



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 102 OF 2014

JOSEPH MATHENGE KAMUTU PLAINTIFF

VERSUS

JOSEPH WAINAINA KARANJA 1ST DEFENDANT

NANCY WANJIRU WAINAINA 2ND DEFENDANT

RULING

Introduction

1. On **15th May, 2014** the plaintiff, **Joseph Mathenge Kamutu** filed the current suit seeking to, *inter alia*, compel the defendants to complete the transaction entered between them and himself on **16th August, 2008**. In alternative to the prayer seeking to compel the defendants to complete the transaction entered between himself and the defendants, the plaintiff seeks an order compelling the defendants to pay him the full market value of the suit properties.

2. It is the plaintiff's case, that by a sale agreement executed between the defendants and himself on **16th August 2008**, he bought the parcels of land known as Nyandarua/Mbuyu/55 and 56 measuring in aggregate 10 acres. Upon execution of the sale agreement in accordance with the terms of the agreement, he paid Kshs 400,000/= and took possession of the suit property. Although the balance of the purchase price amounting to Kshs. 150,000/= was to be paid after the defendants obtained a consent to transfer the suit properties in his favour, in 2010 on the request of the defendants he paid a further Kshs. 65,000/=.

3. It is the plaintiff's case, that in breach of their contractual obligation, the defendants failed or refused to obtain the requisite consent to sale or transfer the suit properties. In 2010 or thereabout, the defendants wrote to him indicating that they wanted to pay back the money paid in respect of the properties and get him to vacate the property.

4. Contending that he is and has been ready to meet his part of the bargain, the plaintiff submits that the defendants should be ordered to meet their part of the bargain because for the six years he has been in possession of the suit properties, he has undertaken massive developments thereon.

5. Simultaneously with the plaint, the plaintiff filed the notice of motion of even date seeking to

restrain the defendants by themselves, their servants and/or agents from selling, charging, alienating or in other way dealing with the suit properties or the title documents in respect thereof pending the hearing and determination of the application and the suit.

6. Upon being served with summons to enter appearance, then defendants filed a statement of defence and counter-claim in which they, *inter alia*, contend that the agreement which is the subject matter of this suit, is void and unenforceable for non-compliance with the provisions of **Section 6(1)** of the Land Control Act, Cap 302 Laws of Kenya.

7. In line with the averments contained in their statement of defence and counter-claim, the defendants filed the notice of preliminary objection dated **18th June, 2014** contending:-

1) That the plaintiff's suit is incompetent because the contract for sale and transfer on which it is based became void for all purposes by operation of law on expiry of six months from the date it was executed;

2) That because the subject matter of the suit is a controlled transaction under **Section 6(1)** of the Land Control Act, this court in the absence of a valid consent of the relevant Land Control Board, lacks jurisdiction to enforce it;

3) That this court lacks jurisdiction to direct the defendant to complete a void transaction or to direct them to pay the current market value of the suit properties;

4) That the plaintiff's remedy is recovery of the purchase price;

5) That the continued possession of the suit property by the plaintiff is by dint of the provisions of **Section 22** of the Land Control Act a criminal offence.

8. The notice of preliminary objection was disposed of by way of written submissions.

Submissions by the defendants

9. In the submissions filed on behalf of the defendants, it is acknowledged that the defendants entered into the contract which is the subject matter of this suit but contended that since none of the parties obtained the consent of the Land Control Board within the period of time prescribed by law or made an application for extension of that period, the transaction being a controlled one, became void for all purposes and unenforceable upon expiry of six months from the date the agreement was executed.

10. With regard to the plaintiff's possession of the suit property after the transaction became void, reference is made to **Section 22** of the Land Control Act and submitted that the plaintiff's continued possession of the suit properties is unlawful (amounts to trespass to land).

11. Concerning the contention that the suit properties were at the time of execution of the agreement of sale exempted from the application of the provisions of **Section 6(1)**, it is submitted that whereas it is true that the properties were subject to a charge in favour of Settlement Fund Trustees (SFT), the transaction did not enjoy the exemption contemplated under **Section 6(3)** of the Land Control Act because SFT was neither a party nor mentioned in the transaction.

