



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO.216 OF 2017

(formerly Machakos HCCC No. 72 of 2012)

AGGREY AMBANI NGAIRA.....PLAINTIFF

VERSUS

PATRICK KARIUNGI.....DEFENDANT

JUDGEMENT

By a Plaint filed on 7th March, 2012, the Plaintiff seeks judgement against the Defendant for:

- a) An injunction restraining the Defendant herein either by himself, his servants, agents, assigns or any other person claiming through him from intimidating, threatening, selling of the said six plots of Title No. KJD/OLOOLOITIKOSHI/KITENGELA/2922 occupied by the Applicant, evicting and/or interfering with the Plaintiff's quiet possession of the property;
- b) Specific performance of the Agreement entered into between the Plaintiff and the Defendant on 26th June, 2003;
- c) Costs of the suit plus interest herein;
- d) Any other relief that this Honourable Court may deem fit to grant.

The Defendant was duly served but never entered appearance nor filed a Defence.

Plaintiff's Evidence

PW1 AGGREY AMBANI NGAIRA who is the Plaintiff herein adopted his witness statement and list of documents dated 9th March, 2012. He said he knew the Defendant whom he met together with his family where they showed him six plots measuring 15 x 30 metres which the Defendant wanted to sell. The Defendant informed him the six plots had one title and if a purchaser sought to buy, he/she had to take all of them. Further that the cost per plot was Kshs 50,000 with the total cost for all the plots amounting to Kshs. 300,000. He stated that on 26th June, 2003 they agreed that he would purchase the plots from the Defendant and they drafted an agreement which he produced as exhibit P 1. They agreed that he would pay in instalments, and for every payment he would issue him with a receipt. He produced the receipts as exhibit P2. After paying Kshs. 50,000, he paid another Kshs 150,000 as reflected in the said agreement.

He testified that the Defendant informed him at the time of subdividing the plots that they were in the name of **Wandaiga Self Help Group**. PW1 stated that he was to pay the balance of Kshs. 100,000 after receiving the title deed as was captured in the Sale Agreement. He averred that the Defendant never

issued him with the title deed but demanded for the remaining Kshs. 100,000 and when he refused to pay and referred him to the agreement, the Defendant started threatening him. When he confronted the Defendant demanding for the title deed, he started sending threatening letters informing him he had changed the name of the properties from **Wandaiga Self Help Group** to **E.W. Properties** and sent to him a letter in June 2011 to this effect, which he produced as exhibit 3. He said from June 2003 to 2011, the Defendant failed to give him the title deed to the suit land but asked him to pay for miscellaneous charges if he wanted it. The Defendant went further to draft a Miscellaneous Sale Agreement dated 1st September, 2011 to that effect, which the Plaintiff produced as exhibit 4.

PW1 stated that the Defendant was sent for a demand letter by his lawyer on 24th November, 2011 demanding title to the suit land. He produced the demand letter as exhibit 5. Further that through his lawyer, he sent back the cheque of Kshs. 200,000 dated 22nd June, 2011, that the Defendant purportedly refunded him the purchase price he had already paid. He produced the cheque as exhibit 6 and a copy of the title deed to the suit land as exhibit 7. He said he occupied the suit land from 2003 upto 2011 but left because of threats from the Defendant who is an ex soldier. He is seeking the court's intervention for specific performance, permanent injunction and orders to remove illegal structures from the suit land, costs and interest.

The Plaintiff thereafter closed their case and filed written submissions which I have considered.

Analysis and determination

Upon perusal of the documents filed and evidence presented, the main issues for determination are:

- Whether there was a valid sale agreement between the Plaintiff and the Defendant.
- Whether there was a breach of contract by either of the parties to the suit and if so by which party.
- Whether the Plaintiff is entitled to the order of specific performance and injunctive relief sought.
- Who bears the costs of this suit?

