



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 47 OF 2012**

**ZEPHANIAH KHISA SAUL.....PLAINTIFF**

**VERSUS**

**GEORGE CHAYUGA ALIAZA.....DEFENDANT**

**J U D G E M E N T**

**INTRODUCTION**

1. The plaintiff is the registered owner of **LR. No. Kakamega/Mabusi/416** measuring **3.11 hectares** (suit land). On **16/9/2002** and **4/10/2004**, the plaintiff sold to the defendant a total of 1.3 acres out of the suitland at a consideration of **Kshs.217,000/=**.

2. The plaintiff filed this suit against the defendant seeing orders of eviction and general damages on the ground that the transaction is null and void for want of consent of the land control board. The defendant filed a defence and raised a counter-claim in which he seeks orders of specific performance of the agreements or in the alternative refund of the purchase price of **Kshs.217,000/=**, cost of the improvements at **Kshs.3.400,000/=** and general damages for breach of contract.

**PLAINTIFF'S CASE**

3. The plaintiff testified that he sold part of the suitland to the defendant. The defendant later started demanding that an access road serving the purchased plot be expanded. It is after the demands by the defendant that the plaintiff brought this suit against the defendant. During cross-examination, it emerged that the plaintiff had sold to the defendant 1.5 acres in 1999. The defendant has already obtained title to the 1.5 acres and that this is not the subject of this suit. The subject of this suit is 1.3 acres which the plaintiff sold to the defendant between 2002 and 2004. The plaintiff now wants the defendant to be evicted from the 1.3 acres on the ground that the transaction did not receive the consent of the land control board.

**DEFENDANT'S CASE**

4. The defendant stated that in 1999, he bought 1.5 acres from the plaintiff. The plaintiff took him before the land control board where consent was obtained. He has since obtained title in respect of the 1.5 acres purchased in 1999.

5. On 16/9/2002, he bought one acre from the plaintiff at a consideration of Kshs.160,000/= which amount was fully paid. Again on 4/10/2004, he bought 0.3 of an acre at Kshs.57,000/= which he also fully paid. Sometime in 2008, the plaintiff closed an access road which connected the plot he had purchased in 1999 and the plots he subsequently purchased. The defendant filed a claim before the local

land disputes tribunal which ruled in his favour. The district surveyor was ordered to correct the width of the access road in contention. This was carried out and this is what prompted the plaintiff to file the present case against him.

6. A surveyor was brought to the ground who excised the 1.3 acres. The defendant took possession of the purchased land where he has put up a seven roomed permanent houses, has a borehole, store, ablution block, cowshed, trees growing on the land and has connected piped water. He now prays for refund of the purchase price as well as the cost of improvements which has been valued at Kshs.3.4 million.

### **ANALYSIS OF EVIDENCE, ISSUES FOR DETERMINATION AND THE LAW**

7. There is no contention that the plaintiff sold 1.3 acres to the defendant. The defendant produced an agreement dated 16/9/2002 [Defence Exhibit 3]. According to this agreement, the defendant bought one acre at Kshs.160,000/= which amount was paid in full and the same was acknowledged in the agreement. On 4/10/2004, the defendant also bought an additional 0.3 of an acre at Kshs.57,000/=. An agreement relating to this transaction was produced as Defence Exhibit 6. The defendant paid Kshs.50,000/= on execution of the agreement. The balance of Kshs.7,000/= was cleared on 21/11/2004 and it was duly acknowledged by the defendant. The plaintiff in his evidence acknowledged Kshs.217,000/= from the defendant.