12. On whether this court can grant the orders sought, it is submitted that this court has no jurisdiction to enforce or order the enforcement of a transaction that the law has declared to be void.

13. There being no evidence that the plaintiff applied for extension of the period within which to apply for the consent, it is submitted that the plaintiff's case is not maintainable.

14. In support of the defendant's contention reliance is made on the following authorities:-

- a. **Jack Kaguu Githae vs. James Mugo Kinga & 9 others**; Nyeri HCCC No.58 of 2012;
- b. **Katana Mranja Angore vs. Ezekiel K. Masha**; Malindi ELC NO. 92 of 2013;
- c. **Charles Gitonga Gakuu vs. Evans Kenneth Thiongo**; Nyeri ELC No. 2005 of 2012;
- d. **Gatere Njamunyu vs. Joseck Njue Nyagah**; Nairobi Court of Appeal Civil Appeal No. 20 of 1982;
- e. **Jacob Michuki Minjire vs. Agricultural Finance Corporation** ; Civil Appeal No. 61 of 1982 (1982) LLR 6197;
- f. **Sisto Wambugu vs. Kamau Njuguna**; Court of Appeal Civil Appeal No. 10 of 1982;
- g. **Jaber Mohsen Ali & Another vs. Priscillah Boit and another**; Eldoret ELC No. 200 of 2012; and
- h. **Dr. Peter Nganga Njenga vs. Loise Wanjiru Nganga**; Nairobi ELC No. 765 of 2012.

Submissions by the Plaintiff

15. On behalf of the plaintiff, reference is made to a clause that exists in the charge executed between the defendants and Mbuyu/Nyandarua Settlement Scheme and submitted that the properties are by operation of law exempted from the requirements of **Section 6(1)** of the Land Control Board. In that regard reference is made to **Section 6(3)** which exempts transactions to which SFT is a party from the requirement of **Section 6** of the Act.

16. In support of the contention that the Land Control Board's consent is not required in the circumstances of this case, reliance is made to the case of **Joel Mutunga Ngundo vs. Thomas Munguti Nzengu; Nairobi Civil Appeal No. 877 of 2003** where **O.K Mutungi J.**, (as he then was) stated:-

"In the plaint, it is admitted that the suit premises have been allocated from a settlement scheme, by the settlement fund trustees.

If that be the case, the section 6 1 c of cap 302, does not apply, and that no land control board consent is required. That is because of the provisions 6 3 b which stipulates as hereunder:-

"This section (that is section 6) does not apply to a transaction to which the government or settlement fund trustees or (in respect of trust land) a county council is a party."

17. The fact that the parties to this suit did not obtain the requisite consent from SFT and that they proceeded as if the defendants were the registered owners of the suit properties, when they were not, is said to have constituted a fundamental mistake on the part of the parties which rendered the transaction voidable as opposed to being void.

18. Maintaining that the transaction between the defendants, until and unless avoided by any of the parties thereto is valid, counsel for the plaintiff urges the court to allow the suit to go to full trial.

19. In reply to the issues raised in the plaintiff's submissions, counsel for the defendant maintains that SFT was not a party to the transaction and submits, even if it were, given the fact that the parties proceeded without the consent required under the charge instrument, this court would still

lack jurisdiction to enforce the contract because of public policy. The decision in the case of **Joel Mutunga Ngundo vs. Thomas Munguti Nzengu** (*supra*) is said to be either bad law or to have been made *per incuriam*.

Analysis and determination:-

20. It is not in dispute that the parties herein entered into a sale agreement for sale of the suit property. It is also not in dispute that following execution of the agreement, the plaintiff was given possession of the suit property pending completion of the transaction.

21. It is also not in dispute that the agreement executed between the defendants and the plaintiff imposed an obligation on the defendants to obtain the consent of the relevant Land Control Board's before the balance of the purchase price could be paid. It appears from the evidence on record, that the defendants refused or ignored to fulfill their contractual obligations and threatened to pull out of the transaction. The defendants justify their refusal to fulfill their contractual obligation on their contention that the transaction became unenforceable (null and void for all purposes) after expiry of six months from the date of execution of the sale agreement.

22. In support of the defendants' contention, reference is made to **Section 6(1)** of the Land Control Act and the authorities cited hereinabove. The said **Section 6(1) (c)** provides as follows:-

(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"

23. From the contentions made in the preliminary objection herein and the submissions filed in respect thereof, I find the issues for determination to be:-

- a. Whether the transaction that is the subject matter of this suit is void"
- b. Whether this court has jurisdiction to enforce the transaction agreement executed between the parties herein"
- c. What orders should this court make"

Whether the transaction that is the subject matter of this suit is void"

24. Concerning this issue, it is submitted that the sale agreement executed between the parties to this suit became void for all purposes after expiry of 6 months from the date of the agreement without the requisite Land Control Board being obtained.

25. That contention by the defendants appears to be premised on **Section 8(1)** of the Land Control Act which obligates parties to a controlled dealing under the Act to apply for consent in respect of a controlled transaction in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction. The contention is also supported by many cases of both the High Court and the Court of Appeal where it has been asserted that failure to obtain the Land Control Board within the six months stipulated in **Section 8(1)** renders a controlled dealing void for all purposes under the Act. In that regard see the cases of **Jack Kaguu and Katana Mranja** (*supra*).

26. The question to answer concerning the contention by the defendants is-whether it is the lapse of the six months within which the parties ought to have obtained consent or the refusal of the consent by the relevant Land Control Board which renders the transaction void. This question is vital because, if it is not the lapse of time which renders the transaction void, then the argument by the defendant will have no basis in law. The agreement executed between them will continue being governed by the terms agreed between them until voided in the manner contemplated under the Act.

27. In determining what renders a dealing void under the Land Control Act, I begin by pointing out that the proviso to **Section 8(1)** gives parties to a controlled dealing a window to apply for extension of the time within which they ought to apply for consent under the Act. It is noteworthy that the section allows parties to apply for extension of time within which they ought to have applied for the consent **notwithstanding that the period of six months may have expired.** **Section 9 (2)**, on the other hand, makes it clear when a controlled transaction shall become void. In this regard the section Provides:-

“Where an application for the consent of a land control board has been refused, then the agreement for a controlled transaction shall become void –

(a) On the expiry of the time limited for appeal under section 11; or

(b) Where an appeal is entered under section 11 and dismissed, on the expiry of the time limited for appeal under section 13; or

(c) Where a further appeal is entered under section 13 and dismissed, on that dismissal.”

28. A plain reading of the above provisions of the Law makes it clear that it is the not failure to apply for consent within the time stipulated in **Section 8(1)** which renders a controlled dealing void, but refusal by the Land Control Board to grant the consent.

29. Despite there being many decisions to the effect that lapse of the six months contemplated in **Section 8(1)** without an application for consent having being applied for renders a controlled dealing under the Act void for all purposes; being of the view that if it was lapse of the period of six months which makes a controlled dealing void, parliament would not have provided for a window to apply for the consent after the lapse of the six months, I decline to follow those authorities and instead follow the decision in the case of **Gatere Njamunyu vs. Joseck Njue; Nairobi Civil Appeal No. 20 of 1992** where the Court of Appeal held:-

“The agreement does not become binding because consent is given, and there is no appeal against it. The agreement is binding between the parties who make it though it is not enforceable until consent has been given. If consent is refused the dealing in agricultural land becomes void for all purposes under section 6 of the Act. Specific performance cannot be claimed in respect of a dealing which becomes void, only recovery of the consideration paid under the agreement is allowed under section 7.”

30. The reasoning in the case of **Gatete Njamumu** Supra, seems to have been given recognition in the recent case of **David Sironga Ole Tukai vs. Francis Arap Muge & 2 others (2014) e KLR** where the Court of Appeal stated:-

“...The learned authors of THE LAW OF CONTRACT, Butterworths Common Law Series (General Editor, Prof Michael Furmston), 3rd ed. 2007, p. 1000 state as follows regarding

express statutory prohibitions, like those of the Land Control Act:

“Where contracts of a specific type are expressly declared to be illegal by a particular statute, the contract is rendered void and unenforceable from its very inception or formation. There is no need to embark on any inquiry into the legislative intent as such for the very simple reason that the legislative intent is evident from the express language of the statute itself. In other words, while the legislative intent remains crucial, the plain language on the face of the statute itself saves the court the time and trouble of inquiring into the intention of Parliament in so far as that particular statute (or material provision thereof) is concerned.”

The following five fundamental conclusions, in our view, are self-evident and flow directly from the above express provisions of the Land Control Act:

(i) All transactions involving agricultural land situate in a land control area are void for all purposes unless the land control board within that land control area has sanctioned them.

(ii) Even declaration of a trust in agricultural land situated in a land control area is not spared; without consent of the land control board, it is also void.

(iii) Consent of the relevant Land Control Board must be obtained within six months of the making of the agreement relating to agricultural land. The High

Court however has power, for good reason, to extend the period for applying for consent.

(iv) Where the transaction is ultimately void for lack of consent, any money or consideration paid by a would-be purchaser is recoverable as a debt.

(v) It is a criminal offence punishable by imprisonment or fine or both to pay or receive payment in respect of a void transaction or to take possession or remain in possession of land, which is the subject of such void transaction.

The reason behind the above stringent provisions of the Act is to be found, in our view, in the rationale of the land control legislation. Before enactment in its present form, the Land Control Act had existed in one form or another in the colonial period. Writing on a previous version of the same law namely, the **Land Control (Native Lands) Ordinance (No. 28 of 1959)**, the eminent Kenyan legal scholar, the late **Prof. HWO Okoth Ogendo** captured the purpose of the legislation thus:

“The purpose of the Land Control (Native Lands) Ordinance was to protect uninitiated peasants from improvident use of their rights under the new tenure system. Even though individualization was seen as necessary precondition to the planned development of the African areas, it was also appreciated that it could lead to many other problems more difficult to solve than the ones it was intended to eliminate. The Royal Commission had warned, for example, that in many peasant communities individualization had led to ‘the emergence of a chronic state of indebtedness, the continued fragmentation of holdings and the unproductive accumulation and holding of land by a few individuals in circumstances of little income-earning opportunity for those who have parted with the land’ ”. (See TENANTS OF THE CROWN, Acts Press (1991) page 74).”

31. Has the transaction which is the subject of this suit become void" My answer to this question is negative. It remains binding between the parties to it until avoided by any of the parties, either as

contemplated in the agreement executed between them. Although this court cannot enforce it until the consent required under **Section 6** of the Land Control Act is obtained, it nevertheless, cannot relieve parties from the obligations they have imposed on themselves under the agreement that is, the subject matter of the current proceedings, until and unless there is evidence that the parties have no intention of fulfilling their legal obligation under the unenforceable contract.

32. The plaintiff in this suit has indicated that he is still ready and willing to conclude the transaction, although the plaintiff cannot obtain orders of specific performance at this stage of the proceedings, holding that the plaintiff may not obtain the consent through the window contemplated in **Section 8 (1)** would be speculative, and shirking from my obligation to do justice to the parties to this dispute.

33. Is the plaintiff's continued occupation of the suit premises illegal" Having found that under **Section 9(2)** of the Land Act, it is the refusal of an application for consent which renders a controlled dealing void as opposed to lapse of time and that, in view of the foregoing, the current transaction has not become void, I return a negative answer to this question.

Whether this court has jurisdiction to enforce the agreement executed between the parties herein"

34. At this juncture, since the parties to the agreement hereto have not obtained the consent required under **Section 6(1)** of Cap 302, I agree with the submissions by the defendant's counsel that this court lacks jurisdiction to enforce the agreement, at least at this stage. Nevertheless, noting that there is something that can still be done to bring the transaction into conformity with the law, I cannot at this juncture state with finality that at the close of the case, this court will still be without jurisdiction to enforce the agreement.

35. Consequently, I decline to find the current suit to be bad in law, at this juncture.

Dated, signed and delivered at Nyeri this 27th day of May, 2015.

L N WAITHAKA

JUDGE

In the present of:

Mr. Kimunya for the Plaintiff

N/A for the Defendant

Court assistant - Lydia



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