



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 152 of 2011**

**AGNES WAMBUI KIHARA.....PLAINTIFF**

**=VERSUS=**

**BAJILA CHONYA BASHORA.....DEFENDANT**

**JUDGMENT**

**Pleadings**

1. The Plaintiff has pleaded in her Complaint that at all material times she was the registered owner of the parcel of land known as LAMU/HINDI/MAGOGONI 1/716 measuring 5.4Ha situated in Hindi within Lamu County. On diverse dates in the year 2009, the Defendant sold to the Plaintiff a portion of the said parcel of land measuring 7 acres at an agreed price of Ksh.350,000/- whereupon the Plaintiff paid to the Defendant Ksh.239,000/- leaving a balance of Ksh.111,000/-.
2. The Plaintiff has further averred that it was a term of the agreement that the Defendant was to transfer the said land upon obtaining the consent from the Land Control Board. However, the Defendant has refused to transfer his rights and title to the Plaintiff.
3. The Plaintiff is therefore seeking for a permanent injunction restraining the Defendant from dealing with the suit property in other way other than transferring it to her. The Plaintiff is also seeking for an order of specific performance of the various agreements.
4. In the Defence, the Defendant has denied ever receiving Ksh.239,000/- from the Plaintiff as alleged in the Complaint; that the Plaintiff failed to complete her part of the bargain by not clearing the balance of the purchase price and that the members of his family objected to the sale of the said portion of land and that the suit offends the provisions of sections 6 and 8 of the Land Control Act.
5. In the Counter-claim, the Defendant has stated that the Plaintiff advanced to him Ksh.36,000/- on diverse dates; that the Plaintiff took advantage of his illiteracy and inability to read and caused him to sign an agreement which stated that he had received Ksh.175,000 as payment of the suit property and that the Plaintiff took the original title deed for Lamu/Hindi/Magogoni 1/716 and that the Plaintiff has taken possession of his land.
6. The Defendant is praying for an order of eviction of the Plaintiff from the suit property.

**The Plaintiff's case**

7. The Plaintiff informed the court that the Defendant approached her, in the company of her daughter and requested her to purchase the suit property. The Plaintiff agreed to purchase part of the suit property for Kshs.350,000/-. On 5<sup>th</sup> June, 2009, the Plaintiff paid to the Defendant Ksh.30,000/- and a further sum of Kshs.6,000/-.
8. It was the evidence of Pw 1 that the Defendant's daughter then prepared an agreement of sale

- which she produced in evidence as PEXB1. The Plaintiff then paid to the Defendant a further sum of Ksh.24,000 to enable him pursue the title deed which was said to be in Malindi.
9. On 2<sup>nd</sup> September, 2009, the Plaintiff accompanied by the Defendant, went to the Settlement office whereupon she paid to the Defendant Kshs.175,000. The Plaintiff stated that the Defendant was to use part of this money to settle a debt he owed the Land and Settlement office and an agreement was done by an officer in the said settlement office. The signing of the agreement was duly witnessed by the Defendant's daughter and the officer from the Land and Settlement Office. The agreement dated 2<sup>nd</sup> September, 2009 was produced in evidence PEXB2.
  10. The Plaintiff informed the court that the Defendant has since refused to obtain the consent of the Board to have the property transferred to her. Instead, the Defendant attempted to sell the suit property to a third party at a price of Kshs.2,500,000/-. The Plaintiff produced in evidence the agenda of the Board showing the Defendant's attempt in seeking the consent of the Board to transfer the suit property to a third party as PEXB3.
  11. The Plaintiff stated that he was ready and willing to pay the balance of the purchase price.
  12. In cross-examination, the Plaintiff stated that he owes the Defendant Ksh.124,000/- having paid him in total Ksh.222,000/-. Although the agreement states that the balance of the purchase price was Kshs.175,000/- the Plaintiff stated that she had separately paid the Defendant and her daughter Ksh.6,000 respectively.
  13. It was the evidence of Pw 1 that he was to pay the balance of the purchase price after the Board gives its consent.
  14. The Plaintiff informed the court that he took possession of the portion of land that the Defendant had sold to him after the Defendant demarcated the said portion.
  15. Pw 2 relied on his statement dated 28<sup>th</sup> August, 2013. In the statement, Pw 2 stated that on 2<sup>nd</sup> September 2009 the Plaintiff approached him to witness her buying the suit property. It was his evidence that they met the Defendant who was in the company of his daughter Rukia and another man.
  16. After drafting the agreement, Pw 2 informed the court that the Defendant's daughter read the agreement to him whereupon the Defendant signed it. Pw 2 stated that the Defendant was paid a total of Ksh.175,000/- upon execution of the agreement.
  17. In cross-examination, Pw 2 stated that the agreement was prepared by the parties themselves and he only witnessed its signing. He was not sure which of the two parties prepared the agreement for sale.
  18. It was the evidence of Pw 2 that he saw the Plaintiff pay the Defendant Ksh.175,000 upon execution of the agreement and that the Defendant was fully aware that he was selling his land.
  19. Pw 3 also relied on his statement dated 28<sup>th</sup> August, 2013. According to Pw 3, he cleared the portion of the land that the Plaintiff had purchased. All along, the Defendant was around and he did not object to the exercise.
  20. It was the evidence of Pw 3 in cross-examination that neither the Plaintiff nor the Defendant are staying on the suit property and that he cleared the bush in respect to the 7 acres that the Plaintiff had purchased.

