



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 150 OF 2015

JOHN CHUNGULI INDIATSI.....PLAINTIFF

VERSUS

CATHERINE CHEMAIYO.....DEFENDANT

RULING

John Chunguli Indiatzi (*hereinafter referred to as the plaintiff*) has filed an application dated 4th September, 2015 praying that the defence filed by Catherine Chemaiyo (*herein after referred to as the defendant*) dated and filed on the 3.7.2015 be struck out for being scandalous, frivolous and vexatious and for reasons that it may prejudice, embarrass and or delay the fair trial of the suit and that judgment be entered for the plaintiff as prayed in the plaint.

The application is grounded on the fact that the plaintiff has abandoned or relinquished part of the claim filed in court being the claim of specific performance against the defendant. The defendant statement of claim offers no legal explanation to the plaintiffs removing part of the claim for a refund of the part of the purchase price paid by the plaintiff to the defendant. In the supporting affidavit, the plaintiff explains the nature of his claim before he abandoned the claim for specific performance. What is now pending in the claim for a refund of Kshs. 900,000 plus interest.

The plaintiff claims that he instituted this suit against the Defendant herein seeking orders of Specific Performance of the contract for the purchase of three acres of land to be excised out of the larger parcel of land known as title Number NANDI/KIPKANGANI/370 and in the alternative, he sought for a refund of the sum of Kshs. 900,000 that he had paid to the Defendant.

He states that upon consultation with his advocate on record, he opted to abandon the claim for Specific Performance and instructed his advocate to file a notice of relinquishment of the said claim and he is aware that a notice to that effect has been filed in court. That he is aware that what is now pending before court for adjudication is his claim for a refund of the sum of Kshs. 900,000 plus interest thereon.

That he entered into agreement for the purchase of three (3) acres of land which was to be carved out of that parcel of land known as Title Number NANDI/KAPKANGANI/370 on the 12th of September, 2010.

The total purchase price for the said land was to be the sum of Kshs. 1,350,000. Although he was required to pay the full consideration by the 30th day of November 2010, he hesitated because the defendant failed to take any steps towards surveying and demarcating the portion that he had purchased. However, he paid the sum of Kshs. 900,000 leaving a balance of Kshs. 450,000/=, which the Defendant agreed to receive upon completing a transfer in his favour. There is therefore no truth in assertion in paragraphs 6 and 7 of the Statement of Defence that he has failed to honour his part of the contract.

He reminded the Defendant of her obligation under the contract for sale aforesaid but she failed, refused and ignored to comply. He is aware that the Defendant encouraged her son, one Richard Kipkorir to plant trees on the portion that he had purchased, a fact which was pointed out by their mutual advocate.

He states that as at the date of filling this suit, the Defendant had failed, refused and ignored to fulfill her part of the contract yet she has retained the part of the consideration paid for at least two years prior to the date of this suit. That he has had an opportunity of perusing the Statement of Defence filed on behalf of the Defendant and the only relevant part relating to the residue of his claim against her would be paragraph 8 and 9 of the Statement of Defence where the defendant avers that the plaintiff has lodged a caution against her property and that he ought to remove the caution for her to refund the payments he made.

According to the plaintiff, there is lack of truth in these averments as he has never lodged a caution against the property known as Title Number NANDI KAPKANGANI/370. That he has obtained an official search from the Nandi District Land Registry which reveals that there is a caution lodged against the property by one MACKLOUT CHUNGULI SHIDAMBI claiming a purchaser's Interest.

Though there is a valid caution lodged against the title, he is not the one who lodged the caution and the said cautioner Macklout Chunguli Shidambi is a total stranger to him and he has never instructed any person to lodge a caution on his behalf. That in the circumstances, it is clear that the Defendant lacks a plausible or reasonable answer to his claim for a refund and her Statement of Defence is a sham. That given the Defendant's action, in withholding his funds for no good reason, he prays that she be compelled to refund the money paid with interest at Commercial lending rates.

In the replying affidavit, the defendant states that at the time of sale, there was truly a need for the subject cash thus the need to have sold a portion of her land. That upon doing so, the applicant failed to pay the balance thereto thus frustrating her proposed project which project was to become a gobbler and as a consequence she became a total failure due to the applicant's failure to pay as result. That if at the first instance, he had the money certainly there would not have been any need for her to sell her land and that in as much as it is her desired response that the plaintiff/applicant is the author of the subject mischief as he failed to honour his obligation and pay as agreed and therefore she does have proper defence in the file and that a summary application is not desirable or at all. That she should be allowed to vindicate her defence.

According to the defendant, what has betrayed her course is the subject caution lodged that cannot allow her to sell the land to a third party. That she is not employed and has no other sources of income to enable refund forthwith other than to lift the said caution, have the said parcel sold and thus facilitate the refund.

I have considered the application, perused the submissions by both counsels and do find that the plaintiff and the defendant entered into a contract of sale in the following terms:

“Whereas the Vendor is the registered owner of land parcel No. NANDI/KAPKANGANI/370 and whereas she is offering 3 acres out of the said land parcel thereof for sale.

1. That the Vendor sells and the Purchaser accepts to purchase the said 3 acres.

2. That the agreed consideration for the said land parcel shall be Kshs. 1,350,000 (read One Million Three Hundred and Fifty Thousand Shillings).

3. That payment shall be made as follows:

(a) That the Purchaser has paid Kshs. 225,000 on signing of this agreement and the Vendor acknowledges receipt of the said sum of Kshs. 225,000 being part payment of the purchase price.

(b) That the balance of Kshs. 1,125,000 to be paid on or before 30th November, 2010.

4. That the Vendor shall sign all documents of conveyance and attend the Land Control Board to enable the Purchaser obtain Title of 3 acres out of land parcel NANDI/KAPKANGANI/370.

5. That the Vendor shall give vacant possession of the said 3 acres upon full payment of purchase price.

6. That the Purchaser has inspected the land and is satisfied with the condition.”

The plaintiff paid Kshs. 900,000 leaving a balance of Kshs. 450,000. The agreement was made on the 15th September 2010 and as at 27th May 2015, there is no evidence of an application for consent of the land control board. Section 6 of the Land Control Act provides for transactions affecting agricultural land thus that Each of the following transactions that is to say—

(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 (L.N. 516/1961) 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.

Section 7 provides for recovery of consideration thus, 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](#).

This court finds that the plaintiff having relinquished his claim on Specific Performance, what remains is the claim for a refund of the purchase price. The defendant having failed to subdivide the land to transfer 3 acres to the plaintiff the only defense he has is that there is no consent of the land control board of the area in which case the plaintiff is entitled to a refund of the purchase price there being no plausible defense to the claim on the refund of the same. The caution was not lodged by the plaintiff hence he cannot be blamed. I do find the defense to be frivolous and the same is struck out. Judgment is entered for the plaintiff for a refund of Kshs. 900,000 with interest at court rates from

the time of filing suit. Orders accordingly.

Dated and delivered at Eldoret this 2nd day of November, 2018.

A. OMBWAYO

JUDGE