



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 596 OF 2013**

**MICHAEL WANJIHIA ONESMUS**

**(Suing as the legal representative of the estate of**

**MARY WANJIKU KINUTHIA (Deceased).....PLAINTIFF**

**VERSUS**

**FRANCIS KARANJA WAIHIGA.....DEFENDANT**

**JUDGMENT**

***(suit by plaintiff claiming vacant possession of certain premises earlier sold to defendant; plaintiff claiming that defendant breached the agreement by not paying balance of purchase price; plaintiff also claiming mesne profits; defendant alleging that it is plaintiff who breached the contract by not availing title deed in defendant's name for him to obtain a bank loan to finance the balance; on the evidence, both parties breached the agreement; agreement in any event null and void as plaintiff had no capacity; plaintiff to refund deposit of purchase price but defendant to pay an amount equivalent to reasonable rent for the duration that he has been in occupation)***

1. This suit was commenced by way of a plaint which was filed on 15 December 2008 originally as Nakuru HCCC No.380 of 2008. The plaintiff has brought this case as the legal representative of the estate of Mary Wanjiku Kinuthia (deceased). He has pleaded in his plaint that on 22 December 2006, he entered into an agreement with the defendant vide which he sold to the defendant part of the land parcel Nakuru Municipality Block 4/114 at a consideration of Kshs. 6,000,000/=. It is pleaded that Kshs. 2,000,000/= was paid on execution of the agreement and the balance was to be paid on or before 31 March 2007 and the completion date was 90 days from the date of the agreement. It was further agreed that occupation was to take place immediately which was done. It is pleaded that the defendant thereafter paid a sum of Kshs. 600,000/= leaving a balance of Kshs. 3,400,000/= which remains unpaid. It is also pleaded that the defendant put up permanent structures on the land which were never approved by the Municipal Council of Nakuru.

2. In the suit, the plaintiff has sought for the following orders :-

*(a) A declaration that the sale agreement between the parties herein dated 22 December 2006 for the sale of the land parcel Nakuru Municipality Block 4/114 is null and void for breach by the defendant.*

*(b) An order of eviction of the defendant, his agents and or servants from the land parcel Nakuru*

*Municipality Block 4/114.*

*(c) An order for demolition of structures put up by the defendant on the land parcel Nakuru Municipality Block 4/114 at the defendant's cost.*

*(d) Mesne profits at the rate of Kshs. 60,000/= per month from 26 December 2006 to the date of eviction.*

*(e) General Damages for breach of contract.*

*(f) Costs of this suit.*

*(g) Any other or further relief that this Honourable may deem fit and just to grant.*

3. The defendant entered appearance and filed a defence. He pleaded in his defence that the plaintiff frustrated the agreement by not availing the title deed for purposes of obtaining a loan to pay the balance yet this was the basis of the agreement. He pleaded that the plaintiff is being dishonest and that his claim is a fraudulent way of attempting to obtain further payment and retain the Kshs. 2, 600,000/= already paid. He denied having put up any illegal structures.

4. The plaint was later amended to add a prayer of mesne profits at Kshs. 60,000/= per month increased by 10% per annum.

5. The hearing of the matter commenced on 1 November 2016. The plaintiff stated that he entered into the sale agreement in his capacity as administrator of the estate of the deceased. He testified that initially, the defendant was a tenant on 1/4 acre of the suit land. His business was one of selling scrap metal. He was paying Kshs. 30,000/= monthly for this 1/4 acre portion as rent. The portion that was sold to the defendant was half acre out of the one acre that comprises the suit property. He testified that after the sale agreement, the defendant now took possession of 1/2 of an acre of the suit land, which was the portion sold to him. He testified that out of the purchase price of Kshs. 6 Million, the defendant made a deposit of kshs. 2 Million and later paid Kshs. 600,000/= and left a balance of Kshs. 3.4 Million which he has never paid. He stated that it is the defendant who breached the agreement by not paying the balance of the purchase price. He denied that there was any understanding that the defendant would use the title deed to secure the balance. He testified that the defendant has built a stone wall and a permanent building for storing his goods which structures are not approved. He wants these structures removed. The plaintiff stated that the defendant has never paid rent since taking possession. He asked for rent of Kshs. 60,000/= per month from the date of the agreement.

6. In cross-examination, he stated that at the time of sale the land was in the name of Mary Wanjiku Kinuthia (deceased). He was nominated as administrator. He testified that currently, the land is registered in his name and that of his brother, one Francis Kinuthia Muriu. Their title was issued on 20 July 2009. He stated that the Grant of Letters of Administration was confirmed on 1 December 2005 and amended on 18 June 2008. At the time of sale, the grant had been confirmed. He did not have anything to show that he had applied for subdivision of the land and neither had he got consent from the Commissioner of Lands within the 90 days completion period. He stated that he could not transfer the property because the balance was never paid and that it would have been risky to have the consent to transfer before payment. He testified that he had prepared a subdivision plan but after the breach, he did not proceed with subdivision. He was not aware that the defendant had applied for a loan with a bank. On the lease, he testified that there was no formal agreement for it. He stated that after the sale, the defendant took possession as a purchaser.

