



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 66 OF 2019

PAUL KINUTHIA RUITHAPLAINTIFF

VERSUS

BERNADETTA WAMBUI WANYOIKE1ST DEFENDANT

THE REGISTRAR OF TITLES.....2ND DEFENDANT

JUDGMENT

1. The plaintiff, **Paul Kinuthia Ruita**, is a nephew to the 1st defendant. The 1st defendant was at all material times the executrix of the will of the late **Simeon Wanyoike Kiarie (the deceased)** and personal representative of his estate. The 1st defendant was a widow of the deceased. At all material times, the deceased was the registered proprietor of **Land Reference Number 7497/9 (Original Number 7497/7/9)**, measuring approximately 43.50 hectares [approximately 107.5 acres] [**the suit property**].

2. Through a sale agreement dated 25/5/2007, the 1st defendant agreed to sell to the plaintiff 5 acres that were to be excised out of the suit property. The plaintiff contended that the 1st defendant gave him possession of the 5 acres but only excised and transferred to him 1.75 acres instead of the agreed 5 acres. Consequently, the plaintiff brought this suit through a plaint dated 5/4/2019. The plaint was amended on 9/7/2019. The plaintiff alleged breach of trust and fraud on part of the 1st defendant and sought the following verbatim reliefs against the two defendants:-

- (a) *A declaration that the plaintiff has an equitable claim to 3.25 acres of land comprised in L.R. No. 7497/66.*
- (b) *A declaration that the 1st defendant holds 3.25 acres of land comprised in L.R. No. 7497/66 in trust for the plaintiff.*
- (c) *A declaration that the defendant has breached the said trust.*
- (d) *An order for specific performance directing the defendant to transfer 3.25 acres of land comprised in L.R. No. 7497/66 to the plaintiff and in default, the Registrar of this Honourable Court do execute the necessary transfer papers.*
- (e) *General damages for breach of trust.*
- (f) *General damages for trespass.*
- (g) *Costs.*
- (h) *Interest on (e), (f) and (g) above at court rates.*
- (i) *Any other or further relief that this court may deem fit to grant.*

Case of the Plaintiff

3. The case of the plaintiff is contained in the amended plaint dated 9/4/2019; the witness statement dated 5/4/2019; his oral testimony in court; and the written submissions dated 22/10/2021, filed through the firm of *F Kibiku & Co Advocates*. In summary, his case was that pursuant to the sale agreement dated 25/5/2007, the 1st defendant delivered vacant possession of the 5 acres to him and he had been in peaceful, uninterrupted, and quiet possession of the 5 acres of land since then. He further contended that on or about 22/3/2010, the 1st defendant transferred 1.75 acres of land to him with a promise to transfer the balance of 3.25 acres thereafter. He added that on or about 3/9/2010, the 1st defendant, in breach of trust, fraudulently transferred the 3.25 acres into her name. He itemized various particulars of breach of trust and fraud on part of the 1st defendant. He contended that as a result of the said breach, he had suffered inconvenience and stood to suffer irreversible detriment.

4. During cross-examination by counsel for the 1st defendant, he stated that upon signing the sale agreement, he paid Kshs. 1,500,000/- to the 1st defendant. He added that he wrote to the 1st defendant on 6/10/2009 informing her that the balance was available. It was his evidence that at the time of signing the sale agreement, they had a common firm of advocates, *M/s Njeri Mburu & Co Advocates*. He did not however, have evidence of remittance of the money to the said advocates. He testified that under Clause 5(3) of the sale agreement, the purchaser was entitled to the acreage equivalent to the money paid. He stated that he accepted the conveyance of 1.75 acres on the understanding that the balance was to be conveyed to him subsequently. He confirmed that the 1.75 acres conveyed to him were equivalent to the Kshs. 1,500,000/- paid to the 1st defendant. He also confirmed that he was in possession of the 1.75 acres and the title relating thereto. He further stated that he took possession of the land in 2007 and the 1.75 acres were conveyed to him in 2016.

