



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 210 OF 2011

LAKEVIEW INVESTMENTS LTD.....PLAINTIFF

VERSUS

IAN MAGARA BWOSIEMO.....1ST DEFENDANT

BRENDA KWAMBOKA MANWAH.....2ND DEFENDANT

AL RUHIA ESTATE LTD.....3RD DEFENDANT

JUDGEMENT

By a Plaint filed on 17th August, 2011, the Plaintiff seeks judgement against the Defendant for:

- a) An order declaring the Sale Agreement between the 3rd Defendant and the 1st and 2nd Defendants null and void
- b) An order of specific performance against the 1st and 2nd Defendants to transfer the parcel of land known as LR No. 25693 as per the Sale Agreement dated 16th February, 2010 and in default, the Deputy Registrar of the High Court of Kenya, do sign all the transfer or necessary documents to the Plaintiff and the 3rd Defendant.
- c) An order of injunction order against the 1st, 2nd and 3rd Defendants or their agents or servants from selling or transferring or disposing the said property or removing or damaging the Plaintiff's fence and beacons or interfering with the said parcel of land in any other way until this suit is heard and determined and also before the application for injunction is heard and determined.
- d) Costs of the suit.
- e) Any other relief that this Honourable Court deems fit and just to grant.

The Defendant never entered appearance nor filed a Defence despite being duly served through substituted service.

Plaintiff's Evidence

PW1 JOSEPH ODUOR OKWARO in his examination in chief stated that he is a Land Agent and a director in the Plaintiff company where they are three directors who deal in properties. He said he knew the three defendants and that the Plaintiff had an agreement with the 1st and 2nd Defendant who wanted to sell land in Mlolongo LR 25693 (suit land) measuring 10 acres, which was registered in their names. He stated that they had agreed with the 1st and 2nd Defendant to purchase the suit land at Kshs. 11 million. He produced the title deed to the suit land as exhibit P 1. He said they made an agreement dated the 16th February, 2010 between the Plaintiff, the 1st and 2nd Defendant where they agreed the purchase price was Kshs. 11 million and the Plaintiff was to pay 10% at the time of signing the agreement and the balance of Kshs. 9.9 million was to be settled within 180 days. He produced the said agreement as exhibit P2. The 1st and 2nd Defendants were to provide the Plaintiff with title deeds and rate clearance certificates but failed to do so and later requested for more money before supplying the said documents. He averred that they paid them another sum of Kshs. 850,000. He produced the acknowledgement of the receipt of the different sums which amounted to Kshs. 850,000 as Plaintiff's exhibit P3, P4 and P5 respectively. Despite paying the monies the 1st and 2nd Defendant failed to furnish the documents to the Plaintiff.

He averred that they took possession of the suit land after paying the 10% as had been agreed upon by the parties, undertook subdivision, and were ready to pay the balance. After subdivision the Plaintiff commenced selling the plots and they sold to the 3rd Defendant to enable them pay the balance of the purchase price to the 1st and 2nd Defendant who were well aware of this transaction. He claimed that they entered into an agreement with the 3rd Defendant to sell 80 plots measuring 40 x 80 metres at Kshs. 350,000 per plot totaling to Kshs. 20, 600,000/=. He produced the agreement between the Plaintiff and 3rd Defendant as Exhibit P6. The 3rd Defendant paid to the Plaintiff Kshs. 2,060,000/= being 10% of the purchase price and agreed that the land was to be registered in the joint names of the Plaintiff and 3rd

Defendant with the 1st and 2nd Defendants accepting this. A transfer was prepared and both the Plaintiff and 3rd Defendant signed but the 1st and 2nd Defendant failed to append their signatures on the section they were meant to sign. He produced the said transfer document as exhibit P7. He averred that the 1st and 2nd Defendants decided to destroy the fence the Plaintiff had put on the suit land, yet there were third parties who the Plaintiff already sold to plots that had already fenced and planted trees thereon. Further the Plaintiff later discovered the 1st and 2nd Defendants now wanted to sell the suit land to the 3rd Defendant and by-pass the Plaintiff.