7. The defendant on his part testified that he first leased the premises in the year 2001 initially occupying a portion measuring 50 X 100 feet. He now occupies half an acre of the property which he purchased following the sale agreement of 22 December 2006. He paid the deposit of Kshs. 2 Million and later Kshs. 600,000/=. He agreed that he still owes the balance of Kshs. 3.4 Million. He stated that this amount was to be paid by the bank upon receiving a title deed in his name. He testified that they had agreed that

the plaintiff will subdivide the land, and transfer the half portion to him, after which he could use it to secure money from the bank, but the plaintiff did not do this. He stated that the plaintiff never handed to him the confirmed grant. After the sale agreement, he did not continue paying rent. He stated that after the year 2008, property prices shot up and the plaintiff asked him to vacate the land or they do a fresh agreement for Kshs. 10 Million which was not agreeable to the defendant. In his view, it is the plaintiff who breached the agreement. He denied having put up any illegal structures and that he has only put up a wall which was approved.

8. In cross-examination, he stated that the last rent that he was paying was Kshs. 7,000/= for a 1/8th acre portion. He stated that the agreement provided for a bank undertaking for the balance and he was not sure if the bank gave any. He did not have any document to demonstrate that the wall that he built was approved by the Council.

9. In his submissions, Mr. Ngure for the plaintiff, inter alia submitted that the defendant did not pay the balance within 90 days as agreed. He submitted that the subdivision was to be done after the plaintiff received the undertaking from the bank but no undertaking was availed by the defendant.

10. On her part, Ms. Muthoni for the defendant inter alia submitted that the plaintiff did not have capacity to enter into an agreement on behalf of the estate of Mary Wanjiku Kinuthia and referred me to Section 82 (b) (ii) of the Law of Succession Act which provides that no immovable property shall be sold before confirmation of grant. She further submitted that as between the plaintiff and defendant, it is the plaintiff who breached the agreement as he failed to secure the consent of the Commissioner of Lands for the transfer. She further submitted that it is the plaintiff who failed to cooperate. She also submitted that mesne profits are not payable since the parties had no landlord/tenant relationship after the sale and relied on the case of ***Kenya Breweries & Another vs Washington Okeyo, Civil Appeal No. 332 of 2000***. She argued that there was no proof of the claim of Kshs. 60,000/= per month. She contended that the plaintiff is not entitled to any general damages and relied on the case of ***VE Muguku vs E Muguku Muriu & Company Advocates, Civil Appeal No. 48 of 1994***. She submitted that the property had been gutted by fire and that all the defendant did was to repair the premises.

11. I have considered the matter. For the record, I did not see any of the authorities said to be relied upon by Ms. Muthoni. Save for the case of ***Gitanga Mwaniki & Another vs Annunciata Waithira Kibue, Nairobi ELC No. 541 of 2009***, no other authority was annexed and I cannot assume that they exist. It is the duty of counsel to supply the court with the authorities sought to be relied upon. I therefore have no benefit of any of the authorities that Ms. Muthoni intended to rely on and I am unable to consider them in this judgment.

12. There is no dispute that the parties herein entered into a sale agreement on 22 December 2006. I have seen the sale agreement and the terms thereof. The plaintiff was vendor and entered into the agreement in his capacity as Administrator of the Estate of Mary Wanjiku Kinuthia. The defendant was purchasing an area measuring 78 X 245 feet which the parties seem to be in agreement that it is about 1/2 of an acre. The consideration noted is Kshs. 6,000,000/= of which Kshs. 2, 000,000/= was paid on execution. The agreement is explicit that the balance of Kshs. 4,000,000/= is to be paid on or before 31 March 2007. Clause 5 of the agreement provides that the completion period is 90 days from the date of execution. Clause 6 states that "*the vendor hereby undertakes to ensure the subdivision and transfer of the said property to the purchaser upon receiving the said Bank's undertaking to pay the balance of the purchase price.*" There is however no previous mention in the sale agreement of any bank undertaking. In Clause 7, the sale is said to be subject to consent being obtained from the Commissioner of Lands.

13. In this suit, the plaintiff claims that the defendant breached the agreement by not paying the balance since only the sum of Kshs. 600,000/= was paid after the initial deposit thus leaving a balance of Kshs. 3,400,000/=. On the other hand, the defendant contends that the parties had an understanding that the plaintiff would do the subdivision and procure the transfer in the name of the defendant so that the defendant can use it to obtain a bank loan to pay the balance of the purchase price. In my view, the agreement is explicit that the balance was to be paid on or before 31 March 2007. The payment of this balance was not subject to anything else although of course the whole agreement was subject to consent

being obtained from the Commissioner of Lands. By not availing the balance within the stipulated time, the defendant was in breach of the agreement.

