



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 283 OF 2013

WINNIE CHEMATIA SETTIM.....PLAINTIFF

VERSUS

MICHAEL KENNEDY OMACHEDEFENDANT

JUDGMENT

(Suit by plaintiff seeking possession of land sold by her to the defendant; plaintiff claiming that the defendant never paid the balance of the purchase price; defendant alleging that he did pay the balance and has been in possession for over 14 years; court not persuaded on the evidence that the defendant ever paid the balance of the purchase price; plaintiff entitled to vacant possession; defendant to be refunded the money that he paid; no pleading for adverse possession and court unable to make a finding on the same)

1. This suit was commenced through a plaint filed on 4 April 2013 which plaint was later amended. In the amended plaint, the plaintiff has pleaded that on 12 November 1999, she entered into a sale agreement with the defendant vide which the defendant purchased the land parcel Naivasha/Ol Jorai Phase II/ 1198 (formerly known as Ol Jorai Plot No.8) at a consideration of Kshs. 174,000/=. It is pleaded that Kshs. 100,000/= was paid and that the balance of Kshs. 74,000/= was to be paid on or before 30 May 2000. It is pleaded that the defendant failed to pay the balance and instead forcefully entered the land. In her suit, she has asked for orders of eviction against the defendant and a permanent injunction to restrain him from the suit land.

2. The defendant filed a defence and counterclaim. He pleaded inter alia that he did pay the balance of Kshs. 74,000 and contended to have been in possession for a period of 14 years, uninterrupted. He averred that the plaintiff fraudulently caused her name to be registered as proprietor of the suit land, and in his counterclaim, he has asked for orders that he be declared the absolute owner of the suit land, cancellation of the plaintiff's title deed, and a permanent injunction to restrain the plaintiff from the suit land.

3. In her evidence, the plaintiff produced the sale agreement that she had with the defendant over the sale of the suit land. She stated that she was paid the sum of Kshs. 100,000/= and the balance of Kshs. 74,000/= was to be paid one month later. She stated that the defendant was not supposed to take possession before paying the whole of the purchase price, and that she went to claim her money around June of the year 2000, but she was chased away. She saw the advocate who wrote the sale agreement, Mr. Motende, who then wrote to the defendant a letter dated 9 November 2000, but this letter was ignored and she reported to the local administration. The land was later verified as belonging to her by the Settlement Office and she eventually got title to it. She stated that she was willing to pay back what the defendant paid to her but that he should vacate the land.

4. Cross-examined, she asserted that she went to claim her balance in the year 2000, and that she never went abroad between the years 2005 and 2009. She insisted that it would be a lie if the defendant claimed to have paid her Kshs. 60,000/= at a later date which was not documented. She stated that their relationship had already soured and they could not sit down to discuss anything.

5. PW-2 was Charles Sironga Koiba, the Chief of Kiambogo Location. He knows the parties and he testified that in the year 2010, they were involved in conducting the registration of land with the Settlement office. When they got to the suit property, there was a dispute, and they sat to resolve it. They learnt that the defendant had a purchase agreement of 1999 and they called the advocate. They resolved that the land should be registered in the name of the plaintiff as the defendant had not fully paid.

6. With the above evidence, the plaintiff closed her case.

7. In defence, the defendant testified that he is a teacher and he got to know that the plaintiff, who lived in Eldoret, was selling her land. They met on 11 February 1999, and they wrote the agreement at the offices of Motende & Company Advocates. He paid Kshs. 100,000/= and he stated that they agreed that he could pay the balance by May of the year 2000. He took possession of the land and made some semi-permanent structures, and that his family has been on the land ever since. In 1999, he intended to build a permanent house, and around

March, the plaintiff came and asked for her balance. He opted not to build the house but clear his debt with the plaintiff. He testified that he had Kshs. 60,000/= which he paid, and since it was a Saturday, they agreed that they could go to the Advocate's office on a weekday so that he can clear the balance. He stated that he went to the Advocate's office but the plaintiff did not appear. He stated that he deposited this balance of Kshs. 14,000/= with Mr. Motende and that the plaintiff emerged in the year 2008 when titles were being processed and demanded the balance. He asked her where she had been and she stated that she had been abroad. He told her that her balance of Kshs. 14,000/=, is deposited at Mr. Motende's office and that she could go and collect it. They went together to Mr. Motende's office and Mr. Motende handed over to her Kshs. 14,000/=, which she declined, insisting that her balance was Kshs. 74,000/=. He asked her about the Kshs. 60,000/= which he had earlier given, but the plaintiff told him that he had no proof of payment since it was never recorded and there was no witness. Mr. Motende advised him to pay the Kshs. 74,000/= as he could not prove that he paid the Kshs. 60,000/=. On 5 November 2009, he went to Mr. Motende's office and deposited Kshs. 60,000/= to top up on the Kshs. 14,000/= so as to make Kshs. 74,000/=. He stated that the plaintiff was then given Kshs. 74,000/= by Mr. Motende in his presence. The matter then lay quiet until the year 2013, when the plaintiff filed suit. He had a copy of a receipt of Kshs. 74,000/= written by Mr. Motende's office. He also stated that the advocate endorsed on the sale agreement. He asked that the plaintiff be restrained from the land and she also refunds him the Kshs. 60,000/= that he handed to her.

