



**Ndegwa v Mpaai (Environment and Land Case Civil Suit 88 of 2011)
[2023] KEELC 21098 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21098 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 88 OF 2011
SO OKONG'O, J
OCTOBER 26, 2023**

BETWEEN

TITUS GETHI NDEGWA PLAINTIFF

AND

MOINKE ENE ERNEST MPAEI DEFENDANT

JUDGMENT

Background

1. The Plaintiff instituted this suit on 3rd March 2011 by way of a plaint dated 2nd March 2011. The plaint was amended on 14th April 2011. In the amended plaint, the Plaintiff averred that at all material times, the Defendant was the registered proprietor of the property known as Title No. Kajiado/Kitengela/6895(hereinafter referred to as “Plot No. 6895”). The Plaintiff averred that through an agreement of sale dated 21st April 2005 between the Plaintiff and the Defendant, the Plaintiff purchased from the Defendant a portion of Plot No. 6895 measuring 50 acres.
2. The Plaintiff averred further that through an agreement of sale dated 3rd April 2006 between the Plaintiff’s nominee, Joseph Njoroge Wanguru and the Defendant, the Plaintiff’s said nominee purchased from the Defendant another portion of Plot No. 6895 measuring 20 acres. The Plaintiff averred that the said agreements were in writing and the signatures of the parties in the same were witnessed by an advocate. The Plaintiff averred that he paid the requisite deposits as provided in the said sale agreements and had been in possession and occupation of the purchased portions of Plot No. 6895 since 2005. The Plaintiff averred that the Defendant subdivided Plot No. 6895 into two portions namely, Title Number Kajiado/Kitengela 33257 measuring 70 acres and Title No. Kajiado/Kitengela/33254 measuring 104 acres. The Plaintiff averred that the Defendant was in breach of the terms of the two agreements of sale by failing to provide the Plaintiff with the completion documents including the title deed and the instrument of transfer on receipt of which the Plaintiff was to pay the balance of the purchase price.



3. The Plaintiff averred that the Defendant had on various dates, changed the advocates acting for her in the transaction thereby frustrating the completion of the sale transaction. The Plaintiff averred that he had indicated to the Defendant personally and through his lawyers that he was ready to complete the transaction but the Defendant had failed, refused and/or ignored to respond to his overtures. The Plaintiff averred that the Defendant was planning to sell the suit properties to third parties. The Plaintiff averred that he would suffer irreparable damage and loss unless the court granted the orders sought. The Plaintiff prayed for judgment against the Defendant for:
 - a. An order of a permanent injunction restraining the Defendant from selling, disposing, alienating, offering for sale, charging or transferring the parcels of land known as Title No. Kajiado/Kitengela/33257 and Title No. Kajiado /Kitengela/33254 being subdivisions of Title No. Kajiado /Kitengela/6895.
 - b. An order of specific performance compelling the Defendant to release all completion documents necessary for the transfer of Title No. Kajiado/Kitengela/33257 to the Plaintiff within 7 days of the order against an undertaking from a reputable bank to pay the balance of the purchase price to the Defendant.
 - c. An order that the Deputy Registrar of the court do proceed to execute the instrument of transfer of the said Title No. Kajiado/Kitengela/33257 in favour of the Plaintiff should the Defendant fail to do so within 7 days of the order of the court against an undertaking from a reputable bank to pay the balance of the purchase price to the Defendant.
 - d. Costs of the suit.
4. The Defendant filed a statement of defence on 13th May 2011. The Defendant averred that prior to 7th May 2010, Plot No. 6895 was registered in the name of her deceased husband Ernest Letuya Ole Mpaayei. The Defendant admitted executing the agreements of sale dated 21st April 2005 and 3rd April 2006. The Defendant averred that she was illiterate and as such she was taken advantage of by the Plaintiff. The Defendant admitted that she subdivided Plot No. 6895. She contended however that the property was subdivided pursuant to the orders that were issued in High Court Succession Cause No. 1836 of 2005, In the matter of the estate of Ernest Letuya Ole Mpaayei, deceased. The Defendant averred that the agreements of sale dated 21st April 2005 and 3rd April 2006 were illegal and as such unenforceable. The Defendant averred that she did not sell to the Plaintiff land measuring 106 acres which the Plaintiff had invaded and occupied illegally.
5. On 14th February 2012, the parties entered into a consent on the following terms:
 - “ 1. That the Plaintiff do remain on Title Number Kitengela/33257 currently occupied and developed by himself, the said land comprising 70 acres.
 2. That the Plaintiff do execute withdrawal of caution forms in respect of Title No. Kitengela/33254 within 7 days of adoption of this consent by the court.
 3. That the parties do discuss and reach an agreement with regard to the balance of the purchase price payable to the Defendant in respect of Title Number Kitengela/33257 within 7 days of adoption of this consent by the court, in default of which either party may move the court for assessment of the balance of the purchase price due and payable to the Defendant.
 4. That the Plaintiff to pay the balance of the purchase price agreed between the parties or assessed by the court within 7 days of such agreement or assessment



