



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 585 OF 2017

(Formerly Machakos ELC Case No. 153 of 2012)

ARNOLD WABWILE LUTALALA.....PLAINTIFF

VERSUS

PETER SANE LEPATAI.....DEFENDANT

JUDGEMENT

By a Plaint dated the 8th May, 2012 the Plaintiff prays for judgement against the Defendant for:

- i) A permanent injunction order to restrain the Defendant by himself, his agents, servants, employees, proxies and/or any person claiming under him from alienating, selling, transferring, trespassing, trading on and/or interfering in any manner with the land parcel known as LR. No. KAJIADO/ KAPUTIEI – NORTH/ 31436;
- ii) The Defendant to be ordered to transfer the land parcel number LR. KAJIADO/ KAPUTIEI – NORTH/ 31436 to the Plaintiff failure of which the Court Registrar execute the necessary transfer documents on behalf and in place of the Defendant and a transfer be effected to the Plaintiff;
- iii) Costs of the suit.
- iv) Such other and/or further orders as this Honourable Court may deem fit and just.

The Defendant filed his statement of Defence dated the 5th January, 2015 where he confirmed entering into a Sale Agreement with the Plaintiff for the Sale of land parcel number KAJIADO/ KAPUTIEI – NORTH/ 31436 for a purchase price of Kshs. 2, 800, 000 but it is the Plaintiff who frustrated the contract. He confirmed receipt of the initial deposit of Kshs. 100, 000/= only and was to use the monies to transfer the said property to his name so as to furnish the Plaintiff with the completion documents bearing his name. The Defendant contends that the completion date was (90) days from the date of execution or (7) days from successful registration of transfer and should have been 31st December, 2009. He explains that it was a term and condition of the Sale Agreement that in the event the purchaser failed to pay the balance of the purchase price within the stipulated period, then the proposed sale would lapse and property would be offered to third parties. He reiterates that the Plaintiff failed to pay the purchase price within the required period and the property was offered to other potential buyers. He denies receiving monies from the Plaintiff and states that the funds he had received as a result of the aborted sale was forwarded to the Plaintiff through the advocates on record. Further that his advocates could not have transferred the suit land to the Plaintiff as he had failed to pay the purchase price. He avers that at the time the suit was filed, he was neither the registered owner of the suit land nor its beneficial owner.

Evidence of the Plaintiff

PW1, the Plaintiff gave evidence in Court and stated that he entered in to an Agreement for sale dated 30th September 2009 and made a deposit of Ksh. 100,000/= as purchase price which the defendant was to use to facilitate the transfer of the suit property to the Defendant's name from the previous owners. PW1 confirmed completing the payment of the purchase price vide Cheque no. 000229 of Ksh. 156,000 and cash payment of Kshs. 50,000 on 7th April 2010 which the Defendant acknowledged receipt of. PW1 stated that all payments towards the purchase price were made directly to the defendant but in the presence of the said Advocate Haron Olando. PW1 stated that he came to learn that something was amiss when one of his partners in in the transaction, was informed by neighbours that other people had come to the suit property and claimed to have bought it.

Evidence for the Defendant

DW1 confirmed he had entered into an agreement for sale of the suit land with the plaintiff and the full purchase price was paid a bit late in

April 2010 and on this ground he was of the view that he was entitled to rescind the said Agreement. DW 1 confirmed in court that he was yet to acquire a consent to transfer the suit property to the Plaintiff as well as prepare and sign the transfer documents in his favour. DW1 confirmed he had entered into an agreement with a third party in an attempt to sell the suit land.

Both the Plaintiff and Defendant filed submissions that I have considered.

Analysis and Determination

Upon perusal of the pleadings filed herein including the exhibits produced and upon hearing testimonies from all the witnesses as well as considering submissions filed by the parties, the following are the issues for determination:

- Who breached the terms of the Sale Agreement dated the 30th September, 2009.
- Whether the Plaintiff is entitled to the orders sought
- Who should bear the costs of the suit.

