



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.18 OF 2012

JOSHUA MBUGUA KINUTHIA.....PLAINTIFF

VERSUS

ERICK TUIKONG.....1ST DEFENDANT

CHARLES KETER.....2ND DEFENDANT

KOECH STANLEY.....3RD DEFENDANT

JUDGMENT

(Plaintiff having purchased land from the defendants who acted as land brokers; no full payment made and plot repossessed by owner; defendants facilitating a second sale of a different plot but at a higher price; plaintiff now claiming the difference in price as damages; plaintiff's suit dismissed as no agreement that defendants were to make good any difference of the price after land has appreciated in value).

1. This suit was commenced through a plaint which was filed on 16 October 2012, and later amended on 14 May 2018. It is the plaintiff's case that on 21 January 2007, he purchased through a written agreement land described as Plot No.8 out of the land parcel Njoro/Ngata Block 2/850, measuring $\frac{1}{4}$ of an acre. He pleaded that the purchase price was Kshs. 190,000/= of which Kshs. 140,000/= was to be paid on execution of the agreement and the balance within 90 days. He has averred that it was mutually agreed that he would take possession of the plot immediately after the sale agreement. He has pleaded that he took occupation, erected a fence, planted crops, planted fruits and trees, and dug a pit latrine. Before the expiry of the 90 days, he looked for the defendants so as to pay the balance in vain. However in the year 2011, his possession was interrupted by a third party who claimed to be the owner of the plot. He called on the defendants to assist him but they implored him to vacate the land and that they would compensate him with an alternative plot. The defendants then sourced and showed him the plots No. 37 and 38 of a land parcel Njoro/Ngata Block 2/203 measuring $\frac{1}{4}$ acre which was sold at Kshs. 560,000/=. He acceded to this proposal and on 12 November 2011, he entered into a sale agreement between himself and the owner of the plots, one Isaac Kipkemoi Towett. He has pleaded that it was mutually agreed that the defendants would compensate him for inflation, the number of years he wasted on the first plot, proximity of the previous plot to the road, inconvenience caused to him by the disruption, and the current market value of the plot vis-a-vis the new plot. He has also averred that the defendants only paid Kshs. 150,000/= for the new plots and he had to pay the balance of Kshs. 410,000/= which the defendants have refused to refund him. It is thus his view that the defendants never honoured their promise to compensate the plaintiff with a new plot. In the suit, the plaintiff has asked for orders for a refund of Kshs. 410,000/=; costs of the sui and interest, alongside any further relief the court may deem fit.

2. The defendants filed a joint defence vide which they admitted entering into an agreement with the plaintiff but pleaded that they were merely agents of one Samwel Kibet Tanui, who had instructed them to sell the plot. They have agreed that an agreement was drawn and the sum of Kshs. 140,000/= paid by the plaintiff leaving a balance of Kshs. 50,000/=. They have contended that the plaintiff did not honour paying this balance of Kshs. 50,000/= within the period stipulated in the agreement which necessitated a repossession of the plot by their principal, who gave the defendants the sum of Kshs. 140,000/= to return to the plaintiff. They pleaded that they informed the plaintiff of these developments and the plaintiff instructed them to secure a different property within the same locality. They proceeded to pay Kshs. 150,000/= for the plot No. 37 in Njoro/Ngata Block 2/ 203 and the plaintiff then took possession. They have denied having any mandate to deal any further with the plot No. 850 as it was surrendered to the owner.

3. On the date fixed for the hearing of the suit, only the plaintiff and his counsel attended. He gave evidence of how the first plot was sold to him and he produced the sale agreement. He stated that the persons who sold to him the plot were not the owners but were selling it on behalf of the owner. He paid Kshs. 140,000/= and took possession and made the developments mentioned in his plaint. He tried to look for the defendants to pay the balance of Kshs. 50,000/= but he was unable to find them until the owner emerged and he had to vacate in the year 2011. The defendants then agreed to compensate him with other land. The 2nd defendant showed him a plot and made a deposit of Kshs. 150,000/= for it but never made any further payments. Since he needed the land, he paid for it in full.

