



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO 294 OF 2013**

**MARY W GITONGA.....PLAINTIFF**

**VERSUS**

**SAMUEL KAGO MUTURA.....DEFENDANT**

**SUSAN WANJIRU KAGO.....INTERESTED PARTY**

**JUDGMENT**

***(Suit by plaintiff seeking specific performance; contract stating that agreement is subject to consent of the Land Control Board; no consent tendered; balance of purchase price not tendered; for want of consent, agreement rendered void; balance having not been tendered, plaintiff cannot succeed on claim for specific performance; land registered in name of another person not a party to this suit; not possible to order specific performance in the circumstances without first ascertaining that registered proprietor has no interest in the land; suit dismissed)***

**PART A : INTRODUCTION AND PLEADINGS**

1. This suit was commenced by way of plaint filed on 15 September 2010. In the plaint, it is pleaded that on 19 August 2009, the plaintiff entered into an agreement with the defendant, whereby she purchased the property Nakuru Municipality Block 26/175 (the suit land) at a consideration of Ksh. 450,000/= which she states that she paid in full. It is further pleaded that it was agreed that the purchaser was to take possession of the suit land after clearing the purchase price and after appearing before the Land Control Board and after obtaining consent. It is pleaded that the defendant has refused to deliver vacant possession despite the plaintiff paying the full purchase price. In the suit the plaintiff has asked for the following prayers :-

(a) *A declaration that the plaintiff is the owner of the parcel of land Nakuru Municipality Block 26/175.*

(b) *Vacant possession of Nakuru Municipality Block 26/175.*

(c) *Costs of this suit and interest.*

2. The defendant entered appearance and filed defence. He has averred that the sum of Kshs. 350,000/= was paid as part payment and the balance thereof was to be paid upon procurement of the consent to transfer from the Land Control Board. He has pleaded that efforts to transfer the property to the plaintiff have been frustrated by family members, who after execution of the sale agreement, strongly objected to

the sale of the family property. It is averred that vacant possession was to be delivered upon payment of the full purchase price but the plaintiff declined to accept a refund after the failure to procure the Land Control Board consent.

3. The wife of the defendant, one Susan Wanjiru Kago was subsequently added as an interested party in the proceedings. She filed a defence and counterclaim wherein she averred that the sale between the plaintiff and defendant is illegal for the reason that the suit property was sold secretly. She wants an order nullifying the sale agreement.

## **PART B : EVIDENCE OF THE PARTIES**

4. The plaintiff testified and produced the sale agreement between herself and the defendant dated 19 August 2009. She testified that out of the purchase price of Kshs. 450,000/= she paid the sum of Kshs. 300,000/= through a banker's cheque and Kshs. 50,000/= in cash. She stated that the balance of Kshs. 100,000/= was paid and an acknowledgement executed. According to her, she performed her obligations and a transfer form was executed. However, the defendant did not give her possession of the property.

5. In cross-examination, she stated that she paid the balance of Kshs. 100,000/= to the agent who showed her the plot, one Mwangi Mahinda. She testified that the defendant verbally instructed her to pay the said agent, so that the agent can get his 10% commission and settle other debts that they had between them. She agreed that the defendant did not execute the said acknowledgment. She testified that at the time of sale, the defendant did not reveal to her any family. He was prepared to allow her to use part of the structures developed in the premises as he arranged to move elsewhere. She admitted that the consent of the Land Control Board was never obtained. The reason given was that the defendant asked her to wait because the title was still in the name of the original owner, one Peter Njeru. She agreed that in the agreement, there was a clause that she would take possession after clearing the balance and after obtaining the Land Control Board consent. In re-examination, she acknowledged that the Land Control Board forms were never executed.

With the above evidence the plaintiff closed her case.

6. The defendant on his part, did not contest the sale agreement and admitted receipt of the initial deposit of Kshs. 350,000/=. He however denied receiving the balance of Kshs. 100,000/=. He did not acknowledge Mr. Mahida as an agent in the transaction, and testified that he is not aware of the acknowledgement document vide which the balance of Kshs. 100,000/= was acknowledged as having been paid. According to him, the balance was to be paid in the offices of the advocate who drew the agreement and this was never done. He testified that he could not go to the Land Control Board for consent because he had not been paid the balance of the purchase price. He testified that his lawyers did write a letter dated 6 November 2009 asking for the balance but the balance was never tendered. He stated that he never involved his wife in the sale agreement because at that time they had differed. He stated that the property was still in the name of Peter Njeru, the original proprietor, from whom he had purchased it, and that he would have arranged for the property to be transferred directly to the plaintiff if he had been paid the balance. He also testified that what he sold was only the soil and not the developments.