but only upon receipt of the signed Transfer documents (in triplicate) in favour of the Plaintiff together with the original title in respect of Title Number Kitengela/33257.

5. That upon compliance with the above orders, the entire suit be marked as settled with no order as to costs.”
6. The said consent was adopted as an order of the court on 28th February 2012 and an order was extracted and issued on 29th February 2012. The parties did not agree on the balance of the purchase price and they called upon the court to assess the same. During the assessment, the parties gave evidence in support of their respective positions on the issue.
7. The Plaintiff, Titus Gethi Ndegwa (PW1) told the court that the Defendant was a friend and that she sold to him the two portions of Title No. Kajiado/Kitengela/6895 (hereinafter together referred to as “the suit properties”). He adopted his witness statement as his evidence in chief and produced his bundle of documents dated 23rd November 2017 as exhibits. He stated that he bought the suit properties from the Defendant at a total purchase price of Kshs. 18,500,000/- and that he had paid a total of Kshs. 14,390,000/- at the time of testimony. He stated that balance of the purchase price payable to the Defendant was Kshs. 4,110,000/-. He denied the Defendant’s claim that she had been paid a sum of Kshs. 5,800,000/- only. He stated that he was ready to pay the balance of the purchase price once assessed by the court.
8. On cross-examination, PW1 stated that he had instructed the firm of Walker Kontos to act for him in the matter before his advocates on record. He stated that Plot No. 6895 was initially registered in the name of the Defendant’s deceased husband. PW1 stated that he entered into an agreement for sale with the Defendant on 21st April 2005 in respect of a portion of Plot No. 6895 measuring 50 acres. He stated that there was another agreement between his brother and the Defendant dated 3rd April 2006 for the purchase of a portion of the same plot measuring 20 acres. He stated that that was why he was claiming land measuring 70 acres. He stated that he nominated his brother, Joseph Njoroge Wanguru to purchase the said land measuring 20 acres for him. He stated that Title No. Kajiado/Kitengela/33257 measured 70 acres and included the land that was purchased by his brother.
9. He stated that he had not finished paying the purchase price for the suit properties because the Defendant refused to receive the balance of the purchase price claiming that she was not ready. He stated that the completion date was 14 days after a separate title had been issued and that he did not know when the separate title was issued. He denied that he defaulted in making payment. He stated that it was the defendant who delayed in coming up with the title.
10. PW1 stated that the interest payable on failure to complete the agreements was 24% per annum and that it was up to the court to determine whether he was liable to pay interest to the Defendant. He stated that he had initially placed a caution on Title No. Kajiado/Kitengela/33254 and Title No. Kajiado/Kitengela/33257 and that following an agreement with the Defendant, he retained a caution only on Title No. Kajiado/Kitengela/33257. On re-examination, PW1 stated that the consent they reached with the Defendant was on the assessment of the balance of the purchase price. He stated that the consent did not touch on interest. He stated that the original title deed for Title No. Kajiado/Kitengela/33257 together with the instrument of transfer were not released to him on the basis of which he could have paid the balance of the purchase price.
11. The Defendant, Moinke Mpaai (DW1) gave evidence after the close of the Plaintiff’s case. DW1 adopted her witness statement dated 29th January 2018 as part of her evidence in chief. DW1 produced her bundle of documents dated 29th January 2018 as Defence exhibit 1. She stated that her husband



