



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 34 OF 2015

SAMUEL KURIA KINYANJUI.....PLAINTIFF

VERSUS

PETERSON MUTUGI NYAGA.....DEFENDANT

JUDGMENT

The plaintiff filed this suit seeking judgment against the defendant in the following terms:

1. ***Ksh. 476,100 consideration.***
2. ***Ksh. 142,830 liquidated interest.***
3. ***Costs.***
4. ***Interest.***

The basis of the suit is that by an agreement dated 22nd December 2009, the defendant agreed to sell to the plaintiff 1½ acres out of land parcel No. MWERUA/KAGIO/324 at a consideration of Ksh. 535,000. The land was however registered in the names of the defendant's brother one **BERNARD MAINA NYAGA** and in furtherance of the said agreement, the plaintiff paid to the defendant Ksh. 195,000 and the defendant directed the plaintiff to pay Ksh. 190,000 to one **NANCY MUTHONI KANYI** who was owed money by the defendant pursuant to a decree in **KERUGOYA SPMCC No. 77 of 2010**. The plaintiff therefore paid a total of Ksh. 476,100 to the said **NANCY MUTHONI KANYI** through the law firm of **R.M.KIMANI** and by clause eight (8) of the said agreement, the liquidated default interest was agreed at 30% of the consideration which is Ksh. 142,830. However, the defendant breached the agreement by dividing the 1½ acres into thirteen (13) plots and thereafter avoiding the plaintiff thus giving rise to this suit.

The defendant in a short defence denied all the averments and pleaded that it was the plaintiff who defaulted in making the payments and the agreement thereby became null and void for want of the consent under the provisions of the **Land Control Act**.

The parties were the only witnesses in their respective cases.

The plaintiff adopted his statement and referred the Court to the agreement dated 22nd December 2009 (Exhibit 1) by which they agreed that the plaintiff would purchase 1½ acres out of land parcel No. MWERUA/KAGIO/324 at a consideration of Ksh. 535,000. The land was then registered in the names of one **BERNARD MAINA NYAGA** a brother to the defendant who was one of the two witnesses to the agreement in which the defendant acknowledged receipt of Ksh. 385,000 although Ksh. 190,000 was to

be paid to one **NANCY MUTHONI KANYI** on the instructions of the defendant. The balance of Ksh. 150,000 was to be paid after the Land Control Board's consent was obtained. The plaintiff testified that he ended up paying **NANCY MUTHONI KANYI** a total of Ksh. 234,000 on instructions by the defendant and as evidenced by the money orders and other documents which are part of his evidence. The plaintiff therefore seeks those sums as well as the default interest of Ksh. 142,830 being 30% of the consideration.

The defendant similarly adopted his statement and stated that he only received Ksh. 190,000 from the defendant but denied having received Ksh. 195,000 nor directing the plaintiff to pay anybody else any money adding that although he had **NANCY MUTHONI KANYI**'s debt, it was him and not the plaintiff who was to pay the same. He also denied having instructed any lawyer by the name of **MR. KIMANI** to receive any money from the plaintiff or having breached the agreement adding that it was the plaintiff who breached it by only paying Ksh. 190,000.

Submissions have been filed both by **MR. J. MBUTHIA** advocate for the plaintiff and **MR. K. KIAMA** advocate for the defendant.

I have considered the evidence herein as well as the submissions by counsel.

MR. KIAMA in his submissions has re-visited the issue of this Court's jurisdiction to handle this dispute. The issue of the jurisdiction of this Court to handle this dispute had earlier been canvassed and a ruling delivered on 22nd April 2016 in which I dismissed the defendant's Preliminary Objection questioning this Court's jurisdiction to handle this dispute. No appeal was filed against that ruling and therefore that issue is spent and cannot be raised again in this Court.

It is common ground that the parties herein entered into an agreement by which the defendant was to sell to the plaintiff 1½ acres of land out of land parcel No. MWERUA/KAGIO/324 at a consideration of Ksh. 535,000. It is clear from clause five (5) of the agreement that the land was agricultural land because the clause states that Ksh. 150,000 would be paid after the consent of the Land Control Board had been obtained. There is no evidence that such consent was obtained and each party blames the other for being responsible for the frustration of the agreement with the defendant alleging that the plaintiff only paid Ksh. 190,000. That allegation cannot however be true because clause four (4) of the agreement is clear that the defendant received Ksh. 385,000 on 22nd December 2009 when that agreement was signed. That clause reads:

“That the Vendor acknowledges a receipt of Ksh. 385,000 (Three Hundred and Eight Five Thousand Shillings only) on the execution of this agreement”.