7. With the above evidence, the defendant closed his case.

8. The interested party did not testify.

## **C. SUBMISSIONS OF COUNSEL**

9. Counsel for the plaintiff reviewed the pleadings and evidence, and submitted that the land in issue was one within the Municipality and therefore did not require the consent of the Land Control Board. He submitted that the land was not agricultural land within the meaning of Section 2 of the Land Control Act, CAP 302. He submitted that both parties were under a mutual mistake of the law that consent of the land control board was necessary. He further submitted that Clause 4(ii) of the agreement, which required payment of the balance after consent of the Land Control Board was obtained, was not the reason why the

defendant had not given vacant possession. It was his view that the defendant declined to give vacant possession owing to the quarrel with his wife. It was his submission that the misunderstanding between the defendant and his wife could not form a good basis for the defendant to fail to complete the transaction. He submitted that the interested party never testified to demonstrate that the property was matrimonial property. He pointed out that the said property was registered in the name of a third party.

He acknowledged that the balance of Kshs. 100,000/= paid to the agent cannot be treated as completion since the agent was not part of the transaction. He however submitted that the defendant had already indicated his unwillingness to complete the transaction long before the payment was made on account of refusal by his family. He submitted that the defendant never gave any notice of rescission of the contract. He submitted that for justice to be done, the plaintiff should be directed to pay the balance of the purchase price within such time as the court may deem just and the defendant to deliver vacant possession.

10. On the other hand, counsel for the defendant submitted that the land in issue was agricultural land which required the consent of the Land Control Board. He submitted that for lack of consent, the agreement was rendered null and void pursuant to the provisions of the Land Control Act. He further submitted that the payment to a third party was improper and was in any event done before the consent of the Land Control Board was obtained. He submitted that the defendant breached the agreement. He submitted that the plaintiff did not perform her part of the bargain and she cannot seek to compel the defendant to fulfill his part. He relied on the case of *Gitanga Mwaniki & Another vs Annunciata Waithera Kibue (2013)* and *Aziz vs Bhatia Brothers Ltd (2001) EA 7*. He submitted that the conduct of the plaintiff and her behavior after the agreement caused the agreement to be frustrated. He also submitted that the interested party did not consent to the transaction and that the prayer for her eviction will inter alia go against natural justice. He submitted that the plaintiff is only entitled to a refund of the purchase price, being Kshs. 300,000/=-, as provided by Section 7 of the Land Control Act. He concluded his submissions by stating that the plaintiff should bear the costs of the suit for breaching the agreement (although at the end he seemed to suggest that there should be no orders as to costs).

#### **D. ANALYSIS AND DECISION**

11. With the concession by counsel for the plaintiff, that the purported payment of the balance of the purchase price cannot be considered, the facts of this case are not really in dispute. It will be seen that the plaintiff and defendant had an agreement for sale dated 19 August 2009 over the sale of a plot measuring 50 X 100 feet, being the land parcel Nakuru Municipality Block 26/175, at a consideration of Kshs. 450,000/=-. A sum of Kshs. 350,000/=- was paid and acknowledged. The agreement itself had a clause on the payment of the balance which was drawn as follows :-

*Clause 4 (ii) The balance, a sum of Kenya Shillings One Hundred Thousand Only (Kshs. 100,000/=) shall be paid to the vendor by the purchaser immediately after both parties appearing before the Land Control Board and obtaining consent to transfer the said parcel of land.*

12. I think that it is also important that I set out clause 6 of the agreement which was drawn as follows:-

*6. That the purchaser shall take possession of the said parcel of land immediately after clearing the purchase price balance in full and after appearing before the Land Control Board and obtaining consent to transfer. Further, the purchaser shall give the vendor (1) month to vacate the premises after appearing before the Board.*

13. It would appear that the parties acknowledged in their agreement that the land was subject to the consent of the Land Control Board. Counsel for the plaintiff argued that this was a mutual mistake as the land fell within a municipality and could not be the subject of the consent of the Land Control Board. He cited Section 2 of the Land Control Act which defines agricultural land as follows :-

*“agricultural land” means -*

(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 Ordinance (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 Ordinance (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.*

14. It will be seen from the above definition, that generally, land within a municipality, unless declared by the Minister by notice in the Gazette to be agricultural land, is exempted from needing the consent of the Land Control Board. I have no problem with this definition of agricultural land, but I do have a problem with reaching the determination that the subject land was not land that required the consent of the Land Control Board.