14. The obligation to obtain consent was certainly that of the plaintiff. He himself conceded that he never sought consent to transfer within the completion period of 90 days. By not availing the consent, he was also in breach of the agreement. Neither do I have any proof that the plaintiff subdivided the property so that the defendant can have a separate title for what he was purchasing. He certainly did not do this within the 90 days completion period.

15. In my view, both parties breached the agreement and none can claim damages for breach against the other.

16. There is also an argument that the plaintiff had no capacity to enter into the agreement. In my view, this is a valid point. At the time of sale, the plaintiff described himself as administrator of the estate of the late Mary Wanjiku Kinuthia (deceased). It means that at this point in time, the estate of the deceased was still under administration. Although it was said that there had been a confirmation of grant in the year 2005 which was amended in the year 2008, I have seen no evidence of such tendered. The plaintiff has not demonstrated that at the time he entered into the sale agreement, he had been granted authority by the court to sell. To me, he had no capacity to sell pursuant to the provisions of Section 82 of the Law of Succession Act, Cap 160, Laws of Kenya, which is drawn as follows :-

*82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -*

*(a)...*

*(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best ;*

*Provided that -*

*(i) the purchase by them of any such assests shall be voidable at the instance of any other person interested in the asset so purchased; and*

*(ii) no immovable property shall be sold before confirmation of the grant.*

17. It will be noted above that an administrator of the estate of a deceased person has no authority to sell immovable property before confirmation of the grant. Ordinarily, if such sale is deemed necessary, the authority of the court must be sought.

18. The subject matter in our case is immovable property. It has not been shown by evidence that at the time of the agreement there was any confirmation of grant. It follows that the plaintiff had no capacity to enter into the agreement of sale. It therefore automatically follows that the agreement is null and void and cannot be enforced. It is as good as if no agreement was ever entered into in the first place.

19. There are however a few issues which arise with the annulment of the agreement. What should happen to the money paid by the defendant and should the plaintiff be entitled to mesne profits ?

20. With voidance of the agreement, strictly speaking, the defendant should be refunded his money. However, he has been in occupation of the premises for all this period of time. If he is not ordered to pay reasonable rent for the period that he has been in occupation, then he will end up having unjustly enriched himself. In my view, to be fair to both parties, this money paid as deposit needs to be offset with what would be considered to be reasonable rent for the period that the defendant has been in possession.

21. The plaintiff asked for rent of Kshs. 60,000/= per month for the half acre occupied. There of course was no proof that the defendant paid rent of Kshs. 30,000/= for a quarter of an acre as claimed. The

defendant himself stated that he used to pay Kshs.7,000/= for 1/8th of an acre at the time of sale. On the defendant's own admission, at the time of the agreement, which was the year 2006, a half acre would be rented out at Kshs. 28,000/= per month. From 22 December 2006 to the date of this judgment is about 10 years and 3 months which comes to 123 months. Rent could not be stagnant and would have increased over the duration of those 10 years. Doing the best that I can, I will compound the rent by a flat rate of 25%. I am sure that by now, rent for such a premises must have at least doubled, but this rate of 25% being a flat rate, will be spread over the entire period, thus smoothen the fluctuations over the years. In my own estimation, and what I consider to be fair, I assess the benefit that the defendant has obtained by using the premises and the loss that the plaintiff has lost by not being in use of the premises, to be the sum of (Kshs. 28,000 x 123) + (25% of the total) = Kshs. 4, 305,000/=. I know that I am estimating, but it is the best I can do under the circumstances.

22. I will enter judgment for the plaintiff in the sum of Kshs. 4,305,000/= with interest to start accruing from the date of this judgment. This amount should be set off from the sum that the defendant deposited, which was agreed to be kshs. 2, 600,000/=. In essence, the defendant now owes the plaintiff the sum of Kshs. 1, 705,000/= which must be paid within 30 days from today or else execution to issue.

23. There was the other prayer to restore the premises. I really have no evidence to back up the oral narrative by the plaintiff that the defendant has built a wall and other structures in the premises. The plaintiff needed to provide evidence of what was there before the sale and what is present so that it can be certain what structures are being complained of. The defendant however seems to admit that he developed some structures. Again doing the best that I can, I can only order the defendant to restore the premises to the situation that it was in at the time of the sale agreement.

24. Since the sale agreement has been nullified, the defendant cannot now claim any rights over the suit premises. He has to give vacant possession. In my view, if I give the defendant 90 days to give vacant possession, I will have given him more than ample time. Thus, the defendant may continue in possession upto the 90 days given, but to be entitled to that continued possession, the defendant must pay monthly in advance an equivalent of kshs. 28,000/= + 25% which is Kshs. 35,000/= for every month that he wishes to be in possession. If he does not pay, then this money be part of the sum due and execution may issue for it.

25. I think all parties were at fault in one way or another. I am unable to award costs to either. Therefore each party will bear his own costs.

26. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 30<sup>TH</sup> day of March 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of :**

Mr. Rubua Ngure for the plaintiff

Mr. Karanja Mbugua for the defendant

Court Assistant: Nelima

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**