



**Mitei v Baseland Property Consultants Ltd & 2 others (Environment & Land
Case 56 of 2015) [2023] KEELC 148 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 148 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 56 OF 2015
SM KIBUNJA, J
JANUARY 25, 2023**

BETWEEN

EMILY JEBET MITEI PLAINTIFF

AND

BASELAND PROPERTY CONSULTANTS LTD 1ST DEFENDANT

HIGHLANDS VALUERS LTD 2ND DEFENDANT

ROSE CHEPCHIRCHIR RONO 3RD DEFENDANT

JUDGMENT

1. The suit herein was instituted vide the plaint dated the February 25, 2015, as amended first on the November 3, 2015, then on the October 8, 2018 and lastly on the September 25, 2020. The plaintiff seeks for “a declaration that part of land parcel number declaring (sic) Eldoret Municipality/Block 10/1991 measuring 0.083Ha. (1/4 Acre) or thereabouts situate in Uasin Gishu County, belongs to the plaintiff having lawfully and legally acquired the same the same (sic) for value from the 1st defendant”. The plaintiff also prays for an order directing the 1st and 2nd defendants to execute all relevant documents to transfer the said land to the plaintiff, permanent injunction, eviction order against 3rd defendant, costs and interests. That further, the plaintiff in the alternative to the first two prayers above, seeks for a refund of the purchase price at the current market value with interest at commercial rates from the 1st and 2nd defendants jointly and severally. The plaintiff averred that on March 10, 2011 she entered into an agreement of sale with the 1st defendant and purchased a portion of the suit property measuring 0.083ha. After the purchase and subdivision, the plaintiff took possession of the suit property. However, the 2nd defendant colluded with the 1st defendant to trespass onto the suit property interfering with her peaceful occupation.
2. The plaintiff further claimed that on March 13, 2012, the 3rd defendant colluded with the 1st and 2nd defendant to fraudulently purchase the suit property with the intention of defeating the plaintiff's



claim. The plaintiff particularized breach of the said agreement on the part of the 1st defendant to be failing to effect transfer and registration of the plaintiff, and for fraudulently causing the suit property to be registered in the name of the 2nd defendant. Further the plaintiff accused the 2nd and 3rd defendants of fraud for receiving monies from the 1st defendant on behalf of the plaintiff but proceeding to fraudulently sell the suit property to the 3rd defendant. The plaintiff maintained that the defendants were trespassers on the suit property causing her loss and damage. The plaintiff prayed for judgement against the defendants jointly and severally.

3. The claim is opposed by the 1st defendant through the statement of defence dated the March 26, 2015 and amended on the December 8, 2015, to among others introduce a counterclaim. The 1st defendant denied interfering with the plaintiff's peaceful occupation of the land. It further averred that the 2nd defendant had on the August 14, 2010 authorized it "to market and sale the whole of that property LR Eldoret Municipality Block 10/1639 and proceeds paid to the 2nd defendant including the amount paid by the plaintiff herein less the 1st defendant's commission." That the plaintiff had purchased ¼ acre portion from the said land which on subdivision became plot Q8, and it does not object to the 2nd defendant transferring it to her. The 1st defendant counterclaimed against the 2nd defendant for the amount paid to it on plot Q8 for purporting to sell the plot to another person. The 1st defendant seeks against the 2nd defendant for refund of the purchase price paid by the plaintiff or alternatively current market price of the plot, interest at commercial rates and costs.
4. The 2nd defendant also opposed the plaintiff's claim through its defence dated the April 14, 2015 and amended on the October 26, 2020. In response to the plaintiff's averments in her subsequent amended plaints. The 2nd defendant denied the plaintiff's averments of having beneficial interest in the suit property. It averred that it had proprietary interest to the suit property, Eldoret Municipality Block 10/1991, measuring 0.083Ha to the exclusion of the plaintiff. In response to the 1st defendant averments, the 2nd defendant stated that it only instructed the 1st defendant to market the sale of the property on its behalf, but never authorized the 1st defendant to enter into any sale agreement on its behalf. The 2nd defendant insisted that there is no valid agreement of sale that had been entered in respect of the suit property in favor of the plaintiff, and that it has never ceded possession of the same to the plaintiff. The 2nd defendant denied the plaintiff's particulars of fraud and contended that it has not colluded with the 1st and 3rd defendant to alienate the plaintiff of her interest in the suit property, since she had none in the first place. The 2nd defendant reiterated that it is the registered proprietor of the suit property and further affirmed that it entered into an agreement of sale with the 3rd defendant on 13th March 2013 over the suit property. The 2nd defendant urged court to dismiss the suit with costs since the plaintiff lacks proprietary interest in the suit property.
5. The 2nd defendant also opposed the 1st defendant's counterclaim through its defence to the 1st defendant's counterclaim dated the April 20, 2016. It averred that contrary to the 1st defendant's claim it has not received the purchase price paid by the plaintiff. That its sale of the land to the 3rd defendant was lawfully done, and the 1st defendant's counterclaim is an abuse of the process of the court.
6. The plaintiff testified as PW1. She told the court how she entered into a plot sale agreement on March 10, 2011 with the 1st defendant who were marketing the plots for sale on behalf of the 2nd defendant. That the sale agreement was entered into by her brother in law on her behalf, and one person from the 1st defendant, but no company seal was affixed. That she paid the whole purchase price of Ksh 710,000 to the 1st defendant, but when she went to take possession the 2nd defendant stopped her, even though she had fenced it. PW1 called Thomas Kibiwot Ngetich who testified as PW2. PW2 told court that he executed the agreement of sale on behalf of the plaintiff, and that the purchase price was paid through his account.



