REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

Civil Case 110 of 2005 (OS)

DAVID MOSE GEKARE:.....PLAINTIFF

VERSUS

HEZRON NYACHAE:.....DEFENDANT

J U D G E M E N T

On 25th January 2005 the plaintiff **DAVID MOSE GAKARA** entered into a sale agreement with the defendant **HEZRON NYACHAE** in which the plaintiff agreed to sell to the defendant his parcel of land **No. KUINET (B) S..T.F./9478** which is situated in Kuinet area. It measures about 10 acres. The agreed purchase price was Shs.370,000/= the two agreed that the defendant was to pay a sum of Shs.200,000/= on 27th January, 2005, then Sh.100,000/= during the first week of March 2005 and the balance soon thereafter. The defendant duly paid the 1st instalment of Shs.200,000/=. On the agreed date. He however did not pay the 2nd installment of Shs.100,000/= on first week of March 2005 as agreed. The plaintiff (PW1) told the court that the defendant instead paid Shs.40,000/= on 7th March 2005, Shs.80,000/= on 9th May 2005 and Shs.40,000/= on 14th September 2005. He thus told the court that the defendant breached their said agreement.

The plaintiff further said that the defendant entered into possession of the said land without his consent and started to plough it. He planted and harvested maize in 2004 and 2005 and continues to do so. In this suit the plaintiff seeks the following reliefs:-

i. A declaration that the contract between the plaintiff and the defendant is null and void.

ii. An order for a permanent injunction against the defendant, his agents and any other person acting on his behalf restraining them from entering occupying, ploughing, alienating or in any other way dealing with the plaintiffs portion on parcel **No. KUINET (B) S.T.F./9478** .

(iii) Eviction from parcel **No. KUINET(B)/S.T.F/9478**.

iv General damages for breach of contract

v. Mense profits of Shs.60,000/=

vi. Costs and interest

vii. Any other relief this Honourable court deems fit to grant.

The plaintiff told the court that the defendant deposited the Shs.40,000/= part of second instalment in his

account. He telephoned him and told him he had done so. He told the court that he told the defendant not to deposit any more money in the account. He said the defendant had got the account number from his tenant. He said he wanted to buy another land and when defendant failed to pay Shs.100,000/= as agreed he told him any more payment will not serve his purpose. However the defendant called him later and told him he had deposited Shs.10,000/= in the account. He later called and told him he had deposited Shs.80,000/=. Plaintiff came to Eldoret and asked for a bank statement for his account and noted that the defendant had paid Shs.330,000/= into that account. He bought a bankers cheque of Sh.330,000/= in the defendants name and took it to the defendant but he refused to take it. He told him he had deposited more money all totaling to the agreed price of Sh.370,000/=. Plaintiff took the bankers cheque to his lawyer who posted it to the defendant but it was returned through the defendants lawyer. He told the court that the money is therefore still in the bank as the cheque had never been encashed. He said he is ready to refund the Shs40,000/= which the defendant further deposited in his account once he confirmed that was so.

Further he told the court that title deeds for the land have not yet been issued by S.F.T who had allocated portions of land to several other people. there is unpaid loan to S.F.T.

Plaintiff said he never put the defendant into possession of the land as he had not fulfilled their contract. He had given the land to one James Obiri to cultivate. He is the one who invited the defendant.

The defendant told court that he had known the plaintiff since 1985. They entered into the sale agreement for the land for a sum of Shs.370,00/=. He said he paid all the money. The agreement did not specifically state that if he was late in payment the agreement would be broken. The plaintiff never told him that the agreement had been voided. Whenever he deposited the money in his account he would tell him. The last payment was in September 2005 but the plaintiff sent him a cheque of only shs.330,000/=.

Further defendant said he went in occupation of the land in the year 2003.

I have carefully considered all the evidence and submissions by the counsels. To my mind the main issue is whether the contract entered by the two parties on 25th January 2005 was void or null by virtue of the defendant breaching it. All the other claims hangs on the validity or otherwise of that agreement. It is not disputed that the two parties entered into the said sale agreement.