As to whether the Plaintiff entered into a valid Sale Agreement with the Defendant, the answer is in the affirmative. The Plaintiff produced the duly signed and witnessed Sale Agreement as exhibit P1. The said Sale Agreement had three distinct clauses as follows:

Parcel: Six plots of 30 x 50 metres which are part of KAJIADO/KITENGELA/ 2922 at the price of Kshs. 50,000 per plot. They are together as one parcel with one title deed.

Payments: ' 1. Sale Agreement Deposit - Kshs. 50,000; 2. Allotment Deposit - Kshs. 150,000; and 3. Title availing - Balance - Kshs. 100,000.

Main points: ' 1. On paying allotment deposit, the buyer will be able to develop the land;

2. The witness will act as the adjudicator in case any dispute arises.

PW1 produced a bundle of receipts issued by **Wandaiga Self Help Group** on diverse dates from 25th June, 2003 up to 1st August, 2004 totaling to Kshs. 200,000 which confirms he indeed paid the agreed purchase price. PW1 informed court he took possession of the suit land after the payment of Kshs 200,000, and commenced developing it. He informed Court that the Defendant had told him at the time of subdividing the plots that they were in the name of **Wandaiga Self Help Group**. All these evidence is not controverted by the Defendant.

I note that despite signing the Sale Agreement, the Defendant breached the said contract and failed to issue the Plaintiff with the Title Deed yet Plaintiff had already adhered to the terms agreed upon. It is PW1's evidence that he stopped using the suit land in 2011 due to threats from the Defendant (an ex soldier), who started sending him threatening letters whenever he demanded for the title deed as had been

agreed upon. From PW1's evidence it is clear the Defendant attempted to illegally vary the terms of the Sale Agreement after he sold the suit parcel and this is evident in exhibit 3 which is a letter from **EW Properties** dated 20th June, 2011 as well as exhibit 4 which is the Miscellaneous Sale Agreement.

It is the Plaintiff's contention that after demanding for his title as per the Sale Agreement, the Defendant sent him a cheque of Kshs. 200,000 dated 22nd June, 2011 purportedly being the refund of the purchase price he has paid, but the said cheque was returned as the Plaintiff was claiming for specific performance. I note that the Defendant did not have clean hands by breaching the contract and further attempting to vary the terms after the Plaintiff had paid the amount agreed upon and taken possession.

I find that by virtue of the Defendant who is the registered proprietor of the suit land, allowing the Plaintiff to take possession of the suit land upon receiving the agreed consideration, it created an element of trust.

In the case of Charles K. Kandie v Mary Kimoi Sang [2017] eKLR where the Court of Appeal quoted the case of Twalib Hatayan & Anor v. Said Saggat Ahmed Al-Heidy & Others [2015] eKLR it emphasized that ' Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial.'

The Court is persuaded by this case and find that by virtue of the Defendant accepting the purchase price as agreed and allowing the Plaintiff to take possession of the suit land, resulting trust arose in favour of the Plaintiff. The intention of the Defendant was indeed The Court further finds that it is the Defendant who was in breach of the Sale Agreement entered into between himself and the Plaintiff on 26th June, 2003.

In the circumstances, and since the Plaintiff's evidence is not controverted, this Court finds that the Plaintiff has proved his case on a balance of probabilities, and accordingly enters judgment for the Plaintiff as against the Defendant as follows:

1. The Defendant either by himself, his servants, agents, assigns or any other person claiming through him be and is hereby restrained from intimidating, threatening, evicting, selling of the said six plots of Title No. KJD/OLOOLOITIKOSHI/KITENGELA/2922
2. An order for Specific performance of the Agreement entered into between the Plaintiff and the Defendant dated the 26th June, 2003.
3. The Defendant to sign the completion documents in respect of the suit land within 60 days from the date hereof, failure of which the Deputy Registrar Kajiado Law Courts will be at liberty to do so.
4. The Defendant shall bear the costs of this suit

Dated signed and delivered in open court at Kajiado this 21st day of September, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

M/s Nyamolo for Plaintiff

No appearance for defendant

Mpoye –Court Assistant