



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL SUIT NO. 1103 OF 2004

GEORGE NJENGA KAGAI.....PLAINTIFF

VERSUS

SAMUEL KABI NJOROGE DEFENDANT

REVEREND PIUS TEMBO MANGOLI

REVEREND PETER NUTHU MWANGI

(SUING AS THE TRUSTEES OF THE

ASSEMBLIES OF GO NAIROBI).....INTERESTED PARTIES

JUDGMENT

1. The plaintiff has sued the defendant for breach of contract via an amended plaint dated 22nd November 2012. He alleges that he entered into a sale agreement with the defendant to purchase the parcel of land known as Dagoretti/Riruta/4170 measuring 0.25 acres for Kshs. 2,100,000/-; that he was pay a down payment of Kshs.100, 000/- and pay the balance in installments whilst the defendant would sign the transfer form in favor of the plaintiff on receipt of the down payment and also pay all outstanding water and electricity bills, land rent and rates. This agreement was to be formalized before an advocate; that on or about 29th July 2003 and after receiving Kshs.430, 000/- from the plaintiff the defendant obtained the necessary consent from the land control board and transferred the land to the plaintiff.
2. On 24th August 2004 the defendant without any probable cause sought to repudiate the contract and refused any further payments of the remaining balance by the plaintiff acts which the plaintiff claim constitute malicious breach of contract; that the defendant purported to sell the said parcel of land to the interested party without obtaining a consent from the land control board an act he terms void as the suit parcel of land falls within a controlled area; that the sale agreement of 27th August 2004 between the defendant and the interested party is time barred having been overtaken by time and contends that the interested party's occupation of the suit premises was illegal. The plaintiff further claims that he is ready and willing to complete his part of the sale agreement and seeks orders of specific performance compelling the defendant to complete the said sale agreement; an order directing the interested party to vacate the suit premises; general damages and cost of suit; in the alternative the plaintiff claims from the defendant full refund of all the monies paid with interest at 30 % interest rate per annum from 29th July 2003 until payment in full and cost of suit.
3. The defendant denied the plaintiff's claims and put his to strict proof thereof. He admitted that there was a sale agreement but the same was premised on the understanding that time was of the essence with completion of the same set to be within 90-120 days as he needed that money to take

his son to study abroad and the plaintiff was to pay the outstanding balance in lump sum. He argued that the plaintiff paid unreasonable amounts overtime making repudiation of the contract inevitable. The defendant further denied refusing further payment from the plaintiff and obtaining consent from the land Control Board. He denied the particulars of breach as raised by the plaintiff in paragraph 11 and in turn alleged that the plaintiff was the one in breach of the said sale agreement by failing to pay the Kshs.2.1million within the completion period. He sought to repudiate the agreement and indicated that he was agreeable to refund the defendant his deposit.

4. The interested parties on its part denies knowledge of the alleged breach raised by the plaintiff in paragraph 11 and added that by the time it entered into a sale agreement with the defendant on 27th august 2004 the plaintiff did not feature anywhere and the agreement between it and the defendant was subject to the vendor giving them a clear title without encumbrances and thus any sale between the plaintiff and the defendant was excluded and further affirmed that the sale to it by the defendant was valid and that the land consent was not necessary the land did not fall in an agricultural area; that in December 2004 on realizing that there was a pending suit instead of concluding the purchase the plaintiff lodged a caution and went into hiding making it impossible for the defendant to transfer of the suit parcel of land to them. They sought orders that the plaintiff's suit be dismissed; an order directed at the plaintiff to cease interfering with the interested parties occupation, use and enjoyment of the suit land; an order of specific performance compelling the defendant to fully effect the sale transaction between the interested parties and the defendant and cost of suit.