- died 10 years ago and the suit property was registered in his name. She stated that her husband left her with 7 children. She stated that she had a co-wife who had 9 children. She stated that after the death of her husband she sold the land to the Plaintiff to raise money for school fees for the children.
12. DW1 stated that she sold 50 acres of land and that they went to an advocate known as Naikuni. She stated that she could remember the terms of the agreement. She stated that she sold the land at a price of Kshs. 250,000/= per acre. She stated that the Plaintiff was to pay a total sum of Kshs. 12,000,000/-. She stated that the Plaintiff paid Kshs. 3,000,000/- to Beatrice who was the daughter-in-law of her co-wife. She stated that the Plaintiff made payments in bits thereafter. She stated that the Plaintiff did not complete the payment of the purchase price as a result of which she decided to sell the land to someone else.
 13. She stated that she sold a piece of land measuring 20 acres to a new purchaser who paid Kshs. 3,000,000/- and then disappeared. She stated that the Plaintiff then came and fenced the parcel of land that was sold to him and the one that was sold to the second purchaser. DW1 stated that she wanted the Plaintiff to pay the balance of the purchase price at the existing market rate and if he was unable to pay the same, he should vacate the land.
 14. On cross-examination, she stated that they entered into 3 agreements with the Plaintiff and that the total amount that was payable under the 3 agreements was Kshs. 12,000,000/-. She stated that the Plaintiff made payments as and when he felt like doing so. She stated that she received; Kshs. 300,000/- mentioned in clause 3 (a) of the agreement dated 3rd April 2006 on 8th June 2005, Kshs. 500,000/- from the Plaintiff in the presence of Beatrice on 7th July 2005, and Kshs. 2,500,000/- from the Plaintiff in the presence of an advocate by the name Mr. Aja Olubayi.
 15. DW1 denied receiving a further sum of Kshs. 500,000/- in cash from the Plaintiff on 7th July 2005. She admitted that she received Kshs. 500,000/- from the Plaintiff on 6th January 2006 in the presence of Paul Mpaai. DW1 stated that Beatrice Sintoyia was the wife of the son of her co-wife and she had authorised her to receive payments on her behalf. She stated that she was aware that the Plaintiff issued a cheque of Kshs. 2,700,000/- in favour of Beatrice Sintoyia on 3rd April 2006. She stated that she was not present when Beatrice was said to have received Kshs. 520,000/- from the Plaintiff on 19th November 2005 and a further sum of Kshs. 230,000/-. DW1 stated that she could not recall receiving Kshs. 270,000/- from the Plaintiff on 3rd November 2005. She denied receiving Kshs. 20,000/- from the Plaintiff on 31st October 2005. She stated that she was not aware that Beatrice received a further sum of Kshs. 30,000/- on the same date of 31st October 2005 from the Plaintiff. DW1 denied that on 21st April 2005, a transfer of Kshs. 700,000/- was made to her. She also denied that a sum of Kshs. 2,700,600/- was paid to her on the same date.
 16. On re-examination, DW1 stated that each time payment was made to her, she would acknowledge receipt of the same by signing on the acknowledgment receipt using her thumbprint.
 17. The Defendant's second witness was Paul Mpoyo Mpaai (DW2). DW2 was the son of the Defendant. He adopted his witness statement dated 29th January 2018 as part of his evidence in chief with a slight amendment. He stated that he was residing in Kajiado and not Narok and that the Plaintiff paid a total of Kshs. 6,200,000/- and not Kshs. 5,800,000/- as stated on page 2 of his statement. DW2 stated further that: The agreement dated 21st April 2005 between the Plaintiff and the Defendant had special conditions on how payments were to be made. The Plaintiff paid Kshs. 2,700,000/- only to Beatrice Sintoyia through a banker's cheque. The Plaintiff did not comply with the conditions in the agreement. On 8th June 2005, the Plaintiff paid Kshs. 500,000/= to the Defendant, on 7th July 2005, he paid Kshs.



2,500,000/-, and on 6th January 2006, he paid a further sum of Kshs. 500,000/-. The receipt of all these payments was acknowledged.

