



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 204 OF 2017

PATRICK WAMBUA MUTA ----- PLAINTIFF

VERSUS

KANINI MUSYA ----- DEFENDANT

JUDGMENT

1) This suit commenced by way of plaint dated 11th July, 2016 and filed in court on 12th July, 2016 wherein the Plaintiff sought the following orders:-

a) An order nullifying the contract dated 13th October, 2013 in respect of 4 acres to be hived from the parcel of land known as Makueni/Kalawa/251 between the Plaintiff and the Defendant.

b) Costs of the suit and any other order this court deems fit and just to grant.

2) On the 22nd July, 2016 the Defendant filed her memorandum of appearance and defence which were both dated 22nd July, 2016.

3) Pursuant to the orders issued by this court in the notice of motion application dated 4th August, 2017 and filed in court on the 9th August, 2017, the Plaintiff filed an amended plaint on the 30th October, 2017. In the amended plaint, the Plaintiff sought the following orders:-

a) An order nullifying the contract of sale dated 13th October, 2013 in respect of 4 acres to be hived from the parcel of land known as Makueni/Kalawa/256 between the Plaintiff and the Defendant.

b) Costs of this suit and any other order this court deems fit to grant.

4) On the 21st February, 2018, the Defendant filed her defence dated 14th February, 2016 to the amended plaint. She sought the following reliefs:-

a) That the plaintiff's suit be dismissed with costs.

b) That the honourable court do issue an order of specific performance against the Plaintiff herein.

c) In the alternative a refund of the purchase price together with interest from the date of receiving the purchase price to date.

d) Damages for breach of contract.

e) Any other relief the court deems fit to grant.

5) When the matter came up for hearing on the 21st February, 2018 parties recorded a consent in the following terms :-

1. That the Plaintiff do refund the consideration of Kshs. 145,000 to the Defendant in respect of the purchase of 4 acres of plot number Makueni/Kalawa/256.

2. Parties to file submissions in respect of interest in breach of contract and damages.

3. Status quo to be maintained and mention within 45 days to confirm fixing of submissions and fixing of a date for judgment.

6) The Plaintiff and the Defendant filed their submissions on the 9th March, 2018 and 11th April, 2018 respectively. Having read those submissions, I am of the view that the issues for determination are:-

1. Whether the agreement for sale of land between the parties herein is valid.

2. Whether the Defendant is entitled to damages for breach of contract .

3. Whether the Defendant is entitled to interest.

7) It has been submitted by the Plaintiff's counsel that the contract between the parties herein is illegal and invalid because they failed to adhere to provisions of Section 7 of the Land Control Act Chapter 302 and further that the agreement was in breach of section 45(1) of the Law of Succession Act Chapter 160 of the Laws of Kenya. The Plaintiff relies on the case of **Root Capital Incorporated Vs Tekangu Farmers' Co-operative Society Ltd & Another[2016] eKLR.**

8) On the other hand, the Defendant's counsel is silent on the validity of the contract. The counsel in his submissions pointed out that the mere act of instituting this suit breached the entire contract dated 13th October, 2013 and as such, the Defendant is entitled to damages. The counsel relies on the case of **Guaranty Discount Company Ltd Vs Oliver Lawrence Ward [1961]EA 285, Nakana Trading Co. Ltd Vs Coffee Marketing Board (1990 – 1994) EA 448 and National Bank of Kenya Ltd Vs Pipe Plastic Samkolit (K) Ltd and Another [2002] EA 503.** The Plaintiff's counsel in his submissions was of the view that parties cannot claim damages for breach of contract since the agreement is void ab initio.

9) On whether or not the Defendant is entitled to interest, the Plaintiff's counsel cited Section 26(1) of the Civil Procedure Act and the case of **Francis Kamaulchatha Vs Housing Finance Company of Kenya Ltd [2015] eKLR** and submitted that this court has discretion to award interest but given the fact that the Defendant refused to take the refund of the purchase price after the Plaintiff informed him about his wish to repudiate the contract for lack of capacity to sell the land, he should not bear the burden of paying interest since the Defendant was not deprived of the use of the money by the Plaintiff. The counsel went on to submit that that Defendant was in occupation of the land since 2013 and has greatly gained economically from it.

10) The Defendant's counsel was of the view that had the money been deposited in a bank in the year 2013, the same would have accrued interest and as such the Defendant is entitled to interest.

11) I will address the three issues collectively. The Plaintiff has averred in paragraph 4 of his amended plaint that he was unable to transfer 4 acres in favour of the Defendant all that parcel of land known as Makueni/Kalawa/256 as it was registered in the name of his deceased mother, one Mary Nthambi Mutua. The Plaintiff had not pursued letters of administration in respect of the estate of the deceased. The Defendant has in paragraph 3 of his defence to the amended plaint averred that he is stranger to the averments. Apart from the submissions on record, no evidence was led on this issue. Similarly, there was no evidence that was placed before me to enable me determine whether or not the contract between the parties herein is valid and whether or not the Defendant is entitled to damages and interest. The submissions by the counsel on record remain evidence from the bar whose veracity was not tested in cross-examination.

12) Since both parties have consented that the Plaintiff do refund the consideration of Kshs. 145,000 to the Defendant in respect of purchase of 4 acres of plot number Makueni/Kalawa/256, the logical conclusion is that this being a "win win" situation for the parties, each one of them should bear their own costs.

13) In the circumstances, my finding is that each party herein should bear their own costs. It is so ordered.

SIGNED, DATED DELIVERED THIS AT MAKUENI THIS 13TH DAY OF DECEMBER, 2018.

MBOGO C.G

JUDGE

In the presence of:

Ms Kyalo holding brief for Mr. Munyasia for the Defendant.

Ms Mbuvi holding brief for Mr. Mutinda for the Plaintiff

Mr. Kwemboi Court Assistant.

MBOGO C.G, JUDGE

13/12/2018