EVIDENCE

5. The plaintiff, George Nyaga testified that on realizing that the defendant was in the process of selling the parcel of land to a third party he register a caution on 25th March 2004 to protect his interest. He denied that the defendant had disclosed the reason for selling the said parcel of land and he had continued paying the installments from time to time which waived the completion period of 90-120 days and that the amount of installments was not agreed upon and the agreement did not specifically provide that time was of the essence. He testified that the defendant did not pay the electricity and water bills during the said period of 120 days and that the interested party entered the said piece of land sometime in 2004 and was still in occupation of the said parcel of land. That the improvements on the land are still semi-permanent structures and nothing had changed. He indicated that it was required of any intending purchaser to do an official search before purchasing a parcel of land and had the interested party done so it would have known there was a caution on the piece of land. That the parties ought to have obtained consent from the Land Control board as Dagoretti was a controlled area and without which he claims the interested party's occupation of the said parcel of land was unlawful and denies the interested party's allegation that instead of completing the transaction he went into hiding. He testified that the outstanding balance was Kshs. 1,670,000/- which he stated was being held by his advocate and should the court give a judgment in his favor he was ready to release it to the defendant. He urged the Court to compel the defendant to complete his part on the sale of the said parcel of land to him.
6. On cross examination by the defendant's counsel the plaintiff reiterated his testimony and denied that he was approached by the defendant in May in 2003 informing him of his intention to sell the suit parcel of land and his reasons for selling the same. He refuted that that they had agreed with the defendant that he would pay the balance of the purchase price in 2 ½ months after paying a down payment of Kshs.100, 000/-. He added that the defendant was to sign the sign the transfer documents on receipt of the Kshs. 100,000/- and before completion of payment of the purchase price. He indicated that he did not know if the consent from the Land Control Board could be obtained fraudulently and without paying the rates but claims that they had obtained consent from the land control board. He also stated that he had paid the defendant Kshs.430, 000/- for the said parcel of land as supported by various documentations he annexed in support of his case. He also admitted that he was informed by his counsel via a letter dated 24/8/2004 that the defendant wanted to rescind the contract and refund the money paid. At that time he denied having instructed his advocate to indicate that he had the money and was ready to complete the purchase.
7. On cross examination by Mr. Jaoko for the interested party. He stated that there were about 6

- temporary iron sheets on the suit parcel of land which belonged to the defendant and that is where the interested party occupied in August 2004 after transforming one of the houses into a church and are still in occupation. On re-examination he reiterated his examination in chief and denied any intentions to defraud the defendant and denied receiving a completion notice.
8. DW1 Samuel Kabi Njoroge adopted his statement dated 24/3/2014 as his evidence in chief and further testified as follows; that the purchase price agreed on was Kshs. 2.1 million and the plaintiff was to pay a down payment of Kshs.1 million and the balance of Kshs.1, 100,000/- was to be paid in installments. He denied signing the sale agreement and could not state for a fact that the signature appearing thereon was forged or not and had not reported the matter to the police as the case in regards to the said parcel of land was still pending in Court. He emphasized that the completion period was 90 days and this period was not extended. He also admitted that on diverse dates he received amount totaling to Kshs.430, 000/- from the plaintiff. He claimed that he had issue the plaintiff with a notice of his intention to cancel the sale but had no proof as the file was stolen when his office was broken into in 2008 and that he had reported the same to the police. He claimed that the only time he went before the land control board was in 1993 when he was selling different plot of land to the plaintiff. He stated that the plaintiff registered a caution on 25/3/2004 on the suit parcel of land when he was still in the process of negotiating with the church. He added that he had an issue with the agreement as it had alterations and further denied that time was not of the essence.
 9. On cross examination by Mr. Jaoko for the interested parties. He admitted to selling the land to the interested parties (Kenya assemblies of God) who were currently occupying the suit parcel of land. On re-examination he affirmed that the sale agreement entered into in writing on 26/03/2003 and that at that time he had not received any money from the plaintiff. He denied going to the land control board with the plaintiff as he would not have entered into a sale agreement with the interested party and that it was his advocate who wrote to the plaintiff's advocate terminating the sale agreement and offering to refund the Kshs.380, 000/- that he had paid. On re-examination he reiterated his testimony.
 10. DW2. Pastor Pius Tembo Mangoi the Secretary and trustee of the Kenya Assemblies of God he adopted his statement dated 15/4/13 in evidence in chief. His evidence was that between March – May 2004 they approached the Samuel Kabi Njoroge for the sale of the land in issue .They agreed on purchase price of Kshs. 2 million. They were to complete payment by adding Kshs. 400,000/-. Samuel wrote to them on the 7th May 2004 seeking to be paid Kshs. 300,000/- to clear with the cautioner. They then entered into the agreement dated the 7th of May 2004. They have been in occupation of the said land from August 2004. He also registered a caution on the 8th of December 2004. On cross examination by the plaintiff's advocate he stated that the church was not aware that the suit parcel of land had been sold to another party; that they did not carry out an official search as they had been assured by the defendant (Mr. Kabi) that the title was clean. There was a delay in the registration of the transfer to the Kenya Assemblies of God and on discovering that there was an issue they registered a caution. He stated that they occupied the said parcel of land in 2003 and only got to hear of the case regarding the suit land in 2013. On cross examination by the defendant's advocate he stated that they had paid Kshs. 2 million directly to the defendant for the purchase of the suit parcel of land but acknowledged that kshs.400,000/- was still owing; that through they had completed the sale the completion documents had been sent to them.
 11. DW3 Reverend Paul Wafula Wawire a pastor at Kenya Assemblies of God adopted his statement dated 15/4/2013 into evidence. He urged the court to find that the payments made were legal and allow them to continue occupying the same. On cross examination by Mr. Oyugi for the plaintiff, he admitted to filing a counter claim and reiterated that he was not aware that the suit parcel of land had been sold to someone else; that it is the advocate who carried out by the lawyer and added that he was not aware that the land was in a controlled area and was not aware if the church appeared before the Land Controlled Board and stated that they had not done any development on the said land. On re-examination DW3 affirmed that there were temporary structures in the said property which were rented out and one that was used for worship. He further added that they had been there for over 10years and affirmed that she did not know whether the land was in a

