

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 380 OF 2015

WILBERT KIPSANG CHOGE.....1ST PLAINTIFF

LEAH KADALI NDEGE.....2ND PLAINTIFF

VERSUS

CLEOPHAS KIRWA MELLY.....1ST DEFENDANT

SARAH KOSGEY.....2ND DEFENDANT

JUDGMENT

The plaintiffs' claim was dismissed with costs and therefore what is pending is the defence and counterclaim. In the counterclaim, the defendant averred that the plaintiff did not adhere to the terms of the agreement for the sale of land parcel **Ngeria/Chepyakwai/Block 2 (Kaplelach)/125** and as a consequence, the plaintiff did not meet the completion date of the agreement. The defendants averred that they refunded the plaintiff the consideration paid of Kshs.1,050,000 and also rescinded the agreement dated 23.5.2015. The agreement was breached and frustrated by the plaintiff. The plaintiff failed to meet the 90 days completion period, failed to pay the balance of the consideration and that no consent of the Land Control Board was ever obtained making the agreement void for all interests and purposes.

The defendants seek a declaration that the plaintiff is a trespasser on land parcel Ngeria/Chepyakwai/Block 2 (Kaplelach)/125 and an order of eviction do issue evicting the plaintiffs, their agents, servants and/or employees from the suit land.

The defendants pray for a permanent injunction to restrain the plaintiffs, their servants, agents and/or employees from interfering with the defendants' use and possession of the suit land. The defendants further seek an order that the agreement dated 23.5.2015 be rescinded and an order directing M/s R. M. Wafula and Company Advocates to release the title documents in their possession to the defendant.

The defendant gave evidence that he entered into agreement with Wilbert Kipsang Choge and Leah Kadali Ndege. He was selling the parcel of land known as Ngeria/Chepyakwai/Block 2 (Kaplelach)/125 measuring 2.5 acres. He was paid Kshs.1,080,000 only. The completion period was 90 days. The plaintiff failed to pay the balance within 90 days. The defendant issued notice for the plaintiff to complete the payment but the plaintiff failed to comply. The plaintiff rescinded the agreement and refunded the Kshs.1,050,000. The plaintiff gave out some postdated cheques but the defendant did not bank them. The title deed was deposited with R. M. Wafula and therefore, he demands the title back.

The gravamen of the defendants' submissions is that the defendant having rescinded the agreement, there is no basis of the plaintiff having both the land and the money. The plaintiffs were in breach of the 90 days completion period.

I have considered the pleadings, evidence and submissions on record and do find that the evidence of DW1 was not controverted that by agreement dated 23.5.2015, the defendants as joint vendors agreed to sell to the plaintiffs as joint purchasers of land reference **Ngeria/Chepyakwai/Block 2 (Kaplelach)/125**. The defendants were selling the whole of the said land measuring 2.5 acres at a consideration of Kshs.2,900,000. The completion date was ninety days from the date of execution of the agreement or such other date as the parties could agree.

The consideration was paid initially, thus Kshs.100,000 upon the execution of the agreement. The balance of Kshs.2,500,000 was to be paid into two instalments of Kshs.900,000 upon the presentation and availability of the title deed in the names of the vendors. The title was to be availed to the parties' Advocates within 90 days from the date of the agreement. Kshs.1,900,000 was to be paid by the joint purchasers upon the vendors obtaining the requisite consent. The plaintiffs were to take vacant possession upon payment of shs. 900,000.

The defendants state that they refunded the plaintiffs all their monies paid. The plaintiffs' case having been dismissed for want of prosecution and the transaction between the plaintiffs and defendants being null and void as no consent of the Land Control Board was obtained as required by the provisions of sections 6 and 8 of the Land Control Act Cap 302 of the laws of Kenya and that full consideration not having been paid as agreed, **the defendants have proved their case on a balance of probabilities.**

This court issues a declaration that the plaintiff is a trespasser on land parcel Ngeria/Chepyakwai/Block 2(Kaplelach)/125 and an order of eviction do issue evicting the plaintiffs, their agents, servants and or employees from the suit land subject to the defendants issuing **a 45 days'** Notice to the plaintiffs. The agreement dated 23rd May, 2015 is declared as having been rescinded and an order is hereby issued directing M/s R. M. Wafula & Company Advocates to release the title documents in their possession to the defendant. Orders accordingly.

Dated and delivered at Eldoret this 19th day of December, 2018.

A. OMBWAYO

JUDGE