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| Case Number: | Environment and Land Case 804 of 2017 (Formerly Milimani ELC 1402 of 2016) |
| Date Delivered: | 04 Dec 2019 |
| Case Class: | Civil |
| Court: | Environment and Land Court at Kajiado |
| Case Action: | Judgment |
| Judge: | Christine Atieno Ochieng |
| Citation: | Daniel Tumbes Olonapa v Briton (K) Ltd & 2 others [2019] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Environment and Land |
| History Magistrates: | - |
| County: | Kajiado |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Suit allowed |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 804 OF 2017

(Formerly Milimani ELC No. 1402 of 2016)

DANIEL TUMBES OLONAPA.....PLAINTIFF

VERSUS

BRITON (K) LTD.....1ST DEFENDANT

HASSAN AHAMED MAHAMUD.....2ND DEFENDANT

ARALE HASSAN AHAMED.....3RD DEFENDANT

JUDGEMENT

By a Plaint dated the 14th November, 2016 the Plaintiff prays for judgement against the Defendants for:-

- a) An Order of Permanent Injunction restraining the 1st, 2nd and 3rd defendants by themselves or their agents and or servants from subdividing, alienating, transferring and or interfering, or in any way dealing with the resultant subdivisions arising from Land Reference Number KAJIADO/LOODARIAK/4453;
- b) An order for the cancellation and or revocation of Certificate of Title for Land Reference Number KAJIADO/LOODARIAK/4453;
- c) In the alternative and without prejudice to the foregoing, an order of Specific Performance directing the 1st defendant to pay the entire purchase price as stipulated in Clause 1 of the Sale Agreement dated the 25th of January, 2016.
- d) Costs and interest from the date of filing the suit at Court's rate; and
- e) Any other order the court may deem fit.

The Defendants though duly served only entered appearance but did not file their respective Defences. On 22nd August 2018 the Plaintiff sought for judgement to be entered against the Defendants for failing to file their Statements of Defence within the requisite time. The Court entered interlocutory judgment against the Defendants and directed the matter to be set down for formal proof. The matter proceeded for formal proof on 21st May, 2019 with the Plaintiff calling one witness.

Evidence of the Plaintiff

The Plaintiff as PW1 testified that he is the owner of land parcel number Kajiado/ Loodariak/ 4453 hereinafter referred to as the 'suit land'. He confirmed entering into a Sale Agreement dated the 22nd January, 2015 to sell a portion of the suit land to the 1st Defendant at an agreed purchase price of Kshs. 90,000,000/= . Further, that the 1st Defendant was to pay Kshs. 5,000,000/= upon execution of the said Sale Agreement. It was his testimony that the 1st Defendant only paid him Kshs. 920,000/= through his bank account, upon execution of the Sale Agreement but proceeded to enter into a new Agreement with the 2nd Defendant dated the 31st July, 2015 to sell the suit land for Kshs. 70,000,000/= with the 1st Defendant having received the sum of Kshs. 28,000,000/= . PW1 stated that he did not know the 2nd and 3rd Defendants. Further, that after the 1st Defendant's representative had paid the Kshs.

920,000/=, he disappeared. The Plaintiff produced a Copy of the demand letter dated 2nd July, 2016; Copy of the Certificate of Title for Land Reference Number Kajiado/ Loodariak/ 4415; Sale Agreement dated 22nd January, 2015; Copy of the Bank Statement and a Copy of the Agreement/ Consent dated the 3rd August, 2015 as his exhibits.

The Plaintiff thereafter closed his case and filed submissions.

Analysis and Determination

Upon consideration of the Plaintiff's testimony, exhibits and submissions, the following are the issues for consideration:

- Whether the 1st Defendant breached the terms of the Sale Agreement dated the 25th of January 2015"
- Whether the Plaintiff herein merits the reliefs sought against the 1st, 2nd and 3rd defendants"
- Who should bear the costs of this suit"

As to whether the 1st Defendant breached the terms of the Sale Agreement dated the 25th January, 2015. It was PW1's testimony that they entered into a Sale Agreement dated the 25th January, 2015 with the 1st Defendant for the sale of the suit land at a purchase price of Kshs. 90,000,000/=. He stated that the 1st Defendant despite agreeing to pay a deposit of Kshs. 5,000,000/= at the time of execution of the said Agreement failed to do so and only paid Kshs. 920,000/= as evident in the bank statement which was produced as an exhibit. Further, after that its representative disappeared and entered into another agreement with the 2nd Defendant to sell him the suit land. It was PW1's testimony that the 1st Defendant proceeded to subdivide and transfer suit land to the 2nd Defendant. The Plaintiff in his submissions contended that the 1st Defendant was in breach of the Sale Agreement which was valid. He relied on the cases of **Nelson Kivuvani V Yuda Komora & Another HCCC No. 956 of 1991; Total Kenya Ltd V Joseph Ojiem HCCC No. 1243 of 1999; Joseph Kangethe Irungu V Peter Nganga Muchoki (2018) eKLR** and **Hadley V Baxendale** to buttress his arguments.