As to whether the Plaintiff breached the terms of the Sale Agreement dated the 30th September 2009, it was the Defendant's contention that the Plaintiff did so, which culminated in his attempting to sell the land to a third party. The Plaintiff contended that he paid the full purchase price albeit late. He submitted that the said Sale Agreement contained terms, amongst others providing that the agreement was subject to Law Society Conditions of sale pursuant to paragraph 3 thereof. He insisted that the Defendant having accepted payment of the final installment of the purchase price on 7th April 2010, cannot claim that he thereafter rescinded the Agreement for sale dated 30th September 2009. PW1 further testified that he had made the final payment in April, 2010 and yet the suit land was sold to a third party in November, 2010. Further, Upon making inquiries from the lawyer, he kept on demanding for more funds to effect transfer. It was his testimony that it was the same advocate who represented both of them and also prepared documents to sell the suit land to a third party. From the Sale Agreement, I note the Sale and Purchase was subject to the Law Society of Kenya Conditions of Sale. I note Clause (7) of the Sale Agreement indicated that in the event of default the proposed Sale would lapse. However, the Defendant did not tender any evidence as to whether he had given the Plaintiff notice to rescind the sale agreement, but he continued to receive funds after the completion date. According to the Law Society of Kenya conditions of Sale, at clause 4 (4) it requires that the vendor should serve the purchaser twenty one (21) day notice to complete a contract before the same can be rescinded. Further, a defaulting party has to be given ample notice for rescission of contract. Since the Defendant never gave the Plaintiff notice for rescission of contract and continued to receive the purchase price, it is my considered view that he is hence estopped from claiming that the Sale Agreement had lapsed. DW1 testified that he asked the lawyer to prepare transfer form so as to transfer the suit land to the Plaintiff, but he never signed it. He admitted that he received the balance of the purchase price but still sold the suit land to a third party. From the Defendant's testimony it emerges that he is the one who was in breach of the Sale Agreement as he failed to adhere to the terms of the Law Society Conditions of Sale and yet he continued to receive the purchase price.

As to whether the Plaintiff is entitled to the orders sought. The Plaintiff seeks for specific performance of the Sale Agreement. PW1 testified that he had paid the full purchase price. DW1 stated that the suit land was already sold to a third party. PW1 admitted that he never appeared before the Land Control Board for purposes of obtaining the transfer of the suit land in his name. DW1 admitted that even though his lawyer prepared the transfer forms, he did not execute them. This begs the question that how would the Plaintiff be transferred to the suit land if no transfer forms were effected. It was the Defendant's submission that the transfer herein becomes void as the consent of the Land Control Board was not obtained, neither did the Plaintiff seeks for extension of time in the High Court. Even though the Defendant claimed he was not paid the entire purchase price, he did not inform Court of the balance he was demanding. .

The Defendant relied on the case of **GITANGA MWANIKI, ONESMUS MWANIKI GICHUIRU –VS- ANNUNCIATA WAITHAKA KIBUE (541/2009) and SAMUEL KIRUBI NJUKI –VS- MAGARET WANGARI MACHARIA ELC NO. 14/2014 J, OMMWAYO** to buttress its arguments.

It emerged in evidence that the suit land had been sold to a third party. Further that the Plaintiff has never been in occupation of the suit land and neither was the consent of the Land Control Board obtained to transfer suit land to him. In the Court of Appeal decision in the case of **KARIUKI –VS KARIUKI** it was held that a purchaser of land where land is yet to be transferred to him has a remedy for the recovery of any money or consideration paid in the course of the transaction under section 6 of the Land Control Act.

Section 6 (1) (a) of the Land Control Act provides that: ‘ **(1) 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; 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.’

Based on these legal provisions, and in relying on the facts above, I find that the agreement for the sale of suit land was void as no consent of the land control board was obtained within six (6) months from the date of the said agreement. In the circumstances, the Plaintiff's claim for specific performance cannot therefore stand.

Insofar as the Sale Agreement is void, I find that the Plaintiff is not estopped from demanding a refund of the purchase price she had paid to the Defendant, as he is the one who breached the contract. I however note that the Plaintiff did not demand for the refund of the purchase price in in the Plaintiff but in prayer (iv) of the Plaintiff, he pleaded that ‘ any other or further relief that this honourable court may deem just and fair to grant.’ In the case of **MOSES MARANGU & ANOTHER Vs ESTHER NTHIRA & OTHERS Civil Appeal No. 95 of 2009 at Nyeri**, the Court of Appeal had held that a Court can order for refund of consideration paid even if the same was not pleaded. In relying on this Court of Appeal decision as well as the doctrine of equity, which is a Constitutional principle, I find that the Plaintiff is indeed entitled to

a refund of the purchase price, which he paid to the Defendant

On the issue of costs, I find that since the Plaintiff has been inconvenienced, he is entitled to costs of the suit.

In the circumstances, I find that the Plaintiff has proved his case on a balance of probability and proceed to make the following order:

- a) The Defendant do refund to the Plaintiff Kshs. 2, 800, 000 inclusive of interest, within the next ninety (90) days from the date hereof;
- b) The amounts stated in (a) above to attract interest from April 2010 to date, at court rates
- c) The costs of the suit are awarded to the Plaintiff.

Dated signed and delivered in open court at Kajiado this 18th day of December, 2018.

CHRISTINE OCHIENG

JUDGE