



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 201 of 2010**

**FREDRICK NYAKANGWA OSORO.....PLAINTIFF**

**-VERSUS-**

**HEZRON MOGERE.....1<sup>ST</sup> DEFENDANT**

**NATIONAL SOCIAL SECURITY FUND, BOARD OF TRUSTEES.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

The present suit was filed by the Plaintiff on 30<sup>th</sup> April, 2010 together with an application seeking an order for injunction. Hon. Justice Mboghohi Msagha heard the interlocutory application and on 27<sup>th</sup> June 2011 made a ruling granting an interim injunction pending the hearing and determination of this suit.

The suit was first listed for hearing before me on 28<sup>th</sup> November, 2012 when all the parties were represented but the 1<sup>st</sup> Defendant's Advocate sought an adjournment on the basis that he 1<sup>st</sup> Defendant had not as yet complied with order II of the Civil Procedure Rules.

I granted an adjournment and made specific directions that the 1<sup>st</sup> Defendant complies with the provisions of order II of the Civil Procedure Rules within 30 days of that date. The parties advocates by consent agreed that the suit be heard on 30<sup>th</sup> & 31<sup>st</sup> January 2013.

In the amended plaint dated 6<sup>th</sup> August 2010 the plaintiff has sought the following orders:-

1. A permanent injunction restraining the Defendants by themselves, their agents, servants employees and/or any other person claiming through them from dealing with, alienating, transferring and/or wasting the property known as title Number Nairobi Block 97/278.
2. A declaration that the 1<sup>st</sup> Defendant is obliged under the terms of the agreement dated 16<sup>th</sup> July 2008 to facilitate the transfer of the property known as Nairobi Block 97/278 to the plaintiff.
3. An order requiring the 2<sup>nd</sup> Defendant to execute in favour of the plaintiff the Transfer document of the property known as Nairobi Block 97/278 and failing which the Deputy Registrar of the High Court of Kenya to execute the documents necessary to effect he transfer.
4. General damages for defamation.
5. General damages for breach of contract

## 6. Costs of the suit and interest thereof.

The record of the court does not show that the 1<sup>st</sup> Defendant filed any statement of defence although he opposed the application for injunction and filed a replying affidavit and submissions in opposition to the application for injunction. The 2<sup>nd</sup> Defendant filed a statement of defence on 3<sup>rd</sup> February, 2011. The 2<sup>nd</sup> Defendant admits that it sold the suit property to the 1<sup>st</sup> Defendant and that the 1<sup>st</sup> Defendant had completed payment for the suit property and that the 2<sup>nd</sup> Defendant was therefore holding the suit property in trust for the 1<sup>st</sup> Defendant as the beneficial owner pending completion of the sale and purchase. The 2<sup>nd</sup> Defendant however, denied any knowledge that the property was awaiting transfer to the plaintiff as a nominee of the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant denied being privy to any agreement between the 1<sup>st</sup> Defendant and the plaintiff.

The suit was listed for hearing before me on 30<sup>th</sup> January, 2013 when the plaintiff attended court and testified in support of his claim. The 1<sup>st</sup> Defendant did not personally attend court but his advocate Mr. Isowe was in attendance. The 2<sup>nd</sup> Defendant was not present and neither was there any representation for them. As the hearing date had been fixed in court on 28<sup>th</sup> November, 2012 in the presence of all the parties the court elected to proceed with the hearing. After the plaintiff testified and was cross examined by Mr. Isowe on behalf of the 1<sup>st</sup> Defendant and re examined by his counsel and the Plaintiff closed his case. Mr. Isowe applied for adjournment of the hearing to enable him to procure attendance by his client who was resident in the USA and further file documents in compliance with previous directions.