18. DW2 stated further that, the payments referred to on page 39 of PEXH. 1 were not made. He stated that the signatures in the document do not belong to Beatrice Sintoyia. He stated that when the Plaintiff defaulted in the payment of the purchase price, they decided to sell another parcel of land measuring 20 acres at a price of Kshs.300,000/- per acre to Joseph Njoroge Wanguru. He stated that there was no indication that Joseph Njoroge Wanguru was a nominee of the Plaintiff or anyone else. He stated that the said Joseph Njoroge Wanguru paid Kshs. 3,000,000/- only. He stated that he failed to pay the balance of the purchase price. He stated that the completion date was 14 days after the subdivision of the main parcel of land.
19. He stated that they obtained a Grant of letters of administration in respect of the estate of his deceased father. He stated that the appointed administrators of the estate were Peris Nashipei Mpaayie and Moinke Ene Mpaai. He stated that the Grant was confirmed thereafter. He stated that the Plaintiff and Joseph Njoroge Wanguru did not complete paying the balance of the purchase price and as such the parcels of land they had bought were never transferred to them. He stated that the Plaintiff fenced the land measuring 50 acres that he purchased and the land measuring 20 acres that was purchased by Mr. Joesph Njoroge Wanguru. He stated that it was at this point that they realised that it was the Plaintiff who had bought the additional 20 acres. DW1 stated that the Plaintiff took possession of the two parcels of land and he was still in possession of the same as at the time of his testimony although he had not completed paying the balance of the purchase price. He stated that the Plaintiff had not deposited the balance of the purchase price with the Defendant or with the Defendant's advocates. He stated that when they tried to discuss and agree on the balance of the purchase price, the Plaintiff wanted to retain the prices of the two parcels of land as of the date of the two agreements of sale while the Defendant wanted the prices based on the value of the land as at the time of the consent that the parties had entered into.
20. He stated that the price of the land in the area was now Kshs. 6,000,000/- per acre and the court should assess the balance of the purchase price based on that rate. He stated that they were prepared to refund to the Plaintiff the payment that he made to them if he could not pay them the balance of the purchase price at the prevailing market rate.
21. On cross-examination, he stated that he was not a party to the agreement dated 21st April 2005. He stated that Beatrice Sintoyia was only paid Kshs. 2,700,000/- by a banker's cheque. He stated that the signature in the diary that was produced in evidence at page 39 of PEXH.1 against the payment of Kshs. 520,000/- did not belong to Beatrice. He stated that the court should assess the amount payable to them based on the current price of land.
22. On re-examination, DW1 stated that there was nothing in the document at page 39 of PEXH.1 showing that the Defendant received any of the payments set out therein.

The Plaintiff's submissions

23. The Plaintiff relied on his submissions dated 22nd August 2016 filed in court on 23rd August 2016. The submissions was filed following the Plaintiff's application dated 11th April 2012 seeking an order that the court assess the balance of the purchase price the parties having failed to agree on the same pursuant to the consent order made on 28th February 2012. The Plaintiff submitted that the total purchase price for the suit properties (Title No. Kajjado/Kitengela/33257) under the 2 agreements of sale dated 21st April 2005 and 3rd April 2006 was Kshs. 18,500,000/- out of which he had paid to the Defendant directly and through her agent Beatrice Sintoyia a total of Kshs. 14,390,000/- leaving a



balance of Kshs. 4,110,000/- due and payable to the Defendant. The Plaintiff gave the particulars of the various payments that he claimed to have made to the Defendant totaling Kshs. 14,390,000/-.

