



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E178 OF 2021

DAVID WAINANA NG'ANG'A.....PLAINTIFF

VERSUS

EUNICE WANGARI MUIGAI.....DEFENDANT

(Sued as the administrator of the Estate of Muigai Kamwaro)

JUDGMENT

Introduction

1. The Plaintiff filed the suit vide a Plaint dated 24th May 2021. The Plaintiff sought the following prayers against the Defendant;

i. Specific performance to execute the requisite transfer documents in favour of the Plaintiff, in default of appearance by the defendant, the Deputy Registrar or this Honourable Court do execute the transfer documents in favour of the Plaintiff with regard to land parcel LR No 76/687 on behalf of the Defendant;

ii. Costs of this suit herein be in the cause.

2. The Defendant despite being served with all the court process did not enter appearance. Neither did she file a defence. In consequence and pursuant to **Order 10 Rule 9 of the Civil Procedure Rules**, the case was set down for formal proof hearing on 20th December 2021.

The Plaintiff's case

3. **David Wainana Ng'anga** the Plaintiff herein testified and adopted his witness statement and bundle of documents dated 24th May 2021. It was the Plaintiff's case that he entered into an agreement with the Defendant for the sale of **LR No. 76/687**. The agreement was dated 8th April 2003 and it was for a total purchase price of **Ksh 1,500,000/=**

4. It was the Plaintiff's further testimony that in execution of the said agreement, he made payments in two instalments. The first instalment was paid as deposit through his advocates. The balance of the purchase price was paid in cash directly to the Defendant after which the Plaintiff was given the original title documents.

5. The Plaintiff also testified that he had lived on the property since 2005 and made developments on the same. It was further stated that despite the Plaintiff honouring his obligations and being in possession of the suit property, the Defendant has failed to execute the required transfer documents and has remained untraceable to date.

Analysis and Determination

6. Having looked at the pleadings filed herein, the bundle of documents, witness statement and the plaintiff's evidence that was adduced during the hearing and of course the relevant law I must now decide the suit.

7. The main issue for determination is whether the plaintiff has proved his case against the Defendant to the required standard to warrant the granting of the prayers sought.

8. Under **Section 3(3) of the Law of Contract Act**, 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:

9. On face value, the Agreement bears the Plaintiff and Defendant's signatures and was witnessed by **M/S Kiarie Kamere & Co. Advocates**. For this reason, it is clear that the said sale agreement met the threshold stipulated in law. The Court must further bear in mind the intention of parties as set out in the said agreement.

10. The intent of the parties is paramount in the interpretation of provisions of an agreement as courts must be faithful to give them effect. It was held in **Savings and Loan Kenya Limited v Mayfair Holdings Limited [2012] eKLR**:

"... Therefore, the intention of the parties should be construed with reference to the object and the terms of the agreement.

If the words used in the agreement are clear they should be construed in their ordinary meaning so as to establish the intention of the parties."

11. Clause 1 of the Agreement stipulated the deposit amount of **Ksh 500,000/=** was to be paid through the Purchaser/Plaintiff Advocate. This would facilitate the issuance of letters of administration. The balance of **Ksh 1,000,000/=** was to be paid upon the confirmation of grant of administration and execution of transfer.

12. I note that the Plaintiff's testimony during trial averred to payment having been made during two instalments of which no specific amounts were stated. This Court was only furnished with a copy of the cheque of **Kshs 330,000/=** drawn in favour of the Defendant.

13. Additionally, a letter addressed to and acknowledged by the Defendant confirmed an additional payment of **Ksh 20,000/=** in cash. No further evidence of payment was presented to this Court confirming the payment of the remaining balance and hence therefor from the evidence tendered only proof of payment of **Ksh 350,000/=** was demonstrated.

14. It is arguable that the Plaintiff did not complete his obligation under the Agreement. Such a position would trigger the remedies under Clause 9 of the Agreement where the conceived remedies include rescinding the Agreement and the Plaintiff forfeiting the deposit.

15. The Court of Appeal in **Samuel Ngige Kiarie v Njowamu Construction Company Limited & Another [2019] eKLR**, acknowledged that parties to a contract are bound by the terms and conditions stipulated therein. The Court also considered the case of **National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR**:

"... The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved..."

16. In formal proof hearings the burden of proof rests upon the Plaintiff's shoulders. In the case of **Gichinga Kibutha v Caroline Nduku [2018] eKLR**, it was stated that: -

"... The Civil Procedure Rules do not define "Formal Proof". Black's Law Dictionary defines "Formal" as including "rules established by an institution according to certain processes". This particular hearing is for the claimant to prove his claim. It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest..."

17. Although the suit was undefended, the Plaintiff has a duty to formally prove his case on a balance of probabilities as is required by law.

18. In the case of **Kirugi and Another v Kabiya & 3 others (1987) KLR 347** the Court of Appeal held that;

"The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof". Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard."

19. In this regard, in a formal proof hearing, a party with the onus of adducing evidence must produce such sufficient evidence which must satisfy the court as to its truth.

20. In the instant case, while the Plaintiff has proven an existing contractual relationship for the sale of the suit property, he was however not able to prove and demonstrate if at all the remaining balance of the purchase price of the suit property was ever paid in full as was required as per the terms of the sale agreement dated 8th April 2003. As it appears only a sum of **Ksh 350,000/-** out of the total purchase price of **Ksh 1,500,000/-** was paid by the Plaintiff to the Defendant. There was no evidence tendered to specifically demonstrate how the remaining balance of **Ksh 1,150,000/** was paid. For an order of specific performance to issue, the Plaintiff should have undoubtedly performed his obligation as per the terms of the sale agreement.

21. In the end, this Court finds that the Plaintiff has not successfully proved his case to the required standard, the Court declines to grant the prayers sought and consequently the suit stands dismissed with an order that each party bears their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JANUARY 2022

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Kiarie for the Plaintiff.

N/A for the Defendant.

Court Assistant; Caroline Nafuna.