Case of the 1st Defendant

5. The 1st defendant filed a statement of defence dated 15/5/2019. Accompanying the defence was her witness statement which she adopted as part of her sworn evidence-in-chief. She filed written submissions dated 4/11/2021 through *M/s Mbugua, Atudo & Macharia Advocates*. In summary, her case was that indeed she entered into a sale agreement with the plaintiff, dated 25/5/2007. She, however, denied delivery of vacant possession of 5 acres of land to the plaintiff. She contended that she only delivered to the plaintiff 1.75 acres. She added that during sub-division of the suit property, the County Government of Kiambu demanded that two public roads be carved out of the suit property. She immediately shared this demand with the plaintiff vide a letter dated 17/11/2009 and advised the plaintiff that the sale of 5 acres would, in the circumstances, not be possible and that she would convey to him 1.75 acres which were the equivalent of the money paid by him to her. It was her case that the two parties to the agreement thereafter willingly executed a transfer for the 1.75 acres, conveying the 1.75 acres to the plaintiff and caused a title to be processed and issued to the plaintiff in 2016. It was her case that conveyance of the 1.75 acres to the plaintiff was in tandem with Clause 5.3 of the sale agreement. She added that since November 2009, when she advised the plaintiff that the sale would not go on, there had been no dispute and that the claim herein was brought eight (8) years after expiry of the completion date.

6. In her evidence under cross-examination, she admitted that she signed the handwritten agreement authorizing the plaintiff to take vacant possession of the 5 acres. She added that when the plaintiff started erecting a structure on the suit property in 2009, she instructed their mutual advocates, *M/s Njeri Mburu & Co Advocates*, to write to him advising him to stop and the advocates promptly wrote to him.

Plaintiff's Submissions

7. Counsel for the plaintiff submitted that the plaintiff acquired an equitable interest in the 5 acres the moment the sale agreement dated 25/5/2007 was signed; the deposit of Kshs. 1,500,000/- paid; and possession given to him. Reliance was placed on the reasoning of **Lord Denning** in the case of *Williams v Createx [1956] ALL ER*. Counsel added that in the circumstances, the 1st defendant, as vendor in the sale agreement dated 25/5/2007, held the 3.25 acres in trust for the plaintiff. Counsel relied on *The Halsbury's Laws of England (4th Edition) Vol 48 page 474* and contended that a constructive trust was created in the circumstances of this case. Further reliance was placed on the Court of Appeal decision in the case of *Willy Kimutai Kitilit v Michael Kibet [2018]eKLR* and on the decision of Kemei J in *African Cotton Industries Limited v Rural Development Services Limited (2021)eKLR*.

8. Counsel for the plaintiff further argued that the 1st defendant had a fiduciary duty to transfer the 3.25 acres to the plaintiff but had failed / refused / declined to do so despite the plaintiff being ready and willing to pay her the balance of the purchase price. Counsel contended that the 1st defendant had, in the circumstances, breached the trust.

9. On the plea for an order of specific performance, counsel submitted that the plaintiff was entitled to the relief because he had been in possession of the 5 acres since 2007. Counsel added that once a constructive trust is established, the remedy of specific performance ought to be granted. Reliance was placed on the decision of Munyao J in *Elijah Sadala Msagha v Benedict Mwakio Mchombo & another [2020]eKLR*.

10. On the plea for general damages, counsel submitted that because the 1st defendant breached the constructive trust, she ought to be held liable to pay general damages for the said breach. Reliance was placed on the decision in *Coast Neurology Centre Limited v Mohamed Kasim Bakari & 3 others (2020)eKLR*.

11. On the plea for general damages for trespass, counsel submitted that the plaintiff had proved that on 16/3/2019, the defendant and her agents invaded the 5 acres and erected a barbed wire fence in the middle of the 5 acres. Counsel added that during the disposal of the plaintiff's interlocutory application dated 5/4/2019, the court directed the 1st defendant to remove the said fence but in brazen act of disregard, she refused to do so and as a result of her refusal, the plaintiff pulled down the fence at a cost of Kshs. 10,000/-. Counsel urged the court to make an award for the said sum of Kshs. 10,000/- to the plaintiff. Counsel urged the court to award the plaintiff the sum of Kshs. 500,000/- as general damages for trespass in addition to the award of Kshs. 10,000/-.