The Defendant's submissions

24. The Defendant filed her submissions dated 3rd November 2022. The Defendant admitted that the total amount that was payable to her for the suit property under the 2 agreements for sale was Kshs. 18,500,000/-. The Defendant denied however that the Plaintiff had paid a total sum of Kshs. 14,390,000/- leaving a balance of Kshs. 4,110,000/- due and payable to her. The Defendant submitted that of all the payments the Plaintiff claimed to have made, the Plaintiff only brought proof in respect of Kshs. 500,000/- paid on 8th June 2005, Kshs. 2,500,000/- paid on 7th July 2005, Kshs. 500,000/- paid on 6th January 2006 and Kshs. 2,700,000/- paid to Beatrice Sintoyia on the instructions of the Defendant. The Defendant submitted that the Plaintiff did not call as witnesses persons who were alleged to have witnessed the other payments allegedly made by the Plaintiff to the Defendant namely, James Sayanga advocate who was alleged to have witnessed the payment of Kshs. 500,000/-, and Beatrice Sintoyia who was alleged to have received a further sum of about Kshs. 3000,000/- from the Plaintiff on behalf of the Defendant. The Defendant submitted that save for the payment that was acknowledged by the Defendant, the authenticity of the cash and other payments receipts of which were allegedly witnessed by the said James Sayanga was questionable. The Defendant submitted that the Plaintiff produced in evidence a copy of his bank statement. The Defendant submitted that according to that statement, the payment made to the Defendant reflected in the said statement was Kshs. 2,700,600/- paid to Beatrice Sintoyia through a banker's cheque. The Defendant submitted that the said payment was admitted by the Defendant. The Defendant submitted that the other payments that were allegedly made to Beatrice Sintoyia were not envisaged in the agreement that the Plaintiff entered into with the Defendant and that the signatures alleged to be of Beatrice Sintoyia in the documents produced by the Plaintiff in evidence were not hers. The Defendant submitted that the alleged payments were also not reflected as withdrawals in the Plaintiff's bank statement. The Defendant submitted that Kshs. 520,000/-, Kshs. 230,000/-, Kshs. 270,000/- and Kshs. 500,000/- were large amounts and as such the Plaintiff should have shown proof of the sources thereof if they were not from his bank account.
25. The Defendant submitted that she only received a total of Kshs. 6,200,000/= from the Plaintiff. The Defendant submitted that the said payment was supported by acknowledgment receipts that were signed by the Defendant and the cheque for Kshs. 2,500,000/-. The Defendant submitted that the burden of proof was upon the Defendant to prove that he made payments to the Defendant over and above these payments that were acknowledged by the Defendant. The Defendant cited Section 109 of the *Evidence Act*, Chapter 80 Laws of Kenya and the case of *Kenneth Nyaga Mwige v. Austin Kiguta & 2 Others* [2015] eKLR in support of this submission. The Defendant submitted that the Plaintiff had a duty not only to produce documents but also to attest to their authenticity and failure to have corroborative evidence rendered the documents and assertions by the Plaintiff hearsay and inadmissible.
26. The Defendant submitted that the Plaintiff had refused to settle the balance of the purchase price. The Defendant submitted that the Plaintiff should pay the remaining purchase price at the existing market rate for land in the area or in the alternative, the Plaintiff should vacate the suit property. The Defendant submitted that the Plaintiff took possession of the suit property immediately after signing the agreement of sale dated 21st April 2005 and had remained in occupation of the land without payment of the purchase price. The Defendant submitted that this conduct amounted to unjust enrichment at the detriment of the Defendant who had been unable to realise any financial gain from the sale of the property.



27. The Defendant submitted that the Plaintiff had come to court with unclean hands as he had all along been stealing a match from the Defendant and should not be allowed to use the court as a weapon to further the injustice. The Defendant submitted that it was in the interest of justice that the court considers that the agreements of sale between the parties were made in 2005 and 2006 and that the Defendant was yet to receive the full payment of the purchase price. The Defendant submitted that the value of the land had increased exponentially over the period of over 17 years that the balance of the purchase price had remained unpaid. The Defendant submitted that the court should consider this fact while assessing the amount owing to the Defendant.
28. The Defendant submitted further that paragraph 5 of the agreement of sale dated 3rd April 2006 provided that interest would be payable at the rate of 24% per annum. The Defendant submitted that since the Plaintiff had not attempted to deposit the admitted amount in court since 28th February 2012 when the parties entered into a consent, the Plaintiff should pay interest on the outstanding amount. The Defendant submitted further that the agreement of sale made on 21st April 2005 was subject to the Law Society Conditions of Sale (1989) so far as they were not inconsistent with the agreement. The Defendant submitted that she was entitled to interest pursuant to condition 8(3) of the Law Society Conditions of Sale (1989).
29. The Defendant submitted that the amount owed to the Defendant according to the contractual purchase price was Kshs. 18,500,000/- less the paid amount of Kshs. 6,200,000/- which left a balance of Kshs. 12,300,000/-. The Defendant submitted that since the Plaintiff had been in occupation of the suit property since 2005/2006, the court should consider the current market price of the land in the area which DW2 had put at Kshs. 6,000,000/- per acre in deciding the amount payable to the Defendant.