controlled area or not.

SUBMISSIONS

12. The plaintiff in his submissions reiterated his testimony and highlighted the defendants and interested parties testimony. He stated that though the defendant denied signing the agreement he recognized the sale agreement dated 26th July 2003 and the same was valid as it contained the essential elements of a contract namely; name of parties, purchase price of Kshs. 2,100,000/- and payment of deposit of Kshs.100, 000/- on signing of the sale agreement and it was signed by both parties. This he argues was proof enough that there was an offer and acceptance. He relied on the words of Chitty Treatises on the law of contract 20th Edition at page 390, “*land has a special value, the loss of which the by the party entitled to it cannot be measured by money, so specific performance of a contract either to buy or hire it on lease will almost invariably be enforced...*”

Further

In order to get a decree there must have been (1) a valid contract (2) parties must be ascertained and (3) the property must be sufficiently defined.”

13. He relied on section 6(1) of Cap 302, Land Control Act, which provides that a sale of any interest in land in a controlled area requires the mandatory consent of the board within six months of entering into an agreement. The plaintiff in his bundle of documents has a letter of consent from the land control board which identifies the parcel of land as Dagoretti/Riruta/4170, the suit premises with the defendant as the vendor and plaintiff. He further submitted that the agreement entered into by the interested party and the defendant was null and void and cannot be enforced in law because the defendant admitted in cross examination that he did not apply for consent from the Land Control Board pursuant contrary to Section 9(2) of the Land Control Act. On this he relied on the case of ***Harambee Co-operative Savings & Credit Society –vs- Mukinye Enterprises Ltd [1983] KLR 611***. Where it was held that, “*the transaction between the parties was a controlled transaction and in absence of consent, the transaction was null and void. The provisions of the land and Control Act Cap 302 are clear as to the necessity of the consent and this Court cannot ignore this without doing violence to those words of the Act.*”

14. In response to the question whether time was of the essence. He submitted that in both sale agreements dated 26th July, 2003 and 29th July 2003 there was no provisions that made time of essence in the contract and the completion period of 90-120 days had lapsed as the defendant had accepted payments way after the completion period and this legally waived his right to insist on the completion period. He relied on the words of Halsbury’s Laws of England, 4th Edition, Vol. 9, “*in case where time has been made of the essence of the contract or where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay by a notice from a party who is not in default fixing a reasonable time for performance.*”