1st Defendant's Submissions

12. Counsel for the 1st defendant identified the following as the three issues falling for determination in the suit: (i) *Whether the plaintiff has demonstrated that he has an equitable claim to the 3.25 acres;* (ii) *Whether the 1st defendant holds the 3.25 acres in trust for the plaintiff;* and (iii) *Whether the plaintiff is entitled to the orders sought.*

13. On whether the plaintiff had demonstrated an equitable claim to the 3.25 acres, counsel for the defendant submitted that immediately the 1st defendant learnt of the requirement to make provision for two public roads in the suit property, she instructed their common advocates and their common advocates wrote to the plaintiff on 17/11/2009, advising the plaintiff that the intended sale of 5 acres was not practically possible and offered to convey to the plaintiff the acreage equivalent to the amount of money which the plaintiff had paid. Counsel added that the two parties to the sale agreement thereafter executed conveyancing documents relating to the 1.75 acres. Counsel for the 1st defendant contended that the letter sent to the plaintiff by the 1st defendant amounted to a counter-offer which the plaintiff accepted unconditionally. Counsel added that the acceptance by the plaintiff of the 1.75 acres was an express abandonment of the terms of the contract dated 25/5/2007 and an implied representation to the 1st defendant that he would not pursue the contract dated 25/5/2007 in future.

Relying on the decision in *Kenindia Assurance Company Limited v New Nyanza Wholesalers Limited [2017]eKLR*, counsel submitted that the plaintiff was estopped from going back on his representation which the 1st defendant had acted upon. Counsel added that the plaintiff was bound by the concept of “*consensus ad idem*,” implying that the plaintiff having received the letter dated 17/11/2009 and having voluntarily acceded to its contents, the parties had a meeting of the mind with regard to which transaction was taking place.

14. In the alternative, counsel for the 1st defendant submitted that the plaintiff was bound by Clause 5.3 which provided that in the event of non-completion, the plaintiff would be entitled to acreages equivalent to the amount paid, reckoning the price of one acre at Kshs. 800,000/-. Counsel added that the four year completion period lapsed on or before 25/5/2011 and at that point the plaintiff had paid only Kshs. 1,500,000/- which was equivalent to the 1.75 acres which were conveyed to him. Counsel further argued that the plaintiff never honoured his obligation to pay the entire purchase price within 4 years as required of him.

15. On whether the 1st defendant holds the 3.25 acres in trust for the plaintiff, counsel submitted that there was no basis for implying a trust, contending that the intention of the parties was made clear when the 1.75 acres of land was conveyed to the plaintiff.

16. On whether the plaintiff is entitled to the orders sought, counsel submitted that the plaintiff was not entitled to an order declaring breach of trust because he had failed to establish the existence of a trust. On the plea for an order of specific performance, counsel submitted that after payment of the deposit, subsequent payments should have been made within 4 years but this never happened and the agreement dated 25/5/2007 was subsequently rendered redundant by the subsequent transaction involving conveyance of 1.75 acres to the plaintiff.

17. On the plea for general damages for trespass, counsel submitted that the 3.25 acres were registered in the name of the 1st defendant and it was not possible for the 1st defendant to be a trespasser on land registered in her name. Counsel added that although Clause 6.2 provided for vacant possession upon payment of the deposit, this was subject to the plaintiff paying purchase price within the agreed period. Counsel argued that purchase price was not subsequently paid and the parties mutually agreed to change the terms of the contract. Counsel contended that the plaintiff had failed to prove ownership of the 3.25 acres. Counsel urged the court to dismiss the plaintiff's suit.

Analysis and Determination

18. I have considered the parties' pleadings, evidence and submissions in this suit. I have also considered the relevant legal frameworks, principles of equity and jurisprudence on the key issues that fall for determination in the suit. Parties did not agree on a common statement of issues. Taking into account the parties' pleadings, evidence and submissions, the following are the two key issues that fall for determination in the suit: **(i) Whether in the circumstances of this case, a trust can be properly implied in favour of the plaintiff in relation to the 3.25 acres subject matter of this suit; and (ii) Whether the plaintiff is entitled to the reliefs sought in this suit.** I will make brief sequential pronouncements on the two key issues in the above order.

19. The uncontested facts in this dispute are that the parties executed a land sale agreement dated 25/5/2007 through which the 1st defendant agreed to sell to the plaintiff some 5 acres that were to be excised out of Land Reference Number 7497/69 at a purchase price of Kshs. 4,000,000/-. The plaintiff paid a deposit of Kshs. 1,500,000/- at the time of signing the agreement. It was expressly agreed that the entire balance of the purchase price [Kshs. 2,500,000/-] was to be paid on or before the completion date. The agreed completion date was four (4) years from the date of the agreement [on or about 25/5/2011]. The parties further agreed that for the purpose of the said sale agreement, the advocates acting for both parties were *M/s Njeri Mburu & Co Advocates*. Indeed, the deposit of Kshs. 1,500,000/- was remitted through a banker's cheque drawn in favour of the said law firm.