PW1 said they registered a caveat on the suit land in 2010 and the Court also granted an injunction pending the outcome of the suit. As at January 2017, he confirmed the caveat was still registered. He averred that the 1st and 2nd Defendants have disappeared and changed their phone numbers, there is nothing going on at the suit land since 2010 and the 3rd Defendant also moved out of the country. He stated that they had to refund to the 3rd Defendant through his lawyer, the monies the Plaintiff had paid him when the 1st and 2nd Defendants declined to sign the transfer. He said they want the agreement between the Plaintiff and the 1st & 2nd Defendants effected as they paid a deposit and they have customers who already paid them a deposit who want their land instead of money. He said they do not want a refund but want the land, and the 1st and 2nd Defendants compelled to sign the transfer forms to enable the Plaintiff pay the balance of the purchase price; and if they fail, the Court to sign the transfer forms. The Plaintiff is also seeking for damages and costs of the suit. He said they are ready to pay the balance to the 1st and 2nd Defendants but if they decline to accept, then they can pay it in court.

PW2 NELSON OCHIENG OKWARO stated that he is an employee of the Plaintiff who identified the suit land for the company to purchase. He said they did a search in 2010 which confirmed the suit land belonged to the 1st and 2nd Defendants. On 16th February, 2010 the 1st and 2nd Defendants entered into an agreement with the Plaintiff to sell the suit land at a cost of Kshs. 11 million with the 10% amounting to Kshs. 1.1 million immediately paid and the balance of the purchase price to be paid later. He said after the payment of the 10%, the Plaintiff took possession of the suit land, fenced it and undertook subdivision. As per the agreement it was agreed the balance was to be paid within 180 days and before expiry of 180 days the 1st and 2nd Defendants were to furnish the Plaintiff with certain documents but this was not done. Instead the 1st and 2nd Defendants requested for more monies amounting to Kshs. 850,000 to enable them settle the land rates, which the Plaintiff did. Further the Plaintiff got a third party who is the 3rd Defendant to purchase the suit land. He said the Plaintiff is ready to pay the balance as it is still in possession of the suit land and he does not know where the Defendants are. He requested that the Court do issue an order within a specific time for transfer to be effected and for the Plaintiff to pay the purchase price.

The Plaintiff closed their case and its Counsel informed the Court that the Defendants' never entered appearance.

Analysis and Determination

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

- Whether the Sale Agreement dated the 16th February, 2010 between the Plaintiff and the 1st & 2nd Defendants is valid.
- Whether the 1st and 2nd Defendants should be compelled to effect transfer of the suit parcel to the Plaintiff.
- Whether the Agreement between the 3rd Defendant and the 1st and 2nd Defendants is valid

On the first issue as to the validity of Sale Agreement dated the 16th February, 2010 between the Plaintiff and the 1st & 2nd Defendants, I wish to interrogate the documents presented. I note the Sale Agreement was duly signed by both the Plaintiff and the 1st & 2nd Defendants. Clause 13 of the said agreement reads: '*Both parties confirm that they have willingly entered into this Agreement without any undue influence or representation or warranty as to the condition of the property except as provided in this Sale Agreement.*' This indeed confirms that the 1st and 2nd Defendant were not coerced to enter into the Sale Agreement (exhibit P2) and they accepted to adhere to the terms and conditions therein. The Plaintiff has established that there was an unchallenged Sale Agreement between them and demonstrated that there was part performance of the said contract by paying 10% of the purchase price amounting to Kshs. 1.1 million and thereafter adding Kshs. 850,000/= as requested by the 1st & 2nd Defendants. The 1st and 2nd Defendants granted them possession of the suit land as per Clause 10 of the Sale Agreement. Clause 6 of the Sale Agreement sets out the terms of termination and rescission of the contract.

In the current case the court has not been shown any documentation from either party to prove a notice to terminate the contract was done. Since the Defendants failed to enter appearance and file Defence to controvert the Plaintiff's claim, I find that the Sale Agreement dated 16th February, 2010 is valid.