Mr. Kerongo Advocate for the plaintiff opposed the application for adjournment on the basis that the 1<sup>st</sup> Defendant's conduct could not entitle him to get the discretion of the court. The 1<sup>st</sup> Defendants had neglected to abide by all the directions given by the court as relates to the preparation and filing of the necessary documents and there could be no justification to allow the 1<sup>st</sup> Defendant to file his witness statement and other documents after the plaintiff had testified and closed his case. The court made a ruling declining to grant adjournment and this prompted the 1<sup>st</sup> Defendants advocate to close the case for the 1<sup>st</sup> Defendant and offer no evidence. Only the plaintiff filed written submissions and on 7<sup>th</sup> March, 2012 the court gave notice that judgment in the matter would be delivered on 22<sup>nd</sup> April, 2012.

In his evidence the plaintiff testified that he and the 1<sup>st</sup> Defendant entered into an agreement of the sale of Title Number Nairobi Block 97/278 whereby the 1<sup>st</sup> Defendant agreed to purchase the said parcel of land for the agreed consideration of Kshs. 1,325,000/= as per the sale agreement dated 16<sup>th</sup> July 2008. The completion of the purchase transaction and payment of the purchase price was to be within 90 days but at the request of the Defendant the plaintiff paid to the 1<sup>st</sup> Defendant an initial deposit of Kshs. 500,000/= to enable the 1<sup>st</sup> Defendant attend to financial obligations that he had. The 1<sup>st</sup> Defendant under the terms of the agreement was to avail the completion documents to enable the transaction to be completed. The plaintiff in the course of the transaction became aware that indeed the 1<sup>st</sup> Defendant had purchased the suit property from the 2<sup>nd</sup> Defendant and that although the 1<sup>st</sup> Defendant had fully paid for the property the 2<sup>nd</sup> Defendant still held the title documents to the property. Indeed the 2<sup>nd</sup> Defendant admitted that the 1<sup>st</sup> Defendant had purchased the property and awaited the resolution of the dispute between the plaintiff and the 1<sup>st</sup> Defendant to release the documents to whichever party is decreed as entitled to receive them.

The plaintiff testified that at the completion of 90 days the 1<sup>st</sup> Defendant had not availed the completion documents and that he on 17<sup>th</sup> October, 2008 made out a cheque for Kshs. 825,000/= being the balance of the purchase price which he placed with their joint advocates M/s Nyaundi Tuiyott & Company Advocates who acted for both parties in the sale to hold as stakeholder and to release to the 1<sup>st</sup> Defendant once the transaction was completed. However the 1<sup>st</sup> Defendant did not avail the completion documents to enable the transaction to be completed and the cheque became stale. The plaintiff replaced the stale cheque by depositing cash with the said firm of M/s Nyaundi Tuiyott & Company Advocates and the 1<sup>st</sup>

Defendant was made aware that the balance of the purchase price was held by the said advocate.

The plaintiff sought completion of the transaction by the 1<sup>st</sup> Defendant but the 1<sup>st</sup> Defendant responded by stating that he was not prepared to proceed with the transaction and unilaterally stated that he was rescinding the sale agreement. The plaintiff was not agreeable to the rescission of the agreement and was insistent on the 1<sup>st</sup> Defendant completing the transaction in view of the fact that he (the plaintiff) had met his side of the bargain. It is during this altercation that the 1<sup>st</sup> Defendant's Advocates on record wrote to the 2<sup>nd</sup> Defendant on 21<sup>st</sup> October, 2009 warning the 2<sup>nd</sup> Defendant regarding the release of the title documents to the Plaintiff who it was alleged had used false pretence. The 1<sup>st</sup> Defendant claimed he was defamed having regard to the contents of this letter in as far as it portrayed the plaintiff as a fraudulent and dishonest person.

The Plaintiff further testified that he paid to NSSF Kshs. 29,135/= which they demanded to enable them release the title documents but the 1<sup>st</sup> Defendant prevented them from releasing the documents to the parties joint Advocates who could have completed the transaction. The plaintiff states that he was left with no other option but to institute these proceedings where he seeks among other orders specific performance of the contract.