15. He relied on the case of ***Wambugu –vs- Njuguna [1983] KLR 172***, it was held that, “*where an agreement does not state that time is of the essence (as was the case here) and neither does not state that time is of the essence, such a vendor having failed to take the necessary steps to make time of the essence has been waived and time can only be made of the essence by fixing a reasonable time.*”

16. He further submitted that the interested party’s occupation was illegal, unlawful, null and void as they did not obtain a consent from the Land Control Board and the said agreement between the defendants and the interested party was incapable of creating an interest in land known in law and hence they had no valid claim on the suit premises as the transaction between them and the defendant was void. He relied on the case of ***Githu vs Kitiba [1990] KLR 634***, where it was held that, “*under the provisions of section 9(2) of the Act, such an agreement shall become void unless the land control area where land is situated has given the necessary statutory consent. As there was no application for consent made to the relevant land Control Board, the respondent had no legal interest capable of registration under the registration of Titles Act (Cap 281).*”

17. The plaintiff further submitted that the interested party cannot seek refuge under the doctrine of a purchaser for value without notice and claim that their defence against him is baseless. He stated that parties are bound by their own contract and Courts of law cannot make it for them and that since the defendant has not pleaded fraud or undue influence and has neither adduced evidence to the contrary. He submitted that the defendant was therefore bound by the terms and conditions save where the same was waived. On this he relied on the case of ***National Bank of Kenya Limited –vs- Pipe Plastic Samkolit and Another [2001] Klr, C.A.*** where it was held, “A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”
18. On general damages he submitted that the plaintiff had been prevented from making any gain from the suit premises and as such he was entitled to general damages as the defendant purported to offer for sale the suit premises knowing that he did not have any sellable interest on the suit premises. He stated that he was ready and willing to complete the sale agreement dated 26th July 2003 and urged the Court to issue eviction orders against the interested party as the same was void and hence the interested parties occupation of the suit premises was illegal and unlawful.
19. The defendant submitted that he had offered to sell the suit parcel of land for Kshs.2.8 million but sometime in April 2003 the plaintiff offered to purchase the suit land for 2.1 million. Since the defendant was pressed for money as he was in the process of sending his son to school in University of Ontario Canada, he agreed. He submitted that contrary to the plaintiff’s allegation that time was not of the essence the agreement was for the plaintiff to pay a deposit of Kshs. 1million and the balance was to be paid in two installments of Kshs. 600,000/- and Kshs.500,000/- but despite the said agreement the plaintiff waited until July 2003 and only offered him Kshs.100,000/- which was given before the agreement was written on the pretext that the Kshs. 1 million would be paid as soon as the same was cleared by the bank but he did not follow through as a result the defendant’s son missed out on his admission. After failing to honor his promise the defendant who was in financial crisis opted to re-sale the suit parcel of land and refund the plaintiff what he had already paid him.
20. He further submitted that the handwritten sale agreement relied on by the plaintiff were drawn by him without the assistance of an advocate and lacked the basic salient and express conditions of sale and also bore different contents and that the same was contrary to the provisions of the Law of contract and Stamp Duty Act Cap 480 section 19. He submitted that the consent purported to have been acquired by him was not valid but a forgery with the same having been applied for on 3rd June 2003 and obtained on 29th July 2003 by advocate E. N. Njuma who was never called to testify and the same was done before any payment had been received by the defendant which was not possible.
21. He further submitted that the law of contract on rescissions allows a vendor to rescind a contract for sale of land on the happening of certain events and in the absence of such the vendor is only to rescind the contract if the purchaser’s condition amounts to repudiation of the contract. He submitted that the plaintiff’s failure to pay the balance of the purchase price as agreed amounted to substantial non-performance or breach by the plaintiff. On this he relied on the case of ***Njamuyu – vs- Nyaga [1993] KLR 282***, where the learned judge quoted from Halsbury’s Law (4th edition p.338, para 482 i.e. “*apart from express agreement or notice making time of essence, the court will require precise compliance with stipulations as to time whenever the circumstances of the case indicate that this will fulfill the intention of the parties.*” In the case of ***Karanja Mbugua –vs- Marybin Holding Co. Ltd [2014] eKlr***” it was held that, “*the legal effect of rescission of a sale agreement is that the parties are restored to their former position. In the present case the pre-contractual position of the parties is that the plaintiffs were the registered owner of the suit premises and the defendant is to be put back into the financial position it was at the time of entering into the sale agreement, and refund any money that it paid under the sale agreement.*”
22. In the case of ***Wambugu –vs- Njuguna (1983) KLR 172***, where it was held that, “*an Order for specific performance cannot be granted to a particular who has not performed his part of the bargain or has failed to show that he was at all time ready and willing and ready to do so. The respondent in this instance made no attempt to perform his obligation to pay the balance of the purchase price for seven years he therefore cannot at this stage to obtain a specific performance*

