



REPUBLIC OF KENYA



KENYA LAW
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**Chege v Njenga (Environment & Land Case 496 of 2016)
[2017] KEELC 3867 (KLR) (27 November 2017) (Judgment)**

Gidraf Maina Chege v Joseph Njoroge Njenga [2017] eKLR

Neutral citation: [2017] KEELC 3867 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 496 OF 2016**

BM EBOSO, J

NOVEMBER 27, 2017

BETWEEN

GIDRAF MAINA CHEGE PLAINTIFF

AND

JOSEPH NJOROGE NJENGA DEFENDANT

JUDGMENT

1. On 11/5/2016 the plaintiff, *Gidraf Maina Chege*, lodged this suit against the defendant, *Joseph Njoroge Njenga*. He prayed for judgment against the defendant for KShs.2,068,185/-, costs of the suit and interest on both items.
2. The plaintiff's case is that at all material times, the defendant held himself out to be the proprietor of Plot No. 510B being a sub division within Land Reference Number 8788/6 situated in Githurai within the Nairobi City County. On or about 9/12/2014, the defendant and the plaintiff entered into a sale agreement in respect of the suit property, pursuant to which the plaintiff paid the defendant the full purchase price of KShs.1,500,000/- and the defendant acknowledged receipt of the money. Thereafter, the defendant handed over possession of the suit property to the defendant. The parties proceeded to *Ngara Muco Kaniriria Company* [land buying company] to effect in house transfer of the plot in the land buying company's internal register. In April 2015, the plaintiff fenced the suit property and ferried building materials to the site, ready to embark on construction works. At this point, a third party by the name *George Njoroge Kariuki* approached the plaintiff claiming to be the registered proprietor of the suit property. He produced a title to support his claim of ownership of the suit property. The plaintiff subsequently conducted a search at the relevant land registry and the search revealed that, indeed, the third party, *George Njoroge Kariuki*, was the registered proprietor of the suit property.
3. The plaintiff contends that the sale contract dated 9/12/2014 was frustrated by dint of the fact that the suit property sold to the plaintiff by the defendant was not available for sale by the defendant because



the title therein was registered in the name of someone else. In addition to seeking a refund of the purchase price, the plaintiff seeks the following special damages against the defendant:

Agreed Penalty at 10%: KShs.150,000/-

Costs of fencing the suit property: KShs.382,185/-

Legal fees on sale contract: KShs. 36,000/-

Total: KShs.568,185/-

4. The defendant filed a statement of defence on 11/7/2016. He admitted that he sold the suit property to the plaintiff and that he received purchase price of KShs.1,500,000/- in full. He however contended that the property claimed by the third party is distinct and separate from the property he sold to the plaintiff. He further denied that he is liable to refund the purchase price together with the penalty of KShs.150,000. He urged the court to dismiss the plaintiff's suit.
5. This suit was listed for hearing on 26/9/2017. On that day neither the defendant nor his advocate attended court. An affidavit of service sworn by Simon Ndege on 22/6/2017 and filed in court on 22/6/2017 indicated that a hearing notice had been served on the defendant's advocates, M/s Kosgey & Masese Advocates on 13/4/2017. Satisfied that, indeed, the defendant's advocates were duly served, the court allowed an ex parte hearing.
6. At the hearing, the plaintiff adopted his witness statement dated 11/5/2016 as his sworn evidence in chief. In summary, the plaintiff's evidence is a replica of his case as summarized above. The plaintiff produced a total of 23 documents, among them receipts in support of the claim for special damages. However, none of the receipts satisfies the mandatory requirements of the law because none bears the revenue stamp. Similarly, none was an electronic cash register [ETR] receipt.
7. The plaintiff's evidence is uncontroverted. Similarly, the defendant did not lead any evidence to support his defence to the effect that the property he sold to the plaintiff is distinct and separate from the property in respect of which George Njoroge Kariuki held a title. Neither did he present any documents to support the defence that the property he sold to the plaintiff is, on the ground and on the registered survey maps, not the same as Parcel Title Number Ruiru/KIU Block 12/61 to which George Njoroge Kariuki lay a claim of title of registered proprietor.
8. Clause 6 of the material agreement for sale provided as follows:

“In the event of default or if this transaction is frustrated by any party whatsoever, the defaulting party will pay the innocent party a penalty of 10% of the purchase price and all other monies incidental to this agreement.”
9. From the evidence on record, I am satisfied that the sale agreement was frustrated by the non-existence of a valid title in the name of the defendant. To this extent, the defendant failed to convey a proper title as legitimately expected by the plaintiff. The defendant failed to avail requisite completion documents necessary for proper conveyance. In the circumstances, it would be illegal and inequitable to allow the defendant to retain the purchase price. The logical remedy available to the plaintiff is a refund of the purchase price paid to the defendant.
10. I have agonized over the claim for special damages. A claim for special damages ought to be specifically pleaded and proved. In the present suit, the plaintiff has made a specific plea for costs incurred in fencing the suit property and costs incurred as legal fees. Regrettably, the supporting receipts do not bear the revenue stamps. This renders them inadmissible in evidence. The two limbs of the plaintiff's claim are therefore untenable.



11. From the foregoing, I am satisfied that the plaintiff has proved his claim for a refund of the purchase price in the sum of KShs.1,500,000/-. I am also satisfied the plaintiff has proved the claim for penalty at KShs.150,000/-. The rest of the plaintiff's claim is rejected because of non-compliance with the mandatory requirements of the law relating to stamping of receipts.
12. In summary, I hereby enter judgment in favour of the plaintiff against the defendant for KShs.1,650,000/- together with interest at court rate from the date of filing suit. The plaintiff is awarded costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF NOVEMBER, 2017.

B M EBOSO

JUDGE

In the presence of:

N/A: for the Plaintiff

N/A: for the Defendant

Halima Abdi: Court Assistant