20. Parties to the sale agreement further expressly agreed that, if for any cause whatsoever, the plaintiff failed to pay the balance of the purchase price as agreed, then the plaintiff would be entitled to purchase the number of acres proportionate to the money already paid to the 1st defendant as at the completion date and the agreed purchase price per acre for that purpose was to be Kshs. 800,000/-. It was also expressly agreed that, if for any cause whatsoever, the sale was to be frustrated by the 1st defendant, then the plaintiff would be entitled to a refund of all the purchase price paid together with a 10% penalty and if the sale was to be frustrated by the purchaser, then the purchaser would forfeit 10% of the purchase price. Lastly, it was agreed that the 5 acres were being sold in vacant possession and the 1st defendant was to give vacant possession of the land to the plaintiff immediately upon receipt of the initial deposit of Kshs. 1,500,000/-.

21. The 1st defendant contends that prior to the completion date and during the exercise of subdivision of the land, the physical planning authorities insisted that provision for two public roads was to be made within the sub-division scheme, making it impracticable to actualize the sale agreement dated 25/5/2007. She contends that through their common lawyer, she wrote to the plaintiff, advising him that owing to the above reason, the offer to sale to him 5 acres would not be met and that she was going to sell to him land equivalent to the money that had already been paid by him. She shared the survey plan with the plaintiff. Further, she advised the plaintiff to stop any further construction on the land with immediate effect.

22. What emerges from the documentary evidence presented by the plaintiff and from the oral evidence of the 1st defendant is that, subsequently, the parties to the sale agreement dated 25/5/2007 executed conveyance instruments relating to 1.75 acres and Land Reference Number 7497/64 measuring 0.7629 hectares (1.725 acres) which was a subdivision out of Land Reference Number 7497/9. The said parcel measuring 1.725 acres was transferred into the name of the plaintiff on 22/3/2016. Missing from the exhibits presented by the plaintiff, however, is the instrument of transfer which would ordinarily contain the agreement of the parties in relation to the transfer of the 1.725 acres. There is however common ground that both parties executed the instrument of transfer.

23. There is no evidence that the plaintiff paid the balance of the purchase price to the parties' common advocates, *M/s Njeri Mburu & Co. Advocates*, within the 4 year completion period. Secondly, there is no evidence to suggest that the plaintiff issued a completion notice to the 1st defendant in tandem with the relevant framework in the Law Society of Kenya Conditions of Sale [1989 Edition] which Clause 10.1 of the sale agreement incorporated into the contract. Thirdly, the plaintiff did not bother to enforce the contract within the limitation period of six years. It is, perhaps, for the above reason that the plaintiff brought a claim in equity urging this court to find that there was a constructive trust in his favour in relation to the 3.25 acres as opposed to bringing a claim to enforce the contract.

24. Is there a proper basis for implying a trust in favour of the plaintiff in the above circumstances? My view is that there is no proper basis for implying a trust. The key obligation of the plaintiff under the sale agreement dated 25/5/2007 was the obligation to pay the agreed purchase price within the agreed time and in the agreed manner. There is no evidence that the plaintiff paid the balance of the purchase price [Kshs. 2,500,000/-] within the 4 years. The parties had a common law firm representing them in the transaction. All that the plaintiff needed to do was to remit the balance of the purchase price to the common law firm on or before the completion date, in tandem with the terms of the agreement for sale. Indeed, the initial deposit of Kshs. 1,500,000/- was remitted through the parties' common law firm. In my view, fulfilment of all his obligations under the sale agreement is what would have created a constructive trust in his favour. There could not have been a constructive trust in favour of a purchaser who had failed to pay the agreed purchase price.

25. The Court of Appeal decision in *Willy Kimutai Kitilit v Michael Kibet [2018]eKLR* which the plaintiff relies on is clearly distinguishable because the purchaser in the *Kitilit case* (supra) had paid the agreed purchase price in full; he had been given possession; and he had been in possession all along. The purchaser in the *Kitilit case* had acquired an equitable interest in the land through payment of the agreed purchase price in full. In the present case, the plaintiff did not pay a penny for the 3.25 acres which he claims is held in trust for him. The plaintiff accepted conveyance of 1.75 equivalent to the sum of Kshs. 1,500,000/- which he had paid to the 1st defendant.