8. Cross-examined, he stated that they did not go to the Land Control Board and no consent from the Board was obtained. He could not recall whether the plaintiff was given any payment voucher to sign when being paid by Mr. Motende and no acknowledgement was written for receipt of the money. He stated that the advocate did not issue him with a receipt for the Kshs. 14,000/= that he deposited with him. Neither did he record the payment of Kshs. 60,000/= when the plaintiff came to visit him.

9. DW-2 was Florence Kwamboka, the wife of the defendant. She testified that in early 2000, the plaintiff came and asked for Kshs. 60,000/= to pay school fees and she was given the money. He stated that in the year 2009, the plaintiff emerged claiming the balance and they went to the advocate's office where the plaintiff insisted to be paid Kshs. 74,000/=. She said that her husband went and got this money and paid the advocate. Cross-examined, she stated that she did not see this amount of Kshs. 74,000/= being paid.

10. With the above evidence, the defendant closed his case.

11. I invited both counsel for the plaintiff and defendant to file written submissions and they both did. I note that in his submissions, Mr. Chepkwony, learned counsel for the plaintiff, inter alia submitted that the transaction is void for want of consent of the Land Control Board. M/s M.C. Getanda & Co Advocates, for the defendant, did not appear to contest this position, but submitted that since the agreement was rendered void, the defendant started accumulating time which would entitle him to claim the suit land by way of adverse possession. Counsel submitted that this court ought to hold that the defendant is entitled to the land by virtue of being a purchaser and also through the doctrine of adverse possession.

12. I take the following view of the matter.

13. First, parties are bound by their pleadings. In her suit, the plaintiff sought orders of eviction and permanent injunction against the defendant. In his defence and counterclaim, the defendant never advanced any claim of entitlement to the suit land by way of adverse possession. Nowhere in his pleadings has he stated that he would wish to be declared owner of the suit land by way of adverse possession. The closest he came, is merely to state that he has been on the land for an uninterrupted period of 14 years, but he never made any claim for adverse possession. I am afraid that having not filed any pleadings claiming the land by way of adverse possession, I am unable to delve into whether or not the defendant is entitled to the suit land through adverse possession. If I do so, I will be prejudicing the plaintiff, for the plaintiff was never put on notice that she would need to defend any suit based on adverse possession. Thus, it follows that the defendant can only succeed if I am persuaded that he is entitled to the suit land through purchase.

14. The defendant, can only succeed if he shows that he abided by the terms of the contract that he had with the plaintiff. I have looked at the sale agreement that the two parties had. I am actually unable to read the month indicated in the agreement, though the plaintiff in her pleadings did state that the agreement was entered into on 12 November 1999, and the defendant in his pleadings provided the date 12 February 1999. On my part, I am prepared to hold that the agreement was entered into on 12 February 1999, as pleaded by the defendant, for I have seen clause 3 of that agreement, which provides that the balance of Kshs. 74,000/= shall be paid on or before 30 May 1999. What the defendant needs to show therefore, is that he paid the balance of Kshs. 74,000/= on or before 30 May 1999. The plaintiff asserts that no further payment has been received apart from the initial deposit of Kshs. 100,000/=. On his part, the defendant insists that he did pay the balance and that it was received. He has contended that he paid Kshs. 60,000/= sometimes in March 1999 on a weekend, which money was not however recorded, and deposited Kshs. 14,000/= with Mr. Motende advocate, the same advocate who drew the sale agreement. However, and so that it may not come back to haunt him, and given that the plaintiff denied receiving this money, he decided to just pay the sum of Kshs. 60,000/= to Mr. Motende on 5 November 2009, and that Mr. Motende paid the plaintiff Kshs. 74,000/= recalling the Kshs. 14,000/= that he had earlier deposited with him. I note that this payment is heavily disputed by the plaintiff and I have to make a decision, whether on a balance of probabilities, I am persuaded that this money was paid.