15. The mere fact that the land is described as Nakuru Municipality Block 26... , by itself, cannot bring one to the conclusion that the land is not subject to the Land Control Act, for we have derived, from the definition of agricultural land, that there may be certain land within municipalities which may be subject to the Land Control Act. The only way in which it can be held that the land is not subject to the Land Control Act is if there were pleadings to that effect, and if evidence was led, that the land was not subject to the consent of the Land Control Act. Nowhere in the pleadings did the plaintiff plead that the land was not subject to the Land Control Act, and the plaintiff did not lead any evidence that the land was not subject to the Land Control Act. The parties themselves were convinced at the time of transacting that the land was subject to the Land Control Act, and the only way that a conclusive determination can be made that the land was not subject to the Land Control Act, is if the plaintiff pleaded and tendered evidence that they were mutually mistaken, that the land was subject to the consent of the Land Control Act, whereas it was not. All along, from the time of transacting till the time of trial, the parties were of the view that the land was subject to the Land Control Act, and I am unable to change this, merely because counsel for the plaintiff has submitted, without evidence, that the land is not subject to the Land Control Act. I can only proceed on the basis that the suit property was subject to the consent of the Land Control Act.

16. Being so subject, the consent of the Land Control Board was required before the property could be transferred to the plaintiff pursuant to the provisions of Section 6 of the Land Control Act which is drawn as follows :-

6. (1) *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.*

17. It will be seen that among the transactions requiring consent, are sale of land transactions and the effect of failing to obtain consent is that the transaction is rendered null and void. The only remedy, pursuant to Section 7 of the statute is for a refund of the purchase price paid and no more. Section 7 is drawn as follows :-

*S. 7 : If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.*

18. I therefore hold that for want of consent of the Land control Board, the agreement between the plaintiff and defendant is null and void and that the only remedy of the plaintiff is a refund of the money paid to the defendant which is Kshs. 350,000/=. I cannot factor in the additional amounts paid by the plaintiff to strangers as there is no evidence that the defendant sanctioned this.

19. But even if I am wrong on the holding that the land was subject to the Land Control Act, the plaintiff would still not succeed in her suit. She has not shown before this court that the defendant had capacity to sell the suit property, as the same is acknowledged to be registered in the name of a third party. That person is not a party to this case. There was no pleading seeking to order the registered proprietor to execute the transfer of the suit property into the name of the plaintiff, and I cannot hold that the registered proprietor has no interest in the property, without first giving him an opportunity to be heard. Moreover, she has not paid the balance of the purchase price to the defendant to entitle her to an order of specific performance.

20. If the parties were mistaken on the need to seek consent of the Land Control Board, and it emerged that indeed the consent was not necessary, it would be upon them to renegotiate their contract, or else the contract is liable to be declared ambiguous and incapable of being performed. The character of the contract will fundamentally change and it is not upon this court to impose terms on the parties. It is up to the parties to make a determination on whether to renegotiate. In the circumstances of this case, I find it difficult to impose terms into a contract which has been freely entered into by the parties. I cannot therefore, as suggested by counsel for the plaintiff, make an order that the balance of the purchase price be paid within a certain time, and neither can I oblige the defendant to accept the balance tendered. It must be appreciated that with effluxion of time, matters and prices of land do change, and the defendant as vendor, may at this point in time, not be willing to accept the balance of the purchase price noted in the agreement. Indeed, it may be unfair to the defendant for this court to order that he must receive the balance of the purchase price noted in the agreement, while he has not been in any kind of breach.

21. I have deliberately avoided going into the issue of whether or not the property is matrimonial property or whether the interested party has any interest in the same and ought to have been consulted before the sale. This is because the interested party never led any evidence to support her pleadings. Not that it matters because I am of the view that the plaintiff cannot succeed in her case.

22. The upshot of the foregoing is that the plaintiff's case must fail. I however order the defendant to forthwith refund the sum of Kshs. 350,000/= to the plaintiff. Such sum will attract interest from the day of this judgment till payment in full.

23. As to costs, in my discretion, I direct each party to bear his/her own costs.

24. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 24<sup>th</sup> day of September 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of :-**

Mr Githui holding brief for Ms Alwala for plaintiff

Ms Wanjiku Wamae holding brief for M/s Munene Chege & Co advocate for defendant

N/A for M/s Ndungu Njuguna & Co for interested party

Court Assistant : Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**