- transfer of the land.”*
23. On the issue of time being of the essence the defendant submits that the completion period was clearly indicated as between 90-120 days and the surrounding circumstances one being sending his son to the university. On whether there was a breach of the contractual term. He submitted that the plaintiff did not fulfill his obligation on time as stipulated in the sale agreement and was therefore in breach and having been the party in breach the Court cannot compel the defendant to complete his part of the contract as the Court only assists a party in the enforcement of a contract if that party has performed its part. That the relief of specific performance is an equitable remedy accorded at the discretion of the court. He relied on the case of **GITANGA MWANIKI & ANOTHER -VS- MWANIKI & ANOTHER V ANNUCIATA WAITHERA KIBUE [2013]**, where it was held that, and *“the plaintiffs herein did not fulfill their obligations on time as per the terms of the sale agreement. They are in breach and therefore plaintiffs themselves having been in breach of a particular undertaking cannot ask the Court to compel the defendant to complete her part of the contract (sale of agreement). The Court only assists a party in the enforcement of a contract if the party has performed its part of the bargain.”*
24. He also relied on the case of **Gurdev Singh Birdiand Marinder Singh Ghatora and Abubakar Madhuti**; He further submitted that a plaintiff that seeking specific performance must have contracted in good faith. It was his submission that the plaintiff had contravened the doctrine of clean hands and as such the Court should deny him the relief sought.
25. On the claim for damages it was his submission that it is he that has suffered damages and not the plaintiff. He relied on the case of **Stephen John Hooper & Linda Anne Hooper –vs- Beverly Charles Oats Royal courts of Justice Srand, London, wc2a 2LL**, where it was held that, *“the general principles for the assessment of damages is compensatory i.e. that the innocent party is to be placed so far as money can do so, in the same position as if the contract had been performed. Where the contract is for sale, this principle normally leads to assess damages as at the date of the breach...”*
26. The interested parties submitted that the defendant had in his confirmed that he sold the suit property to the interested parties who were in occupation of the same to-date but denied any transactions with the plaintiff; that the contract between them and the defendant satisfied the essentials of a valid contract and they had even paid to the defendant a deposit of Kshs. 2 million. On the issue of consent from the Land Control Board they submitted that it was not possible to obtain the same because of the pendance of the case and the caution lodged by the plaintiff and therefore section 22 and section 9(2) of the Land Control Act Cap 302 could not apply to them. He contends that the purported consent dated 4th June 2003 was applied for 43 clear days before the sale agreement was entered into on 26th July 2003. He submits that the plaintiff’s prayer against the interested party cannot stand as they are purchasers for value without notice. Further they disregard the authorities relied upon by the plaintiff irrelevant and urged the Court to dismiss the plaintiff’s suit with costs and order that the plaintiff cease interfering with the interested party’s

DETERMINATION

The issues for determination are as follows;

- i. Whether there was sale agreement between the plaintiff and the defendant? Was time of essence?
- ii. Whether the interested parties have a valid claim?
- iii. Is the plaintiff entitled to general damages?

