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| Date Delivered: | 22 Mar 2022 |
| Case Class: | Civil |
| Court: | Environment and Land Court at Nairobi |
| Case Action: | Judgment |
| Judge: | Jacqueline Akhalemesi Mogeni |
| Citation: | Simon Ngugi Njenga v Tabitha Wanjiku Munyua & another [2022] eKLR |
| Advocates: | Mr. Gacheru for the defendants |
| Case Summary: | - |
| Court Division: | Environment and Land |
| History Magistrates: | - |
| County: | Nairobi |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | - |
| History County: | - |
| Representation By Advocates: | One party or some parties represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 129 OF 2012

SIMON NGUGI NJENGA.....PLAINTIFF

VERSUS

TABITHA WANJIKU MUNYUA.....1ST DEFENDANT

CAROLINE NJANGO MUNYUA.....2ND DEFENDANT

JUDGMENT

1. The plaintiff in this matter seeks the following reliefs:-

i. An order to compel the 1st defendant to sign transfer form for land No. LR Kabete/Kabete/2492 to Simon Ngugi Njenga the plaintiff.

ii. An order to compel the 2nd defendant to remove the caution lodged by her on plot No. LR Kabete/L.Kabete/2492 to facilitate transfer

iii. Cost of the suit and interest.

2. According to the plaintiff on or about April 2008, the Plaintiff entered into a sale agreement to purchase 1/8 acre of Land Reference Number Kabete/Kabete/957, which piece of land was in the process of being sub-divided by the 1st defendant.

3. The piece of land was to be sold for a consideration of Kshs. 300,000 and the parties agreed that the plaintiff had to meet all the disbursements for surveying for the sub-division.

4. After sub-division the 1st defendant identified the plaintiff's piece of land as Land Reference Kabete/L. Kabete/2492 measuring about 0.051 acres. The plaintiff after being shown his land started developing pending transfer. The plaintiff has built a permanent residential house where he resides with this family.

5. The plaintiff conducted an official search of the property on 24/02/2012 at Kiambu Lands Office, he noted that one Caroline Njango Munyua the 2nd defendant herein had lodged a caution on the said plot which has been a hindrance to transfer of the suit property to the plaintiff.

6. The plaintiff avers that the 1st defendant has since declined to sign all the relevant documents to effect transfer of the suit property into the plaintiff's name as required by the agreement without giving any explanation despite having received the full purchase price.

7. The plaintiff further avers that he presented the consent to the land board which was executed for transfer but the defendant declined to sign when the form was presented to her despite the plaintiff having paid the full purchase price.

8. The 1st and 2nd Defendant denied the Plaintiff's claim in a joint statement defendants' defence filed on the 27/04/2012. She

averred that She entered into a Sale Agreement as the Vendor with the plaintiff who was the Purchaser with intention of selling a portion of the suit premises to the plaintiff measuring 1/8 acre, and the 2nd defendant being a beneficiary of the 1st defendant as her daughter, lodged a caution against the suit property. The sale price was to be Kshs. 300,000 and a deposit of Kshs. 182,000 was paid leaving a balance of Kshs. 118,000 which was to be paid on or before 8/05/2008 upon transfer.

9. She contends that the sale was to be subject to Law Society of Kenya Conditions of sale (1989) Edition. She contends that the Purchaser never paid the balance price within 90 days since the agreement was subject to Law Society Conditions of Sale (1989) and that the Purchaser obtained fraudulently the relevant documents including title documents, consents, evidence in form of certificates and receipts for payment of all outgoings and land rent and rates clearance certificates among others in collusion of the Advocates who was acting for both parties in the transaction.

10. Further, the plaintiff claims that the 1st defendant has unjustifiably and wrongfully caused a caution to be registered over the suit land to prevent its transfer to the plaintiff. The defendants refused to remove the caution. It is on the basis of those facts that the remedies referred to hereinabove were sought.

11. The hearing of this suit took place on 29/11/2021 the plaintiff filed his written submissions on 31/01/2022 while 1st and 2nd defendant subsequently filed their submissions on 4/02/2022. The plaintiff avers that the 2nd defendant put a caution on the suit property on 8/06/2011 and on 14/04/2014 the plaintiff got an order to preserve status quo and lifting of the caution by the 2nd defendant.