Analysis and Determination

30. I have considered the pleadings, the evidence tendered and the written submissions filed by the parties. I am of the view that the issues arising for determination by the court following the consent by the parties adopted by the court on 28th February 2012 are the following;
 - a. How much was paid by the Plaintiff to the Defendant on account of the purchase price for the suit property and what is the balance of the purchase price due and payable by the Plaintiff to the Defendant?
 - b. Whether the Plaintiff should pay interest on the balance of the purchase price found due to the Defendant.
31. I will consider these issues together. The Plaintiff purchased from the Defendant a parcel of land measuring 50 acres through agreement of sale dated 21st April 2005. The agreed purchase price was Kshs. 12,500,000/-. The Plaintiff used a proxy, one, Joseph Njoroge Wanguru to purchase from the Defendant another parcel of land measuring 20 acres through agreement of sale dated 3rd April 2016. The agreed purchase price for this second parcel of land was Kshs. 6,000,000/-. The two parcels of land measured 70 acres and are comprised in Title No. Kajiado/Kitengela/33257 (the suit property). The agreed total purchase price for the suit property was therefore Kshs. 18,500,000/-. This fact is not disputed by any of the parties.
32. The Defendant has urged the court to use the current market value of land in the neighbourhood of the suit property rather than the agreed purchase price when assessing the balance of the purchase price due to the Defendant. In the consent order that was made by the court, what was left for this court to determine was only the balance of the purchase price payable to the Defendant. This court is not



supposed to determine who breached the two agreements of sale between the parties. The parties agreed that the Plaintiff should retain the suit property provided that he pays the balance of the purchase price. This presupposed that the parties did not wish to pursue the determination of the issue whether it was the Plaintiff or the Defendant who breached the two agreements of sale. The court cannot order the Plaintiff to pay the balance of the purchase price at the current market rate for various reasons. First, the court cannot vary the purchase price that was agreed upon by the parties. Secondly, I am of the view that if the Defendant felt that the Plaintiff was in breach of the two agreements of sale or any of them, the Defendant should not have agreed to the consent which in effect granted the Plaintiff an order of specific performance. A party who is in breach of a condition or a term of the agreement of sale is not entitled to an order of specific performance. That is why I have stated above that the consent by the parties presupposed that the agreement remained in force and was enforceable by the payment of the balance of the purchase price. The increase in the value of land is normally considered by the court when assessing damages payable to a purchaser by the vendor for breach of an agreement for sale of land where specific performance cannot be ordered. I am of the view that the Defendant having agreed to perform the agreements, she waived her right to claim damages for alleged breach of the said agreements. The loss that the Defendant may have suffered as a result of the breach of the terms of the two agreements can only be recovered as damages and not by adjustment of the agreed purchase price upwards. Since my role is limited to assessing the balance of the purchase price, I will not venture into the issue of damages.

33. According to the Plaintiff, he paid to the Defendant a total sum of Kshs. 14, 390,000/- for the suit property leaving a balance of Kshs. 4,110,000/- only. The Plaintiff set out the particulars of the payments that he made to the Defendant directly and through Beatrice Sintoyia in his submissions. From the said particulars, the Plaintiff has not set out separately the payments that he made in respect of the first agreement of sale and the second agreement of sale. From the said particulars, the Defendant has admitted receipt of the payments in respect of which she executed acknowledgment receipts and those that were made by cheque. The total payment receipt of which is admitted by the Defendant comes to Kshs. Kshs. 6,200,000/- only. The Defendant denied receiving the payments alleged to have been made to her directly or through Beatrice Sintoyia in cash receipt of which was alleged to have been acknowledged in a copy of a diary that was produced by the Plaintiff in evidence. The Defendant also denied receipt of the cash that was alleged to have been paid to her in the presence of some persons who were not called as witnesses. The Defendant also denied receipt of payment that was alleged to have been made to her through money order.
34. The Defendant averred that the agreement of sale dated 21st April 2005 provided that the Plaintiff would pay the Defendant's daughter-in-law one, Beatrice Sintoyia Kool a sum of Kshs. 3,000,000/- upon the execution of the agreement. The 2nd instalment of Kshs. 3,000,000/- was to be paid on or before 30th June 2005, the 3rd instalment of Kshs. 3,000,000/- was to be paid on or before 30th September 2005 and the balance of Kshs. 3,500,000/- was to be paid upon completion. The Defendant testified that the Plaintiff paid a deposit of Kshs. 2,700,000/- to Beatrice Sintoyia and thereafter, the Plaintiff made payments in bits. She averred that the Plaintiff failed to complete the payment of the purchase price. The Defendant contended that the Plaintiff failed to comply with the conditions of the agreement dated 21st April 2005. The Defendant contended that after the said initial payment made to Beatrice Beatrice Sintoyia of Kshs. 2,700,000/-, the Plaintiff paid to the Defendant Kshs. 500,000/- on 8th June 2005, Kshs. 2,500,000/- on 7th July 2005, and Kshs. 500,000/- on 6th January 2006 which payments were all acknowledged. The total payment received under this first agreement according to the Defendant was Kshs. 6,200,000/- leaving a balance of Kshs. 6,300,000/-. For the agreement dated 3rd April 2006 the Defendant contended that out of the purchase price of Kshs. 6,000,000/-, the Plaintiff's proxy paid a sum of Kshs. 3,000,000/- leaving a balance of Kshs. 3,000,000/- not paid. The



