



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 150 OF 2013**

**BONFACE MIHESO INGOSI.....PLAINTIFF**

**VERSUS**

**NELSON ALUSIOLA MOGA SHIKAMI.....DEFENDANT**

**JUDGEMENT**

By a plaint dated 3<sup>rd</sup> May 2013 the plaintiff avers that, by an agreement made between the plaintiff and the defendant on 15<sup>th</sup> July, 2010 the plaintiff agreed to sell and the defendant agreed to buy half (1/2) acre portion of the piece of land known as KAKAMEGA/SHIKULU/657 at the purchase price of Kenya Shillings Eighty Three Thousand (Ksh. 83,000/=). At the signing of the said agreement the plaintiff paid a sum of Ksh. 50,000/= part of payment of the purchase price and completed paying the sell purchase price on 17<sup>th</sup> September, 2010. On signing of the said agreement the plaintiff let the defendant into possession of the said piece of land and the plaintiff has tilled and worked the said land and is in possession of the said piece of land. It was a condition of the said sale and the defendant warranted as follows, that he was the owner of or entitled to the said piece of land as heir. Defendant would cause the said piece of land to be transferred to the plaintiff.

Unknown to the plaintiff, the succession to the said piece of land was complete in or about January, 2013, and the defendant instead of causing the said piece of land to be transferred to the plaintiff had the same transferred to Messrs. Obadiah Shiboche Isalia and Joseph M. Makotsi. It is the plaintiff's contention that the sale of half (1/2) acre portion by the defendant to the plaintiff was fraudulent and intended to defraud the plaintiff. The plaintiff prays for judgment against the defendant as follows:-

- (a) A declaration that the sale by the defendant of half (1/2) acre portion of title No. KAKAMEGA/SHIKULU/657 was fraudulent.
- (b) Refund OF Ksh. 83,000/= for want of consideration.
- (c) General damages.
- (d) Interest on (b) and (c) above at court rates till payment in full.
- (e) Costs of this suit.

The defendant was served but failed to attend court during the hearing. In his statement of defence is a mere denial. That if any refund is to be made to the plaintiff the profits and gain made by the plaintiff on the land whilst he was in use and occupation of the same should be deducted from the refund

This court has carefully considered the case before it and submissions therein. It is a fact that the suit land is agricultural land and the provisions of the Land Control Act (CAP 302 (LCA) therefore apply. Section 6, 7 and 8 provide as follows;

**6. (1) Each of the following transactions -**

- (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 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.

7. 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.

**It is the plaintiff's evidence that he entered into an agreement** on 15<sup>th</sup> July, 2010 the agreed to defendant sell and the plaintiff agreed to buy half (1/2) acre portion of the piece of land known as KAKAMEGA/SHIKULU/657 at the purchase price of Kenya Shillings Eighty Three Thousand (Ksh. 83,000/=). At the signing of the said agreement the plaintiff paid a sum of Ksh. 50,000/= part of payment of the purchase price and completed paying the sell purchase price on 17<sup>th</sup> September, 2010. He produced the said agreement as PEx1 and 2. However, the land was never transferred to him as it was fraudulently resold to a third party.

**In the case of Fiat Kenya Ltd Vs Ali Jama Roble (1973) EA 11** the Court held that;

*"The Court never award specific performance when it is incapable of enforcing the order. By part of reasoning I do not think it should ever award specific performance if it entertains any serious doubt that the contract is capable of performance".*

According to the *Black's Law Dictionary 2<sup>nd</sup> Edition*, breach of contract is defined as:

*"A legal cause of action in which a binding agreement or bargained-for exchange is not honoured by one or more of the parties to the contract by non-performance or interference with the other party's performance".*

I find that this contract is incapable of performance. In the case of *Simiyu v Watambala (1985) KLR 852* the court held as follows on a transaction that was declared void for want of consent :-

*"The appellant's remedy, subject to the laws of limitation (emphasis mine), was an action for damages, coupled with the right of recovery of the purchase money under Section 7 of the Act"*

In the case of *Kenneth Kipruto Chebet v Laban Kipkering Murei [2013] eKLR*, the court held that;

*"Given that the land has been resold to another buyer, the plaintiff is perfectly entitled to rescind the contract, and I order it rescinded. I opt to have the contract rescinded rather than order it "frustrated". The end effect is in any event the same. I will also award the plaintiff costs of the suit as the defendant had an obligation to refund the money received as he was never going to complete the sale".*

Likewise I find that the defendant in this case despite accepting the purchase price he fraudulently resold the same suit land to a third party. His defence is a mere denial and I reject it. I find that the plaintiff has proved his case on a balance of probabilities. The claim of general damages has not been proved and the same will not be awarded. The *Civil Procedure Act* is clear on its provision to *Section 27* that costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge shall for good reason otherwise order. There is no good reason shown why the plaintiff should not have his costs in this matter. I therefore grant the following orders;

1. A declaration that the sale by the defendant of half (1/2) acre portion of title No. KAKAMEGA/SHIKULU/657 was fraudulent.
2. Refund of Ksh. 83,000/= for want of consideration.
3. Interest on (2) above at court rates till payment in full.
4. Costs of this suit to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20<sup>TH</sup> DAY NOVEMBER 2018.**

**N.A. MATHEKA**

**JUDGE**