



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 691 OF 2012

Formerly HCC 35 OF 2011

KIPLAGAT KOTUT.....PLAINTIFF

VS

ROSE JEBOR KIPNGOK.....DEFENDANT

(Suit by plaintiff to compel defendant to transfer land; an agreement having been made between the parties; previous agreement between defendant and a third party; whether such agreement could be imported to the agreement of the parties in absence of a clause; introduction of oral evidence to the terms of an agreement; when this can be permitted; consent of the Land Control Board; consent obtained outside the 6 month period of agreement; whether such consent valid; held that such consent being outside the stipulated period is invalid; for want of valid consent transaction nullified; suit by plaintiff fails)

JUDGMENT

A. INTRODUCTION AND PLEADINGS

This suit was commenced by way of plaint filed on 4 March 2011. In the plaint, the plaintiff has pleaded that by an agreement dated 31 January 2000, the defendant agreed to sell to the plaintiff the land parcel Plateau/Plateau Block 2 (Uasin Gishu)/63 at a price of Kshs. 700,000/=. It is pleaded that the plaintiff has performed all his obligations under the agreement and consent to transfer was secured from the Land Control Board on 11 January 2001. In the suit the plaintiff has sought the following orders (as drawn):-

- (a) An order of specific performance compelling the defendant to execute transfer, P.I.N Certificate, Copy of Identity Card and thereby release to the plaintiff for registration to effect transfer.*
- (b) Further and or in the alternative to prayer (a) above the Deputy Registrar to execute the transfer whereof the same be deemed sufficient to effect transfer of Plateau/Plateau Block 2 (Uasin Gishu)/63 in favour of the plaintiff.*
- (c) Costs of this suit.*

The defendant entered appearance and filed a Defence and Counterclaim. In the defence, the agreement is admitted, but completion is denied. It is pleaded that the plaintiff owes the defendant a total of Kshs. 70,000/= and interest thereof. In the counterclaim it is pleaded that the defendant entered into an agreement to sell to the plaintiff the suit land, but that the plaintiff did not pay an outstanding debt of

Kshs. 70,000/= together with cumulated interest thereof. It is also pleaded that the plaintiff fraudulently acquired consent from the Land Control Board and the following particulars of fraud are pleaded :-

(a) Presenting application for consent to the Land Control Board without authority of the defendant.

(b) Purporting to have obtained consent of the Land Control Board without the participation of the defendant.

(c) Purporting to obtain consent of transfer of a land that was at the time charged to the Agriculture Finance Corporation.

(d) Purporting to obtain consent to transfer from an irregular Land Control Board.

It is pleaded that there was no Land Control Board that sat to give consent to the transaction hence the transaction is now null and void by operation of law. In the counterclaim, the defendant has sought the following orders :-

(a) The sale transaction be declared a nullity and the plaintiff be refunded his deposit.

(b) An execution order evicting the plaintiff from the property in question.

The plaintiff filed a Reply to Defence and Defence to Counterclaim. He denied owing the defendant the sum of Kshs. 70,000/= and denied that the consent of the Land Control Board was secured fraudulently.

B. EVIDENCE OF THE PARTIES

The plaintiff is a university professor. He testified that he and the defendant entered into a sale agreement on 31 January 2000 over the suit land. He was to pay some money on signing of the agreement, and also pay an outstanding loan due to Agriculture Finance Corporation (AFC). In total, the consideration was Kshs. 700,000/= which sum he states was paid as noted in clause 3 of their agreement. He testified that the agreement was executed before advocate Philip K. Kandie. He testified that clause 8 of the agreement provided that the vendor was to secure consent of the Land Control Board. He testified that the defendant prepared the application for consent and invited him to appear before the Land Control Board and consent was issued. He testified that it is the defendant, as vendor, who handed over to him the consent of the Land Control Board. He then proceeded to pay the amount due to AFC, and cleared the same, and AFC issued a Notification of Discharge to the defendant. He stated that despite this, the defendant has declined to give him the documents required to transfer the suit property.

In cross-examination, an agreement dated 24 August 1993 (the 1993 agreement) between one Moses Kiplagat Changwony and the defendant, was put to the plaintiff. The plaintiff stated that he knows Moses as his cousin, but is not aware of the said agreement. The 1993 agreement was over the same land at a consideration of Kshs. 700,000/= (same as in this case), with Kshs. 500,000/= to be paid to AFC and was similarly witnessed by Philip Kandie, the same advocate who witnessed the agreement between the plaintiff and defendant. The plaintiff denied that Moses, is the one who introduced him to the defendant. Challenged to produce proof of payment of the purchase price, he stated that the proof is in the agreement itself. He testified that he paid off the AFC loan by installments until he cleared it although he did not produce proof of payments. The application for consent and the consent of the Land Control Board were put to him. The application is dated 28 December 2000 and the consent, as issued, is dated 11 January 2001. The consent however refers to an application dated 11 January 2001. He asserted that both he and the defendant attended the Land Control Board (LCB). AFC were also represented at the Land Control Board and they had no objection to the transaction.

In re-examination, he stated that their agreement was a stand alone agreement that made no reference to that of 1993, and that the discrepancy in the dates in the consent of the LCB, can be better explained by the defendant, since it is the defendant who arranged the LCB meeting and availed the documents to him.

With the above evidence, the plaintiff closed his case.

The defendant is an officer at the Central Bank of Kenya. She testified that she is the owner of the suit land which she purchased from a Mrs. Mwangi through an AFC loan. The purchase price was Kshs. 480,000/=. She took possession and developed a structure. She was badly affected by the tribal clashes of 1992 and she made a decision to sell the property. Moses Changwony was interested in purchasing it, and vide an agreement dated 24 August 1993, she sold the land to Moses. The purchase price was Kshs. 700,000/=, which price was exclusive of the structure that she had developed on the land, which structure was valued at Kshs. 70,000/=. She testified that out of the purchase price of Kshs. 700,000/=, Moses Changwony was to pay cash of Kshs. 200,000/= and Kshs. 70,000/= for the structure. He was also to pay off the AFC loan. He was first to pay the AFC loan after which he would pay the cash of Kshs. 270,000/= and the property be transferred to him. Clause 10 in their agreement stated that the AFC loan was Kshs. 500,000/=. There was also a special condition in the agreement that Kshs. 70,000/= was to be paid on signing of the agreement. She stated that this money was never paid. Neither was she paid Kshs. 130,000/= as the balance of the purchase price. The completion date in that agreement was 30 November 1993. Moses Changwony paid some money to AFC, but later, he approached the defendant and informed her that he was unable to pay and he introduced his uncle, the plaintiff, to the defendant to take over the agreement of 1993. They therefore entered into the agreement of 31 January 2000.

She testified that although clause 3 of the agreement stated that the purchase price has been paid, she did not receive any money at all. She stated that if she had received the sum of Kshs. 700,000/= there would have been nothing due to AFC as the sum would have been sufficient to clear the loan. She testified that the plaintiff was to take up the AFC loan, which constituted part of the purchase price, and clear it, which he eventually did in the year 2010 although he was to clear the loan by 31 November 2000. She stated that she paid the final payment of Kshs. 3,000/= for the discharge. She stated that the plaintiff took possession of the land in the year 2000. She testified that the plaintiff was also to inherit the structures on the land and pay the Kshs. 70,000/= for the same, which according to the defendant, was not paid. It was her evidence, that in essence, the plaintiff was inheriting the 1993 agreement that she had with Mr. Changwony.

She stated that she refused to hand over the transfer documents to the plaintiff because the plaintiff has not paid her the sum of Kshs. 270,000/=. She further disputed the signatures in the application for consent of the Land Control Board. She testified that on 28 December 2000, when the application is said to have been signed, she was in Nairobi undergoing surgery and was discharged on 31 December 2000. She also stated that the consent could not be issued by the Ainabkoi Land Control Board as the property is in Uasin Gishu. She further stated that on the date that consent was said to have been issued, she was in Nairobi attending to a doctor, and that consent could not be issued because the property was still under charge to AFC. She denied ever attending the Land Control Board.

In cross-examination, the plaintiff conceded that the plaintiff was not a party to the 1993 agreement. She also conceded that the two agreements are separate and that the agreement of 31 January 2000 does not make reference to that of 1993. She asserted that although clause 3 of the agreement states that the money is acknowledged and paid, she did not receive even a penny. She agreed that according to clause 8 of the agreement, she as vendor, was the one to procure the consent of the Land Control Board. She however denied availing the consent and reiterated that she did not make any application nor attend the Land Control Board. She contended that what is said to be her signature in the application is a forgery and that she has reported the same to the police. She did not however produce any report made to the police. She testified that the plaintiff was to pay the AFC loan by 31 November 2000 but was cleared in the year 2010 because that is when she was informed by AFC. She stated that the debt of Kshs. 70,000/= for the structure is still owing as it was never paid by Moses Changwony. She averred that the purchase price was inclusive of this amount of Kshs. 70,000/=. She agreed that she holds the title deed and discharge of charge to the land.

With the above evidence, the defendant closed her case.

C. SUBMISSIONS OF COUNSEL

In his submissions, Mr. J.K. Korir for the plaintiff, argued that the plaintiff has fulfilled his obligations according to the agreement of 31 January 2000. He submitted that in her pleadings, the defendant sought to introduce an outstanding payment of Kshs. 70,000/=, which was at variance with her evidence, where she claimed Kshs. 270,000/=. He submitted that Sections 97 and 98 of the Evidence Act, CAP 80, barred the introduction of oral evidence where a contract or disposition of property has been reduced into writing. He also submitted that the agreement of 1993 had no bearing whatsoever on the agreement of 31 January 2000 and in any event it goes against the doctrine of privity of contract. On the consent of the Land Control Board, it was his submission that consent was duly applied for and granted, and that the defendant did not call an iota of evidence to prove her allegations of fraud. He was of the view that any discrepancy on the dates did not invalidate the consent, and that in any event, it was for the defendant to explain the anomalies as she is the one who availed the consent to the plaintiff. He also submitted that the plaintiff completed his part of the agreement including paying off the AFC loan by 31 November 2000 as agreed, and that the payment she made in 2010, was only to release the discharge of charge. He submitted that the defendant did not table evidence to show otherwise. He also raised issue that the defendant cannot raise the issue of consent having been issued outside the 6 month period as this was not pleaded. He submitted that parties are bound by their pleadings and relied on various decisions on this point which however were not annexed. He asked that the plaintiff's suit be allowed.

On the other hand, Mr. P.K. Kibii for the defendant argued that the discrepancy in the dates surrounding the consent of the LCB was not well explained by the plaintiff. He submitted that the same were forgeries and that consent could not be obtained as the land was under a charge. He also pointed out at inconsistencies in the agreement surrounding payment of the purchase price. He submitted that part of the agreement states that the purchase price has been paid, yet another part, provides that the AFC loan is to be taken as part of the purchase price. He submitted that in any case, consent of the LCB must be granted within 6 months of the date of the agreement. He submitted that the case of the plaintiff be dismissed.

D. ANALYSIS AND DECISION

It is with the above pleadings, evidence and submissions that I need to determine this matter. First, it is not in dispute that the parties herein had an agreement dated 31 January 2000, through which the defendant sold and the plaintiff purchased, the suit property. For full effect, I think it is best that I lay out the agreement. It is drawn as follows :-

AGREEMENT FOR SALE

AN AGREEMENT made the 31st day of January 2000 BETWEEN ROSE JEBOR KIPNGOK (the vendor) of P.O Box 6666 Eldoret and KIPLAGAT KOTUT (the purchaser) of P.O BOX 34668 Nairobi.

- 1. The property sold is ALL THAT property situated in Uasin Gishu District called Title No. PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU) 63 measuring 8.027 hectare.*
- 2. The interest sold is Freehold.*
- 3. The purchase price is Kenya Shillings Seven Hundred Thousand (Shs. 700,000/-) which sum has been paid the receipt of which the vendor acknowledges on the signing hereof. The purchaser shall in addition pay the balance due to Agricultural Finance Corporation as mentioned in the special condition in order to have the property discharged.*
- 4. The sale is subject to the Law Society Conditions of Sale (1989 Edition) in so far as they are not inconsistent with the conditions contained in this agreement.*
- 5. The completion date is 31st November 2000 or earlier as may be agreed between the parties hereto.*
- 6. The vendor's advocates and the purchaser's lawyers are Messrs. Kandie Kimutai & Co Advocates of Cannon House, 3rd Floor, P.O Box 74907 Nairobi.*

7. *The property is sold with vacant possession and the purchaser shall take possession immediately after signing.*

8. *The vendor shall secure the consent of the Land Control Board for the sale and transfer.*

9. *The property is sold subject to the Charge in favour of Agricultural Finance Corporation.*

SPECIAL CONDITION

The purchaser shall from the date of signing of the Agreement take over the payment of the loan due to AFC on the aforementioned property which loan balance is taken to be part of the purchase price after the servicing of which the property shall be transferred to the purchaser.

IN WITNESS whereof this Agreement has been duly executed by or on behalf of the parties hereto the day and year first hereinbefore written.

SIGNED by the vendor

ROSE JEBOR KIPNGOK

In the presence of

Philip K. Kandie

Advocate

P.O Box 74907

Nairobi.

SIGNED by the purchaser

KIPLAGAT KOTUT

In the presence of

Philip K. Kandie

Advocate

P.O Box 74907

Nairobi.

DRAWN BY

KANDIE KIMUTAI & CO

ADVOCATES

CANNON HOUSE

P.O BOX 74907

NAIROBI.

It was the position of the defendant that this agreement is related to another, entered into between herself and one Moses Changwony, and I think it is only fair that I also lay out this agreement as well. It is drawn as follows :-

AGREEMENT FOR SALE

AN AGREEMENT made the 24th day of August 1993 BETWEEN ROSE JEBOR KIPNGOK (the vendor) of P.O Box 60000 Nairobi and MOSES KIPLAGAT CHANGWONY (the purchaser) of P.O BOX 3950 Eldoret.

- 1. Property sals ALL THAT property situated in Uasin Gishu District called Title No. PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU) 63 measuring 8.027 hectare.*
- 2. The interest sold is Freehold.*
- 3. The purchase price is Kenya Shillings Seven Hundred Thousand (Shs. 700,000/-) of which the sum of Shs. 500,000/= shall be paid to Agricultural Finance Corporation and the balance of Kshs. 200,000/= shall be paid to the vendor as provided in special condition (ii).*
- 4. The sale is subject to the Law Society Conditions of Sale (1989 Edition) in so far as they are not inconsistent with the conditions contained in this agreement.*
- 5. The completion date is 30th day of November 1993 or earlier as may be agreed between the parties hereto.*
- 6. The vendor's advocates and the purchaser's lawyers are Messrs. Kandie Kimutai & Co Advocates of Cannon House, 3rd Floor, P.O Box 74907 Nairobi.*
- 7. The sale includes the following things which shall be paid for by the purchaser at a price of Shs. House Kshs. 70,000/= or thereabouts to be paid by the purchaser within 12 months of the signing of the agreement.*
- 8. The property is sold with vacant possession and the purchaser shall take possession immediately after signing.*
- 9. The vendor shall secure the consent of the Land Control Board for the sale and transfer.*
- 10. The property is sold subject to the Charge in favour of Agricultural Finance Corporation.*

SPECIAL CONDITIONS

(i) The purchaser shall from the date of signing of the Agreement take over the payment of the loan due to AFC on the aforementioned property which loan balance is taken to be part of the purchase price after the servicing of which the property shall be transferred to the purchaser.

(ii) The vendor shall pay Kshs. 70,000/= on the signing of the agreement and the balance of 130,000/= within 8 months of the signing hereof.

IN WITNESS whereof this Agreement has been duly executed by or on behalf of the parties hereto the day and year first hereinbefore written.

SIGNED by the vendor

In the presence of

Philip K. Kandie

Advocate

P.O Box 74907

Nairobi.

SIGNED by the purchaser

In the presence of

Philip K. Kandie

Advocate

P.O Box 74907

Nairobi.

DRAWN BY

KANDIE KIMUTAI & CO

ADVOCATES

CANNON HOUSE

P.O BOX 74907

NAIROBI.

It was the plaintiffs contention, that the latter agreement of the year 2000, must be read in concert with the former agreement of 1993. However, there is nothing in the latter agreement which makes reference to the former one. Granted, the two applications are drawn in almost similar terms, but that does not necessarily mean that the parties in the subsequent agreement inherited the terms in the former agreement. There would have been nothing easier than for the parties to insert a clause in the latter agreement, if at all the terms of the former agreement, were to be a part and parcel of this latter agreement. I am unable to import the terms of the former agreement into the latter one in the absence of clear reference in the latter agreement.

Neither can I allow the import of oral evidence to vary or contradict what was clearly put down in writing. This would go contrary to the provisions of Sections 97, 98 and 99 of the Evidence Act, CAP 80, Laws of Kenya, which are drawn in the following terms :-

PART VI – EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE
S. 98 Written contracts and grants

(1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

(2) Notwithstanding the provisions of subsection (1) of this section—

(a) wills admitted to probate in Kenya may be proved by the probate;

(b) when a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

(3) Subsection (1) of this section applies equally to cases in which contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

(4) Where there are more originals than one, one original only need be proved.

(5) The statement, in any document whatever, of a fact other than the facts referred to in subsection (1) of this section, shall not preclude the admission of oral evidence as to the same fact.

98. Evidence of oral agreement

When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 97 of this Act, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms: Provided that—

(i) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law;

(ii) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved, and in considering whether or not this paragraph of this proviso applies, the court shall have regard to the degree of formality of the document;

(iii) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved;

(iv) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of such documents;

(v) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved, if the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract;

(vi) any fact may be proved which shows in what manner the language of a document is related to existing facts.

99. Evidence to explain a patent ambiguity

When the language used in a document is on the face of it ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

It will be seen from the above that the general rule is that where a contract is reduced into writing, then oral evidence, may not be adduced to prove the terms of such contract. There are of course some exceptions outlined in Section 98 above. These exceptions give leeway to a party to

(a) prove some extraneous circumstance which is not within the written terms of the contract but which may vitiate the contract such as fraud, intimidation, illegality and other such factors; provide terms of a separate oral contract of which the written contract is silent, but which is not inconsistent with the terms

of the written document;

(b) provide terms of an oral agreement constituting a condition precedent to the written contract;

(c) provide the existence of a subsequent oral agreement except in cases where the contract is required to be in writing; provide any usage or custom;

(d) to prove a fact to show the manner in which the language of the document relates to existing facts.

The defendant in this case does not wish to vitiate the contract on the ground of fraud or other extraneous circumstances that would bring her within the ambit of proviso (i) of Section 98 of the Evidence Act. Neither does she wish to provide evidence of an oral agreement that was a condition precedent to the entry of this agreement in terms of proviso (iii); nor provide any usage or custom under proviso (v), or prove a fact to explain the language of the document as per proviso (vi). In my view, the oral evidence sought to be introduced by the defendant, may at best fall within the ambits of proviso (ii) and (iv) of Section 98, but then, oral evidence falling under these two exceptions, cannot be allowed, in proviso (ii) where the terms would be inconsistent with those put down in writing, and in proviso (iv) where the contract is required by law to be in writing. The contract herein is a contract for the sale of land, and it is a requirement arising out of Section 3(3) of the Law of Contract Act, CAP 23, Laws of Kenya, that such contracts be in writing.

I am unable to see what proviso under Section 98 would allow the defendant to introduce oral evidence. For that reason, the agreement of 31 January 2000 must be construed according to the terms that comprise the said agreement. As earlier stated, that contract is a stand alone contract which must be interpreted according to its terms.

There is no dispute that what was being sold in the agreement of 31 January 2000 was the suit land. It has been argued by counsel for the defendant that the consideration is not clear. In my opinion, the consideration is contained in Clause 3 of the agreement which provides as follows :-

3. The purchase price is Kenya Shillings Seven Hundred Thousand (Shs. 700,000/-) which sum has been paid the receipt of which the vendor acknowledges on the signing hereof. The purchaser shall in addition pay the balance due to Agricultural Finance Corporation as mentioned in the special condition in order to have the property discharged.

My interpretation of the above provision is that the purchase price was to be cash of Kshs. 700,000/=, and in addition, the purchaser was to pay off the AFC loan that the vendor owed. I do not see any ambiguity between this clause and the special condition, as argued by Mr. Kibii for the defendant. The special condition in the agreement provides that upon signing the agreement, the purchaser shall take over payment of the loan due to AFC, which loan balance is taken to be part of the purchase price, and it is after servicing of this loan, that the property was to be transferred to the purchaser. In my opinion, clause 3 of the agreement and the special condition are in concert. I can see why the special condition was inserted, for the vendor did not want to be dispossessed of the land and yet still have the burden of paying off the AFC loan, which loan was still in her name. The intention of the parties was to have the purchaser pay to the vendor the sum of Kshs. 700,000/= , and also settle the AFC loan, as consideration for the transaction. The question that arises is whether the purchaser performed his part of the bargain.

The plaintiff testified that he paid the sum of Kshs. 700,000/= to the defendant and also paid off the AFC loan. This is proved by the fact that AFC issued a discharge to the defendant and indeed the defendant concedes that the AFC loan has been paid. In her defence, the defendant pleaded that the plaintiff owes her a sum of Kshs. 70,000/= and interest on the transaction. This is repeated in the counterclaim, where the defendant pleaded that the plaintiff did not pay an outstanding debt of Kshs. 70,000/= together with accumulated interest thereof. In her evidence, the defendant testified that she was not paid a single penny out of the transaction. She indeed denied receipt of the sum of Kshs. 700,000/= which is stated in clause 3 of the agreement as having been paid. In her evidence in chief, she testified that she was to be paid Kshs. 270,000/= in cash, which sum was inclusive of the cost of the structure that she had developed on the land

valued at Kshs. 70,000/=, and that the loan to AFC was Kshs. 500,000/=. If I got her right, she was trying to say that the purchase price of Kshs. 700,000/= comprised of Kshs. 500,000/= as the AFC loan and she was to be paid cash of Kshs. 200,000/= in cash, and further, the plaintiff as purchaser, was to also add the sum of Kshs. 70,000/= for the structure.

Unfortunately, these terms are not in the contract that she executed with the plaintiff on 31 January 2000. There is no mention that the AFC loan is Kshs. 500,000/= and that the defendant is to be paid cash of Kshs. 200,000/= and not cash of Kshs. 700,000/= . Neither is the structure valued at Kshs. 70,000/= mentioned. This is in contrast to the agreement of 1993 which explicitly had a clause that what is due to AFC is Kshs. 500,000/=. and the defendant as vendor, was to be paid cash of Kshs. 200,000/= together with kshs. 70,000/= to compensate her for the structure. These are contained in clauses 3 and 7, and the special conditions in the agreement of 24 August 1993. I have already held that the two agreements are separate and each is a stand-alone agreement. The plaintiff is not a party to the agreement of 1993 and he cannot be bound by the terms of that agreement, owing to the doctrine of privity of contract.

I therefore hold that the consideration for the agreement between the plaintiff and defendant was that the plaintiff would pay Kshs. 700,000/= in cash and also pay off the AFC loan that the defendant owed. I am further prepared to hold on a balance of probabilities, that the sum of Kshs. 700,000/=, was paid on execution of the agreement, for that is what is stated in the agreement itself. If that was not the case, then the defendant, as vendor, ought not have executed the agreement. She executed the agreement, which contained the clause that she has been paid and acknowledges receipt, and she is now estopped from attempting to renege from that clause. The defendant has not in any way pleaded that the agreement is a fraud, or is vitiated by other factors, which would have entitled this court to nullify the agreement. She is therefore bound by the terms thereof. To hold otherwise will be to set a bad precedent and will go to dilute the sanctity and binding authority of the terms contained in agreements. Moreover, there is a clear discrepancy between what is pleaded and the evidence that was led by the defendant.

I have already stated what I think was the reason for having the clause requiring the plaintiff, as purchaser, to pay off the loan to AFC. The defendant attempted to argue that the contract stipulated for a completion period of 31 November 2000 (of which I take note that such date does not exist for the month of November only goes up to the 30th day), and that the plaintiff did not pay the money to AFC within this period. The burden of proving that the plaintiff failed to pay the loan within the stipulated time fell upon the defendant and the defendant did not table any evidence that the plaintiff did not pay the loan within the specified period. That said, I do not think it was material, whether or not the plaintiff paid off the loan immediately or later, so long as AFC did not ask the defendant to pay the said loan. No prejudice was caused to the defendant by any delayed payments of the loan by the plaintiff, not that any was proved by the defendant.

The upshot of the above is that I do hold that the plaintiff did make good the consideration as stipulated in the agreement of 31 January 2000.

Let me now turn to the other important issue, which is whether or not, consent of the Land Control Board was granted and if so, whether or not it is valid.

It was the position of the plaintiff that the parties had agreed in their contract that the vendor was to procure the consent of the Land Control Board for the sale and transfer of the suit property. That is indeed captured at clause 8 of the agreement. The plaintiff testified that they did apply for consent and attended the land control board. He stated that consent was eventually obtained. The application for consent which he produced is dated 28 December 2000. The consent produced by the plaintiff was issued on 11 January 2001. The consent refers to an application made on 11 January 2001, which appears to be a discrepancy, as the application is actually dated 28 December 2000. But I do not think that there is anything serious in this discrepancy. What is serious and needs to be determined is whether or not the application is a forgery as claimed by the defendant, and whether or not the consent as issued, is also a forgery.

It is the defendant who raised the issue of forgery and it follows that the burden of proof is upon her to prove that the documents are forgeries. The plaintiff claimed that she did not sign the application for

consent and that what is contained in the application is not her signature. She did not however produce any evidence to support this. She could easily have sought the services of a document examiner to prove that the signature therein is a forgery. There was also no proof that she did not attend the Land Control Board and that the consent produced by the plaintiff is a forgery. She claimed in her evidence that she on the date that the application is said to have been signed, she was undergoing surgery in Nairobi. It would not have been difficult for the defendant to obtain hospital records if she had wanted this allegation to be given serious consideration. Neither did she produce the minutes of the Land Control Board to demonstrate that no meeting was ever held and that the consent is therefore a fraudulent one. In a nutshell, the defendant has failed to prove her allegations that the application and the consent of the Land Control Board are forged documents.

The only issue which I think arises out of the application and consent is the submission by Mr. Kibii, that the consent was not issued within 6 months of the date of the agreement, as required by Section 6 of the Land Control Act, CAP 302, Laws of Kenya. Mr. Korir for the plaintiff brushed this off on the ground that it was not pleaded but I think the point is pleaded. Part of the particulars of fraud is that the plaintiff purported to obtain consent to transfer from an irregular Land Control Board. Moreover, the point is squarely in issue, as it is a point of law that arises out of the facts tabled by the parties. It is not an issue that can be ignored.

The Land Control Act where relevant is worded as follows :-

S. 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.

S. 8. (1) 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.

It will be seen from the above that an application for consent of the Land Control Board is to be made within 6 months of the making of the agreement. There is a proviso that the High Court may extend time, but I believe the High Court can only extend time if an application is made after expiry of the 6 months, and before the application is lodged to the Land Control Board. The agreement of the parties is dated 31 January 2000. Six months expired on 31st July 2000. It is within this period that the application for consent needed to be made. There was no application made to the High Court to extend time. Instead, the application was made on 28 December 2000, and probably lodged on 11 January 2001, which is the date given in the consent. This was clearly outside the time frame provided by law. The same contravened the provisions of Section 8 of the Land Control Act and cannot be allowed to stand. On this point, the law is clear on the time required to obtain consent, and it cannot be argued that a consent obtained in contravention of the law is a good consent.

I have no choice but to hold that no valid consent of the Land Control Board was ever issued as the application and consent came outside the time stipulated by law without there being an extension granted by the High Court as required by law.

Where no consent or no valid consent is issued, the transaction becomes null and void for all intents and purposes, and cannot be enforced. The only remedy is a refund of the purchase price which is recoverable as a debt by the person who paid it from the person to whom it was paid. This is provided under Section 7 of the Land Control Act, which 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.

Section 22 of the Land Control Act, does not aid the plaintiff for the same provides as follows :-

22. Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6, and any person -

(a) pays or receives any money; or

(b) enters into or remains in possession of any land,

in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.

I am not too certain of the exact amount of money that was paid by the plaintiff under the transaction herein. For sure, there is the payment of Kshs. 700,000/= acknowledged in the agreement, but I cannot tell the other sums paid by the plaintiff to AFC. In absence of proof, I am unable to state with precision, the amount of money that the plaintiff can claim and I am unable to make any determination in these proceedings. But all is not lost, as the plaintiff can make a separate claim for the money paid under the transaction, which then will remain a matter to be determined in the said suit, assuming that the plaintiff is minded to claim the said sum.

Having held that there was no valid consent of the Land Control Board, it follows that the plaintiff's claim must fail. I am unable to order specific performance on a contract that has been nullified by operation of law. The plaintiff's claim is therefore hereby dismissed.

The defendant had a counterclaim for the sale transaction to be declared a nullity, an order that the plaintiff be refunded his money, and an order for eviction. For want of a valid consent, the sale transaction is hereby declared to be a nullity. I have already addressed the issue of refund and stated that I am unable to make a specific order of refund, for I do not have the facts to enable me make a determination of how much the plaintiff may be refunded. The only other issue is the prayer for eviction. Having held for the defendant, I cannot deny the defendant this prayer. I direct the plaintiff to vacate the suit premises within a period of 30 days from the date hereof, and in default, the defendant is at liberty to apply for an order of his eviction.

The last issue is costs. The plaintiff has lost the suit but I am sympathetic to him as he had imagined that he had a valid consent of the Land Control Board which is not the case. For the circumstances of this case, I think it is only fair that each party bears his own costs.

In summary, I make the following final orders :-

(a) The sale agreement dated 31 January 2000 between the plaintiff and defendant over the land parcel

Plateau/Plateau Block 2 (Uasin Gishu)/63 cannot be enforced for want of a valid consent of the Land Control Board, the consent having been applied for and obtained outside 6 months of the agreement and the said agreement is hereby declared to be null and void.

(b) The plaintiff's remedy is to claim a refund of the money paid under the transaction, but this court is unable to make any determination on this point, as no evidence was tabled on the exact amount of money paid under the transaction. The plaintiff is at liberty to file a separate claim for this, and the claim if and when filed, will be determined on its merits.

(c) The defendant is entitled to vacant possession of the land parcel Plateau/Plateau Block 2 (Uasin Gishu)/63 and I order the plaintiff to vacate the suit land within 30 days from the date hereof. In default, the defendant is at liberty to apply for an order of eviction.

(d) There shall be no orders as to costs.

Judgment accordingly.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF NOVEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of: