



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 173 OF 2014

JOHN MOSE MICHIRA.....PLAINTIFF

VERSUS

EDWIN KIPKEMBOI KOSGEI.....DEFENDANT

JUDGMENT

1. The plaintiff brought the suit herein against the original defendant, one **Barnaba Kipkosgei Surtan** vide a plaint dated 26/11/2014 and filed in court on 1/12/2014.
2. The plaintiff sought an order of declaration to issue, to declare that he is the lawful owner of parcel number **Trans-Nzoia/Sinyerere/219** having fully paid the purchase price and taken physical possession of the same. The plaintiff also sought an order directing the defendant to execute all the necessary documents to effect transfer of Trans-Nzoia/Sinyerere/219 to the plaintiff and in default the Deputy Registrar of this Court do execute such documents on his behalf. He also prays for costs of the suit and interest.
3. In the plaint, the plaintiff states that he bought 7 acres from the defendant out of the suitland vide a written agreement on 28/3/1993, for Kshs.245,000/= which was paid in full; that he entered into a second agreement on 19/10/1993 for the purchase of the balance of 13 acres out of L.R. Trans-Nzoia/Sinyerere/219 at the agreed consideration of Kshs.604,500; that the latter purchase price sum was paid in installments; that however Kshs.20,000/= out of this sum was left outstanding to cater for statutory dues to be paid at the time of the transfer.
4. It is pleaded that the plaintiff took possession of the entire parcel of 20 acres. The defendant sold some of his property which had been on the premises and took away other property with him. The plaintiff avers that at the time of these agreements the land was still registered in the name of the Settlement Fund Trustees. The plaintiff carried on agricultural activities on the land and in 2004, he began operating a school on the land. It is the plaintiff's case that the defendant would effect transfer to the plaintiff once the land was discharged from obligations owed to Settlement Fund Trustees. However the title deed was issued to the defendant in his name and the defendant held onto that title in the plaintiff's view, illegally hence this suit.
5. The defendant denied part of the claim. In his defence dated 3/9/2015 and filed in court on 8/9/2015, the defendant included a counterclaim. The defence denies practically everything on the plaint.
6. It is in the counterclaim that some material substance is found. The defendant's position is that he admits the agreement for the sale of 7 acres to the plaintiff but avers that later the plaintiff sought a lease over the remaining 13 acres since he had set up a school on the 7 acres and he thus took the remaining 13.5 acres. **Paragraph 15, 16 and 17** of the defendant's counterclaim are incomprehensible.

7. However, the defendant in his counterclaim prays for a declaration that he is the rightful owner of the land and that the title is in his name. Further, he seeks a declaration that the transaction over the 13 acres is null and void as it had no consent of the Land Control Board. The defendant therefore seeks an injunction or “interim order” barring the plaintiff from further usage and encroachment on the suit land and costs of the suit.

8. After the defendant died, his son the current defendant, was substituted. This suit came up for hearing on 23/8/2017 and on 9/10/2017. On the latter date the defendant closed his case. The plaintiff filed his final submissions on 6/11/2017 and the defendant on 3/11/2017.

9. At the hearing the plaintiff produced the original of the agreement dated 28/3/93 as “**P. Exhibit 1**” and the original of the agreement dated 19/10/1993 as “**P. Exhibit 2**”. There is no contention that the amount of consideration for the 7 acres was paid in full. However, a dispute arises in respect of the second transaction. The plaintiff states that he paid Kshs.300,000/= by cheque on 15/11/1993. Later, the plaintiff got a demand letter from the defendant’s advocate dated 15/10/1996 asking for payment of Kshs.203,900/=. He maintained that the sum demanded should have been Kshs.160,000/= as Kshs.43,500/= which he had paid on 2/6/1995 had not been taken into account. In his response he proposed to clear the admitted balance on 10/2/1997 and on 31/7/1997 respectively. On 16/12/1996 the plaintiff was addressed a second demand letter. That demand states that the cheque for Kshs. 43,500/= was dishonoured by the bank. The letter states that the plaintiff should liaise with the deceased so that “the 14 acres” which are commensurate with the payment the plaintiff had made, may be excised for him out of the 21 acres.

10. The plaintiff averred that after this demand, he paid Kshs.140,000/= to Anassi Momanyi & Co. Advocates on 18/2/1997 and he produced a receipt to that effect. The plaintiff testified that a balance of Kshs.20,000/= remained outstanding. He says he did not forward the balance because he found that there were land rates which had not been paid.

11. When questioned in cross-examination over the transactions the plaintiff’s attention was drawn to his letter in the record dated 15/4/1994 to the deceased. He admitted that the cheque number appearing in that letter was 805533 while the cheque number on the agreement was different, yet the letter was explaining the amount he had paid in respect of the agreement. The plaintiff’s attention was also drawn to a cheque counterfoil dated 10/1/1994. It appears to be in respect of cheque No. 805533 for Kshs.300,000/= to Barnabas Sultani Kipkoskei.

