



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 3316 OF 1995 (OS)

JOHN KITUKU WAMBUA.....PLAINTIFF

VERSUS

JOSHUA MBONDO MUKII.....DEFENDANT

RULING

The defendant is the registered proprietor of all that parcel of land known as LR No. Machakos/Muahills/296 (hereinafter “the suit property”). On 25th November 1968, the defendant entered into a conditional agreement for sale with the plaintiff by which the defendant agreed to sell and the plaintiff agreed to buy the suit property on terms and conditions which were set out in the said agreement. Under the said agreement, the plaintiff paid to the defendant a sum of Kshs 3,460/- to enable the defendant purchase another parcel of land. In the event that the defendant succeeded in the purchase of the said parcel of land, he would then transfer to the plaintiff the suit property. On the other hand, if the defendant failed to purchase the said parcel of land, the defendant was to refund to the plaintiff the said sum of Kshs. 3,460/- and the agreement would stand terminated. It is not clear from the material on record whether the defendant purchased the said parcel of land. The plaintiff has claimed however that he took possession of the suit property soon after he entered into the said agreement for sale in 1968 and that despite him having fulfilled his part of the agreement for sale, the defendant failed to transfer the suit property in his favour. The plaintiff instituted this suit claiming to have acquired the suit property by way of adverse possession. The plaintiff claimed that as at the time of bringing this suit, he had been in uninterrupted possession of the suit property for 27 years.

On 27th June 2011, the parties filed a consent in court dated 24th June 2011 settling this matter on the terms and conditions which were set out in the said consent. The said consent was adopted as an order of the court on the same day by Waweru J. The consent provided among others that the defendant was to transfer to the plaintiff the suit property in consideration of the plaintiff paying to the defendant a sum Kshs. 1,250,000/-. The consent provided the manner in which the said payment was to be made and the suit property transferred to the plaintiff. It was a term of the said consent that in the event that any of the parties was unable to fulfil his part of the agreement or was in breach of the agreement, either party could move the court to have the consent varied or set aside.

The plaintiff performed part of the agreement which he entered into with the defendant under the said consent while the defendant failed to perform his part of the agreement. What I now have before me is a Notice of Motion application dated 16th July 2014 brought by the plaintiff seeking an order to compel the defendant to execute within 30 days the instrument of transfer and other requisite documents in respect to the suit property so that the suit property may be registered in the name of the plaintiff as was envisaged under the said consent and in default, the Deputy Registrar be authorised to execute all the requisite documents on behalf of the defendant.

The application was supported by the plaintiff's affidavit sworn on 16th July 2014 in which he contended that he took possession of the suit property upon purchasing the same from the defendant in 1968 and that he had lived on the property for over 30 years without disruption. He stated that the defendant breached the agreement for sale between them prompting him to institute this suit in order to secure his interest in the suit property. He stated that they reached a settlement in this matter and filed a consent in court dated 24th June 2011. He stated that in part performance of the terms of the said consent, his advocate and the defendant's advocate opened a joint account where he deposited Kshs. 250,000/- representing 20% of the settlement sum. He stated that the defendant on his part had refused to sign the Application for Land Control Board consent and instrument of transfer of the suit property in his favour. The plaintiff contended that it would serve the interest of justice if his application was allowed so as to bring finality to this suit.

The application was opposed by the defendant through a replying affidavit sworn on 3rd June 2014. The defendant admitted having entered into an agreement with the plaintiff for sale of the suit property and that the said agreement was not completed due to his inability to fulfil his contractual obligations. The defendant contended that he cancelled the said agreement and refunded to the plaintiff the deposit which he had paid to him. The defendant contended that there was no basis for compelling him to transfer the suit property to the plaintiff.