The same was reduced in writing. It is the plaintiff who allegedly wrote it down. In it the purchase price was agreed on. The parties then set out how the same was to be paid. It was to be paid in three installments – the first of Shs.200,000/= on or before 27th January 2005. This was duly paid in time. The 2nd payment of Shs.100,000/= was to be paid on the 1st week of march 2005. This was Shs.100,000/=. Apparently the defendant failed to honour that time. He paid Shs.40,000/= on 7th March 2005. This I think was the last day of the 1st week of March. On 9th March 2005, two days later he paid Shs.80,000/= and he also paid Shs.10,000/= bringing the total sum paid to Shs.330,000/= by 9th March 2005. This is the CRUX of the matter in this suit. The plaintiffs contention is that the defendant breached the agreement as he had not paid the Shs.100,000/= by end of 1st week of March as agreed. He submits that this breach lead to the contract being void. The other monies were paid later and the last payment being in September 2005. Plaintiff contended that the contract had stipulated that after the payment of Shs.100,000/= the balance was to be paid soon thereafter. To him "**soon thereafter"** meant within the month of March 2005. The balance was not paid within that time which again was a breach. This brings to the fore the issue whether time was of essence of the said contract. The plaintiff submitted that this was so but the defendant was of the opposite view. In the case of **SAGOO –VS- DONARADO (1983) KLR 366** cited by the plaintiffs counsel the court of appeal dealt with the issue of time. The circumstances were similar in that case as in this. In its holding No.1 the court held as follows:-

1. In contracts of all types, time will not be considered to be of essence unless

(i) Parties expressly stipulate that conditions as to time must strictly complied,

(ii) The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered of essence and/or

(iii) A party who has been subjected to unreasonable delay gives notice to the party in default making time of essence.

I do find that the contract in dispute fails on all the three requirements as to make time of essence. The two parties never expressly in the agreement set out a condition that time must be strictly complied with. There are no such express words apart from setting out how the monies were to be paid. Infact there was no specific time when the final payment was to be done nor was there any statement that in default of payment of any monies within a certain time the contract will be voided. The last installment was said to be "**any time soon thereafter".** That was after the second payment. Second payment had been paid by 9th march 2005. The agreement do not say that '**soon thereafter'** was within the month of March 2005**.** If that was son, the contract showed have stated so. The plaintiff is the one who wrote it and did not deem it fit to clearly state that.

True the payment of 2nd instalment was late. However this did not void the contract as there was no condition that any late payments will lead to the contract being void. In any case defendant continued to pay and that amount was paid soon thereafter. Though the plaintiff said he telephoned the defendant and told him not to deposit the money there was no evidence to support that. The agreement was a written one. He should have wrote to him stopping any further payment. This he did not do and it is clear he condoned the delay and accepted the late payments.

The nature of the matter and the surrounding circumstances did not show that time was to be considered of essence. As I said claim after the defendant got late with the second installments the plaintiff took no steps to enforce the agreement. He did not give any notice to the defendant making time of essence. This he should have done in writing. All what he did was to make a bankers cheque in September 2005. By then the defendants stated that he had completed all the payments of Shs.370,000/=. The defendant therefore cannot be faulted. He fulfilled his part of the agreement. As such I make a finding that he did not breach the contract and as such I decline to declare the contract between the two as null and void. It is a valid agreement to date.

Having found that there was no breach of agreement and the same is valid it follows that all the other prayers must fail. The court cannot grant injunction against the defendant. He is the one in occupation of the land. He had gone into occupation even before the two entered into the agreement and I believe it was the plaintiff who put him in possession. Infact in paragraph 8 of the plaint the plaintiff states that the defendant had ploughed and planted maize in the land in the year 2004 and 2005. The agreement was entered in the year 2005. By then the defendant was already in occupation as he had ploughed in 2004. The plaintiff must have been aware of that fact even as they entered into the agreement. I believe that is why the sale agreement was silent as to when the defendant was to take possession of the land. He was already in possession of the same and that is why the issue did not arise. The court cannot therefore order for the eviction of the defendant from the land.

There was no breach of contract and as such no damages are awardable.

The upshot of the above if that I find suit has no merit and the same is dismissed with costs.

Dated and delivered at Eldoret this 13th day of June,2007.

KABURU BAUNI

JUDGE