



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Civil Case 3 of 2005

FRANCIS KANG'ETHE WARAI..... PLAINTIFF

V E R S U S

EMMANUEL NAKITARE..... 1ST DEFENDANT

PAMELA WAVOMBA..... 2ND DEFENDANTS

J U D G E M E N T

On the 29th of January 2007 the parties to this suit did file a consent letter in which the suit was consolidated with two other cases, namely;

(i) HARVATSINH M. VAGHELA & ANOTHER Vs EMMANUEL W. NAKITARE & ANOTHER, KAKAMEGA HCCC. NO. 4 OF 2005; and

(ii) BHIKHALAL JADAVBHAI PATEL & ANOTHER Vs EMMANUEL W. NAKITARE & ANOTHER, KAKAMEGA HCCC NO. 9 FO 2005

It was also a term of the said consent, that the findings in this case would be binding on the other two cases which had been consolidated with it.

In his claim, the plaintiff seeks an order to compel the defendants to specifically perform their part of the contract of sale. In particular, the plaintiff asks the court to compel the defendants to sub-divide the plot L.R. NO. KAKAMEGA MUNICIPALITY/BLOCK 111/97, and to thereafter execute transfer forms in favour of the plaintiff, in respect of the portion which the plaintiff had not only agreed to buy, but for which he had paid the agreed consideration.

In answer to the claim, the defendants denied that the claim for specific performance was sustainable. Instead, they indicated a willingness to refund the money which the plaintiff had paid because, in their view, the contract between the parties herein had been altered by circumstances beyond their control.

It is common ground that the Agreement for Sale was dated 11th October 2002, and that it was executed by all the parties thereto. In the Agreement, the defendants were the vendors, whilst the plaintiff was the vendee.

By the Agreement, the plaintiff was buying a portion of land which was to be carved out from L. R. NO. KAKAMEGA MUNICIPALITY BLOCK 111/97. The portion which the plaintiff was buying was identified as;

“measuring 0.061 hectares or thereabouts or more particularly that portion of land reflected and marked on the attached sketch plan as “A” absolutely free from any encumbrances.”

The agreed purchase price was KShs.720,000/=.

It is common ground that the defendants received payment of the agreed purchase price. However, the defendants had not transferred to the plaintiff, the parcel of land which he was buying.

It is the plaintiff’s case that the defendants did not offer any explanation for their failure to transfer the portion of land which the plaintiff had paid for. Therefore, the plaintiff believes that there was no good reason for the defendants’ failure to transfer the property, especially after the defendants had applied for and obtained consent to sub-divide the land.

The plaintiff produced a Notification of Approval dated 1st September 2004. The said Notification was issued by the Municipal Council of Kakamega.

A few days before the Council gave its Notification, the Ministry of Roads and Public Works had written a letter to the Kakamega Town Clerk, informing him that the Ministry had no objection to the sub-division of BLOCK 111/97.

After the Ministry had indicated that it had no objection, and also after the Council had issued a Notification of approval to the sub-division, the plaintiff received a letter from the defendants, dated 19th October 2004. By that letter, the defendants told the plaintiff that the survey work was complete, on the ground. The defendants were then only waiting for a lay-out plan, which would have the exact measurements of the plot.

Although that is what the plaintiff said in his oral evidence, a reading of the letter dated 19th October 2004 reveals that as at that date, the 1st defendant already had the lay-out plan which had the exact measurements of each of the plots which were being carved out from BLOCK 111/97.

As at that date, what was pending, according to the 1st defendant, was the submission of the actual survey plan, which was then scheduled for 25th October 2004.

The 1st defendant’s letter of 19th October 2004 did contain a request to the plaintiff to pay to the defendants, the sum of KShs.72,000/=, which sum was described as “penalty fee.”

It is the plaintiff’s understanding that no penalty fee was payable by him, to the defendants, because he had paid the full purchase price.

During cross-examination, the plaintiff clarified that L.R. NO. KAKAMEGA BLOCK 111/97 (which shall hereinafter be cited as “Parcel No.97”) was to have been sub-divided into 10 plots. Out of the said 10 plots, the plaintiff was supposed to buy the plot marked “A” on the sketch map.

