



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 586 OF 2005**

**EUNICE WAIRIMU MUTURI.....1<sup>ST</sup> PLAINTIFF**

**WASHINGTON MUCHII MUTURI.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**MAVJI RAMJI PATEL.....DEFENDANT**

**JUDGMENT**

The plaintiff by a plaint dated 17<sup>th</sup> May, 2005 filed the present suit seeking judgment against the Defendant for:

- a. An order for specific performance compelling the defendant to complete the sale agreement dated 23<sup>rd</sup> September, 2003.
- b. General damages.
- c. Alternatively and without prejudice to the aforesaid prayers a full refund of all the monies paid to the defendant pursuant to the agreement with accrued interest at 30% p.a with effect from 23<sup>rd</sup> September, 2003 until full and final payment.
- d. Costs of the suit.

The defence filed by the Defendant was ordered to be struck out by Hon. Justice Mbogholi Msagha on 20<sup>th</sup> April, 2010 following an application on the part of the plaintiff to have the defence struck out under the provisions of Order VI Rule 13(1) (b) (c) and (d) of the Civil Procedure Rules. In striking out the defence the Honourable Judge observed:-

***“It is clear to me that breach is on the part of the defendant not the plaintiff. It is clear to me also that frustration of the agreement cannot be attributed to the plaintiff at all. It is also clear that the defence raised by the defendant cannot be said to contain any triable issues.***

***In that case therefore, the application by the plaintiff cannot be resisted by the defence filed and replying affidavit that has been sworn by the defendant. On my part, taking all the issues in totality,***

*going by the pleadings herein and the submissions filed by counsel, I find that the defence filed by the defendant on 6<sup>th</sup> September, 2005 does not contain any triable issue. If anything it is intended to delay an early disposition of this suit”.*

Following the striking out of the defence the plaintiff fixed the suit for formal proof hearing and the matter was listed before me on 13<sup>th</sup> March, 2013 when Mr. Washington Muchiri Muturi the 2<sup>nd</sup> plaintiff (after the initial plaintiff was substituted following death) testified on behalf of the plaintiffs. Counsel for the defendant attended the hearing and cross examined the witness on his evidence. The witness testified that he was a co-administrator of his late father’s estate with his mother and that his late father had entered into an agreement for sale with the defendant to purchase from the defendant land Parcel L.R No. 209/1832, Nairobi vide an agreement for sale dated 23<sup>rd</sup> September, 2003. A copy of the agreement was produced in evidence of PEX 2.

Under the agreement the purchase price for the property was Kshs. 10,000,000/= and the plaintiff (purchaser) paid Kshs. 3,000,000/= deposit towards the purchase price to the vendors advocates as stake holder pending completion of the transaction in terms of clause 2 of the Agreement for Sale. The balance of the purchase price of Kshs. 7,000,000/= was to be paid to the vendor on or before the completion date. The completion date was to be 90 days from the date of execution of the Agreement or such other earlier date as the parties may agree in writing. Under special conditions ‘A’ of the Agreement for sale the vendor was required on the completion date to deliver to the purchaser’s Advocates the completion documents as follows: -

- i. Certificate of Title Number I.R No. 18/82 for the property.
- ii. The transfer of the property executed by the vendor in favour of the purchaser (in duplicate)
- iii. The consent of the commissioner of Lands.
- iv. Valid rates clearance certificate.
- v. Valid Land rent clearance certificate
- vi. Stamp duty valuation form duly completed.

The plaintiff testified that the deposit for Kshs, 3,000,000/= was paid by a cheque dated 16<sup>th</sup> September, 2003 in favour of the vendor’s Advocates. A copy of the cheque was produced as PEX3. The plaintiff witness testified that the defendant did not avail the completion documents which the defendant was under an obligation to provide even after he was served with a notice to complete and this prompted the plaintiff to file this suit seeking specific performance of the agreement. The witness testified that the plaintiff was all along ready, able and willing to perform and fulfil his part of the contract. The witness produced a Bank Statement for account No. 0102025240400 held in the name of **GERALD MUTURI MAINA (the Purchaser)** at Standard Chartered Bank, Kenyatta Avenue branch that reflected a credit balance of Kshs. 20,752,830.85/= as at 31<sup>st</sup> January, 2013. Copy of statement produced as PEX4.

The witness further testified that the defence filed by the defendant was ordered to be struck out as it did not raise any triable issue and it was clear that it was the defendant who was in breach of the agreement.

On cross examination by Mr. Kago Advocate for the Defendant the witness acknowledged he did not have a current official search on the property but indicated he was aware there is a caveat registered against the title and that a consent order for status quo to be maintained had been given. The witness clarified the plaintiff did not wish to be refunded the deposit paid towards the purchase but wanted specific performance of the contract of sale.

The parties counsel filed written submissions and on the part of the defendant, the defendant’s counsel in his submissions dealt at considerable length on the circumstances surrounding the sale transaction inter alia the question regarding the extension of the lease and some intended subdivision of the suit property.