8. A look at the pleadings and evidence adduced herein shows that the following are issues for determination:-

**(i) Whether the agreements between the plaintiff and the defendant are null and void.**

**(ii) Whether extension of time for obtaining the consent of the land control board can be given at this stage.**

**(iii) Whether an order of specific performance can be given in the circumstances of this case.**

**(iv) Is the defendant's counter-claim time barred?**

**(v) Can the plaintiff or defendant claim general damages.**

**(vi) Is the defendant entitled to compensation for the improvements on the land which he purchased?**

**(vii) Whether the plaintiff is entitled to an eviction order.**

### **(i) Whether the agreements between the plaintiff and the defendant are null and void.**

9. The first agreement for one acre was entered into on 16/9/2002. The second agreement for the 0.3 of an acre was entered into on 4/10/2004. The property purchased was in an agricultural area and therefore consent of the land control board was necessary. Both parties to this litigation concede that no consent of the land control board was obtained. The Land Control Act provides that consent of the land control board must be obtained within six months from the date of the agreement. If this is not done, the transaction becomes null and void for all purposes. As there was no consent of the land control board obtained, I find that the transactions therein became null and void after the expiry of six months from the respective dates of the two agreements.

10. The defendant's counsel submitted that the plaintiff put the defendant in possession of the purchased portion and that this court should find that there was an implied or constructive trust created. In this respect, counsel cited a *Court of Appeal decision in Nyeri Civil Appeal No. 26 and 27 of 2011 between Macharia Mwangi Maina & 87 Others and Davidson Mwangi Kagiri* where the issue of consent of the land control board arose and the Court of Appeal Judges held that the existed constructive or implied trust in that the respondent had put the appellants in possession even though no consent of the land control

board had been obtained.

11. Counsel also quoted from a number of decisions which dealt with the issue of equity and estoppel some of which were cited in the *Macharia Mwangi Maina case (supra)*. I sympathize with the predicament of the defendant herein. I have also had occasion to go with the decision of the *Machria Mwangi Maina case (supra)* in other cases depending on the circumstances of each case but in the present case, the defendant did not adduce credible evidence that would have led me to go with the Court of Appeal decision in the above case. This is because, the defendant had testified that he bought his 1.3 acres out of **LR. No. Kakamega/Mabusi/419**. The pleadings in this case relate to **LR. No. Kakamega/Mabusi/416**.

12. The defendant premised his counter-claim on **LR. No. Kakamega/Mabusi/416**. It is therefore not clear as to whether the buildings are lying on the land in contention or on the land which he had purchased earlier on and which is not in dispute. The valuation report was based on a portion of **LR. No. Kakamega/Mabusi/416** measuring **1.3 acres**. The two agreements did not refer to the plot number from where the defendant bought his contested 1.3 acres and as such it will be difficult to make a finding on where the improvements are based as the defendant's evidence is contradictory.

**(ii) Whether extension of time for obtaining consent of the Land Control Board can be given at this stage.**

13. Counsel for the defendant in his submissions, asked the court to exercise its discretion to extend the time for obtaining consent of the land control board. **Section 8(1) of the Land Control Act** gives court the power to extend the period for applying for consent of the land control board notwithstanding the fact that the period for application of the same has expired. This section gives the court power to extend the period if there is sufficient reason to do so. In the instant case, the defendant is seeking to apply for extension in passing through written submissions. I do not think that this is an appropriate time to make such an appeal. If the defendant wanted the court to consider his case, he should have made an application at the appropriate time when he realized that the plaintiff was not keen on going for consent. In any case, there are no sufficient reasons disclosed to warrant the court to extend the period. The application is improperly made in passing through submissions. This cannot be entertained.

**(iii) Whether an order of specific performance can be given in the circumstances of this case.**

14. The transaction between the plaintiff and the defendant is null and void for all purposes. There can be no order of specific performance given in respect of an agreement which is already null and void. The Land Control Act provides a remedy for such agreements which are null and void that is recovery of the purchase price as a civil debt. I therefore find that no order of specific performance can be granted in the circumstances of this case.

**(iv) Whether the defendant's counter-claim is time barred**

15. The Limitation of Actions Act gives a period of six months within which to bring actions for recovery of contractual amounts or claims. In the instant case, the plaintiff first brought up the issue of the agreement between him and the defendant being null and void for want of consent of the land control board on 7/1/2008 when he demanded the defendant to vacate the purchased portion [see demand letter dated 7/1/2008 produced as Defence Exhibit 1]. Prior to this, the defendant had no reason to worry about the transaction being null and void. It therefore follows that the cause of action arose on 7/1/2008 when he was asked to vacate the land.