total payment admitted by the Defendant under the two agreements was therefore Kshs. 9,200,000/- leaving a balance of Kshs. 9,300,000/-.

35. I have considered the evidence on record and the rival submissions by the advocates for the parties on this issue. What I need to determine is the amount that was paid by the Plaintiff to the Defendant and the balance which is due to the Defendant from the Plaintiff. In *George Mbiti Kiebia & Another v. Isaya Theuri M'lintari & Another* [2014] eKLR the Court of Appeal stated that:

“Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. How the appellant got registered as proprietor of Land Parcel No. 70 is a fact within the knowledge of the appellant and it was incumbent upon the appellant to dislodge the notion that Land Parcel No. 70 was ancestral clan land and refute that he was not registered as proprietor as a representative of the family of the late M’Kiebia.”

36. The Plaintiff claimed that he paid to the Defendant a total sum of Kshs. 14,390,000/- under the two agreements of sale. When and how the Plaintiff made this payment was a fact within his knowledge. The burden was therefore upon him to prove that he paid to the Defendant the said sum of Kshs. 14,390,000/-. From the evidence on record, it is my finding that the Plaintiff proved payment of Kshs. 6,200,000/- only under the agreement of sale dated 21st April 2005 and Kshs. 3,000,000/- under the agreement of sale dated 3rd April 2006. Since the Defendant denied all the payments allegedly made to Beatrice Sintoyia on her behalf in cash, the Plaintiff had a duty to call the said Beatrice Sintoyia as a witness to prove such payments. The Defendant also denied receipt of the payments that were allegedly made directly to her in cash the particulars of which are set out in a diary that was produced in evidence by the Plaintiff. I have looked at the said diary in which some of the payments alleged to have been made to Beatrice Sintoyia were also captured. I have noted that there are no signatures of Beatrice Sintoyia against some payments while in others, the signatures of Beatrice Sintoyia are different from her other signatures. I have also noted that while some payments are indicated to have been made to the Defendant who is referred to in the document as ‘Mathe’ and ‘Mama’, the Defendant who appears to have been signing documents through thumbprint did not sign against the payments. A part from the foregoing, there was also no proof that the Defendant received a sum of Kshs. 500,000/- in cash at the offices of Ajaa Olubayi Advocates. There was also no proof that the Defendant received another cash payment of Kshs. 500,000/- “on or about” August 2005 in the presence of one, James Sayanga. These people were not called by the Plaintiff to verify the allegation that they witnessed the alleged payments. I am also wondering why the Plaintiff chose to pay in cash over Kshs. 3,000,000/-. The source of this cash was not disclosed. There was also an alleged payment of Kshs. 700,000/- made to the Defendant through money order on 21st April 2005. The Plaintiff produced a bank statement to prove this payment. However, there is nothing in the said statement to show that the payment of Kshs. 700,000/- was made to the Defendant or her agent.
37. Due to the foregoing, it is the finding of the court that the Plaintiff paid to the Defendant a sum of Kshs. 6,200,000/- under the agreement of sale dated 21st April 2005 between the Plaintiff and the Defendant and a sum of Kshs. 3,000,000/- under the agreement of sale dated 3rd April 2006 between the Defendant and Joseph Njoroge Wanguru. The Defendant therefore received a total of Kshs. 9,200,000/- from the Plaintiff on account of the purchase price of the suit property. The balance of the purchase price due and payable by the Plaintiff to the Defendant is Kshs. 9,300,000/-.



38. The two agreements of Sale between the parties were subject to Law Society Conditions of Sale (1989) Edition (LSK Conditions of Sale). Conditions 8(3) and (4) of the LSK Conditions of Sale on payment of interest on the balance of the purchase price provides as follows:

“ 8.