The intent and thrust of this line of submissions was to show that the performance of the contract on the part of the defendant was impractical and hence the contract was frustrated. While my view is that Honourable Justice Mboghli Msagha considered these same issues and rejected the same and proceeded

to strike out the defence by the defendant I would further observe that the Agreement for Sale did not contain any provisions related to either renewal of the lease and/or subdivision of the suit property.

Under clause 1 of the agreement for sale the property the subject of the sale is described as L.R. No. 209/1832 Nairobi measuring 0.07461 of an acre or thereabout being the land comprised in the certificate of title dated the 23<sup>rd</sup> August 1974 registered as Number I.R. No. 18/82. Clause 4 of the Agreement for Sale provided that **“The property is sold subject to the matters stated in the memorandum endorsed on the said certificate of Title but otherwise free from all charges, lease or encumbrances”**. According to the plaintiff this agreement for sale was not mutually varied by the parties and the Defendant could not unilaterally vary the same. Approval for the lease extension at any rate had been given in the year 2000 before the parties entered into the sale agreement and under the agreement it was the obligation of the vendor to avail all the necessary completion documents for the transaction as held by Honourable Justice Mboghli Msagha. With respect to the Counsel for the Defendant the submissions tendered on behalf of the defendant is substantially on matters of evidence and facts. The matters and issues that the submission address are the same matters and issues that the parties canvassed before Honourable Justice Mboghli Msagha while arguing the application to strike out the Defendant’s defence. I agree with counsel for the plaintiff that the defendant cannot again submit before me on the same issues that the court has already made a decision on as the same are now res judicata. The Defendant wants to have a second bite of the cherry and I will not permit him to do so.

As this matter stands the Defendant has no defence on record and/or evidence and the court has already made a finding and held that the Defendant was the one who was in breach of the Agreement for Sale. This finding and holding by the court to the extent that the same has not been reviewed, varied and/or set aside remains valid. In my view the only issue that remains to be determined is whether the remedies sought by the plaintiff are available and can be granted.

While counsel for the defendant has through his submissions attempted to introduce the aspect of mistake on the part of the parties to the agreement as a factor that operated to render the agreement voidable, it is my view that there is no basis for such submissions. The Defendant predicates the aspect of mistake on the fact that the defendant was to sell the plaintiff a subdivided portion of the suit property. As I have observed above the signed agreement had no reference to any subdivision and no formal variation of the agreement has been demonstrated. I would in the premises disallow the plea of mistake as an afterthought on the part of the defendant in an endeavour on his part to avoid the consequences of his breach.

I have reviewed and considered the evidence tendered by the plaintiff and observe as follows:-

- i. That the evidence has established that there was an agreement for the sale of the suit property to the plaintiff. The agreement of sale dated 23<sup>rd</sup> September, 2003 was valid clear and plain and properly defined the property. The consideration for the property is not disputed and the plaintiff has demonstrated that he is always ready, able and willing to complete the sale by paying the balance of the purchase price. At the trial the plaintiff through the Bank Statement PE4 demonstrated that the balance of purchase price was readily available.
- ii. That the plaintiff’s obligation under the agreement for sale was to pay the purchase price which he has been ready and willing to pay against the defendant availing the necessary completion documents. The defendant did not avail the completion documents and that precipitated the present suit.

There is nothing the plaintiff has failed to do that he was required to do under the Agreement for Sale. Parties enter into contracts for the sale of Land on the basis that each of the parties will perform their part of the bargain under the contract. Where one party has performed and/or has demonstrated that they have been or are ready to perform their part of the bargain, the court will in a suit for specific performance grant an order for specific performance requiring the opposing party to perform their part of the contract in completion of the transaction.

In this suit the plaintiff has made a claim for general damages in addition to the prayer for specific performance. The plaintiff did not provide any basis upon which general damages would be paid to him.

The plaintiff's counsel in the filed submissions did not address this aspect of the plaintiff's claim and the court does not consider that the plaintiff would be entitled to an award of general damages in a suit such as this one founded on breach of contract. I disallow the plaintiff's claim under this end.

In the result I enter judgment in favour of the plaintiff as against the defendant on the following terms:-

- a. An order be and is hereby issued for specific performance requiring the Defendant within 30 days from the date of this judgment execute all the necessary documents to effect the transfer of L.R No. 209/1832 Nairobi to the plaintiff and in default the Deputy Registrar of the court to execute in place of the defendant.
- b. The plaintiff be and is hereby directed to within 30 days from the date of this judgment deposit the sum of Kshs. 7,000,000/= being the balance of the purchase price in court to be released to the defendant upon confirmation of the registration of the transfer in favour of the plaintiff.
- c. The costs of the suit to be paid to the plaintiff by the Defendant.

Orders accordingly.

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

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the Plaintiffs

..... for the Defendant