12. In the plaintiff’s bundle of documents the following counterfoils which were not produced in evidence for the numbered cheques are evidently included:-

(1) Cheque No. 575071 for Kss.30,000/= dated 1/7/1993

(2) Cheque No. 805533 for Kshs.300,000/= dated 10/1/1994

(3) Cheque No. 805538 for Kshs.10,000/= dated 15/2/1994

(4) Cheque No. 805550 for Kshs.100,000/= dated 18/3/1994.

13. The letter dated 15/4/1994 from the plaintiff to the deceased reads as follows:-

15th April, 1994

Mr. Barnaba Kipkoskei Arap Surtan

Dear Sir,

RE: PLOT NO. 219 SINYERERE SCHEME TRANS-NZOIA DISTRICT

This is further to confirm that the agreement signed on 19th October, 1993 in respect of the remaining parcel of land after the 1st agreement has been particularly settled as follows:-

Agreed price - Kshs.604,500

Less Cheque Number NS/AG – 805533 (300,000)

Cheque Number NS.AG 805550 (100,000)

Share of Chief Fees (600)_____

Balance owing Kshs.203,900/=

As advised you (sic) in February, 1994 when we met in Kitale, this balance will take some time to settle. By December, 1994, I would have settled a substantial amount of the balance.

Please be patient until December, 1994.

Yours sincerely

J.M. Michira

13. On 2nd June, 1995, one Caren Michira who can only be presumed to be the plaintiff's kin, wrote to the deceased saying that she has not been able to pay him in time and enclosing a cheque of Kshs.43,900/=. As at 11/11/1996 the plaintiff acknowledged indebtedness of Kshs.160,000/= and in a letter of the same date, proposed to settle it in two installments of Kshs.50,000/= and Kshs.110,000/= on 10th February, 1997 and 31st July, 1997.

14. Apparently the plaintiff was not amused by this proposal and, through Anassi Momanyi & Co. Advocates he wrote another letter dated 16/12/1996 decrying the plaintiff's delay in paying the balance of consideration. He said the cheque for Kshs.43,900 (Cheque No. 403465) was dishonored when it was presented to the bank. The letter also said that the deceased could not give the plaintiff any further indulgence. Consequently, it invited the plaintiff to physically call on the deceased so that the deceased may excise for the plaintiff "14 acres" for him which was "commensurate with the payments already made". The letter flatly rejected the proposal for instalments.

15. The plaintiff appears not to have "physically called upon the deceased. The plaintiff produced as "P. Exhibit 7" a receipt dated 18/2/1997 showing that two months after the deceased had notified him of his disagreement with the proposal to pay in instalments the plaintiff paid Kshs.140,000/= in cash to Anassi Momanyi & Co. Advocates. This mode of payment is curious because first, before this, the plaintiff used to make out cheques directly to the plaintiff and secondly, payment was made long after the letter dated 16th December 1996, and thirdly, no further or other correspondence is given showing that the firm of Anassi Momanyi had any further instructions to handle the matter in a manner that would go contrary to the rescission contained in their letter dated 16/12/1996.

16. In his evidence the defendant who is the deceased's son concedes to the sale of 7 acres. However he maintains that the plaintiff never purchased the additional 13 acres as he never paid for them. He conceded that Kshs.140,000/= was paid through Momanyi Advocates and the money was received.

17. The defendant stated that he has no objection to giving the plaintiff 7 acres since even the defendant's father had stated that he should be given 7 acres. According to the pleadings, the issues arising for determination in this suit are as follows:-

(a) Whether the plaintiff was in breach of the agreements.

(b) Whether the provisions of Section 6(1) of the Land Control Act apply to the transactions between the parties herein and if so whether the agreements are void for want of consent.

(c) What orders should issue.

The issues are addressed as hereunder:-

(a) Whether the plaintiff was in breach of the agreements.

18. The oral evidence of the plaintiff and his documentary evidence show that the plaintiff was not consistent in his observance of the second terms of the agreement. In the first agreement credit must be given to the plaintiff on the strength of the defendant's admission that the plaintiff had paid all that was due from him as consideration. However it is the contention by the deceased and the defendant that the plaintiff had not paid entirely in respect of the second transaction that this court must examine.

19. According to the available evidence the plaintiff's steps faltered from the beginning of the second transaction when the Cheque No. 784842 dated 15/11/1993 for Kshs.300,000/= being the initial deposit, bounced. This meant that the plaintiff was already in breach. This cheque was only replaced 3 months later on 10/1/1994 vide another cheque No.805533 for a similar amount. There is no evidence as to whether this replacement cheque was honoured. The plaintiff however includes it, without any further evidence that it was cashed, among the actualized payments listed in his letter of 15/4/1994 in respect of the second agreement. This letter was not produced in evidence.

20. A demand for the balance of Kshs.203,900/= dated 15/10/1996 was made by the deceased's advocate to be paid within 14 days. In his now characteristic luxurious mode, the plaintiff wrote a letter dated 11/11/1996 to propose payment in instalments. This was clearly outside the 14 days period given. Even if the letter by the defendant's advocate were deemed to be reviving the transaction after the first breach this was evidently the second breach.