The plaintiff conceded, during cross-examination, that although the sketch map had 10 plots, plans which were approved by the Municipal Council of Kakamega had only 6 plots. He also admitted that the position of the road on the approved plan was different from the position it was on in the sketch plan.

When he was asked who were the advocates acting for the buyers, (including himself), and the defendants, the plaintiff said that they had a common advocate, Messrs Shitsama & Company.

Their said common lawyer did chair a meeting between the buyers and the defendants on 21st October 2003. The plaintiff was one of the buyers who attended the meeting. After the said meeting the firm of Shitsama & Company Advocates wrote to, amongst others, the plaintiff on 22nd October 2003. By that letter, the advocates noted that the following issues had been agreed upon:

“1. That the said sale Agreement be reviewed.

2. That Mr. Nakitare meets the Stamp Duty for the transfer of the property into his names from Kenya Commercial Bank Ltd.

3. That the price of the plots to be increased or decreased proportionate to the increase or decreased in size consequent upon the said plots being reduced from the original 10 to 6 and further taking into account the new concept on the road reserve.

4.

5.

6. That a revised Sale Agreement for each of the parties be drawn to reflect the above adjustments.

7.

8.

9.

Kindly confirm that the above reflects the true position of what was agreed upon. If there are any amendments and or additions to be made feel free to let me have them for incorporation in the next revised Agreement.”

When he was testifying in court, the plaintiff said that the contents of the letter reflected the discussions at the meeting, but not what was agreed.

But when pressed further, the plaintiff said that the lawyer did ask those who had attended the meeting to either confirm or deny the accuracy of the record. Notwithstanding the plaintiff’s said understanding, he neither denied nor confirmed the accuracy of the contents of the letter dated 22nd October 2003.

In my understanding of the law, documents speak for themselves. And in this instance, the lawyer acting for both the buyers and the defendants made it clear in his letter dated 22nd October 2003, that after a 3 – hour meeting, the persons who attended the said meeting reached the agreements spelt out in the said letter.

Surely, if any of the persons who attended the said meeting did not feel that the contents of the letter under reference constituted a true record of what was agreed upon, the easiest thing would have been to say so, at that time.

Having failed to do so, at that time, the plaintiff’s contention, during the trial, that the letter reflected only the discussions but not what was agreed upon, can only be seen, by the court, as a belated attempt to wiggle out of what had indeed been agreed upon.

I am fortified in my said finding, by what transpired after the defendants and the buyers held a meeting on 8th April 2004. That meeting was also held under chairmanship of the advocate who was representing both the buyers and the defendants.

After the meeting, the lawyers wrote to the plaintiff, the 1st defendant and the other buyers, on 13th April 2004.

The plaintiff confirmed to this court that he did attend the meeting in question. He also confirmed having received a copy of the letter dated 13th April 2004.

The firm of Shitsama & Company Advocates stated, inter alia, that the meeting held on 8th April 2004 agreed on the following issues;

1. ***The earlier existing Sale Agreements were to be revised to reflect the new measurements for each of the plots.***
2. ***The sizes of the Plots had increased from the original 0.061 hectares to 0.074 hectares each.***
3.
4.
5. ***The revised price of each of the plots to be in direct proportion to the increase in size of each of the plots in relation to the price reflected in the earlier Sale Agreements.***
6.
7. ***The resolutions made at the earlier meeting of 21.10.2003 do remain in force and or binding subject to the new terms/condition herein above stated.***
8.
9.

If you are not in agreement with any of the above Clauses do let us know as soon as possible otherwise it will be assumed that the above represents what was discussed and agreed at the meeting held on 8.4.2004.”

In my considered opinion, as the plaintiff appreciated the fact that he would be deemed to have acknowledged the letter dated 13th April 2004 to be a true and accurate record of what transpired at the meeting held on 8th April 2004, if he did not notify the lawyer (Mr. Shitsama) of his disagreement, the plaintiff must be held to have accepted the accuracy of the letter dated 13th April 2004.

