



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 230 of 2004

JOSEPH D. HALAKE.....PLAINTIFF

VERSUS

YUNIS MALIK.....DEFENDANT

JUDGMENT

The plaintiff Joseph D. Halake filed suit against the defendant Yunis Malik seeking the following prayers from the court:

- (a) *An order for specific performance of the sale agreement between the plaintiff and the defendant for the sale and transfer of **L.R. NO. 19912/6** and **19912/7** to the plaintiff.*
- (b) *An injunction to restrain the defendant, his servants, agents and all who claim by or through him from disposing the said plots **L.R. NO. 19912/6** and **19912/7** to any other party save the plaintiff or otherwise dealing with the same.*
- (c) *Costs of the suit.*

In his plaint, the plaintiff averred that in May, 2001, he entered into an oral agreement with the defendant whereby the defendant agreed to sell to him parcels No. **19912/6** and **19912/7** at Kshs.250,000/= and Kshs.300,000/= respectively. He averred that pursuant to the said agreement, he paid the defendant a total sum of Kshs.525,000/= between the June, 2001 and January, 2002 in the following manner:

- (i) On 25th June 2001 – Kshs.100,000/= by Bank transfer.
- (ii) On 2nd August 2001 – Kshs.50,000/= by bank transfer.
- (iii) On 27th September 2001 – Kshs.100,000/= - payment in cash.
- (iv) On 7th December 2001 – Kshs.100,000/= - payment in cash.
- (v) On 10th December 2001 – Kshs.100,000/= – payment in cash.
- (vi) On 16th January 2002 – Kshs.75,000/= – payment in cash.

The plaintiff further averred that he paid a sum of Kshs.22,950/= as land rates and land rent in

respect of the said parcels of land. In breach of the agreement, the plaintiff averred that the defendant had refused or neglected to hand him the title documents in respect of the said parcels of land or execute the transfer in respect of the same to him. Plaintiff therefore prayed for orders of specific performance and injunction as stated earlier in this judgment.

The defendant duly filed a defence when he was served with a copy of the plaint. He denied that he had agreed to sell the said parcels of land *i.e.* LR No. **19912/6** and LR No. **19912/7** for Kshs.550,000/= to the plaintiff. The defendant however admitted that he had agreed to sell the said parcels of land to the plaintiff for consideration of Kshs.1,000,000/=. The defendant acknowledged that he had received the sum of Kshs.150,000/= as part of the purchase consideration. He denied receiving any other purchase consideration other than the admitted sum. The defendant reiterated that although he was willing to sell the suit properties to the plaintiff, the plaintiff had failed to raise the agreed purchase consideration. The defendant averred that there existed no valid agreement between himself and the plaintiff and any agreement that could have existed between them had been rendered null and void. The defendant urged the court to dismiss the plaintiff's suit with costs.

At the hearing of the suit, the plaintiff called three witnesses. He testified as PW2 whilst PW1 was Dhanji Lilandhar Pamar and PW3 was Ibrahim Abduba Abdullahi. From the evidence adduced in court, it was the plaintiff's case that the defendant had sold him a parcel of land adjoining the suit parcels of land on which was erected a rental house. The plaintiff testified that the said parcel of land was LR No. **19912/5**. The purchase consideration was Kshs.1.5 million. The plaintiff paid the purchase consideration in full. The agreement was in writing and witnessed by an advocate (*agreement produced as plaintiff's exhibit No.1*). The parcel of land was transferred to the plaintiff.

According to the plaintiff, in 2001, he expressed an interest in purchasing the two adjoining plots *i.e.* LR No. **19912/6** and LR No. **19912/7** which to his knowledge were owned by the defendant. The plaintiff inquired from the defendant if he would be interested to sell the said parcels of land to him. The defendant told the plaintiff that he would be willing to sell the two plots to the plaintiff for a total purchase consideration of Kshs.800,000/=. The plaintiff testified that he later met with the defendant in the company of his brother-in-law PW3 Ibrahim Abduba Abdullahi at Hotel Kunste where an oral agreement was reached for the sale of the said parcels of land. According to the plaintiff, a verbal agreement was reached for the sale of the two plots: LR No. **19912/7** was to be sold for the purchase consideration of Kshs.300,000/= whilst LR. No. **19912/6** was to be sold for the sum of Kshs.250,000/=. The plaintiff testified that the defendant accepted to be paid the purchase consideration in instalments.