The defendant admitted further that they entered into a consent with the plaintiff dated 24th June 2011 which was filed in court and adopted as an order of the court on 27th June 2011. The defendant contended that he was unable to honour his part of the consent because of a disagreement in his family over the same. The defendant contended that the said consent explicitly provided that in the event of breach thereof by either party, the only available recourse was for the offended party to move the court for the variation or setting aside the same. The defendant contended that the reliefs sought by the plaintiff in the present application are not available to him under the said consent. The defendant termed the plaintiff's application as misconceived and bad in law.

The application was argued by way of written submissions. The plaintiff filed submissions dated 8th February 2015 while the defendant did not file any submissions even after being given ample opportunity to do so. In his submissions, the plaintiff reiterated the facts of the case as set out in his supporting affidavit and argued that under section 1A, 1B and 3A of the Civil Procedure Act, the court has wide powers to make orders geared towards doing substantive justice to the parties. The plaintiff submitted that this suit had been in court since 1995 and that the delay in conclusion of the same had impacted on justice as between the parties. The plaintiff cited the cases of Alice Wangui Gichuka vs. Mwenjera Gichuka (2004) eKLR, Anne Karuru Kibati vs. Samuel Bede Ogembo (2012) eKLR and Elimu Sacco Society Ltd vs. Paul Mwangi (2013) Eklr and submitted that this court has powers to grant the orders sought. The plaintiff submitted that he had performed part of the consent entered into by the parties on 27th June 2011 and that the defendant had not showed willingness to perform his part of the bargain. The plaintiff submitted that a consent was a binding contract between parties and was enforceable as such. In support of this submission the plaintiff relied on the case of **Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & another (1998) eKLR**. The plaintiff argued that the consent between the parties herein had not been varied or set aside and as such was binding on the parties.

I have considered the plaintiff's application together with the affidavit and submissions filed in support thereof. I have also considered the defendant's affidavit which was filed in opposition to the application. The issue arising for determination by the court is whether the court can compel the defendant to transfer the suit property to the plaintiff under the terms of the consent dated 24th June 2011 which was adopted herein as an order of the court on 27th June 2011.

The terms of the consent dated 24th June 2011 which was entered into between the parties herein are not disputed. What are in dispute are the rights accruing to the parties thereunder. It is common ground that the defendant had breached the terms of the said consent or was unable to fulfil his obligations thereunder. I am in agreement with the defendant that the said consent speaks for itself as to what should happen in the event of a breach thereof or inability of either party to fulfil his obligations thereunder.

Paragraph 8 of the said consent provides as follows:-

“In the event either parties breach this agreement or for some reason are unable to proceed with performance of their duties under the said agreement, the same shall be communicated to the honourable court at the earliest and orders may be sought for variation of or setting aside of the agreement by consent.”

It is clear from the foregoing that the only remedy that was available to an aggrieved party in the event of a breach of the said consent was to move the court to have the consent varied or set aside so that the suit can proceed to trial. That is not the remedy sought herein by the plaintiff. As was correctly submitted by the plaintiff, a consent is a contract which binds the parties. It follows therefore that the plaintiff is bound by the remedies that he had agreed upon with the defendant under the said consent. This court cannot invoke the provisions of Sections 1A, 1B, 3A and 3B of the Civil Procedure Rules to vary the agreement that the parties had reached by granting the reliefs which the parties had not agreed upon. As was held in the case of, Board of Trustees National Social Security Fund vs. Micheal Mwalo Nai CA No. 293 of 2014, a court will not interfere with a consent order except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. No good grounds for variation of the consent dated 24th June 2011 have been advanced by the plaintiff.

The upshot of the foregoing is that the Notice of Motion dated 16th July 2014 is without merit. The same is accordingly dismissed with costs to the defendant. Since the subject matter of the suit is situated in Machakos County, I make a further order transferring this suit to the Environment and Land Court at Machakos for hearing and final determination.

Delivered and Signed at Nairobi this 31st day of March, 2017

S. OKONG'O

JUDGE

In the presence of

N/A for the Plaintiff

Present in person Defendant

Kajuju Court Assistant