



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 143 OF 2013

STEPHEN MACHOKA NYARIBO.....PLAINTIFF

=VERSUS=

1. JULIUS MWALIMU KATANA

2. ELIZABETH KADZO KAZUNGU..... DEFENDANTS

J U D G M E N T

Introduction:

1. The Plaintiff moved this court by way of a Plaint dated 26th July 2013.
2. In the Plaint, the Plaintiff has averred that on 2nd October 2010, he entered into an agreement of sale with the 1st Defendant in respect of parcel of land known as Gongoni Settlement Scheme/903 and 907 at an agreed price of Kshs.150,000/-; that he paid a deposit of Kshs.50,000 and that although the completion date was to be within ninety (90) days, the Defendant has been unable to complete the transaction.
3. The Plaintiff has further averred that he has so far paid to the Defendant Kshs.91,000 for the land. The Plaintiff is claiming for vacant possession and transfer of the suit property in his favour and in the alternative, a refund of Kshs.91,000 paid to the 1st Defendant.
4. Although the Defendants were served with the Summons to Enter Appearance, they did not file their Defences.
5. The matter proceeded for formal proof on 9th October 2014.
6. The Plaintiff reiterated what has been averred in the Plaint in his evidence in chief.
7. According to the Plaintiff, PW1, after signing the agreement of 2nd October 2010, the Defendant handed to him the original letter of offer, the title deed and the duly signed transfer documents.
8. According to PW1, one (1) acre of the suit property was occupied by one Jefwa Kazungu Charo and he entered into a separate agreement with him after paying him Kshs.15,000.
9. However, the 2nd Defendant later on informed the Plaintiff that he had also purchased the suit property

from the 1st Defendant.

10. It was the evidence of PW1 that he has so far made a payment of Kshs.103,000 to the Defendant leaving a balance of Kshs.47,000 which the 1st Defendant has refused to accept

11. The Plaintiff further informed the court that the 1st Defendant has refused to obtain the consent of the Land Control Board and that he is unable to access the land. The Plaintiff produced in evidence the documents in support of his case as PEXB 1.

12. It is not in dispute that on 2nd October 2010, the Plaintiff entered into a written agreement with the 1st Defendant for the sale of two parcels of land known as plot number 903 and 907 Gongoni Settlement Scheme (the suit property).

13. I have perused the said agreement. One of the conditions required the 1st Defendant to obtain the consent of the Land Control Board. That consent has never been obtained.

14. The Plaintiff is seeking for an order of either specific performance of the agreement or for a refund of Kshs.103,000 (according to his evidence).

15. For specific performance to issue, the terms of contract sought to be enforced must be certain and precise (see Halsbury's Laws of England, Vol 44(1)).

16. The Plaintiff has admitted that although the consent of the Board was required, the same was not obtained within six months as required by the provisions of section 6 of the Land Control Act. It therefore follows that the agreement of 2nd October 2010 is void for all purposes for want of the consent of the Board (see section 7)

17. Consequently, an order of specific performance cannot issue in respect of an agreement that is void.

18. Where an agreement of sale is void for want of the consent of the Land Control Board, the Plaintiff can only claim for the money paid to the Defendant.

19. Although the Plaintiff gave evidence to show that he paid to the Defendant Kshs.103,000, he did not amend the Plaintiff to plead that amount. The amount pleaded in the Plaintiff is Kshs.91,000. That is the amount that the court can grant to the Plaintiff.

20. For the reasons I have given above, I allow the Plaintiff's Plaintiff dated 26th July 2013 in the following terms;

(a) The 1st Defendant to refund to the Plaintiff Kshs.91,000.

(b) The 1st Defendant to pay to the Plaintiff interest on the above amount at court rates from the date of filing the suit until payment in full.

(c) The 1st Defendant to pay the costs of the suit.

Dated and delivered in Malindi this 6th day of February, 2015.

O. A. Angote

Judge