7. The 1st defendant called James Kiprono Kibos, a director, who testified as DW1. He told court that the suit property was registered in the name of Micheal Cheruiyot and Rael Kibor. That the 1st defendant was contracted by the 2nd defendant to sell the suit property which was acquired from the two registered owners. He stated that they subdivided the suit land into several quarter acre plots and the specific portion the plaintiff claims was granted a provisional number of Q8. The plaintiff purchased Plot Q8 for Kshs 710,000/= which he remitted the 2nd defendant less his commission. He told court that despite receiving the cash, the 2nd defendant sold the plot to the 3rd defendant and urged court to find the 2nd defendant liable to the plaintiff.
8. The 2nd defendant called Samuel Kiptala Chemelil, a director, who testified as DW2. He told court that the 2nd defendant had bought the 11acre parcel out of Block 10/1639, and subdivided the same into sixty (60) small plots, which they contracted the 1st defendant to market. That the plot in dispute was sold to Rose Ronoh, the 3rd defendant, vide an agreement of sale dated 13th March 2013, and that she has possession. On cross examination DW2 indicated that the 1st defendant had sold some of the plots and was paid about Ksh 14,000,000 but remitted about Ksh 7,000,000 to the 1st defendant only. That among the money 2nd defendant had received from the 1st defendant included part of what the plaintiff had paid for the plot. That the purchase price in the sale agreement between the 2nd defendant and the 3rd defendant was higher than that between the plaintiff and the 1st defendant. He also told court that at the time of selling the plot to the 3rd defendant, the 2nd defendant had verbally informed the 1st defendant to stop transacting on the plots.
9. The 3rd defendant though duly served with summons, did not enter appearance or file a statement of defence.
10. The learned counsel for the Plaintiff, 1st and 2nd Defendants filed their submissions dated the March 29, 2022, April 25, 2022 and June 13, 2022 respectively, which the court has given due considerations.
11. The following are the issues for the court's determinations;
 - a. Whether the agreement of sale dated March 10, 2011, between the plaintiff and the 1st defendant was enforceable.
 - b. Whether the plaintiff is entitled to an order of specific performance or alternatively reimbursement of the purchase price, and if the latter, who is liable.
 - c. Whether the 1st defendant has proved their counterclaim against the 2nd defendant.
 - d. Who pays the costs in the main suit and counterclaim.
12. The court has carefully considered the parties pleadings, evidence tendered by the three parties, submissions by the three learned counsel, superior courts decisions cited thereon, and come to the following conclusions;
 - a. That from the testimonies of PW1, PW2, and DW1, there is no doubt a sale agreement was entered into by PW2 on behalf of the plaintiff [PW1], and the 1st defendant for sale of a quarter acre plot out of Eldoret Municipal/Block 10/1639 on the March 10, 2011. The plaintiff had before buying the plot conducted an official search on the suit property that revealed that the Eldoret Municipality Block 10/1639, measured 24.303ha and was registered in the names of Rael Jemutai Kibor and Michael Cheruiyot on September 25, 2009 in the nature of leasehold.



She was also satisfied that the 1st defendant had authority to enter into the sale agreement in view of the authority given to it by the 2nd defendant vide the letter dated August 14, 2010. The plaintiff further stated that on the March 10, 2011 she paid the purchase price in full Kshs 710,000/= to the 1st defendant, Baseland Property Consultants Limited, who issued her with a receipt No. 121 on the same day. From the foregoing testimony, it is evident and apparent that at the time the plaintiff and 1st defendant entered into the agreement of sale, neither Baseland Property Consultants Limited, [1st defendant], nor Highlands Valuers Limited, [2nd defendant], were the registered proprietors Eldoret Municipality Block 10/1639. There is no evidence that the 1st defendant had a power of attorney to execute the said agreement of sale on behalf of the registered proprietors, namely Rael Jemutai Kibor and Michael Cheruiyot. The plaintiff was aware about these facts as she had conducted an official search, and no power of attorney had been shown to her by the 1st defendant. There is no evidence that the plaintiff had reached out to Rael Jemutai Kibor and Michael Cheruiyot, the registered proprietors of the land, to confirm whether they had authorized the 1st and 2nd defendant, or either of the two, to sell the portion of the suit property on their behalf.

- b. That sections 3(3) and 3(6) of the *Law of Contract Act*, Chapter 23 of the Laws of Kenya, are relevant in the determination of whether or not the sale agreement that the plaintiff relies on is valid and enforceable. It provides;

Section 3(3);

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

- (a) the contract upon which the suit is founded—
- (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

.....”

Section 3(6);

“For the purposes of subsection (3)-

.....“party” includes any agent, auctioneer or advocate duly authorized in writing to act in the absence of the party who has given such authority;

“sign”, in relation to a contract, includes making one’s mark or writing one’s name or initial physically or by means of an advanced electronic signature on the instrument as an indication that one intends to bind himself to the contents of the instrument and in relation to a body corporate includes—

- a. signature by an attorney of the body corporate duly appointed by a power of attorney registered under the *Registration of Documents Act* (Cap. 285);
- b. the affixing of the common seal of the body corporate in accordance with the constitution or the articles of association of the body corporate, as the case may be, in which case no further attestation shall be required;



- c. execution of the document in accordance with section 37 of the [Companies Act, 2015](#), for body corporates incorporated under the [Companies Act, 2015](#).”

The sale agreement the plaintiff relies on was not signed or executed by her, though she is indicated to be the purchaser. The person who signed the agreement is her brother in law who testified as PW2, but no written authority has been availed to the court authorizing him to sign the agreement on the plaintiff's behalf. The sale agreement shows that one Stanley Kibos, executed the sale agreement on behalf of the 1st defendant, a limited company. That execution was insufficient for failure to adhere with the requirement of Section 3 (6) of the [Law of Contract Act](#), which requires a limited company to sign an agreement of sale by affixing its common seal of the body corporate, and no such seal was affixed. That the execution of the said sale agreement has not been in accordance of section 3 (6) of the [Law of Contract Act](#). The wording of Section 3 (3) of the [Law of Contract Act](#) is mandatory, and as the agreement was not signed or witnessed as required by the law, it is therefore untenable, invalid and unenforceable as it offends the said section.

- c. Having come to the above conclusion, the next question that arises is whether the plaintiff who admittedly paid the full purchase price of Ksh 710,000, under the said agreement is without legal recourse? The plaintiff has demonstrated to the court that on March 10, 2011, Ngetich Thomas Kibiwot, PW2, paid Kshs 710,000/= on her behalf to the 1st defendant as purchase price for the suit land, and was issued with a receipt on the same day. DW1, James Kiprono Kibos, the 1st defendant's director, acknowledged to have received Kshs 710,000/= from the plaintiff for the sale of a quarter acre of Eldoret Municipality Block 10/1639. He claimed to have remitted Kshs 500,000/= to the 2nd defendant vide a cheque No. 000475, Co-operative Bank of Kenya on May 24, 2011 (Dex-6). The said cheque was forwarded with a letter dated the same day informing the 2nd defendant that the balance of Kshs 150,000/= would be remitted in three months (Dex-7). DW1 stated that the balance Kshs 150,000/- was remitted to the 2nd defendant vide a cheque No. 000559 of Kshs 500,000/= Co-operative Bank of Kenya on October 13, 2011 (Dex-5B). The said cheque was forwarded with a letter dated the same day informing the 2nd defendant that the same were proceeds from the sale of Block 10/1639. However, on cross examination, he could not prove that the second cheque of October 13, 2011 was in respect of the suit property. On being asked as to why he claimed to have remitted Kshs 650,000/= and not Kshs 710,000/= he argued that the difference was his commission for having sold the suit property. That DW2 for the 2nd defendant agreed receiving some of the proceeds totaling about Ksh 7,000,000 out of about Ksh 14,000,000 the 1st defendant had realized from the sale of plots to be subdivided from Eldoret Municipality/Block 10/1639. He however disputed having allowed the 1st defendant to sell the plots insisting that the authority was only to market for sale.
- d. From the evidence tendered, the 2nd defendant was not privy to the agreement of sale between the plaintiff and the 1st defendant. The 2nd defendant had not featured during the negotiations, execution of the sale agreement, and payment of purchase price between the plaintiff through PW2, and the 1st defendant. The plaintiff has not demonstrated to court through evidence that she paid any monies directly to the 2nd defendant. However, it is evident to court that the defendants worked together in the sale of plots of land without the legal capacity to pass good title to ignorant Kenyans, like the plaintiff, eager to own a piece of land. The 2nd defendant's director Samuel Kiptala Chemelil acknowledged, while under oath as DW2, that the 2nd defendant had engaged the 1st defendant to market the sale of the suit property, but not



enter into agreements of sale on their behalf. That limitation does not however appear to have stopped the 2nd defendant from receiving the proceeds that the 1st defendant forwarded to it after selling the same plots that it was allegedly only supposed to market. I find the conduct of the 1st and 2nd defendants directors rather deceitful. DW2 was well aware that the 2nd defendant is not the registered owner of the suit property but went ahead, in my view, in cahoots with the 1st defendant, to aggressively market, sell and receive proceeds of the sale at the detriment of the purchasers, like the plaintiff herein, while knowing very that they had no title to the plots capable of being legally transferred to the purchasers.

- e. The Court of Appeal of Uganda held in the case of *Katende v Haridas and Company Limited* (2008) EA 173, that;

“A bonafide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bonafide doctrine he must prove the following: he holds a certificate of title, he purchased the property in good faith, he had no knowledge of the fraud, he purchased for valuable consideration, the vendors had apparent valid title, he purchased with no notice of any fraud and he was not party to any fraud.”

It is doubtful as to whether the plaintiff was a bona fide purchaser for value without notice. She had reportedly carried out a search that was clear on who the registered proprietors of the land, from where her quarter acre was to be excised from were. They were not the 1st and 2nd defendants, but she went ahead not only to enter into a sale agreement, but also to make full payment of the purchase price thereon. This she did knowing very well that the 1st and 2nd defendant had no title at all to the land to legally enable them cause subdivision and transfer of a quarter acre of land to her name.

- f. As I have pointed the circumstances under which the suit property was sold to the plaintiff by the 1st defendant was colored by illegality and no good title was passed to the plaintiff, while she had fully paid the purchase price, the two defendants should be held liable to make good the payment. To allow the 1st and 2nd defendants keep the purchase price paid by the plaintiff would result into grave injustice, and equity would not allow it. I seek the guidance of the equity maxim that equity will not suffer a wrong to be without a remedy (*ubi jus ibi remedium*), in determining the appropriate orders in this matter. The Court of Appeal in *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR held that:

“This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.”

The 1st and 2nd defendants should therefore be made to refund to the plaintiff the Ksh 710,000 she paid as purchase price on the 13th March 2011. The two defendants should also pay the plaintiff interests of the said sum from that date till payment in full.

13. That though the 1st defendant had filed a counterclaim against the 2nd defendant, it surprisingly did not tender any evidence in support. In any case, having found that both the 1st and 2nd defendants were deceitful in their conduct, the court finds the counterclaim was merely a red herring to divert the



court's attention from its role in the whole saga of receiving money and allegedly earning commissions from transactions over plots where neither it, nor the reportedly instructing principal had title to.

14. That as under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya costs follow the events, unless where for good cause the court directs otherwise, the 1st and 2nd defendants will pay the plaintiff's costs.
15. Based on the foregoing analysis I enter judgement in favor of the plaintiff as against the 1st and 2nd defendants and make the following orders:
 - a. The 1st and 2nd defendants to jointly and severally refund the plaintiff Kshs 710,000/= [seven hundred ten thousand Kenya shillings], being the purchase price paid, with interest at courts rates from the March 13, 2011, till payment in full.
 - b. The plaintiff is awarded costs of the suit to be paid by the 1st and 2nd defendants jointly and severally.
 - c. The 1st defendant counterclaim against the 2nd defendant is hereby dismissed with each party bearing its own costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 25th DAY OF JANUARY 2023.

S.M.KIBUNJA, J.

IN THE PRESENCE OF;

PLAINTIFF : Absent

DEFENDANTS : Absent

COUNSEL: M/s Kigen for the Plaintiff.

Wilson .. Court Assistant.

S,M,Kibunja, J.

ELC MOMBASA.

