozia Mohammed (2012) EKLK** where the Court held;

“To my mind, the fact that the Defendant accepted further part payment of the purchase price for consideration for the purchase by the Plaintiff of the suit property, such amounted to acquiescence and waiver of any limitation right.”

They also relied on the case of **Kiplangat Arap Biator Vs Esther Tala Chepyegon (2016) CA 38 of 2012** where the parties entered into an agreement for the purchase of Plot No. 3 but the purchaser later realized that he was in occupation of 500 as opposed to Plot no.3. That appellate Court agreed with the Superior Court that a mistake occurred in the process of drawing up the agreement and that is why the equitable remedy of rectification is appropriate in the matter”.

15. Having weighed the pleadings, the evidence and the written submissions of the parties, the issue for determination are; whether the Defendants are in breach of the agreement for sale; Whether there was any misrepresentation by the Plaintiff; whether there exists a mistake in the contract that requires the Courts remedy; Who meets the costs of the suit.

16. It is commonly accepted and acknowledged that the suit land LOC8/KANDEGENYE/1802 was owned by the Plaintiff who embarked on the process of subdivision as early as in 2011 as seen by the field diagram and observations on site document dated the 3/5/11. This evidence has also been corroborated by the Plaintiff and PW2 who led evidence that the suit land had been subdivided on the ground by a surveyor called Wangechi but the land reference numbers had not been issued. According to the evidence on record, the Plaintiff subdivided the LOC8/KANDEGENYE/1802 into 4 plots 1298-1301.

17. I have perused the agreement of sale dated the 4/5/2011 between the parties, which is not in dispute in all respects. The land being sold measured 0.11 situated at Mugoiri Location in Kahuro Division. The purchase price is Kshs 300,000/- out of which Kshs 200,000/- was paid at the execution of the agreement and the balance was to be paid on transfer of the said portion to the Defendants immediately after obtaining land control board consent. The Defendants were to take possession of the portion upon execution with authority to develop as they wish. It was stated that the Plaintiff had subdivided the plots into 4 and the portion the Defendants were acquiring was the second plot from the road, which heads to Githagara shopping centre.

18. The Defendants have claimed that they were shown the plot (1301) in 2011 and immediately commenced developments thereon in form of fencing and growing a hedge and nappier grass on the land. That in 2016 they built a house and the Plaintiff never raised any complaint until in 2017 when he had obtained titles to the land. The Plaintiff has led evidence that once he saw the Defendants had taken possession of the wrong plot i.e the first one instead of the second one, he warned the 1st Defendant but she was adamant. That he involved the chief and his Advocate to try to resolve the matter but the 1st Defendant would not hear about it. It is on record that the Plaintiffs Advocate wrote to the

1st Defendant on 23/2/17, 15/5/17 and 16/5/17. It would appear that the 1st Defendant had written to the Plaintiff a letter on 24/6/2016 asking for her plot title. This letter was however not produced in evidence. On the 19/5/17, the 1st Defendants responded to the Plaintiff's Advocate disputing that she has forcefully taken possession of the 1st plot and insists that she was shown the plot by the Plaintiff. What can be cleaned from this letter is that she had been obstructed from construction for which she had visited the Plaintiffs Advocate to report the said complain. This evidence agrees with the Plaintiffs evidence that she warned the Plaintiff not to construct on plot No 1301 but she was adamant. In the said letter, she refutes the clear provisions of the clause 4 of the contract, which described the land she purchased as the second plot (1300). She did not lead evidence to show that indeed the Plaintiff showed or pointed out plot no 1301 on the ground. The Plaintiff has stated that he showed the 1st Defendant plot No 1300 (the second one from the road). The 1st Defendant has stated that plot No. 2 had coffee plantation until the partitioning of the same and that the neighbors and the chief were aware. The neighbors nor the Chief were not called to give evidence. The Court finds the 1st Defendants evidence evasive and unbelievable in view of the clear provisions of the agreement of sale.

19. It is trite law that Courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of **Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592, Scrutton L.J.** held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract.”

20. In the case of **Attorney General of Belize et al Vs Belize Telecom Ltd & Another (2009), 1WLR 1980 at page 1993**, citing Lord Person in **Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973) 1 WLR 601 at 609**, held as follows:

“The Court does not make a contract for the parties. The Court will not even improve the contract, which the parties have made for themselves. If the express terms are perfectly clear from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the Court thinks some other terms could have been more suitable.”

21. The importance of interpreting contracts strictly was further reiterated in the case of **Curtis Vs Chemical Cleaning & Dyeing Co. Ltd (1951), ALL ER 631** in which Lord Denning held as follows:

“If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including exception clauses, unless the signature is shown to be obtained by fraud or misrepresentation.”

22. Guided by the above law precedents it is the Court's view that the parties entered into an agreement of sale. Clause 4 provided for the full description of the land in terms of the second plot from the road, which heads to Githagara shopping centre. The 1st Defendant was duly shown the plot on the ground, which was one of the 4 resultant plots from the main 1802. She later settled on the first plot touching the road to Githagara Shopping centre and started developments. She was warned and even obstructed from occupying and construction of the same by the Plaintiff but she was adamant in so occupying and developing the plot with full knowledge that the plot she built was not the 2nd plot from the road as provided for in the contract of sale. Several letters and meetings to try to resolve the matter did not bear fruit.

23. It is clear that the 1st Defendant did occupy the plot 1301 contrary to the agreement of sale and without the consent of the Plaintiff. That explains why she has not been given her title. It is noted in evidence that she had cautioned the land 1802 thus causing delay in the subdivision of the plots.

24. The Defendants have alluded to misrepresentation by the Plaintiff by receiving the purchase price. According to the agreement of sale on record the purchase price was payable through installments. The receipt of monies was therefore in conformity with the agreement for the purchase of Plot No2 from the road. I do not agree with the claim of the Defendants that there was any misrepresentation on the part of the Plaintiff or that they were receiving the monies on account of plot No 1.

25. In respect to whether there was a mistake, the Court notes that mistake can vitiate a contract. In this case, the Defendants have not pleaded mistake. In any event, the express terms of the contract are clear as to the description of the land that was being bought. Even if the Court were to accept the Defendants claim that she was shown plot No 1 (next to the road) surely that did not conform with clause 4 of the contract. There was no evidence that the said contract was revised and no other contracts save the one dated the 4/5/17 was presented to Court. The Court does not find any mistake in the contract that the Defendants could be said to have relied on to their detriment. In my view, the Defendants have brought the detriment upon themselves.

26. In response to the counterclaim, the Court's view is that it cannot order the transfer of the plot No 1 (1301) to the Defendants because there is no contract to that effect. In the end, the Defendants' counterclaim fails.

27. Final orders;

- a. The Defendants are by themselves, their servants agents or any one claiming through them ordered to vacate from the first plot No. LOC8/KANDEGENYE/1301 and move to the second plot from the road heading to Githigara shopping centre being Number LOC8/KANDEGENYE/1300.
- b. The Defendants' Counterclaim is dismissed.
- c. The Plaintiff shall have the costs of the suit and the counterclaim.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 22ND DAY OF NOVEMBER 2018.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Kimwere HB for Ndegwa for the Plaintiff

Wandaka for the 1st and 2nd Defendants.

Irene and Njeri, Court Assistants