27. I have read and considered the parties pleadings, their submissions and authorities relied on. It is not disputed that there was an agreement between the defendant and the plaintiff for the sale and purchase of the suit property. In support of this there is a hand written sale agreement dated 26th July 2003 between the plaintiff and the defendant for the sale of the suit parcel of land. The said agreement gives the purchase price as 2.1 million with agreement that the plaintiff paying a deposit of Kshs.100, 000/- on signing the agreement and the balance of Kshs. 2million as stated in page two was to be completed within 90-120 days and the same would only be extended on agreement and the same is signed by the plaintiff and the defendant. This was followed by the sale

agreement between the parties dated 29th July 2003 the same bears all the contents of the sale agreement dated 23rd July 2003 save for paragraph 5 which though it does not state the completion period as 90-120 days the same states that the installments will be made within the completion period this to me refers to the 90-120 days. From plain reading of the two sale agreements it is clear to me that the completion period being a term in the said sale agreement demonstrates that the same was intended to make time of the essence.

28. In regards to the issue of consent. The consent relied on by the plaintiff from the Dagoretti Land Control Board was applied for on 3/6/2003 and was granted on 4/6/2003 the details contained therein refer to the parties and the suit parcel of land Dagoretti/Riruta/4170. However I find it peculiar that the same was done almost a month prior to the parties entering into a sale agreement on 26th July 2003 while ordinarily in the course of things the same comes after the parties have entered into a sale agreement but within 6 months of the said sale agreement as provided for under section 8 of the land Control Act Cap 302 which provides that;-

- i. *An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:*
- ii. *Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit."*

29. The question then is, was there breach of the sale agreement and if so by whom? The plaintiff had admitted that he only paid Kshs.430, 000/- of the purchase price and did not complete payment of the balance of the purchase price. The completion period was stipulated to be within 90-120 days which lapsed mid December 2003. Thereafter the plaintiff lodged a caution on the suit parcel of land on 21/3/2004. On 27th August 2004 the defendant entered into a sale agreement with the interested parties for the sale of the suit parcel of land and they paid him Kshs.2 million. The defendant made concerted efforts to have the caution lifted to enable him transfer the same to the new purchasers. In what seems as a bid to remedy the situation and urge the plaintiff to lift the caution the defendant's advocate vide a letter dated 6/10/04 wrote to the plaintiff's advocate advising the plaintiff to collect the sum of Kshs. 380,000/- which had been paid by then from the defendant's advocates offices. On 14/9/2004 the plaintiff's advocate wrote to the defendant's intimating that the plaintiff had the money ready to complete his part of the sale agreement and this turned out not to be so but instead on 18th October 2004 the plaintiff sought an injunction order barring the defendant from purporting to sell the suit parcel of land or transferring the same to the interested parties who had already taken possession of the suit parcel and are currently still in possession. All the while the plaintiff claimed to have the money to complete the sale agreement but made no efforts whatsoever to do so. In my view the plaintiff knew he was not ready to complete the transaction a fact he admits during cross examination by the defendant's advocates where he denies instructing his advocate to communicate that he was ready to finalize the contract as was communicated to the defendant via the letter dated 14/9/2004 but opted to drag the defendant along with hopes of obtaining money to complete the transaction in future. In this regards I find that the plaintiff has approached this Court with unclean hands and in the interest of just he is undeserving of the prayers sought. The defendant shall refund the plaintiff the Kshs. 430,000/- he had paid towards the purchase of the suit parcel of land. Being the author of his own misfortune the plaintiff is not entitled to any interest on the same. The caution registered by the plaintiff is therefore vacated and the defendant can sign the relevant forms and make the relevant arrangements to transfer the suit property to the interested parties subject to them finalizing payment of the balance of the purchase and paying the relevant monies in form of taxes under the law. The plaintiff's suit is dismissed with cost to the defendant.

30. Further I find that the interested parties are innocent purchasers for value and should be allowed quiet enjoyment of their interest in the suit parcel of land I therefore order that the plaintiff cease interfering with the interested parties occupation, use and enjoyment of the suit land, I further order the defendant to fully effect the sale transaction with the interested parties to its conclusion. For avoidance of doubt the plaintiff's suit against the interested parties is dismissed with costs.

Orders accordindly.

Dated, signed and delivered this **23rd** day of **January** 2015.

R.E. OUGO

JUDGE

In the presence of:-

.....**For the Plaintiff**

.....**For the Defendant**

.....**For the Interested Party**

.....**Court Clerk**