I have reviewed the pleadings, the plaintiff's evidence and the plaintiff's advocates submission and now turn to consider whether the plaintiff has proved his case on a balance of probabilities to be entitled to the orders he seeks. The plaintiff framed his statement of issues as follows:

1. Is the 2<sup>nd</sup> Defendant a necessary party of this suit?
2. Did the plaintiff perform his obligations under the agreement dated 16<sup>th</sup> July 2008 and has the plaintiff always been able ready and willing to perform his obligations?
3. Has the 1<sup>st</sup> Defendant arbitrarily attempted to rescind the agreement dated 16<sup>th</sup> July 2008?
4. Is specific performance a suitable remedy in the circumstances?
5. Who is to bear the costs of this suit?

On the first issue I would answer in the affirmative. The 2<sup>nd</sup> Defendant remains the registered proprietor of the suit property and holds the documents of title and has confirmed it holds the documents in trust for the 1<sup>st</sup> Defendant as the beneficiary entitled to them.

On the second issue I would also answer in the affirmative as the only obligation the plaintiff had under the agreement of sale was to pay the purchase price of Kshs. 1,325,000/=. The plaintiff paid the 1<sup>st</sup> Defendant a deposit of Kshs. 500,000/= towards the purchase price and he has placed the balance of Kshs. 825,000/= with the firm of M/s Nyaundi Tuiyott & Company Advocates who both parties used in the sale transaction. The plaintiff demonstrated his ability to pay the purchase price and in fact by depositing the balance of the purchase price the plaintiff was not left with any other obligation under the agreement and the burden fell on the 1<sup>st</sup> Defendant to honour his part of the bargain under the agreement which was to facilitate the release of the title documents from the 2<sup>nd</sup> Defendant and to avail the necessary completion documents to enable the transaction to be completed.

On the issue of the rescission of the agreement dated dd16th July 2008 I am of the view that since the plaintiff had performed and/or demonstrated his ability to perform his obligations under the agreement any rescission of the agreement would have needed to be consensual and the 1<sup>st</sup> Defendant could not have unilaterally rescinded the agreement as he attempted to do. I therefore hold the purported rescission of the agreement by the 1<sup>st</sup> Defendant was ineffectual.

On the issue whether or not the plaintiff would be entitled to an order for the specific performance of the agreement dated 16<sup>th</sup> July 2008 the court notes that the 2<sup>nd</sup> Defendant has confirmed that it holds the title documents to the suit property and would abide with any direction or order issued by the court in regard to the release of the title documents. On the basis of the evidence by the plaintiff which evidence is uncontroverted I find and hold that the plaintiff has demonstrated to this court that he has performed his part of the bargain in terms of the agreement for sale. Applying the principle enunciated in the cases of **OPENDA VS. AHN (1984) KLR 208 and ASSANAND VS. PETTIT (1989) 252** where the courts considered the conditions a party has to satisfy for the grant of the equitable remedy of specific performance I hold that the plaintiff in the present case has fulfilled his part of the bargain as per the agreement and as I do not consider that damages would be an adequate remedy I would in the circumstances of this case grant an order for specific performance.

The plaintiff in his plaint further made claims for damages for defamation and general damages for breach of contract. With respect I consider that the plaintiff's evidence in regard to the defamatory allegations was rather muted and subdued and I am not satisfied there was sufficient evidence to establish the allegation that the plaintiff was defamed.

Equally, I do not consider that the plaintiff would be entitled to any damages for breach of contract in the face of the court's holding that he plaintiff is entitled to an order for specific performance of the contract. At any rate the plaintiff did not lead any evidence to establish that the plaintiff suffered any damages directly attributable to the breach of the agreement to persuade the court to award damages in addition to an order for specific performance of the contract.

In the result and for all the reasons set out above I enter judgment in favour of the plaintiff in terms of prayers 1, 2 and 3 of the Plaintiff's amended plaint dated 6<sup>th</sup> August 2010.

I award the costs of the suit to the plaintiff to be paid by the 1<sup>st</sup> Defendant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF APRIL 2013.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> Defendant