The plaintiff recalled that he paid the defendant in several instalments. The first two instalments of Kshs.100,000/= and Kshs.50,000/= were paid in bankers drafts. The balance of the purchase consideration of Kshs.375,000/= was paid in cash to the defendant. The plaintiff explained that the reason why he paid the defendant in cash was because the defendant had requested him to pay in the said manner so as to avoid too many queries from the tax authority. The plaintiff produced copies of his statements of accounts which confirms that he withdrew the amounts which he paid to the defendant. The said statements were marked as *plaintiff's exhibit No. 2(a) – (c)*. The plaintiff explained that the reason why the oral agreement was not reduced into writing was because he trusted the defendant having earlier purchased from him LR No. **19912/5**. He further explained that he paid the defendant in cash without requesting for a receipt because he did not think that the defendant would later deny that he had received the said purchased consideration.

The plaintiff testified that he did not pay the entire purchase consideration because he utilized the sum of Kshs.22,950/= to pay the land rent and the land rates. It was his testimony that after paying the purchase consideration in full, the defendant allowed him to take possession of the said suit properties. He stated that he had constructed a one storey building on LR No. **19912/7**.

The plaintiff testified that when he requested the defendant to hand him over the transfer documents including the title documents of the said parcels of land, the defendant became evasive. At one time, the defendant told him that the said documents had been misplaced at his advocate's office. Due to the reluctance by the defendant to transfer the said parcels of land to him, the plaintiff sought the assistance of PW1 Danji Lilandar Parmar, a pillar in the Nakuru Asian community to intercede on his behalf with a view to persuading the defendant to release the said title documents to him. PW1 recalled that after the plaintiff had requested him to talk to the defendant, he went to the defendant's business premises accompanied by the plaintiff. He testified that the defendant told him that he would hand over the said documents once his advocates, who were then moving office, were settled in their new offices. He stated that at the time the defendant did not mention to him that the plaintiff owed him the balance of the purchase consideration.

According to the plaintiff, although the defendant agreed in the presence of PW1 to hand over the title documents to him, the defendant failed to fulfil his promise. The plaintiff then made a report to the police culminating in the defendant being summoned by the criminal investigation department officers. The defendant was however not charged with any criminal offence. The plaintiff subsequently thereafter went to the business premises of the defendant where he managed to obtain a document from the defendant acknowledging that he had been paid Kshs.425,000/=. The plaintiff stated that the said document was signed by the defendant. The document was produced as *plaintiff's exhibit No. 7*. The said document states as follows:

“Received 425000/= for the plots No. 19912/6, 19912/7. The balance 125,000/= left 10th December 2001.”

A signature appears in the document which the plaintiff stated testified belongs to the defendant. It was the plaintiff's further testimony that at one instance when he visited the defendant with a view of persuading him to release the title documents to him, he secretly recorded their conversation in a tape recorder. He explained that in the said tape recording, the defendant acknowledged that he had paid the purchase consideration in full. The plaintiff conceded that as an educated person, he ought to have insisted that the agreement be reduced into writing. He explained his lapse of judgment was understandable in the circumstances as he had trusted the defendant especially in view of the fact that he had dealt with him before.

PW3 Ibrahim Abduba Abdulahi corroborated the plaintiff's testimony in regard to the meeting which was held in 2001 between the plaintiff and the defendant. He testified that he was present when the plaintiff and the defendant negotiated and agreed the purchase consideration of the suit parcels of land at Kshs.550,000/=: which purchase consideration was to be paid by instalment. PW3 testified that he did not however witness the plaintiff make any payment of the purchase consideration to the defendant.

