



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 275 OF 2014**

**JULIUS NJENGA KIMAN.....1ST PLAINTIFF**

**JENNIFER MUMBI NJENGA.....2ND PLAINTIFF**

**VERSUS**

**STEPHEN YEGO MELI.....1ST DEFENDANT**

**SUSAN BOINETT.....2ND DEFENDANT**

**JUDGMENT**

Julius Njenga Kimani and Jennifer Mumbi Njenga (*hereinafter referred to as plaintiffs*) have sued Stephen Yego Meli and Susan Boinett claiming that at all material times, the plaintiffs were and are still the registered owners of Plot Number Pioneer/Ngeria Block 1(EATEC) 8440 situated in Eldoret measuring approximately 0.09 Ha. By an agreement in writing dated 16th November 2009 made between the 1st plaintiff as vendor on behalf of himself and as authorized agents and representatives of 2nd plaintiff on the one part and the 1st defendant on behalf of himself it was agreed *inter alia* that the plaintiffs would sell to the Defendants and the Defendants would purchase from the Plaintiffs the suit parcel at a price of Kshs.320,000/=. On or before the signing of the agreement, the sum of Kshs.100,000/- would be paid by the defendants to the plaintiffs. The balance of the purchase price would be paid by the defendants to the plaintiffs in two installments thus the first installment of Kshs.50,000/- was to be paid on or before 20th November 2009 whilst the second and final installment of Kshs.170,000/- was to be paid on or before 14th January 2010. The defendants were to take possession of the said property upon the signing of the agreement. Pursuant to and in accordance with the terms and conditions of the agreement and in performance of the obligations placed on the plaintiffs thereunder, the plaintiffs duly gave possession of the land to the defendants as agreed. The possession of the land was given by the Plaintiffs on the understanding that the 1st Defendant would perform their obligations in the agreement. It was a term of the contract between the Plaintiffs and the 1st Defendant that the agreement would bind them and any party in breach was to pay innocent party punitive damage for breach of the contract. Subsequently thereto the 1st defendant only paid a total of Kshs.160,000/- of the purchase price and as a result the amount of Kshs.160,000/- remains outstanding to date. It was a further term of the agreement between the plaintiffs and the 1st defendant that any party in breach, was to be liable to pay punitive damages for breach of contract to the innocent party. Notwithstanding the foregoing and in flagrant breach of the agreement the 1st Defendant breached the agreement by failing to remit the entire purchase price as had been agreed thereby frustrating the completion of the said agreement. The particulars of breach of the 1st defendant are enumerated as:-

- i. Failing to pay the purchase price as had been agreed in the agreement.***
- ii. Failing to pay the full purchase price.***

*iii. Ceasing and thereafter refusing, failing and/or neglecting to pay the outstanding amount even after being reminded by the plaintiff to do so.*

*iv. Notwithstanding the failure to pay the full purchase price, further failing to give back the parcel of land to the vendors pursuant to the agreement after repudiation.*

*v. Purporting to transfer ownership of Title to the 2nd Defendant.*

Subsequently thereto, the plaintiffs through their own investigation discovered that the 2nd defendant is now in possession of the suit property. Notwithstanding repeated requests to the Defendant by the Plaintiffs and their Advocates, the Defendant neglected and refused to take any steps towards the completion of the agreement or vacate from the land herein. The plaintiffs thereupon gave notice of repudiation of the agreement and elected to sue for the eviction of the Defendants as opposed to enforcing their right to specific performance.

The plaintiff's claim against the Defendants therefore is for a declaratory order holding that the plaintiffs are lawful registered owners of all that parcel of land known as Pioneer/Ngeria Block 1(EATEC 8440 and that the agreement between them and the 1st defendant stands rescinded and the immediate eviction of the defendants from the suit property for failure to pay the purchase price and or obtain consents to transfer within six months of the agreement as required by law. The plaintiffs claim damages for loss of user, punitive, exemplary and aggravated damages and costs of this suit and interest thereon.

Despite demand being made and notice of intention to sue having been given, the Defendants have refused and/or neglected to vacate from the suit property. The defendants were served with summons to enter appearance but neither entered appearance nor filed defence and therefore interlocutory judgment was entered and the matter set down for formal proof on 17th November, 2015.

**The 1st plaintiff** testified that he is a businessman owning a photocopy bearue while the 2nd plaintiff is his wife. The suit land was initially registered in the name of Fatuma Faraji Some who was the owner of the property and claims to have bought the land on 27th April 2007 and produced the agreement between the plaintiff and Fatuma Faraji Some. He produced an application for consent dated 18th August 2010 made by the vendor and purchaser and the letter of consent in in respect of the said parcel. He also produced the transfer document as evidence that the property was transferred from Fatuma Farati Some to the plaintiffs. I have also seen the title deed certifying that Julius Njenga Kimani of ID NO. 7552420 and Jennifer Mumbi Njenga of ID No. 209756612 are now registered as absolute proprietors of the land comprised in the title subject to the entries in the register relating to the land and to such overriding interests set out in section 30 of the Registered Land Act as it then was before being repealed. The title deed was issued on 25th August 2011 to the plaintiffs.

The plaintiffs later entered into a sale agreement with Stephen Yego Meli in respect of the said parcel for a consideration of Kshs.320,000/-. The defendant paid Kshs.160,000/- and took possession of the suit land but has refused to pay the balance or vacate the land and further registered cautions on the parcel of land but the cautions were finally removed. He prays that the parcel of land reverts back to the plaintiff's as the defendant has breached the agreement and that there is lack of consent of the Land Control Board.

**The second plaintiff** testified further that by an agreement in writing dated 16th November made between herself and the husband on one part and the defendants, it was agreed inter alia, that the plaintiffs would sell to the defendants the piece of land Plot Number Pioneer/Ngeria Block 1(EATEC 8440 at a price of Kshs.320,000/-. On or before the signing of the agreement, the sum of Kshs.100,000/- was to be paid by the purchaser to the vendors. The balance of the purchase price was to be paid by the purchaser to the vendors in two installments thus, the first installment of Kshs.50,000/- was to be paid on or before 20th November 2009 whilst the second and final installment of Kshs.170,000/- was to be paid on or before 14th January 2010. The defendants were to take possession of the said property upon the signing of the agreement. Pursuant to and in accordance with the terms and condition of the agreement and in performance of the obligation placed on the 1st plaintiff, he duly gave possession of the land to the 1st defendant as agreed on the understanding that the 1st defendant would perform his obligations in the

agreement. Subsequently thereto the 1st defendant only paid a total of Kshs.160,000/- of the purchase price and as a result the amount of Kshs.160,000/- remains outstanding to date. Through their own investigations, the plaintiffs discovered that the 2nd Defendant took possession of the suit property. Notwithstanding repeated requests to the defendants by the plaintiffs and their Advocates, the Defendant neglected and refused to take any steps towards the completion of the agreement or vacate from the land therein. The 1st defendant further registered a caution of the land at Lands registry prompting the plaintiffs to have the cautions removed and notice of an intention to remove the caution was sent on 22nd April 2013 and was addressed to the 1st defendants on 23rd November, 13th March 2013 and 22nd April 2013. The caution was finally removed. They pray that the Land reverts back to them due to breach of agreement by the 1st Defendant and lack of consent to transfer the land. They further pray for the court to issue an eviction order against the 2nd Defendant who is in occupation of the land.

I do find that the plaintiffs evidence is not controverted that they are the registered proprietors of the suit parcel. **Section 24 of the Land Registration Act 2012** provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; **and** that the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease. **Section 25 of the said Act** provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and to such liabilities, rights and interests as affect the same and are declared by **section 28** not to require noting on the register, unless the contrary is expressed in the register and that nothing in the section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee. **Section 26** provides that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—on the ground of fraud or misrepresentation to which the person is proved to be a party where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The evidence on record shows that the suit parcel of land is registered in the names of the plaintiffs and therefore the plaintiffs are entitled to the protection of sections 24, 25 and 26 of the Land Registration Act 2012.

The agreement between the plaintiff and the 1st defendant is not binding as the consent of the land control board was not sought within six months of the agreement. Section **6 of the Land Control Act Cap 302** Laws of Kenya provides the control on transactions affecting agricultural land. Thus “Each of the following transactions that is to say—***the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with*** any agricultural land which is situated within a land control area; the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply; the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act. Section 8(1) of the Act provides that an application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto: Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit. This court finds that failure to apply for the consent of

the land control board within 6 months renders the transaction a nullity. Moreover, by failing to pay the balance of the purchase price, the defendants were in serious breach of the agreement and therefore the plaintiffs were entitled to rescind the same.

The upshot of the above is that the plaintiff have proved their case on a balance of probabilities and therefore judgment is entered against the defendants in terms that an order is hereby issued rescinding the sale agreement between the Plaintiffs and the 1st Defendant. Moreover, a declaratory order is issued in terms that the plaintiffs are the lawful registered owners of all that parcel of land known as PIONER/NGERIA BLOCK 1(EATEC)/8840. Lastly, an eviction order is issued against the 1st and 2nd Defendants, their servants and or agents from that parcel of land known as PIONER/NGERIA Block 1(EATEC)/8840. Costs of the suit to the plaintiffs.

**DATED AND DELIVERED AT ELDORET THIS 8TH DAY OF JUNE, 2016.**

**ANTONY OMBWAYO**

**JUDGE**