On the second issue as to whether the 1st and 2nd Defendants should be compelled to effect transfer of the suit parcel to the Plaintiff. It is the Plaintiff's contention that the Sale Agreement dated 16th February, 2010 is valid. Further that the 1st and 2nd Defendants breached the terms therein and failed to furnish the Plaintiff with the requisite documents within 180 days as per clause 4 of the Sale Agreement. The documents included the original certificate of title; valid rates clearance certificate; valid rent clearance certificate; a duly executed but undated transfer drawn in favour of the Purchaser; copies of the vendors PIN Certificate; three passport photographs of the directors of the vendor; all other documents consents, clearances, utility bills. Clause 4.4 of the Agreement states as follows: '*on the completion date or any other earlier date, the Vendors shall deliver to the Purchaser the aforesaid Completion Documents and simultaneously therewith the Purchaser shall deliver to the Vendors the balance of the purchase price alluded to in Clause 2.1.1 hereinabove.*'

I note as per Clause 10 of the Sale Agreement which states that;

' 10.1: The Vendors shall deliver the property unto the Purchaser in vacant possession immediately upon the payment of the balance of purchase price.

10.2: The purchaser shall be at liberty to immediately fence off the property immediately upon payment of the said deposit.'

In so far as the Plaintiff was allowed to take possession of the suit land after paying 10%, it was not given an authority to subdivide the suit land as stated by PW1 but only to fence it. PW1 contended that they subdivided the suit land, placed beacons thereon and sold to some to a third party. Further that they also entered into a contract with the 3rd Defendant who was supposed to purchase 80 plots. He claimed the 1st and 2nd Defendant were well aware but declined to sign the transfer form between the Plaintiff and the 3rd Defendant. However I note that there was no where in the Sale Agreement where the Plaintiff was to subdivide the suit land and sell to third parties. Clause 10.2 only stated that the Plaintiff was at liberty to fence off the suit land once it paid the 10% deposit of the purchase price. It is hence evident that the Plaintiff's acts of sub dividing the suit land and selling to third parties amounted to breach of contract as it did not have a title to pass to a third party. PW1 and PW2 both insisted they wanted the suit land and were ready to pay the balance of the purchase price if the 1st and 2nd Defendants furnished them with the relevant documents and effected transfer. They further stated that they wanted the court to sign the transfer form if the 1st and 2nd Defendant failed to do so and were ready to pay the balance of the purchase price in court. The Court notes that it is seven (7) years since the Sale Agreement was signed. The Plaintiff did not provide proof that they have sent notices to the 1st and 2nd Defendant to complete the Sale of the suit land. It is not the Court's duty to rewrite the terms of the contract between the Plaintiff and 1st & 2nd Defendant but to interpret and enforce intentions of the parties herein. In so far as the Sale Agreement was to be completed within 180 days, the Plaintiff was not vigilant enough to pursue its completion, and only has a remedy to get the refund of the deposits he had paid and the expenses incurred to fence the suit land. In the case of **KARANJA MBUGUA & ANOTHER -V- MARYBIN HOLDING CO. LTD [2014] EKLR**, Justice Nyamweya held that *'The legal effect of rescission of a sale agreement is that the parties are restored to their former position. In the present case the pre-contractual position of the parties is that the Plaintiffs were the registered owner and in possession of the suit premises, and that the Defendant is to be put back to the financial position it was at the time of entering into the sale agreement, and refunded any money that it paid under the sale agreement.'*

In the circumstances and relying on the above case, I am not inclined to compel the 1st and 2nd Defendant to sign the transfer forms since the full purchase price had not been paid, but to refund to the Plaintiff the funds it paid, the costs incurred and interest on the same at court rates.

On the issue as to whether the Agreement between the 3rd Defendant and the 1st and 2nd Defendants is valid. Since the Sale Agreement of the suit land was signed prior to this agreement and the Plaintiff paid 10% purchase price as had been agreed. The 1st and 2nd Defendants hence did not have capacity to enter in to a fresh contract with the 3rd Defendant when the contract with the Plaintiff was still in existence. I find that the Sale Agreement between the 1st & 2nd Defendants and 3rd Defendant is null and void.

In the circumstances I find that the Plaintiff has proved its case on a balance of probability and proceed to make the following order:

- a) The Sale Agreement between the 3rd Defendant and the 1st and 2nd Defendants be and is hereby declared null and void.
- b) The 1st and 2nd Defendant be and are hereby ordered to refund the deposit of the purchase price amounting to Kshs. 1,950,000/= including costs incurred to fence the land with interest at 18%. per annum.
- c) costs of the suit to be borne by the Defendants

Dated signed and delivered in open court at Kajiado this 5th day of October, 2017.

CHRISTINE OCHIENG

JUDGE