26. The plaintiff urged this court to imply a trust on the basis of the fact that he was given vacant possession upon paying the deposit of Kshs. 1,500,000/-. I cannot do that because what would have created a trust is the payment of the agreed purchase price by the plaintiff. Secondly, parties anticipated breach and agreed on the available remedies for breach, notwithstanding the fact that the plaintiff was being given possession upon paying the deposit of Kshs. 1,500,000/-. It was therefore properly anticipated by the parties that in the event of non-completion, the plaintiff would legitimately be expected to vacate the land.

27. Although the plaintiff withheld from the court the transfer instrument which conveyed the 1.75 acres, it is not lost to the court that the transfer instrument which conveyed the 1.75 acres was in itself a deed of variation of the agreement dated 25/5/2007 to the extent that parties to the instrument of transfer mutually agreed to a conveyance of 1.75 acres instead of the 5 acres that had initially been sold to the plaintiff. If there was no common intention, the plaintiff would have declined to be a party to the conveyance and pursued the remedy of specific performance of the agreement dated 25/5/2007. Similarly, the plaintiff would have pursued the remedy of specific performance of the contract when the 1st defendant, through their common advocates, rescinded the agreement and offered to convey to him only the equivalent of the sum of Kshs. 1,500,000/- which he had paid to her.

28. Further, the court has looked at the letter dated 17/11/2009 which was written by the parties' common advocates. It is clear that the 1st defendant rescinded the agreement dated 25/5/2007. The remedy available to the plaintiff at that point was what the parties had mutually agreed on as damages that would accrue in the event of non-completion. The plaintiff, however, elected not to pursue that remedy and went ahead to execute a conveyance instrument relating to 1.75 acres.

29. The totality of the foregoing is that, I find no basis for implying a constructive trust in the circumstances of this dispute. That is my finding on the first issue.

30. The second issue is whether the plaintiff is entitled to the reliefs sought in this suit. Prayers (a), (b), (c) and (d) relate to declarations and damages for breach relating to the trust which this court was invited to imply. I have already made a finding to the effect that there is no proper basis for implying a trust in the circumstances of this suit. It therefore follows that the plea for those declarations and for damages similarly fails.

31. Prayer (d) is a plea for an order of specific performance. The plaintiff elected not to pursue the contractual remedy of specific performance. That remedy would have been available only if the plaintiff initiated enforcement proceedings within 6 years as stipulated under the Limitation of Actions Act. Counsel for the plaintiff cited the decision in *Elijah Satta Msagha v Benedict Mwakio Mchombo & another [2020]eKLR* in which a Judge of this court held that he would issue an order of specific performance based on a constructive trust. In my view, an order of specific performance relates to specific performance of a contract. Once a contract is found to be unenforceable in a particular context, no enforcement order of the unenforceable contract can be issued in the same context. What would be issued on the basis of a constructive trust are simply equitable orders vesting the land in the name of the purchaser. However, in the present case, I have made a finding to the effect that there is no proper basis for implying a trust. It therefore similarly follows that no vesting order can be issued.

32. On the plea for general damages for trespass, it is clear at this point that the plaintiff never acquired the 3.25 acres. The 3.25 acres were registered in the name of the 1st defendant. The plaintiff only acquired 1.75 acres. No evidence was tendered to suggest that the 1st defendant trespassed on the 1.75 acres which belonged to the plaintiff. The 1st defendant was entitled to fence the 3.25 acres. In the circumstances, the plea for general damages for trespass fails.

33. On costs, the plaintiff and the defendant are close relatives. The original sale aborted because of the demand for two roads in the sui property. Taking into account the background to this dispute, I will not make any award relating to costs.

34. In the end, the plaintiff's suit is dismissed for lack of merit. Parties shall bear their respective costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 28TH DAY OF FEBRUARY 2022

B M EBOSO

JUDGE

IN THE PRESENCE OF: -

MR. KIBIKU FOR THE PLAINTIFF

MS MUCHIRI FOR THE DEFENDANTS

COURT ASSISTANT: LUCY MUTHONI