(3) Where the completion is, for any reason whatsoever, other than the default of the vendor or his mortgagee, delayed beyond the completion date, the purchaser shall, subject as is hereinafter otherwise provided, pay to the vendor on completion interest on the balance of the purchase money computed from the completion date until the date of payment of the purchase money in full (both dates inclusive) provided however that, where any portion of the purchase money is secured by an undertaking under the provisions of condition 4(2)(b), interest on the secured balance shall only be payable from the earlier of the following dates, namely:

- a. a date seven (7) days after successful registration of the conveyance; or
- b. a date thirty (30) days after the completion date.

(4) If any payment provided for in the Special Conditions is not paid on the date agreed, on completion the purchaser shall pay to the vendor interest on such payment from the date agreed until actual payment.”

39. The agreement of sale dated 21st April 2005 provided in the Special Conditions how the Plaintiff was to pay the balance of the purchase price. Under this agreement, only the sum of Kshs. 3,500,000/- was payable upon completion. The Plaintiff was supposed to pay a total sum of Kshs. 9,000,000/- by 30th September 2005. From my findings above, the Plaintiff did not pay the purchase price in accordance with the agreement between him and the Defendant which specified dates on which payments were to be made. The Plaintiff is therefore liable under Condition 8(4) of the LSK Conditions of Sale to pay interest to the Defendant on the balance of the purchase price outstanding less the amount that was payable on completion. The balance of the purchase price under the first agreement is Kshs. 6,300,000/- of which a sum of Kshs. 2,800,000/- should have been paid before the completion date. Out of the total purchase price of Kshs. 12,500,000/- under the first agreement, the Plaintiff was supposed to pay a total sum of Kshs. 9,000,000/- by 30th September 2005 leaving a balance of Kshs. 3,500,000/- only to be paid on the completion date. The Plaintiff paid a sum of Kshs. 6,200,000/- only leaving a sum of Kshs. 2,800,000/- unpaid as at that date. Interest shall accrue on this amount of Kshs. 2,800,000/- from 1st October 2005 until payment in full. The interest rate is provided for in Condition 2 of the LSK Conditions of Sale. The parties did not address the court on the applicable interest rate under Condition 2 aforesaid. From my research, the Central Bank Base Rate in October 2005 was 8.19% while the average Commercial Bank Lending Interest rate was 12.97%. I am aware that these rates keep fluctuating. I will apply a flat interest rate of 13% per annum.

40. With regard to the agreement of sale dated 3rd April 2006, again, the parties agreed on how the purchase price of Kshs. 6000,000/- was to be paid. A total sum of Kshs. 3,000,000/- was to be paid by 30th April, 2006 and the balance of Kshs. 3,000,000/- was to be paid on completion against receipt of the title deed



for the property. The Defendant admitted having been paid a total sum of Kshs. 3,000,000/- under this agreement. The court was not told whether the payments were in accordance with the terms of the agreement or not. Due to the foregoing, the Defendant is not entitled to interest on the balance of the purchase price under this agreement.

Conclusion

41. In conclusion the court makes the following orders in the matter:

1. The balance of the purchase price for the suit property payable by the Plaintiff to the Defendant under the agreement of sale dated 21st April 2005 is Kshs. 6,300,000/-. A portion of this balance in the sum of Kshs. 2,800,000/- shall attract interest at the rate of 13% per annum from 1st October 2005 until payment in full.
2. The balance of the purchase price for the suit property payable to the Defendant by the Plaintiff under the agreement of sale dated 3rd April 2006 is Kshs. 3,000,000/- There is no interest payable on this amount.
3. The Plaintiff shall pay to the Defendant the amounts set out in orders (1) and (2) above within 7 days from the date hereof provided the Plaintiff would have received from the Defendant the instrument of transfer of the suit property in triplicate duly signed by the Defendant together with the Original title in respect of Title No. Kajiado/Kitengela/33257 in accordance with the consent order made on 28th February 2012.

DELIVERED AND DATED AT KISUMU ON THIS 26TH DAY OF OCTOBER 2023.

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Mutinda for the Plaintiff

Mr. Oluoch h/b for Mr. Oyatta for the Defendant

Ms. J.Omondi-Court Assistant

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