It cannot therefore be correct for the defendant to now allege, as he has done by his oral evidence, that he only received Ksh. 190,000 from the plaintiff. He is estopped from doing so. The law is that oral evidence will not be allowed to add or subtract from a contract that has been reduced in writing. This is known as the **“parole evidence rule”** and this Court is enjoined to make a finding that on 22nd December 2009 when the parties appended their signatures to the sale agreement, the defendant received Ksh. 385,000 of which he acknowledged receipt.

Apart from the sum of Ksh. 385,000, the plaintiff also seeks a refund of other sums of monies allegedly paid to **NANCY MUTHONI KANYI** and also to an advocate **MR. R.M. KIMANI** on the instructions of the defendant. Documentary evidence to that effect was filed. This include an acknowledgment slip dated 31st March 2010 signed by the defendant in the presence of **R.M. KIMANI** advocate and it reads:

“I, PETERSON MUTUGI NYAGA have today received a further Ksh. 45,000 from MR. SAMUEL KURIA. The balance now Ksh. 105,000”.

That acknowledgment slip is document No. 2 among the plaintiff's list of documents and is signed by the defendant in the presence of **R.M. KIMANI** advocate. It also quotes some monies sent to **NANCY MUTHONI KANYI** and although the defendant denied having signed the slip, this Court is satisfied that

he signed them upon receipt of the Ksh. 45,000 from the plaintiff. After all, the plaintiff had no relationship, contractual or otherwise, with the said **NANCY MUTHONI KANYI** and so the payments made by the plaintiff to her could only have been on the instructions of the defendant who owed her money. Those payments to **NANCY MUTHONI KANYI** are captured in the following money orders:

1. Money Order No. YY 2361467 for Ksh. 10,000

2. Money order No. YY 2495709 for Ksh. 10,000

There is also a Money Order No. YY 2358467 for Ksh. 100,000 dated 10th May 2011 in favour of **NANCY MUTHONI KANYI**. In his evidence during re-examination, the plaintiff told the Court that infact he paid the defendant over and above the contractual sum. He said:

“The money orders are part of my documents and I ended up paying NANCY even more than Ksh.. 190,000 which I was to pay her”

That assertion appears to be correct because part of the plaintiff’s documentary evidence includes another Money Order No. YY 2358468 for Ksh. 100,000. That would mean that the plaintiff actually paid the defendant well in excess of the purchase price of Ksh. 535,000. However, by his plaint filed herein on 27th March 2015, the plaintiff only seeks a refund of the consideration of Ksh. 476,100 which I find he has proved and which I award him because this Court can only grant what has been pleaded and no more.

The plaintiff further seeks the sum of Ksh. 142,830 as liquidated interest. It is of course correct that the parties by their agreement agreed under clause No. 8 as follows:

“Incase of default on the part of the Vendor, he shall refund the purchase price paid plus 30% being liquidated interest”

It is also clear from the agreement that the land subject of the same was agricultural land for which the consent of the Land Control Board was required. This is evidence from clause No. 5 which reads:

“That the balance of Ksh. 150,000 (One Hundred and Fifty Thousand only) shall be paid after Land Control (sic) to Transfer”.

It is common knowledge that no such consent of the Land Control Board was obtained as required by **Section 6 of the Land Control Act**. The agreement was therefore rendered “void” and by dint of the provisions of **Section 7 of the Land Control Act**, only the purchase price became recoverable. That provision reads:

“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid but without prejudice to Section 22”

In the circumstances, the plaintiff can only be entitled to a refund of the purchase price.

Further, it is also clear from the agreement that by the time the plaintiff was purchasing the land parcel No. MWERUA/KAGIO/324 from the defendant, it was infact registered in the names of one **BERNARD MAINA NYAGA** the defendant’s brother. The defendant therefore had no interest in the land which he could purport to transfer to the plaintiff. That agreement was therefore illegal and as was held in the case of **MISTRY SINGH VS SERWANO WOFUNIRA KULUBYA 1963 E.A 408**, no Court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to have arisen from a contract or transaction that is illegal. See also **STANDARD CHARTERED BANK VS INTERCOM SERVICES LTD & OTHERS 2004 e K.L.R.** Given the above positions in law, it would be improper for this Court to order the defendant to pay to the plaintiff the liquidated interest of Ksh. 142,830 as that would amount to enforcing an illegal contract. That prayer is therefore rejected.

The plaintiff is nonetheless entitled to costs and interest.

There will be judgment for the plaintiff against the defendant in the following terms:

1. Ksh. 476,000.

2. Costs.

3. Interest.

B.N. OLAO

JUDGE

6TH OCTOBER, 2017

Judgment delivered, dated and signed in open Court at Kerugoya this 6th day of October 2017

Ms Waweru for Mr. Kiama for Defendant present

Mr. Munene for Mr. Mbuthia for Plaintiff present

Right of appeal explained.

B.N. OLAO

JUDGE

6TH OCTOBER, 2017