### **The Defendant's case**

21. The Defendant, Dw 1, informed the court that he would rely on his statement filed on 21<sup>st</sup> October, 2011. In the statement, the Defendant has stated that the Plaintiff is her neighbour.
22. It was the Defendant's evidence that in the year 2009, she went to the Plaintiff's house and requested for an advance of Ksh.36,000/- to pay for his daughter's school fees which amount was given to him after signing an agreement that he did not understand.
23. The Defendant informed the court that he agreed with the Plaintiff that if he defaulted in repaying the Ksh.36,000, he would sell to her 7 acres of his land at a consideration of Ksh.350,000 per acre. That is when he gave her the title deed which she never returned to him.
24. The Defendant admitted that he has never obtained the consent of the Board to transfer the suit property to the Plaintiff and that he is willing to refund the Ksh.36,000 that the Plaintiff paid him.
25. It was the evidence of Dw 1 that it was his daughter, who was 14 years old then who prepared the agreement and that although he signed it he did not understand its contents.

26. In cross-examination, Dw 1 admitted that he saw and signed the agreement dated 2<sup>nd</sup> September, 2009. It was his evidence that the agreement was done by his daughter. The Defendant insisted that he was to sell his land for Ksh.350,000/- per acre.
27. As for the typed agreement, Dw 1 stated that the same was prepared at the lands office and that he did not know that the agreement was in respect to the sale of his land. Dw 1 however admitted that he signed the agreement.

### **Submissions**

28. The Plaintiff's advocate submitted that the various agreements that were produced in court showed that the purchase price of the suit property was Ksh.350,000/- out of which the Plaintiff paid Kshs.239,000/- leaving a balance of Ksh.111,000 and that the Defendant's contention that he was tricked to sign those agreements because he was illiterate is unfounded.
29. Counsel submitted that oral evidence cannot be adduced to contradict a written document.
30. In praying for an order of specific performance, counsel relied on the case of **Openda vs AHN(1984)KLR 208** where it was held as follows:-

**“A condition precedent for specific performance of an agreement is that the purchaser must pay or tender the purchase price to the seller or such persons as he directs at the time and place of completing the sale. The Respondent did not have to tender physically the balance of the purchase price and interest if the appellant had clearly refused to accept it and by so acting waived that requirement”**

31. The Plaintiff counsel submitted that the Defendant cannot repudiate the contract on the ground that the Plaintiff has not fully paid the purchase price given the fact that he was unwilling to receive the purchase price.
32. The Plaintiff's counsel admitted that the Land Control Board consent was and remains a basic requirement before the transfer of agricultural land and that in its absence, the whole transaction becomes a nullity.
33. Counsel submitted that there is no way the Plaintiff could have obtained the consent of the Board without the Defendant's co-operation.
34. The Defendant's counsel submitted that the Plaintiff's claim cannot stand in law because the alleged transaction is void for all purposes for want of the relevant Land Control Board's consent and that the terms of the contract between the Plaintiff and the Defendant were not certain and precise for an order of specific performance to issue. Counsel filed several authorities which I have considered.

### **Analysis and findings**

35. The Plaintiff produced in evidence as PEXB1 a handwritten agreement dated 5<sup>th</sup> June 2009. In the agreement, the Defendant agreed to sell to the Plaintiff land measuring 7 acres for Kshs.350,000 and he received Kshs.30,000 on the said date.
36. The Defendant admitted that he signed the said agreement which was drafted by his daughter aged 14 years old by then. It was his Defence that although he signed the agreement, he did not know that it was a sale agreement in respect to his land. What he thought was that the Plaintiff was advancing to him the said money to enable him settle his daughter's school fees.
37. The Defendant however stated that he had agreed with the Plaintiff that in case he defaults in the payment of Kshs.36,000 that the Plaintiff advanced to him, he could sell to her the suit property at a price of Ksh.350,000/- per acre.
38. In view of the fact that the said handwritten agreement was drafted by the Defendant's daughter, she must have explained to him the contents of the agreement before he signed it. It is therefore inexcusable for him to state that he signed the agreement whose contents he did not know.
39. Another agreement dated 2<sup>nd</sup> September, 2009 was produced by the Plaintiff as PEXB2. In the agreement, the Plaintiff agreed with the Defendant for the purchase of 7 acres of the suit property for Ksh.350,000/-. The Defendant admitted in the agreement that he had received Ksh.175,000/-

- from the Plaintiff leaving a balance of Ksh.175,000 which was to be paid upon obtaining the consent of the Board.
- 40.The Defendant agreed to having signed this agreement which he says was prepared in the offices of the Ministry of Lands. The signatures of the Plaintiff and the Defendant were witnessed by Pw 2 and Athman Omar Athman.
  - 41.Pw 1 and Pw 2 informed the court that the Defendant was accompanied by her daughter who read to him the agreement dated 2nd September, 2009. The Defendant cannot therefore run away from the contents of that agreement having admitted that he signed it.
  - 42.The Plaintiff is seeking for the specific performance of those agreements. It is the Plaintiff's position that she was supposed to pay the balance of the purchase price upon obtaining the consent of the Board. That consent has never been obtained since 2nd September 2009 when the last agreement was drawn.
  - 43.Section 6 of the Land Control Act provides that a sale or transfer of agricultural land 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 within six months.
  - 44.The Plaintiff has admitted that although the land she was buying is agricultural land within the meaning of the Land Control Act, the Defendant did not obtain the consent of the Board.
  - 45.Section 7 of the Act provides that if any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under the Act, the 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.
  - 46.The law is clear that the consent of the Board should have been obtained within six months of the making of the agreement. It does not matter that the Defendant changed his mind when he realized that he could sell the suit property to a third party at a higher value. The bottom line is that the agreements that the Plaintiff is relying on for an order of specific performance are void in view of the provisions of section 6 of the Act.
  - 47.The remedy of specific performance presupposes the existence of a valid contract between the parties. A contract that is unenforceable because it has not complied with the provisions of the law cannot be enforced by way of specific performance.
  - 48.In the circumstances, and considering that the Plaintiff's prayer for orders of specific performance and a permanent injunction are based on void agreements, I find and hold that the Plaintiff's claim cannot succeed.
  - 49.For the reasons I have given above, I dismiss the Plaintiff's suit and allow the Defendant's Counter claim. I shall however not make an order for costs considering that indeed the Defendant entered into an agreement to sell the suit property. The Defendant has only used the provision of the land to avoid the contract by failing to procure the consent of the Land Control Board for the transfer of the suit property to the Plaintiff.
  - 50.Each party shall therefore bear his/her own costs.

Dated and delivered in Malindi this **11<sup>th</sup>** day of **July**, 2014.

**O. A. Angote**

**Judge**