12. PW1 – Mr. Simeon Ngugi Njenga the plaintiff who was representing himself, testified that on 9/04/2008 he entered into an agreement to buy a piece of land owned by one Tabitha Wanjiku Munyua the 1st defendant herein in Lower Kabete area for Kshs. 300,000. They went to the advocate, and he paid Kshs. 182,000 and the balance of Kshs. 118,000 was to be paid before 08/05/2008. In the agreement the plaintiff was to subdivide the land into three portions which consisted of:

a) 0.054 hectaes

b) 0.051 hectares and

c) 0.088 hectares and a path measuring

d) 0.072 hectares

13. He avers that from the three sections new numbers were allocated as follows 2492, 2491 and 2493. He further contends that the 1st defendant gave him the portion number 2492 and she allowed him to enter and he put up a mabati house and grew some crop.

14. He contends that they then went to the Land Control Board where they were given consent for transfer. He states that after the consent he tried reaching the 1st defendant but never found her. He states that in 2014 he did a search and found the land had a caution by one David Kamau Mwangi ID No. 30948928. He avers that later when he did the search he found that the caution had been removed. In cross-examination by the Advocate for the 1st and 2nd defendant Mr Gacheru, the plaintiff stated that he paid the balance of Kshs. 118,000 but the plaintiff never gave him a receipt but he has a witness who saw him paying. Further he averred that they went to the Chief due to the disagreement about payment and that he went to the Chief to ask him to ask the 1st defendant to oblige to the transfer.

15. He stated that they never varied the terms of the agreement and they never had a disagreement on payment and he also restated that he built a mabati house and his son stayed on the suit property. He testified that he filed the Search though he never served it on the 1st or 2nd defendant.

16. PW2 – Mr Gerald Miano, testified that he was employed by **PW1** and that around April – May 2008 on a Sunday he accompanied PW1 Mr Simeon Mbugua Njenga to the house of 1st defendant one Ms Tabitha Wanjiku Munyua where PW1 gave the 1st defendant Kshs. 118,000. During cross-examination he averred that PW1 never invited him to the chief to give evidence. He reiterated that they went to the house of the 1st defendant in the morning around 7:00 a.m where they found her alone. He stated that PW1 stated that they were in a hurry and that he would go back to later. He identified the house of the 1st defendant to be situated in

Chura at Kabete. At this point the plaintiff closed his case.

17. DW1- Tabitha Wanjiku Munyua –testified that she is a business woman who worked with KSG before retiring. She retired in 1997. She testified that she entered into a Sale Agreement for sale of 1/8 of an acre of land with one Simeon Ngugi Njenga at a consideration of Kshs. 300,000 and on signing the Agreement she received Kshs. 182,000 from the plaintiff in the presence of M.N.Muthanji & Co. Advocates. She contends that the balance of Kshs. 118,000 was to be paid to her before the same advocates. Further that they attended the Land Control Board on 4/03/2010 and got the letter of consent the same day and the title deed and letter of consent was handed over to the Advocate M.N. Muthanji & Co. Advocates on 4/03/2010.

18. She further contends that they agreed that the vendor was to forfeit 10% of the paid up sum should he fail to pay the remaining balance. They further incorporated the Law Society Conditions of Sale (1989), She contends that she is entitled to 10% of paid up sum and rescinding of the agreement since she initiated several attempts for amicable solution but they did not succeed due to frustration by the plaintiff.

19. She avers that the plaintiff failed to clear the outstanding amount and so she refused to transfers the title and instructed her daughter who is a legal beneficiary of the land to lodge a caution against the property to avoid and transaction on the same. She testified that they went before the chief in relation to this matter of sale of land. In cross-examination the 1st defendant admits to receiving Kshs. 182,000 and that she averred that she went to the chief accompanied by two elders who were to listen to the case. In re-examination she testified that the elders found the sale agreement and the surveyor's receipt.

20. DW2– Caroline Njango Munyua testified that the 1st defendant is the registered owner of the suit property. That she was the only child of the 1st defendant and she tills and depends on the land for livelihood and sustenance. She averred that she had lodged a caution on 8/06/2011 to prevent the 1st defendant from selling the suit property which would have deprived here of developments that she had carried out and to render her and her family landless and destitute. In cross-examination **DW2** testified that she got to know that the Land Control Board had approved and given consent for the sale of the suit property. She also testified that here mother who is **DW1** explained to her that she was selling all the land and he lifted the caution because she was ailing and she did not want her other to suffer when she came back from where she had gone for treatment. In being cross-examined further she stated that the plaintiff had an agreement with her mother **DW1** for a sale agreement of only 1/8 of an acre.

