



**Waweru v Dombido (Environment & Land Case 107 of 2020)
[2023] KEELC 20989 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20989 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 107 OF 2020
EO OBAGA, J
OCTOBER 26, 2023**

BETWEEN

JOSEPH KAIRU WAWERU PLAINTIFF

AND

ISAAC JUMA DOMBIDO DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit against the Defendant in which he sought the following reliefs: -
 - a. An order of specific performance compelling the Defendant to execute all completion documents to facilitate transfer of the land parcel No. Eldoret Municipality Block 16 (Kamukunji) 794 to the Plaintiff.
 - b. An order of eviction directing the Defendant be evicted from the land parcel No. Eldoret Municipality Block 16 (Kamukunji) 794.
2. On 26/8/2016, the Plaintiff entered into a sale agreement with the Defendant in which the Defendant agreed to purchase 1/16th of an acre out of LR. Eldoret/Municipality/Block 16 (Kamukunji)/794 measuring 0.047 hectares at a consideration of Kshs 300,000/= It was a term of the agreement that the Plaintiff was to pay a sum of Kshs 200,000/= upon signing the agreement. The balance of Kshs 100,000/= was to be paid on or before 26th August, 2018. It was a further term of the agreement that possession was to be given upon signing the agreement.
3. As at 26/8/2018 the Plaintiff had not cleared the balance in accordance with the sale agreement. On 19/6/2019, the Plaintiff's lawyer wrote a letter to the Defendant intimating that the Plaintiff had been willing to clear the balance of the purchase price but that it was the Defendant who was declining to receive the balance.



4. During the hearing, the Plaintiff testified that when he got the balance, he took the money to the Defendant who declined to receive the same arguing that he had sold the land cheaply. The Plaintiff took the money to his lawyer's office but the Defendant declined to collect the money from his lawyer.
5. The Plaintiff further testified that despite the agreement stipulating that he was to take possession immediately, he tried to take possession but the Defendant declined to allow him to do so. He stated that he was willing to clear the balance and take his land.
6. On his part, the Defendant testified that following the sale, the Plaintiff took possession and is occupying two rooms where he stays with his two boys. He stated that it is the Plaintiff who is in breach of the sale agreement as he refused to clear the balance.
7. This court directed the parties herein to file written submissions within 14 days from 10/7/2023. A mention was fixed for 25/9/2023. As at 25/9/2023, it is only the Defendant's counsel who had filed submissions. I have considered the submissions by the Defendant. I have also considered the evidence adduced by the parties. The main issue for determination is, who between the Plaintiff and Defendant breached the agreement. the other issue is whether the Plaintiff is entitled to the reliefs sought. The last is the order to be made on costs.
8. On the first issue, the contract between the plaintiff and Defendant was that the Plaintiff was to pay Kshs 200,000/= on signing the agreement and take immediate possession. According to the Defendant, the plaintiff took immediate possession but that he refused to clear the balance. The court directed that the Registrar do visit the suit property and prepare a report on whether there was occupation of the suit property. The Deputy Registrar filed a report in which he stated that there was no occupation of the two rooms but that there was evidence of recent occupation.
9. The balance of Kshs 100,000/= was to be paid on or before 26/8/2016. There is no evidence that the Plaintiff attempted to pay the balance on or before 26/8/2016. Whereas he says that he took the money to the Defendant's home and that the Defendant refused to take it saying that he had sold the property cheaply, he could not remember the date he took the balance to the Defendant. When he finally decided to take the money to his lawyer who wrote to the Defendant, it was almost 10 months later. There was no evidence that the Advocate received the money and issued him a receipt acknowledging the client's money. There is only a letter which was written on 19/6/2019 indicating that the Plaintiff had been refusing to receive the balance.
10. Without any credible evidence of willingness to clear the balance of Kshs 100,00/= there is no basis upon which the court can fault the Defendant. It is the Plaintiff who defaulted in payment of the balance of the purchase price. This being the case, no order of specific performance can be granted.
11. In the case of *Purple Rose Trading Company Limited –Vs- Bhanoo Shashikant Jai* (2014) eKLR it was held as follows: -

“Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim... The moment the Plaintiff went into equity and asked for specific performance, and it was proved that he himself was guilty of the breach of contract... the court of equity would refuse to grant specific performance and would leave the parties to their other rights... When the Appellants came to court seeking the relief of specific performance of the agreement, they had not performed their one essential part of the agreement, namely payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In



these circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice.”

12. Further in the case of *Gatobu M’Ibuntu Karatho –Vs- Christopher Muriithi Kubai* (2014) eKLR, the court cited the High court in Kampala in the case of *Nakana Trading Co. Ltd –Vs- Coffee Marketing Board* 1990 – 1994 EA 448 where it was stated as follows: -

“In contract, a breach occurs when one or both parties fail to fulfil the obligations imposed by the terms since the contract between the parties was reduced into writing, the duty of the court is to look at the documents itself and determine whether it applies to existing facts.”

13. It was incumbent upon the Plaintiff to adduce clear evidence that he was always ready and willing to clear the balance and that it is the Defendant who failed to accept the money. He did not discharge this burden. In his plaint, the plaintiff is seeking to evict the Defendant from the entire parcel yet he only purchased 1/16th of an acre. This cannot happen. I find that the Plaintiff has failed to prove his case on a balance of probabilities. The Plaintiff’s suit is dismissed with costs to the Defendant.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 26TH DAY OF OCTOBER, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

M/s Odhiambo for Mr. Omusundi for Defendant.

Court Assistant –Laban

E. O. OBAGA

JUDGE

26TH OCTOBER, 2023