In his defence, the defendant testified that he was the beneficial owner of LR No. **19912/6** and LR No. **19912/7**. He told the court that he had purchased the said parcels of land from one Mohammed Karama. The two plots were however not yet transferred to him. He testified that the plaintiff approached him with a view to purchasing the two plots. He recalled that, at the time, he was willing to sell the said plots for a purchase consideration of Kshs.1.2 million. After negotiating with the plaintiff, the purchase consideration was agreed at Kshs.1,000,000/=. He admitted that the plaintiff paid him a sum of Kshs.150,000/= in part-payment of the said purchase consideration.

The defendant was categorical in his denial that he had agreed to sell the two parcels of land for a total consideration of Kshs.550,000/=. He further denied the testimony of the plaintiff that he had paid him a total sum of Kshs.525,000/=. He maintained that the only sum paid to him by the plaintiff was Kshs.150,000/=. He reiterated that the plaintiff made no payment to him in cash. He testified that the plaintiff took possession of the suit parcels of land without his permission. He reiterated that the plaintiff had not completed paying the balance of the agreed

purchase consideration. He conceded that one of the parcels of land was larger than the other hence his decision to sell the larger parcel of land for Kshs.550,000/= and the smaller one for Kshs.450,000/=. He denied that he was the author of the document which was produced as *plaintiff's exhibit No. 7*. He insisted that he was willing to complete the transaction if the plaintiff would be willing to pay the balance of the purchase consideration.

The defendant reiterated that it was the defendant who was reluctant to accompany him to his advocate's office so that they could execute a written agreement. He conceded that the plaintiff had constructed a house on one of the plots without his raising any complaint. He maintained that it was the plaintiff who had refused for a written agreement to be entered into for some unknown reason. He denied the suggestion by the plaintiff that the reason why the oral agreement was not written was because of the plaintiff trusted him. He stated that trust had nothing to do with it. The defendant stated that no trust was involved hence the reason why the agreement in respect of LR No. **19912/5** was reduced into writing. He testified that the plaintiff's suit should be dismissed with costs.

After the close of the both the plaintiff's and the defendant's cases, the parties agreed by consent to file written closing submissions. Having carefully read the pleadings filed, and considered the evidence adduced by the parties to this suit including the closing submissions filed the issue for determination by this court is whether the plaintiff and the defendant entered into an agreement for the sale of the two parcels of land i.e. L.R. No. **19912/6** and LR No. **19912/7**, and if so, on what terms.

Certain facts are not in dispute in this case. Both the plaintiff and the defendant agree that an oral agreement was entered between them for the sale of the suit parcels of land sometime in 2001. The defendant testified that he was at the time willing to sell the said parcels of land to the plaintiff. On his part, the plaintiff testified that he was, at the time, interested in purchasing the said two parcels of land. The plaintiff was particularly interested because the said two plots were adjoining to a parcel of land which he had previously purchased from the defendant *i.e.* LR No. **19912/5**. The plaintiff testified that he was with his brother-in-law PW3 Ibrahim Abduba when he negotiated the purchase consideration for the said parcels of land. The plaintiff recalled that the agreed purchase consideration was Kshs.550,000/=. He maintained that the two parcels of land were sold for the purchase consideration of Kshs.300,000/= and Kshs.250,000/= respectively. The plaintiff explained the difference in price as being due to the fact that one plot was smaller than the other. PW3 corroborated the plaintiff's testimony on this point. On his part the defendant while admitting that he had agreed to sell the said parcels of land to the plaintiff, maintained that the purchase consideration was Kshs.1,000,000/= and not Kshs.550,000/= as claimed by the plaintiff.

I have evaluated the evidence adduced on this aspect of this case and also considered the respective demeanours of the witnesses as they testified before the court. The plaintiff conceded that in the final analysis, this court will determine the issue of what the two had agreed as the purchase consideration by determining who to believe as between the plaintiff and the defendant. I observed the plaintiff as he testified in court. He came across as an intelligent and meticulous person. This court wondered how the plaintiff could have entered into an oral agreement for the purchase of land when he knew that there was danger that he could be risking his money. Taking into consideration the fact that the plaintiff had insisted on a written agreement in the previous agreement between himself and the defendant in respect of LR No. **19912/5**, it was inexplicable that he agreed to seal the deal in respect of LR No. **19912/6** and LR No. **19912/7** in the absence of a written document to attest to it.