Even though the plaintiff readily admitted, when he was giving evidence, that the size of the plot he was buying had increased in size, he insisted that he was still entitled to an order of specific performance. His stated position was that the defendants could still curve out 0.061 hectares.

After the plaintiff closed his case, the 1st defendant gave his evidence. He explained that although he had been desirous and ready to sell the 10 plots as shown on the sketch plan attached to the Sale Agreement, the Municipal Council of Kakamega did not approve the plans. The reason for the Council’s refusal to approve the plans, was that the same had not been prepared by a qualified physical planner.

The 1st defendant said that when he sought advice from the Council, he was told to engage a qualified physical planner, who would then ensure compliance with the By-Laws of the Municipal Council of Kakamega.

In the approved plans, the plots were reduced in number, to 6. The size of the plot which the plaintiff was buying then increased from 0.061 to 0.074 Hectares.

The 1st defendant (who shall hereinafter be referred to as “DW1”) testified that the plaintiff not only attended the meetings which were convened by Mr. A. S. Shitsama, but also accepted the changes cited in the letters which Mr. Shitsama wrote immediately after each of the meetings, to capture the agreements arrived at during the said meetings.

One of the said agreements was that a revised Sale agreement would be prepared. However, DW1

testified that no revised Sale Agreement was ever drawn up. He therefore asked this court to enforce the terms of the Sale Agreement dated 11th October 2002.

In effect, the parties to this case appear to be in agreement, on the need to give effect to the terms of the Sale Agreement.

In the understanding of the plaintiff, clause 5 of the Agreement stipulates that there ought to be specific performance. He said that the seller was not allowed to get out of the Agreement, although the buyer may get out of it.

On the other hand, the defendants' understanding was that pursuant to clause 14 of the Agreement, if the transfer was not completed within 90 days from the date the seller receives the purchase price, the buyer would be entitled to a refund of the purchase price, with interest.

Before reverting to the question whether or not there ought to be specific performance, I do find that as at the date when the Sale Agreement was executed, on 11th October 2002, the defendants were not yet the registered proprietors of parcel No.97. As at that date, the said property was still owned by Kenya Commercial Bank Limited. Clearly therefore, the parties to the Sale Agreement were well aware that the first step in the whole process was for the defendants to acquire title to parcel No.97. The Sale Agreement made it clear that the defendants were still at the stage of processing the issuance of the certificate of lease into their joint names.

Pursuant to clause 2 of the Sale Agreement, the plaintiff was to pay KShs.250,000/= as deposit, by the time of executing the agreement. The balance of KShs.470,000/= was payable on or before 2nd January 2003.

Pursuant to clause 5 of the Sale Agreement, the defendants were to transfer the plot to the plaintiff immediately upon receipt of the full purchase price.

According to the evidence adduced by the plaintiff, he paid the balance of KShs.470,000/= on 16th January 2003.

In effect, the plaintiff did not comply strictly with the requirement that the balance be paid by 2nd January 2003.

But in the same breadth, the defendants were not able to comply at all, with the requirement of an immediate transfer. They did not even yet have the property registered to their names.

From the certificate of official search produced by the plaintiff, it appears that it was not until 16th April 2004 when the defendants were registered as proprietors of parcel No.97. In so finding, I am not shutting my eyes to the possibility that the defendants need not have necessarily first transferred parcel No.97 to their names first, before transferring to the plaintiff, the plot which he had bought. But, at the same time, it is noteworthy that between the parties herein, the defendants were to first get parcel No.97 registered into their joint names. It is only thereafter that the defendants were to jointly transfer to the plaintiff, the plot he was buying.

Pursuant to clause 12 of the Sale Agreement;

“If either party to this Agreement fails to perform his/her part of this Agreement then the defaulting party shall pay to the innocent party a penalty fee hereby agreed at 20% of the purchase price hereby agreed PROVIDED such a default is not occasioned either directly or indirectly by that other party.”

As I have already held herein, the plaintiff was late in paying the sum of KShs.470,000/=, which was payable by 2nd January 2003.

