



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 573 OF 2012

NICHOLAS IRUNGU KIBE.....PLAINTIFF

VERSUS

SAMUEL NJOROGE THITU..... 1ST DEFENDANT

CHIEF LAND REGISTRAR..... 2ND DEFENDANT

JUDGMENT

This suit was filed by way of a Plaint dated 28th August 2012 and filed on 4th September 2012 in which the Plaintiff seeks for judgment to be entered against the Defendant in the following terms:

- a) An order of transfer of the parcel of land identified as Muguga/Kahuho/1700 (hereinafter referred to as the “suit property”) into the Plaintiff’s names;
- b) mIn the alternative to (a) above an order for the refund of Kshs. 263,000/- plus all the accrued value of the suit property to date of judgment; and,
- c) Costs of this suit.

It is the Plaintiff’s case that he entered into a Sale Agreement with the Defendant for the purchase of the suit property. He explained that prior to sub-division, the suit property was part of a larger parcel of land known as Muguga/Kahuho/1220 registered in the name of the Defendant. The Sale Agreement entered into by the two parties was dated 15th June 2011 in which the consideration for the suit property was fixed at Kshs. 450,000/-. The Plaintiff asserts that after the sub-division of the larger parcel which yielded, inter alia, the suit property, the Defendant refused to transfer the suit property to him notwithstanding that he had paid a total of Kshs. 263,000/- to the Defendant as part payment of the purchase price.

In his Defence and Counterclaim dated 5th November 2012 and filed on 7th November 2012, the Defendant refuted all the Plaintiff’s claims stressing that it is the Plaintiff and not him who breached the terms of the Sale Agreement entered into by both of them. He confirmed having entered into a Sale Agreement with the Plaintiff for the sale of the suit property for a consideration of Kshs. 450,000/-. He confirmed having received Kshs. 250,000/- from the Plaintiff as part payment of the purchase price which he utilized to have the property discharged from the Agriculture Finance Corporation where it had been

offered as security for a loan. He confirmed that upon payment of that loan, the property was discharged and the original title deed released to him. He stated that upon requesting the Plaintiff to pay him the balance of the purchase price being Kshs. 200,000/- to assist him to facilitate the subdivision and obtaining land control board consent authorizing the transfer, the Plaintiff failed to pay the sum. It is the Defendants case that the Plaintiff not only failed to pay the balance as requested, but also disappeared completely for a period of about 8 months without communicating to him. He asserted that he was forced to attend to the subdivision exercise alone and to rescind the Sale Agreement. He added further that after an absence of about 8 months, the Plaintiff came back to him stating that he was now prepared to proceed with the sale transaction. He declined to proceed stating that he had already rescinded the Sale Agreement. He noted that he was unwilling to proceed with the sale of the suit property to the Plaintiff and even offered to refund the Kshs. 250,000/- paid to him by the Plaintiff. The Defendant further narrated that shortly thereafter, he received a call from a police officer attached to CID at Kikuyu Police Station where he was immediately arrested on the charge of obtaining money by false pretenses. He narrated that he was released on condition that he refund the Plaintiff the amount of Kshs. 263,000/- which the Plaintiff was claiming he had paid him. The Defendant stated that he did obtain this amount but that the Plaintiff did not turn up to take the amount, forcing him to deposit the sum of Kshs. 250,000/- with his Advocate Mrs. Muhuhu with letter notifying the Plaintiff of this. He confirmed that instead of collecting the said sum from Mrs. Muhuhu, the Plaintiff proceeded to lodge cautions on the suit property as well as on the parcel of land known as Muguga/Kahuho/1701 claiming a purchaser's interest. In his Counterclaim, the Defendant sought for the following orders:

- (a) An order declaring the lodging of cautions by the Plaintiff against the parcels of land known as Muguga/Kahuho/1700 and Muguga/Kahuho/1701 as unlawful;
- (b) An order directing the Chief Lands Registrar to remove the cautions lodged against those parcels;
- (c) A permanent injunction restraining the Plaintiff, his servants, agents and /or employees from entering upon, alienating, disposing of or howsoever dealing with those parcels of land;
- (d) An order declaring the lodging of a complaint by the Plaintiff with the Police leading to the Defendants arrest as malicious and unlawful;
- (e) General damages;
- (f) Costs of this suit; and,
- (g) Interest on (e) and (f) above at court rates until payment in full.

Both the Plaintiff and the Defendant testified at the hearing of this suit and affirmed the facts set out above contained in the Plaintiff and the Defence and Counterclaim.

It is not disputed that the suit property is presently registered in the name of the Defendant. The Plaintiff seeks for an order of specific performance compelling the Defendant to transfer the suit property to him or in the alternative that the Defendant be ordered to refund him the sum of Kshs. 263,000/- which he stated he paid to the Defendant in part payment of the purchase price. Having regard to the facts of this case, it would appear to me that the Plaintiff by disappearing into the unknown for a period of over 8 months without communication to the Defendant contributed to a large extent to the frustration of sale agreement entered into between the two parties. It would therefore not be fair to impose on the Defendant an order of specific performance, which in itself is an equitable remedy, while all along the Plaintiff does not come with clean hands. My finding is that the Plaintiff is not entitled to an order of specific performance. However, the Plaintiff did make part payment of the purchase price. He asserted that this was Kshs. 263,000/- while the Defendant concedes to having received Kshs. 250,000/-. There is evidence produced by the Plaintiff comprising of copies of two bankers cheques in the name of the Defendant which show that the Defendant received Kshs 250,000/- from the Plaintiff. There was no evidence adduced to support the payment of the additional Kshs. 13,000/- claimed by the Plaintiff. The Defendant

stated that he deposited the sum of Kshs. 250,000/- with his advocate Mrs Muhuhu who in turn notified the Plaintiff to come and collect the sum. The Plaintiff has never done so to date. My finding is that the Plaintiff has demonstrated and the Defendant has conceded to having received Kshs. 250,000/- from the Plaintiff and not Kshs. 263,000/-. I direct that the Plaintiff do collect the Kshs. 250,000/- from the Defendant's Advocate Mrs. Muhuhu upon the delivery of this Judgment. I will not order for the sum to be paid with any amount of interest or even award the Plaintiff the costs of this suit for the reason that the Defendant offered the Plaintiff the refund of his money even before this suit was filed. The Plaintiff had a chance to recoup his money but chose to file suit instead.

On the Counterclaim, I acknowledge that the Plaintiff is to blame for the sale transaction having fallen through. It would be unfair to encumber the suit property by way of a caution which the Plaintiff lodged. It is also unfair for the Plaintiff to lodge a caution over the other parcel of land being Muguga/Kahuho/1701 to which he had no claim whatsoever. In light of the findings I have made above, the Plaintiff has no claim over those two parcels of land and the cautions registered by the Plaintiff must be removed. To that extent therefore, Judgment is entered in favour of the Defendant in terms of prayer numbers (a), (b), (c) and (f) of the Counterclaim. The other prayers are declined.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JANUARY 2017.

MARY M. GITUMBI

JUDGE