16. The plaintiff filed a suit for his eviction on 27/3/2009. On 29/4/2009, the defendant filed a counter-claim for among other reliefs, refund of purchase price. He subsequently filed an amended counter-claim in which he sought Kshs.3.4 million being compensation for improvements on the land. This was on 24/9/2010. Both the original counter-claim and the amended counter-claim were made within the six years contractual period. I therefore find that the defendants claims are not time barred.

**(v) Whether the plaintiff or the defendant can claim general damages**

The plaintiff pleaded general damages in his claim. The defendant also claimed general damages for breach of contract. In their evidence, no party led any evidence on the same or prayed for the same. In any case the law is clear that no party can claim general damages based on a contract which is null and void. In the case of *Kariuki -vs- Kariuki [1983] KLR 1983 225 at page 227, Law J.A.* stated thus:

**“No general or special damages are recoverable in respect of a transaction which is void for purposes for want of consent. The only remedy open to a party to a transaction which has become void under the Act is that he can recover any money or consideration paid in the course of the transaction under Section 7 of the Act”.**

17. I therefore find that the plaintiff’s claim for general damages as well as the same claim by the defendant are misconceived and are not maintainable in law.

**(vi) Whether the defendant is entitled to compensation for improvements on the land which he purchased.**

18. The defendant is seeking to recover Kshs.3.4 million being the value of the house and improvements thereon. This claim cannot be granted. The only remedy available to a person whose transaction is void is refund of any consideration of the purchase price. In the case of *Kariuki -vs- Kariuki (supra), Law J.A.* had this to say in regard to compensation for improvements. He cited the decision in *Cheboo -vs- Giminyegei (Kisumu Civil Appeal No. 40 of 1973)* in which a majority of the Court of Appeal disagreed with the view expressed by Madam JA that compensation for improvements was recoverable in addition to the money or other consideration paid in the course of a transaction which has become void under the Act.

19. The decision in *SBI International Holdings AG (Kenya) -vs- Reuben Kipkorir & Another [2014] eKLR* cited by the defendant’s counsel is clear that cost of improvements on the land whether claimed as general or special damages is not recoverable. What is only recoverable is consideration paid under the void contract. I therefore find that the defendant is not entitled to claim the Kshs.3.4 million being the cost of the valued properties which are improvements on the land which he purchased.

**(vii) Whether the plaintiff is entitled to an eviction order**

20. *Section 22 of the Land Control Act* makes it a criminal offence for any person who remains in possession of land whose transaction is void. It therefore follows that a person who so remains on land whose transaction is void is a trespasser and the lawful owner can perfectly bring a claim for eviction of the trespasser. This may appear absurd but this is the law. If the defendant does not voluntarily vacate the land in question, the plaintiff is at liberty to evict him after giving him sufficient notice to remove the structures from the suitland.

**DECISION**

21. I find that both the plaintiff and the defendant have partially succeeded in their respective claims. I make the following orders:-

**(1) The defendant shall vacate the 1.3 acres within a period of three months failing which he should be evicted therefrom with no further recourse to court save for assistance to ensure a smooth eviction.**

**(2) Judgement is entered for the defendant against the plaintiff in the sum of Kshs.217,000/=, Kshs.160,000/= to attract interest at court rates from 16/9/2002 until payment in full. Kshs.57,000/= to attract interest at court rates with effect from 21/11/2004 until payment in full.**

**(3) As both parties have partially succeeded in their claims, I make an order that each party shall bear their own costs.**

Dated, signed and delivered at Kitale on this **20th** day of **January, 2017**.

**E. OBAGA**

**JUDGE**

In the presence of M/s Mufutu for Mr Omwansa for defendant and plaintiff who is in person.

Court Assistant – Isabellah.

**E. OBAGA**

**JUDGE**

**20/1/17**