The plaintiff has not attributed the said delay to the defendants.

But, on their part, the defendants have failed to transfer to the plaintiff, the 0.061 hectares' plot, which the plaintiff has paid for in full. The defendants have not attributed their failure to the plaintiff's actions or omissions. Instead, the defendants have attributed their failure to circumstances beyond their control.

In the circumstances, the defendants have stated that they were ready and willing to refund to the plaintiff, the money which the plaintiff had paid as purchase price.

In my considered opinion, clause 5 of the Agreement does not provide for specific performance. The said clause spells out the defendants' obligation, upon their receipt of the purchase price. In other words, immediately after receiving payment of the purchase price, the defendants were obliged to transfer the plot to the plaintiff.

But, as I have already found earlier herein, the defendants were not in a position to comply with that obligation because they still did not even have title to parcel No.97.

Although the defendants were not able to transfer the plot to the plaintiff either immediately or within 90 days (as provided for in clause 30), the plaintiff was entitled to;

“treat the sale as cancelled and demand immediate refund of the purchase price then already paid by him to the Vendor plus the agreed penalty.”

The plaintiff has not exercised that right. Had the plaintiff treated the sale as cancelled, and had he demanded immediate refund from the defendants, the said defendants would have been obliged to make full refund together with the agreed penalty fee, within 30 days of the demand.

The plaintiff has, instead, insisted that the defendants should curve out 0.061 hectares and transfer the same to him.

Regrettably, the plaintiff appears to have overlooked the fact that the decision whether or not to curve out the plots in accordance with the sketch plan which was attached to the Sale Agreement, is not wholly in the hands of the defendants. I say so because the authority to sub-divide rests in persons other than the defendants. The plans must be drawn by a qualified physical planner, who must comply with the Bye-Laws of the Municipal Council of Kakamega. Secondly, the Ministry of Roads and Public Works must consent to the plans drawn by the qualified physical planner. Thereafter, the Municipal Council of Kakamega must give its consent.

The defendants have exhibited an approved plan which does not have a plot which is 0.061 hectares. The court cannot therefore simply order that such a plot be transferred to him, because he had paid for it.

Had the plaintiff called evidence from the Municipal Council, the physical planner and the Ministry of Roads and Public Works, to show that they were all ready to approve plans to curve out 0.061 hectares from parcel No.97, the court would have been ready to order that there should be specific performance.

But in the light of the evidence adduced, if this court granted an order for specific performance, it may well be in vain, because the court cannot insist on enforcing such an order even if the concerned authorities raise legitimate issues that militate against the order for specific performance.

Meanwhile, even though the parties did not execute a revised Sale Agreement, there is no doubt at all, that they had agreed on the need to revise the Agreement dated 11th October 2002. To my mind, the agreements embodied in the letters from Shitsama & company Advocates, dated 22nd October 2003 and 13th April 2004, are a clear indication that the parties had mutually agreed to move away from the Sale Agreement dated 11th October 2002. They had moved away from that Agreement because they appreciated that there had arisen some intervening circumstances, which made it impossible to strictly

enforce the original Sale Agreement. They had appreciated the change in the size of the plot which the plaintiff was to buy, and the consequent need to revise the agreed purchase price proportionately, with the increase in size.

In those circumstances, I find and hold that the plaintiff is not entitled to an order of specific performance. His claim to that effect is thus dismissed.

However, the defendants cannot be permitted to keep the purchase price. If that were to happen, the court would have enabled him to enrich himself unjustly. Therefore, the defendants are ordered to refund to the plaintiff the purchase price of KShs.720,000/=. They will also pay to the plaintiff the agreed penalty fee of 20% of the purchase price. Both the purchase price and the penalty will attract interest at the contractual rate of 15% per annum from the date of filing the defence. The interest is to be charged from that date because the plaintiff did not prove that he made a demand upon the defendants, before he filed suit.

As the plaintiff's claim is unsuccessful, I order that each party will bear his own costs.

Dated, Signed and Delivered at Kakamega, this 22nd day of January 2009

FRED A. OCHIENG

J U D G E