21. Subsequently the plaintiff purported to pay Kshs.43,900/= by cheque number 403465 which according to P. Exhibit 5, was dated 5/6/1995. Ironically, that cheque was transmitted in a letter dated earlier than its date, which was produced as "**P. Exhibit 5**". Despite the defendant's insistence that the cheque bounced, the plaintiff never produced evidence that the cheque was cleared. However in view of the issuance of a replacement cheque of Kshs.300,000/= dated 10/1/1994 this court is, in the absence of any evidence by the plaintiff, to believe that the cheque was dishonoured by the bank hence the defendant's letter of 16/12/1996 ("**P. Exhibit 6**"). This was the third breach.

The letter of 16/12/1996 by the defendant's advocate appears not to have been acted upon by the plaintiff as per the instructions by which he would have gotten 14 acres commensurate with his payments. Instead the plaintiff chose to pay Kshs.140,000/= to the defendant's advocate on 18/2/1997 *two months* later. Even if the letter of 16/12/1996 were to be deemed a revival of the agreement, this failure to observe instructions by the plaintiff was clearly a fourth breach. This breach incorporates the plaintiff's failure to pay Kshs.20,000/= which he admittedly retained without showing which provision of the second agreement entitled his retention. It is no wonder then that the defendant stuck to his defence that the plaintiff was entitled to 7 acres only in his written defence and counterclaim. I find that the plaintiff was evasive in his oral evidence and that he has attempted to suppress most of the documentary evidence to his case notwithstanding that he is the one who filed it. I find he has been untruthful.

22. I therefore find that the plaintiff was guilty of a series of breaches of the second agreement dated 19/10/1993, and that disentitled him from the 13 acres under the second transaction.

(b) Whether the provisions of Section 6(1) of the Land Control Act apply to the two transactions between the plaintiff and the deceased.

23. The plaintiff's position is that prior to 8th August, 2010, the suit premises were registered in the name of Settlement Fund Trustees. This is not disputed. The plaintiff therefore argues that the **Land Control**

Act does not apply to land where the Settlement Fund Trustee is a party. He cited **Section 6** of the Act.

24. However from the contents of Section 6, of the Act, the preliminary question arising from the plaintiff's said submission is whether the Settlement Fund Trustees were party to the agreements between the parties herein. I have examined the two agreements herein seeking the role of the Settlement Fund Trustees and found none. In his submissions the plaintiff has not demonstrated how the Settlement Fund Trustees were a party to the said agreements. The deceased was already entitled to the land, having been allotted the same by the Settlement Fund Trustees. In my view the two agreements fell within the definition of a "*sale.....or other disposal of or dealing with agricultural land which is situated in an agricultural area*".

I find that the mere fact of registration in the Settlement Fund Trustees' name is not sufficient to warrant an invocation of Section **6(3) (b)** of the Act. It is the transfer or sale of the interest in the land that this court is concerned with. It is this interest that the defendant was transferring to the plaintiff.

25. Consequently I find that the provisions of **Section 6(1)** of the Land Control Act were applicable to the two transactions. However, in respect of the first transaction in respect of seven acres that is clearly admitted by both parties and which the plaintiff has been occupying, I find that a constructive trust was created by the defendant in favour of the plaintiff despite the failure to comply with the requirements of the Land Control Act. Furthermore, the defendant has expressly admitted that part of the claim. I find that the plaintiff is entitled thereto. I do not find so in respect of all the land intended to be covered by the second agreement.

(c) What orders should issue?

26. This court has already found that the plaintiff was in breach of the second agreement. This court finds that the plaintiff did not fully pay for the land covered by the second agreement. This court cannot therefore order specific performance in respect of the entire suit land in this matter. This being a court of law and equity, it would also be only fair to grant the plaintiff, who has been unable to establish his claim under the second agreement, the amount of land that has been admitted by the defendant to be his entitlement and no more, and that is seven acres out of the defendant's land. The order for specific performance is severable and it can issue on equitable terms in respect of the seven acres. The plaintiff has not sought any other orders.

This court therefore orders that the constructive trust in favour of the plaintiff in respect of the seven acres is hereby determined and further that the defendant do execute all necessary documents to excise seven acres out of LR NO. **Trans-Nzoia/Sinyere/219** and effect the transfer the said seven acres to the plaintiff herein.

Regarding costs, I have observed the conduct of the plaintiff during the entire period of the dispute and noted that were it not for his conduct the suit would not have been necessary. I order that the plaintiff do meet the defendant's costs of the suit.

Dated, signed and delivered at Kitale on this **20th** day of **December, 2017**.

MWANGI NJOROGI

JUDGE

20/12/2017

Before - Mwangi Njoroge -Judge

Court Assistant - Isabellah

Ms. Mwemeke holding brief for Samba for plaintiff

N/A for defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

20/12/2017