21. There was no re-examination and Mr Gacheru closed the defence case.

Analysis and Determination

22. In the Plaintiff dated 14/03/2012, the Plaintiff averred that on 9/04/2008, he executed a contract of sale of a portion of parcel of land known as Kabete/Chura/957 to be hived off 1/8 of an acre.

23. According to the Plaintiff, the purchase price was agreed at Kshs.300,000 and that he paid Kshs.182,000 initially as per the agreement and that he was to pay the balance of Kshs. 118,000 but he took actual possession of the land and commenced developments.

24. It is the Plaintiff's case that the Land Control Board gave its consent for the transfer of the land to him but the Defendant has refused to transfer the land to him. The 1st Defendant also confirmed that the Land Control Board gave its consent on 4/03/2010.

25. The Plaintiff is claiming for an order compelling the Defendant to execute the transfer document so that he can get his piece of land LR Kabete/L. Kabete/2492

26. In her defence, the 1st defendant averred that the Plaintiff never paid the balance of Kshs. 118,000.

Whether the Plaintiff is entitled to the Relief sought.

27. The Plaintiff, PW1, reiterated the averments that are in his Plaintiff. The Plaintiff also produced the sale agreement that he entered into with the Defendant dated 9/04/2008.

28. PW1 also produced in evidence the Title Deed and the official search showing that the 1st defendant is the registered owner of the parcel of land known as Kabete/Lower Kabete/2492 measuring 0.051 Hectares.

29. The 1st defendant has not denied that she sold a portion of the suit property to the Plaintiff. In her defence, the defendant averred that it is the Plaintiff who fraudulently and in collusion with the advocate obtained title documents, consents, and receipts for payment of all outgoing and land rent and rates clearances certificates without paying the balance.

30. This 1st defendant did not call any evidence to support this averment. Further the 1st defendant did not bring any evidence to show fraud and collusion. Section 107 of evidence Act places the burden of proof on he who alleges fraud to prove it. The 1st defendant had the burden to discharge this allegation but she failed to prove the particulars of fraud alleged against the plaintiff. See the case of *Place Investment Limited v Geoffrey Kariuki Mwenda & Another [2015]eKLR*.

31. Further, the Court finds that the Plaintiff has been ready and willing to complete the transfer of the land agreement as shown by his deposit of the purchase price and his testimony of having paid the balance. Whereas the advocate for the 1st defendant in his cross-examination asked the plaintiff to produce the receipt of payment of the balance of Kshs. 118,000 and the plaintiff testified that the 1st defendant never gave him a receipt. I find this line of cross-examination interesting because the plaintiff was never asked to produce the receipt of the initial payment of Kshs. 182,000.

32. DW2 in her testimony stated that the 1st defendant who is her mother had indeed sold to the plaintiff 1/8 of an acre to the plaintiff and the only reason she had put a caveat was to protect her interest but once she realized that the Land Control Board had consented she removed the caution.

33. The plaintiff led evidence with supporting documentation of pictures on the development on the suit property and this evidence was not controverted by either the 1st defendant nor the 2nd defendant.

34. The evidence before me shows that indeed the 1st Defendant should transfer a portion of land LR No. Kabete/L.Kabete/2492 measuring 0.051 hectares to the Plaintiff.

35. This Court therefore finds that the Plaintiff has proved his case on the balance of probabilities and is entitled to the orders sought. This Court accordingly finds judgment for the Plaintiff and orders as follows:

a) An order to compel the 1st defendant to sign transfer form for land No. LR Kabete/Kabete/2492 to Simon Ngugi Njenga the plaintiff within the next 60 days.

b) An order to compel the 2nd defendant to remove the caution lodged by her on plot No. LR Kabete/L.Kabete/2492 to facilitate transfer.

c) Each party shall bear their own costs of this suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 22ND DAY OF MARCH 2022.

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MOGENI J

JUDGE

In the presence of:

N/A for the plaintiff

Mr. Gacheru for the defendants

Vincent Owuor..... Court Assistant



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