Section 3(3) of the Law of Contract Act provides that: ' **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:'

It is not in dispute that the Sale Agreement dated the 25th January, 2015 was between the Plaintiff and the 1st Defendant was duly executed by the respective parties. Further, the signatures therein were attested. In relying on the legal provisions cited above, I find that there is indeed a valid contract between the Plaintiff and the 1st Defendant. On the issue as to whether the 1st Defendant breached the terms therein, I wish to make reference to various clauses in the said Sale Agreement.

Clause 3 provides that: '**3.1 The Purchaser shall pay unto the Vendor a sum of Kenya Shillings Five Million (Kshs. 5,000,000) out of the Purchase price as a deposit on 22nd July, 2015. 3.2 The balance of the purchase price shall be paid in instalments within the duration of the agreement specified under clause 5 below. '**

Clause 4 states that: ' **The sale is subject to the law Society of Kenya (LSK) Conditions of Sale (1989) in so far as they are not inconsistent with the conditions contained in the Agreement. '**

Clause 12 is the Default Clause, where the parties agreed as follows: '**Should the purchaser fail to complete this**

transaction after execution of this Agreement by the parties hereto then the Vendor will give a Twenty One (21) days completion notice requiring the Purchaser to complete this transaction and should he fail to do so he will then forfeit 10% of the deposit of the purchase price herein and upon such refund the Parties Advocates shall upon demand return of Title and other completion documents to the Vendor in the same good condition they were in, when received and should the registration of any document or instrument be registered against the title, the Parties advocate shall procure the cancellation of the registration of the said documents (s) such that the Vendor Title reverts to the original position it was in when received in the Parties Advocates offices. ‘

Black’s Law Dictionary 10th Edition defines a breach of Contract as: ‘ **A violation of a contractual obligation by failing to perform one’s own promise, by repudiating it, or by interfering with another party’s performance. ‘**

The Law Society Conditions of Sale, 2015 provides for remedies for breach of Agreement by either party. In instances where a purchaser fails to complete a transaction, the Vendor shall be entitled to serve a notice in writing upon the purchaser requiring the purchaser to complete the said transaction within Twenty One (21) days from the date of the Notice. In the current scenario, the Plaintiff served the 1st Defendant with a notice dated the 22nd of July, 2016 in accordance with Clause 12 on Default, requiring that he pays the balance of the purchase price as the title deed was already in his possession. Further, the said Law Society Conditions of Sale 2015 provides that if a purchaser fails to adhere to the Completion Notice, the Vendor may rescind the Agreement and retain a 10% deposit of the purchase price and accrued interest thereon; sell the property to a third party or claim damages from the purchaser. In this instance, the 1st Defendant failed to even pay the full 10% deposit of Kshs. 5,000,000 on 22nd July, 2015 and only paid Kshs. 920,000 to the Plaintiff.

In the case of **Total Kenya Ltd V Joseph Ojiem HCCC No. 1243 of 1999**; the Court held that:’ **Parties to a contract they have entered into voluntarily are bound by its terms and conditions.’**

It is against the foregoing and associating myself with the legal provisions and decision cited above that I find that the failure by the 1st Defendant to pay the full purchase price and even the full 10% deposit as required in the Sale Agreement dated the 26th January, 2015 amounted to a breach of contract.