15. Firstly, I am not persuaded that the sum of Kshs. 60,000/= was paid in March 1999 as claimed by the defendant. The simple fact of the matter is that save for the oral allegations made by the defendant and his witness, who happens to be his wife and whose independence is doubtful, I have absolutely no evidence of any payment of this amount of Kshs. 60,000/=. It was a significant amount of the selling price, and one would expect that there either be a written document evidencing the same at the time that it was paid, or a follow up letter to indicate payment of this sum. In any event, if the plaintiff came to demand this money before it was due, because she had a pressing school fees problem as alleged by the defendant, you would expect that she would quickly follow up on payment of the balance of Kshs. 14,000/= which the defendant stated that he was ready to pay and deposited in the advocate's office. It should not be forgotten that this was a sale of land, and it is trite law, that in sales such as these, documents are of critical importance. I have no document to show any payment of Kshs. 60,000/= in March 1999 as claimed by the plaintiff, and I am therefore not persuaded on a balance of probabilities, that this money was ever paid to the plaintiff.

16. I am also not persuaded that any money was paid to the plaintiff in the year 2009. I have seen the documents which the defendant purports to evidence payment of this money. First, my own view of the documents is that they are of dubious authenticity. The sale agreement which the defendant claims has an endorsement of receipt of the balance from Mr. Motende's office has a third page, being a

photocopy of the 2nd page of the agreement, and it is not clear to me why the advocate did not simply endorse on this 2nd page, rather than copy a third page. Secondly, and I need no handwriting expert for this, the writing that the balance of Kshs. 14,000/= is paid on 15 January 2000, and the writing that Kshs. 74,000/= is deposited with Mr. Motende, are very different and I have no doubt in my mind that they were written by the same person. It is not said who exactly made these endorsements.

17. But even let me assume that the sum of Kshs. 74,000/= was deposited with Mr. Motende. I have no evidence before me that the plaintiff was ever informed that this money was available for collection at Mr. Motende's office. Neither do I have any evidence that this money was ever handed over and collected by the plaintiff. If Mr. Motende's office were careful enough to write a receipt to the defendant when he deposited this money with them, then you would expect that they would be careful enough, to have a payment voucher or some acknowledgment executed by the plaintiff, when they were handing over this money to her.

18. My own take is that all these documents were manufactured by the defendant, with an aim of fortifying his case. Even if they were not manufactured, as I have said, I have no proof that the plaintiff was ever paid this money from Mr. Motende's office.

19. My conclusion and finding therefore is that on a balance of probabilities, I am not persuaded that the defendant ever paid the balance of Kshs. 74,000/= as stipulated in the sale agreement or at all. Having not been paid, the plaintiff is thus entitled to repudiate the sale agreement. She has stated that she is ready to refund what was paid to her which is well and good. In any event, the sale agreement, would have been rendered void for want of consent of the Land Control Board and in such event the remedy of the purchaser is a refund of the purchase price. The plaintiff may thus proceed to refund the defendant what he paid and the defendant must cede possession of the suit land as I have held that he is not entitled to the same.

20. I believe I have dealt with all issues save for costs. Costs follow the event and I see no need to depart from this. The plaintiff shall have the costs of this suit.

21. I now make the following final orders :-

i. That it is hereby declared that as between the plaintiff and defendant, it is the plaintiff who is entitled to ownership and title of the land parcel Naivasha/OI Jorai Phase II/1198.

ii. That it is hereby declared that the plaintiff is entitled to repudiate the sale agreement that she had with the defendant over the sale of the land parcel Naivasha/OI Jorai Phase II/1198, for the reason that the defendant did not pay the balance of the purchase price as stipulated in the sale agreement or at all.

iii. That the plaintiff is hereby ordered to refund the defendant the sum of Kshs. 100,000/= which money may be deposited in the offices of counsel for the defendant, and upon making such deposit, the defendant do forthwith vacate the suit land, and if he does not do so within 14 days of deposit of the refund, the plaintiff is at liberty to apply for his eviction.

iv. That an order of permanent injunction is hereby issued, restraining the defendant from entering, being upon, utilizing or in any way taking or keeping possession of the land parcel Naivasha/OI Jorai Phase II/1198.

v. That the plaintiff shall have the costs of the main suit and of the counterclaim.

22. Judgement accordingly.

Dated, signed and delivered in open court at Nakuru this 22nd day of November 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Kaholo for the defendant.

No appearance on the part of M/s Chepkwony & Co for the plaintiff.

Court Assistants: Nelima Janepher

Carlton Toroitich

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU