



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 1020 OF 2012

GEOFREY WAMUGI NDUNG'U.....PLAINTIFF

VERSUS

SAMUEL NGIGI NDUNG'U.....DEFENDANT

JUDGMENT

Geofrey Wamugi Ndung'u (*hereinafter referred to as the plaintiff*) has come to court claiming that on the 31st December, 2003 entered into an agreement with the defendant wherein the defendant sold him 104 feet x 57 feet of Plot No. Kamukunji – Bondeni Block 16 C Kamukunji 200, 0.3600 hectares at a total consideration of Kshs.150,000/=.

The plaintiff made a payment of Kshs.100,000/= to the plaintiff at the signing of the agreement and the balance of Kshs.50,000/= was to be made upon the defendant transferring the title to the suit land to the plaintiff so that the plaintiff is the registered owner of the suit land. The suit land Plot No. Kamukunji – Bondeni Block 16 C Kamukunji 200, measuring 0.3600 hectares was later subdivided and the portion bought by the plaintiff was renamed Eldoret Municipality/Block 16 (Kamukunji/818. The plaintiff avers that he is in possession of the suit parcel of land and resides on the land from the 31st December, 2003. The plaintiff has been waiting for the defendant to effect transfer in his favour so that he may clear the balance of Kshs.50,000/= as agreed. The plaintiff avers that the defendant acted fraudulently and in breach of the terms of the agreement by his failure to effect transfer in favour of the plaintiff and Secretively selling the land to a third party without the plaintiff's knowledge. Moreover receiving money from a third party whilst also having received the sum of Kshs.100,000/= from the plaintiff and transferring the suit land to third party. Lastly, failure to issue any notice to the plaintiff terminating the contract and or refunding the consideration.

The plaintiff avers that the defendant's action to sell the suit land to a third party in spite of having received consideration from the plaintiff was illegal, null and void and therefore the plaintiff prays for a declaration that the defendant is bound to refund to the plaintiff the consideration paid for the suit land Eldoret Municipality/Block 16 (Kamukunji)/818 at the current market rates or as may be proved by the plaintiff.

The defendant filed defence stating that the plaintiff failed to pay the remaining balance of Kshs.50,000/= for over 10 years hence the defendant claims to have been entitled to terminate the contract and have the defendant's deposit forfeited. The defendant admits having sold the suit land after notifying the plaintiff.

When the matter came for hearing, Geofrey Wamugi Ndung'u testified that the defendant sold him a plot which was called Kamukunji Bondeni Block 16 C Kamukunji 200 measuring 0.3600 hectares of the land for Kshs.150,000/= and that the balance was to be paid after transfer. He produced the agreement as evidence of the existence of the contract. He purchased the land, it was subdivided and the portion he

bought was registered in Eldoret as Eldoret Municipality Block 16 Kamukunji/818. He fenced the plot and built a temporary structure but did not live on the land as he left it in the hands of one John Mungai whom he permitted to plant vegetables. When he did a search, he found that the defendant had transferred the land to one Charles Migiro Kembenya. He testified that the defendant breached the agreement by transferring the land to the said buyer. Before he filed the suit, he wrote to the plaintiff to collect the money but he refused.

On cross-examination by Andambi, he states that the agreement was made on 1.12.2003 and that the land was transferred to another person on 21.8.2012 about 9 years after the agreement. He does not have any letter or document showing that he was pursuing the transfer. The agreement was that he gets the transfer before paying the balance. He did not avail a valuation report to show the value of the land.

The defendant, Samuel Ngigi Ndung'u testified that he sold the plaintiff's land No. Kamukunji Bondeni Block 16(c). The land was 104 feet by 57 feet. He sold him at Kshs.150,000/=. The plaintiff paid Kshs.100,000/= on 31.12.2003. He agreed that the balance would be paid at the conclusion of the transaction. He disappeared not to be seen. He went to court 10 years after the defendant sold him the land. On the 12.6.2012, he wrote the plaintiff to look for him and conclude the transaction. He believes the letter reached him because the plaintiff went to the defendant's advocate with Ksh.15,000/= but the defendant refused because he wanted Kshs.50,000/=. He produced the letter. Another letter was written on 19.11.2012 asking him to take his deposit of Kshs.100,000/=. He left the money with his advocates but the plaintiff refused to take. He revoked the agreement. He prays that the suit be dismissed.

On cross-examination, he states that Kshs.100,000/= was to be paid before the transaction and Kshs.50,000/= at the end of the transaction but the balance could not be paid due to the fact that he was not co-operative.

The plaintiff submits that he has proved his case on a balance of probabilities thus that the plaintiff and defendant entered into an agreement for sale of the suit land on 31.12.2003 and that it was a term of agreement that the sum of Kshs.100,000/= was paid at the signing. The sum of Kshs.50,000/= was to be paid upon the defendant transferring the title to the suit land to the plaintiff. The plaintiff contends that it was incorrect upon the defendant to transfer the land to the plaintiff and therefore it was the defendant's duty to obtain consent of the Land Control Board. It is unfair for the defendant to retain the land and the money.

The defendant submits that the plaintiff did not specifically claim the value of the land and did not even produce a valuation report. The defendant further argues that the consent of the Land Control Board was not necessary, this being a plot within Eldoret Municipal Council. There is no indication that the plaintiff tried to complete the purchase price and that he came to court more than 9 years after the transaction. He submits that the suit is statute barred.

I have considered the pleadings, evidence on record and submissions of parties and do find the following issues ripe for determination:

- (1) Whether the land in dispute is agricultural land.***
- (2) Whether the land in dispute is a leasehold.***
- (3) Whether there is any fraud pleaded and proved.***
- (4) Whether there was breach of agreement and by who?***

On the ***1st issue*** as to whether the land in dispute is agricultural land, this court finds that the land in dispute is Eldoret Municipality/Block 16 (Kamukunji)/818 by virtue of official search issued on 7.12.2012. The title is absolute measuring 0.043 ha being a subdivision of plot No. 200 which was registered in the name of Charles Migiro Kembenya on the 21.8.2012 and a title deed issued on the same date. Though there is no evidence that the land is gazetted agricultural land, the court finds that the land

being an absolute proprietorship, the consent of the Land Control Board is required. The parcel of land is not leasehold as the defendant is registered as the absolute proprietor. The Interpretation section of the Land Control Act Cap 302 Laws Of Kenya defines **“agricultural land”** to mean;

(a) land that is not within—

(i) a municipality or a township; or

(ii) an area which was, on or at any time after the 1st July 1952, a township under the Townships Act (Cap. 133, 1948 now repealed); or

(iii) an area which was, on or at any time after the 1st July 1952, a trading centre under the Trading Centres Act (Cap. 278, 1948 now repealed); or

(iv) a market;

(b) land in the Nairobi Area or in any municipality, township or urban centre that is declared by the Minister, by notice in the Gazette, to be agricultural land for the purposes of this Act,

other than land which, by reason of any condition or covenant in the title thereto or any limitation imposed by law, is subject to the restriction that it may not be used for agriculture or to the requirement that it shall be used for a non-agricultural purpose;

Section 6 of the Land Control Act provides for control in the dealings in Agricultural land thus each of the following transactions -

(a) 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;

(b) 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 for the time being apply;

(c) 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.

No evidence has been laid before this court to prove that the land herein is Agricultural land however the same appears to be land within the municipality that required the approval of the County Council of Wareng as it then was. The import of the above is that it is not clear whether the agreement in dispute had a lifespan of 6 months with the option of extension of time to obtain consent of the Land Control Board. However it is clear that neither the consent of the land control board nor the approval of the county council was obtained and therefore the transaction is still a nullity.

Fraud has been pleaded but the same has not been proved as the land in dispute was never the plaintiff's parcel of land.

On the issue of breach of agreement, I do find that the balance of Kshs.50,000/= was to be paid at the conclusion of transaction. I do find that transaction in such matters are concluded when the title deed is issued. In this matter, I do find that the transaction could have been frustrated by either lack of the consent of the Land Control Board or approval by the County Council of Wareng.

Ultimately, this court finds that though the plaintiff has failed to prove that the defendant is in breach of the sale agreement which expired six months from the date it was signed he is entitled to a refund of his

money.

I do agree with the plaintiff that it is unfair to allow the defendant to have the land and the money and since both parties are guilty for failure to apply for either consent of the Land Control Board or approval of the County Council of Wareng , I do give judgment to the plaintiff only for a refund of Kshs.100,000/= being the money paid plus costs and interest from the date of filing the suit. The prayer for payment of the current market rates of the land is rejected as it is not specifically pleaded and proved.

Orders accordingly.

DATED AND DELIVERED AT ELDORET ON 4TH DAY OF NOVEMBER, 2016.

ANTONY OMBWAYO

JUDGE