As to whether the Plaintiff herein merits the reliefs sought against the 1st, 2nd and 3rd defendants" The Plaintiff sought for various orders including a Permanent Injunction restraining the 1st, 2nd and 3rd defendants by themselves or their agents and or servants from subdividing, alienating, transferring and or interfering, or in any way dealing with the resultant subdivisions arising from Land Reference Number KAJIADO/LOODARIAK/4453; Cancellation and or revocation of Certificate of Title for Land Reference Number KAJIADO/LOODARIAK/4453; or in the alternative an order of Specific Performance directing the 1st defendant to pay the entire purchase price as stipulated in Clause 1 of the Sale Agreement. In his submissions he relied on the case of **Alice Chemutai V Nickson Korir & 2 others (2015) eKLR and Thrift Homes Limited V Kays Investment Limited (2015) eKLR** to canvass the argument that he was entitled to the orders sought in the Plaint since the 1st Defendant had breached the terms of the Sale Agreement. PW1 in his testimony confirmed that the 1st Defendant despite not paying the full purchase price had proceeded to enter into a fresh contract with the 2nd Defendant to sell the suit land for Kshs. 70,000,000/= . Further, that he did not know the 2nd and 3rd Defendants but only discovered they had been sold for this land, after proceeding to the Land Registry to register a Caution on the suit land to safeguard his interests. He further discovered that the 1st Defendant had subdivided and transferred suit land to the 2nd Defendant who had even paid its representative kshs. 28,000,000. In the Sale Agreement dated 26th January, 2015, there was no indication that the purchaser who is the 1st Defendant herein could proceed to sell suit land to a third party before concluding the sale. Further, clause 3.4 was clear that the parties advocates was to retain the title in the vendor’s name until completion of payment to the vendor. At this juncture it is worth noting that the 1st Defendant despite its failure to pay even the full 10% deposit proceeded to deal with the suit land as it wished and transfer it to a third party without consent from the Plaintiff. Since I have already held that the 1st Defendant had breached the terms of the Sale Agreement dated the 26th January, 2015, I find that it did not have any legal capacity to enter into a fresh Sale Agreement with the 2nd and 3rd Defendants respectively. Further, it did not have a good title to pass to the 2nd and 3rd Defendants.

Section 80 of the Land Registration Act which provides that: ‘(1) **Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.**

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence

of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.’

In the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR Justice Sila Munyao held that:

‘ It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows :-

"...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. "I stand by the above words and I am unable to put it better than I did in the said dictum.’

While in the case of *Agnes Naipanoi Pasha Vs Stephen K. Wangombe & 2 others* High Court Civil Suit No. 123 of 2011, Justice Msagha observed that.....’ **The court cannot countenance a situation whereby a party obtains a property through a criminal act, transfer the same to a third party and hold that the third party has a valid title.’**

The Court of Appeal in *Arthi Highway Developers Vs West End Butchery Limited & 6 others* (2015) eKLR, while deciding on the issue of transfer of land by a Vendor possessing a fraudulent title held as follows:.....’ **It is our finding that as between West End and Arthi, no Valid title passed and the one exhibited by Arthi before the trial Court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof...;**

Based on the actions of the 1st Defendant which I have analyzed above, it is my considered view that it should have adhered to the default clause and returned the title of the suit land to the Plaintiff instead of selling the said land to a third party. In the circumstance, and associating myself with the judicial decisions cited above, I hold that that the title held by the 2nd and 3rd Defendants is not a good title as it was passed by a party that did not legally own it. I opine that the said title should hence be cancelled and the register rectified to reflect the name of the Plaintiff who was the original owner of the suit land. In line with the established principles on injunction set out in the case of *Giella Vs. Cassman Brown & Co. Ltd* (1973) EA 358 I hold that the Plaintiff has indeed established a prima facie case to warrant the granting of injunctive orders sought. I will hence proceed to find that the Defendants by themselves or their agents and or servants should be permanently restrained from subdividing, alienating, transferring and or interfering, or in any way dealing with the resultant subdivisions

As who should bear the costs of the suit, since the Plaintiff is the inconvenienced party due to the actions of the Defendants, I find that he is entitled to the costs of the suit.

It is against the foregoing that I find that the Plaintiff has proved his case on a balance of probability and will proceed to enter judgment on his behalf in the following terms:

i. An Order of Permanent Injunction be and is hereby issued restraining the 1st, 2nd and 3rd defendants by themselves or their agents and or servants from subdividing, alienating, transferring and or interfering, or in any way dealing with the resultant subdivisions arising from Land Reference Number KAJIADO/LOODARIAK/4453;

ii. The Land Registrar Kajiado North be and is hereby directed to cancel and or revoke the Certificate of Title for Land Reference Number KAJIADO/LOODARIAK/4453 or any resultant subdivisions therefrom in the name of BRITON (K) LTD; HASSAN AHAMED MAHAMUD and ARALE HASSAN AHAMED and replace the same with the name of DANIEL TUMPES OLONAPA the original proprietor.

iii. Costs of the suit to be borne by the 1st Defendant

iv. Interest on (iii) above from the date of filing the suit at Court's rate

Dated signed and delivered in open court at Kajiado this 4th day of December, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

In the absence of both of parties

Court assistant-.Mpoye



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