I am unable to agree with the explanation given by the plaintiff to the effect that, at that time, he had trusted the defendant. I am unable to reach a finding that the plaintiff proved to the required standard of proof on a balance of probabilities that indeed the agreed purchase consideration was Kshs.550,000/=. Neither am I in a position to be certain that the agreed purchase consideration was Kshs.1,000,000/= as claimed by the defendant. On that issue, this

court finds the fact neither proved nor disproved. **Section 3(4)** of the **Evidence Act** states that a fact is not proved when it is neither proved nor disproved.

The other issue for determination is whether the plaintiff paid the defendant a sum of Kshs.525,000/= as the purchase consideration. The plaintiff testified that he paid the defendant the sum of Kshs.150,000/= by bankers draft. The balance of Kshs.375,000/= was paid to the defendant in cash. The plaintiff produced statements from his bank account as exhibits which established that he had withdrawn certain amounts from his account on the days he claimed to have paid the defendant. The said statements could not however establish whether the said sums of money were actually paid to the defendant. On his part, the defendant admitted receiving the sum of Kshs.150,000/= but denied receiving the sum of Kshs.375,000/= in cash. The plaintiff explained the reason why he paid the defendant in cash was because the defendant had requested him not to deposit the said amount in his account as he did not want queries to be raised by the taxman.

I have carefully considered the evidence adduced by the plaintiff and the defendant on this aspect of the case. As in the earlier issue, the court will resolve the issue by determining who as between the plaintiff and the defendant is to be believed. As stated earlier, the plaintiff came across to the court as an intelligent and meticulous man. It is inconceivable that the plaintiff could have paid cash to the defendant without demanding some form of acknowledgement of receipt from him. The document which the plaintiff produced as *exhibit No. 7* is of no help to him. This is because the said document bears no name of the recipient of the sum mentioned in the document. The signature of the recipient could not be verified. The defendant denied the signature on the document was his. This court is unable to hold that the plaintiff established to the required standard of proof on a balance of probabilities that he indeed paid the defendant the said sum of Kshs.375,000/=. The only amount which the plaintiff established that he paid to the defendant is Kshs.150,000/=.

Before concluding this judgment, it is imperative that the legal position be stated as regards agreements relating to land transactions. The oral agreement between the plaintiff and the defendant was entered into in 2001. This was before the amendments were effected in **Section 3(3)** of the **Law of Contract Act** by **Act No. 2 of 2002**. The applicable law was therefore the then existing **Section 3(3)** of the **Law of Contract Act**. The said section provided that:

“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it:

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of the contract –

(i) has in part performance of the contract taken possession of the property or any part thereof, or

(ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

In the present case, it is clear that the plaintiff and the defendant did enter into an oral agreement whose terms cannot however be ascertained. However, in part performance of the agreement, the plaintiff has taken possession of both parcels of land. According to the defendant, the plaintiff had even constructed a one storey building on one of the plots without his let or hindrance. It is therefore for the plaintiff and the defendant to agree on the purchase consideration and the mode of its payment. The plaintiff has established that he had paid the defendant the sum of Kshs.172,950/= comprised of Kshs.150,000/= purchase consideration and

Kshs.22,950/= paid as land rent and land rates. The defendant has indicated that he is willing to finalise the deal or alternatively refund the purchase consideration to the plaintiff. The decision to finalise the agreement is therefore left for the plaintiff and the defendant. If the parties are unable to agree on the purchase consideration, the opinion of a land valuer may be sought to resolve the disagreement on the value of the said parcels of land.

This court having found that the plaintiff had not proved that the purchase consideration of the suit parcels of land was Kshs.550,000/= and further having failed to establish that he has paid the said purchase consideration save for Kshs.172,950/=: it is the judgment of this court that the plaintiff has failed to establish his case to the required standard of proof on a balance of probabilities. The plaintiff's suit is therefore dismissed. In view of the peculiar circumstances of this case, I will exercise my discretion and made no orders as to costs.

DATED at NAKURU this 18th day of October 2007

L. KIMARU

JUDGE