4. I have considered the above evidence and the written submissions of Mrs. Mukira, learned counsel for the plaintiff. From his amended plaint, all that the plaintiff wants is a refund of Kshs. 410,000/= which is the difference between the sum of Kshs. 560,000/= and the sum of Kshs. 150,000/= which the defendants deposited on his behalf. The reasoning behind this claim, if I got it right, is that the defendants failed to deliver to him the first plot that he purchased, and that he had to pay more money for the second plot.

5. I have seen the first agreement that was made between the plaintiff and the defendants on 21 January 2007. In that agreement, the defendants made clear that they were selling the property as agents of Samuel Kibet Tonui, the son of Taplule Chepkemoi Chumo who was the registered proprietor of the land. The agreement shows that the purchase price of the plot No. 8 out of the land parcel No. 850, was Kshs. 190,000/=. Kshs. 140,000/= was paid and the balance of Kshs. 50,000/= was to be paid within 90 days. The agreement also states that any party in breach would pay 30% of the purchase price. Now, the plaintiff states that he tried to look for the defendants so as to pay the balance of Kshs. 50,000/= in vain and thus the owner came and repossessed the plot. I am not persuaded that the plaintiff tried to look for the defendants in vain. I have not seen any letter or any communication to the defendants. I have also not seen any indication that the plaintiff took this balance to the owner of the land so as to make full payment. When the original owner came to the land in 2011, the plaintiff if he was ready to make payment, ought to have come to court at that time, to claim that he has all along been ready to pay, but the sellers cannot be found. Instead, he allowed himself to be moved to a different parcel of land which was now more expensive, probably due to the appreciation of properties over time. Although the plaintiff claims that the defendants promised to make good the difference between what he was now paying and what he had deposited with them, I have no documentary evidence of this. It is trite law that one can only enforce an agreement over land, when the same has been reduced into writing. This is captured in Section 3(3) of the Law of Contract Act, Cap 3, which is drawn as follows :-

3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

6. The plaintiff has not shown me any written contract where he has agreed with the defendants that the defendants will make good the difference between the purchase price of Kshs. 560,000/- and the Kshs. 150,000/= that they had deposited on his behalf. He cannot therefore attempt to enforce any such agreement, if ever one existed, for the same is not in writing.

7. If the plaintiff thought that the defendants had breached the first agreement then his entitlement would be damages to the extent of 30% of the purchase price which is Kshs. 57,000/=. But as I have said, I am not persuaded from the evidence that there was any breach by the defendants of this contract, for I have not been shown any evidence that the plaintiff was ready and willing to pay the balance of Kshs. 50,000/= within the 90 days stipulated in the agreement. Neither can the plaintiff try to enforce any claim for the sum of Kshs. 410,000/= for there is no written agreement or document indicating that the defendants were to pay this sum.

8. I am aware of Mrs. Mukira's submissions, and the authorities that she annexed, that since the defendants called no evidence, then the case of the plaintiff must be deemed to have been uncontroverted. That may be the case, only that in this instance, there is a specific legal provision, which requires that contracts relating to sales of land be in writing. I cannot enforce the plaintiff's claim irrespective of the fact that the defendants have not tendered any evidence, for if I do so, then I will be running afoul a clear provision of the law. I have not been given any written contract to show the terms under which the second sale was being entered into. I cannot therefore import the allegation of the plaintiff that there was a provision that the defendants were to pay the whole of the purchase price, meaning liability to pay the extra Kshs. 410,000/=.

9. It is apparent therefore that the plaintiff cannot succeed in his claim. I thus proceed to dismiss the plaintiff's case. I however make no orders as to costs, as the defendants filed no defence to the amended plaint, which made the specific claim for the sum of Kshs. 410,000/=.

10. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 15th day of November 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Ngugi holding brief for Mrs. Mukira for the plaintiff.

No appearance on the part of M/s Momanyi & Co. Advocates for the defendants.

Court Assistants: Nelima Janepher

Carlton Toroitich

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU