



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L 823 OF 2012**

**Formerly HCC 37 of 2012**

**KENNETH KIPRUTO CHEBET.....PLAINTIFF**

**VS**

**LABAN KIPKERING MUREI.....DEFENDANT**

*(suit by plaintiff for rescission of contract for sale of land, damages for breach of contract and refund of purchase price; agreement for sale of land having been entered; defendant receiving some payments and later reselling the land to a third party; plaintiff not having made payments as scheduled in the agreement or within time waived by defendant; whether plaintiff entitled to damages; order for rescission and refund granted; prayer for damages denied as plaintiff was equally in breach; plaintiff awarded costs).*

**JUDGMENT**

Vide an amended plaint filed on 19 July 2012, the plaintiff has principally sought the following orders against the defendant :-

- (a) A declaration that the sale agreement dated 18th September 2010 has been frustrated by the defendant through the subsequent sale and transfer of Nandi/Lelmokwo/544 to one Kiptanui Jonah arap Too.
- (b) General damages for breach of contract.
- (c) Rescission of the agreement dated 18th September 2010 and refund of Kshs. 547,600/= received by the defendant with interest from the date of receipt.

The defendant despite being served with summons, never entered appearance and never filed defence. On 5 December 2012, the plaintiff applied for interlocutory judgment for the sum of Kshs. 547,600/= with interest, which judgment was entered. The matter thus proceeded to formal proof.

The plaintiff testified as the sole witness. It was his case that he was entrusted by a couple, Betty and Christopher Kipkulei, who reside in the USA, to look around for land on their behalf. He identified the land parcel Nandi/Lelmokwo/544 (the suit land), measuring in total 1.6 hectares (about 4 acres), which was registered in the name of the defendant. Betty and Christopher donated to the plaintiff a power of attorney and gave the plaintiff the go-ahead to purchase two acres of the suit land. The plaintiff then

entered into the agreement dated 18th September 2010 to buy two acres of the suit land, at a consideration of Kshs. 700,000/=. They had agreed that the money could be paid in installments. He paid Kshs. 160,000/= on the day of the agreement; Kshs. 100,000/= on 29 September 2010; Kshs. 70,000/= on 11 October 2010; Kshs. 20,000/= on 25 October 2010; and finally Kshs. 127,600/= on 29 January 2011. These payments were acknowledged in writing by the defendant. The plaintiff also made some additional payments through one of his brothers using the M-Pesa service. These were Kshs. 10,000/= paid on 13 August 2011 and another Kshs. 10,000/= paid on 29 August 2011. Further deposits were made through one Cheburet who handed over the amount of Kshs. 25,000/= and Kshs. 15,000/= on 15 April 2011, and 29 September 2011. Another M-Pesa payment was made of Kshs. 10,000/=. Therefore in total, a sum of Kshs. 547,600/= was paid, leaving a balance of Kshs. 152,400/=. The plaintiff got this money from Betty, and he called the defendant so that they can finalize the transaction. The defendant however never showed up. It was then that the plaintiff learnt that the defendant had sold the same land to a third party and a transfer effected on 5 October 2011. He wrote letters of demand which were ignored by the defendant.

It is obvious that the sale agreement of 18th September 2010 cannot be given effect now that the land has already been transferred to another person. The plaintiff has lost the land and it is only fair that the defendant do refund the purchase price, otherwise he will be unjustly enriched. I therefore confirm the judgment already entered for the plaintiff for the sum of Kshs. 547,600/= being refund of the money paid under the transaction. The plaintiff has asked for interest from the day that the money was received. I do not think this would be fair since at the times the bulk of the money was received, the contract was still running and it could have been performed. Interest as noted in Section 26 of the Civil Procedure Act, CAP 21, is in the discretion of the court. Taking all factors into consideration, it is my view that it will be fair if I granted interest from the day the money was demanded, for from that date, the defendant had an obligation to refund the money. The formal demand was made on 6 December 2011, and therefore interest on the amounts paid shall be from 6 December 2011.

As to damages for breach of contract, I do not think that the plaintiff is entitled to the same. This is because the plaintiff also never strictly followed the terms of the agreement of 18 September 2010. I have seen from the agreement that the purchase price was Kshs. 700,000/=. The terms of payment according to the agreement were that the plaintiff would make an initial deposit Kshs. 160,000/= at the time of the agreement; Kshs. 190,000/= on or before 25 September 2010; and finally, Kshs. 350,000/= on or before 31 January 2011. The first payment of Kshs.160,000/= was paid as agreed. On 29th September 2010, a sum of Kshs. 100,000/= was paid. This of course was beyond the 25th September 2010 as agreed. It is possible however that the defendant waived the strict time line, as in the acknowledgement instrument of the sum of Kshs. 100,000/=. it is averred that the shortfall of Kshs. 90,000/= shall be paid on or before 10/10/2010 and Kshs. 350,000/= shall be paid on or before 31/01/2011 as earlier scheduled. The next payment was however made on 11 October 2010 and it was not for Kshs. 90,000/=. but Kshs. 70,000/=. There was thus a shortfall of Kshs. 20,000/= . Probably this late payment was also waived as yet again in the acknowledgment instrument, it is stated that the Kshs. 20,000/= will be paid on or before 25/10/2010 and Kshs. 350,000/= on or before 31/01/2011. The Kshs. 20,000/= was paid on 25 September 2010 as re-negotiated, leaving the balance of Kshs. 350,000/= that was due before 31 January 2011. Only a sum of Kshs. 127,600/= was paid before 31 January 2011; the acknowledgment note states that the balance will be paid on or before 28th February 2011, probably another waiver by the defendant. But the balance was certainly not paid on or before the 28th February 2011. It was instead paid in bits and pieces as noted in the preceding paragraph of this judgment.

We may never know, but it could be that it was the intermittent payments that made the defendant get exasperated and decide to sell the land to another purchaser. It is clearly apparent that the plaintiff breached the terms of the contract and he cannot therefore claim damages for breach of contract, for he himself is guilty of breach. Mr. C.F. Otieno, learned counsel for the plaintiff, submitted that time ceased being of essence to the agreement and he proposed Kshs. 50,000/= as damages for breach of contract. I agree, that the defendant seems to have waived the issue of time, but only upto 28th February 2011. If all payments had been done by this time, then the defendant would have been in breach of contract if he failed to convey the suit land to the plaintiff. But there is absolutely no evidence that the defendant was bound to accept any payments made beyond 28th February 2011, and it seems to me that it is actually the plaintiff who breached the contract. I am therefore unable to grant the plaintiff any damages for breach of

contract.

Given that the land has been resold to another buyer, the plaintiff is perfectly entitled to rescind the contract, and I order it rescinded. I opt to have the contract rescinded rather than order it "frustrated" . The end effect is in any event the same. I will also award the plaintiff costs of the suit as the defendant had an obligation to refund the money received as he was never going to complete the sale.

I therefore make the following final orders :-

- 1. I declare the contract between the plaintiff and defendant rescinded by the plaintiff.*
- 2. I enter judgment for the plaintiff for the sum of Kshs. 547,600/= being refund of the purchase price, the same to attract interest at court rates from 6 December 2011, the day that it was demanded.*
- 3. I decline to make any award as damages for breach of contract.*
- 4. The plaintiff shall have the costs of this suit.*

It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 26TH DAY OF NOVEMBER 2013**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Read in open Court*

*In the Presence of:-*

*Mr. C.F. Otieno for the plaintiff*

*Defendant – Absent (Never entered appearance)*