



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 158 OF 2017

ROBERT JUMA WASWA.....PLAINTIFF

VERSUS

KIMAIYO ARAP SAMOEL.....1ST DEFENDANT

EMMANUEL SAMOEI KIPCHUMBA.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiff filed an amended plaint dated **18/12/2019** in court on the same date seeking for judgment for the following orders against the defendants:-

(a) An order of specific performance of the requiring the defendants herein to give immediate vacate possession and/or transfer the said plot measuring 50x100 feet from plot No. KITALE MUNICIPALITY BLOCK 1/LESSOS/1558 to the plaintiff herein.

(aa) in the ALTERNATIVE the plaintiff's claim against the 1st and 2nd defendants herein in an order of refund of the purchase price at the current market price together with interest at court rates from the date of purchase to date.

(b) General damages

(c) Costs of this suit.

(d) Any other relief this court may deem fit and just to grant.

THE PLEADINGS

The Plaintiff

2. It is the Plaintiffs' case that he bought land measuring **50ft by 100ft** Part of that parcel of land known as Plot No. **Kitale Municipality Block 1/Lessos/1558** from the 1st and 2nd Defendants on or about **3/6/2016**. The agreed consideration was **Kshs. 800,000/=** which he paid in two installments. The 1st being a deposit of **Kshs. 600,000/=** which was received by the 2nd Defendant on behalf of the 1st Defendant at the execution of the agreement, and the second and final installment of **Kshs. 200,000/=** was paid on the **20/12/2016** and receipt also acknowledged by the 1st Defendant.

3. The Defendants were required to give vacant possession of the land parcel purchased upon payment of the full purchase price of **Kshs. 800,000/=** and particularly upon payment of **Kshs. 200,000/=** being the final installment. He has completed payment of the agreed purchase price. The Defendants have however failed to give vacant possession of the land measuring **50ft by 100ft** to the Plaintiff as agreed. They (Defendants) have also failed to transfer a portion of that parcel of land known as Plot No. **Kitale Municipality Block 1/Lessos/1558** measuring **50ft by 100ft** to the Plaintiff.

4. The Plaintiff therefore has come to court seeking for the prayers stated in the plaint as stated in **paragraph 1** above.

The Defendants' Joint Amended Defence

5. The Defendant filed their amended defence dated **17th January, 2020** in court on the same date. The Defendants admit that they sold a portion of land measuring **50ft by 100ft** part of **Plot No. Kitale Municipality Block 1/Lessos/1558** to the Plaintiff on the **3/8/2016** at an agreed consideration of **Kshs. 800,000/=** which was paid in two installments of **Kshs. 600,000/=** and **Ksh.200, 000/=** respectively. However they contend that upon payment of full purchase price, it came to their knowledge that the plot did not have an access road thus they opted to refund the purchase money they received from the Plaintiff who declined their offer for refund. They also contend that they are willing to refund the purchase price to the Plaintiff but not at the current market price claiming that the same will amount to unjust enrichment on the part of the Plaintiff.

The Plaintiff's Evidence

6. The case came up for hearing on the **2/12/2020** when **Robert Juma Waswa** the Plaintiff (**PW1**) testified. His evidence is that the Defendants sold him a plot measuring **50ft by 100ft** part of **Plot No. Kitale Municipality Block 1/Lessos/1558**. The Defendants have never given him vacant possession of the plot as agreed hence the suit. He adopted his statement dated **27/09/2017** as evidence in examination-in-chief. He produced the sale agreement in respect to the sale dated **3/8/2016** and marked it as **P. Exhibit 1(a)**. The total agreed consideration of the suit property was **Ksh.800,000/=** which he paid in two installments of **Kshs.600,000/=** on execution and **Kshs.200, 000/=** which was paid on the **20/12/2016** vide cash acknowledgement marked as **P. Exhibit 1(b)**.

7. In his evidence he states that **P. Exhibit 1(a)** was duly signed by all parties and it was specific that he was to take possession after paying full consideration i.e. after paying the balance of **Kshs.200,000/=** to the Defendants as per **Clause 3** of the agreement. He was also specific on the content of **paragraph 5** of the agreement which stipulated that **“both parties will abide by the terms of the contract.”** He abided by paying full consideration whereas the sellers breached the agreement. He testified that when the Defendants failed to give him vacant possession, he sought advice from his advocates who wrote a letter to the Defendants and which was served upon them reminding them to make good the agreement to give him vacant possession of the suit property he produced the Demand letter as **P. Exhibit 2**. He further testified that he had carried out search of the suit property and produced a Certificate of Official Search showing that the registered owner is **Kimaiyo Arap Sameoi** (the **1st** Defendant herein) marked as **P. Exhibit 3(a)** and Receipt of Payment for search marked as **P. Exhibit 3 (b)**.

8. In his evidence, he stated that he was not given an alternative land by the Defendants. He said that the Defendants showed him how to carve the road to access the plot and that is how he ended up with an agreement. He maintained that the plot that he accepted at the execution of the agreement is the plot he wanted and a refund would not do him justice since the Defendants have delayed his efforts to build on the land and get more income. Further, he averred that the Defendants have stayed with the money paid as consideration for five (**5**) years. He urged the court to give him vacant possession of the plot, or if the plot is unavailable, a refund at the current interest rates and for general damages. He stated that the current market price would not enrich him unjustly as the Defendants have enriched themselves with his money for **5 years** with his money. He prays to be given the plot.

9. Upon cross-examination by Mr. Bungei Advocate **PW1** stated that according to him the surveyor was supposed to visit the ground after he has completed paying the purchase price for the plot to be excised out of the **4.66 Ha**. The surveyor visited the suit property. The Defendants showed him how he would carve out the road from the main road for him to access the plot. He insisted that there was no disagreement or opposition by anybody when he entered into the sale agreement with the Defendants. He confirmed that Mr. Sameoi told him that everyone was aware of the sale. He was not informed of any disagreement even or after the sale. He denied knowing other buyers of the land and clarified that he was not shown any other alternative plot and that he only became aware of the alternative plot when the matter was already in court. He was showed the alternative plot however the defendants demanded more money being **Kshs. 200,000/=** (in excess of what he had already paid) in respect of the alternative plot. There was caution over **Plot No. 1558** registered in favour of the **1st** Defendants' daughter. He seeks a refund of the purchase price at current market rates. Finally he confirmed that there was no disagreement at the time of the agreement as stated in **paragraph 3** of the agreement.

10. **PW2, Jack Frank Talian Chekeliek** testified on the same day as **PW1**. His evidence was that he knew the **1st** and **2nd** Defendants as father and son respectively; that on the **3/8/2016** Kimaiyo sold a Plot to Robert. The purchaser was shown a plot measuring **50 by 100Ft** and they went to National Bank where they paid the sum of **Kshs.600,000/=** and then executed an agreement. He identified **P. Exhibit 1(a)** as the agreement which he witnessed and signed. The balance of **Kshs.200,000/=** was also paid in his presence; he witnessed and signed the cash acknowledgement. He adopted his statement dated **27/9/2019** in examination-in-chief as his evidence.

11. Upon cross-examination by Mr Bungei, he confirmed that the agreement was signed at Bungei Advocates. He confirmed that the plaintiffs were shown a plot measuring **50 by 100 Ft** and they never asked for the title deed since they never thought that there could be fraud. He also confirmed that Emmanuel and Kimaiyo were the sellers; Kimaiyo is the owner but he gave Emmanuel authority to transact on his behalf. Further he confirmed that the portion that was sold **-50 by 100 Ft** had been demarcated and to reach the land, they would pass through Kimaiyo's *boma*. He does not know why the plot had not been given to the buyer and he has not inquired why. Finally he confirmed that the whole purchase price had been paid by the purchaser.

12. That marked the close of the Plaintiffs' case.

The Defendants' Evidence

13. **DW1, Emmanuel Kipchumba Sameoi** testified on the **15/12/2020**. He adopted his statement dated **23/12/2019** as his evidence-in-chief. His evidence is that he is the **2nd** Defendant in this case, whereas the **1st** Defendant gave him authority to plead on his behalf since he is unwell. He marked the authority to plead as **D. Exhibit 1**. The Plaintiff went to their home and they sold him **50 by 100Ft** plot out of land parcel **No. Kitale Municipality Block 1 /Lessos/1558** measuring approximately **4.66 Ha**. That they later entered into a land sale agreement with the Plaintiff on the **3/08/2016**, he identified **P. Exhibit 1 (a)** as the agreement they entered into. According to him, the land had not been surveyed at the time of sale however they called a surveyor later who conducted the survey. Thereupon they realized that the access road to the plot would be difficult as it would take almost **1 acre** of the land. They sat as a family and agreed to allocate the Plaintiff and notified him at their home of the idea to give him an alternative plot. They also told the Plaintiff that there was a dispute and that **Plot No. 1558** is a homestead and some beneficiaries had lodged a caution over the land; these are, Philemon Koech and Milkah Cherop. He produced a copy of

Notice of Caution to the registered proprietor as **D. Exhibit 2**. He explained the new development to the Plaintiff and averred that at the time of the transaction there were other purchasers, one of them being **Stanley Mwangi Ndungu** who purchased **50 by 100ft** of that land parcel **No. 1558**. He produced sale agreement in relation to the sale to Stanley Mwangi as **D. Exhibit 3**. It was his evidence that they called both Juma and Stanley Mwangi and explained to them that they would relocate them to another parcel belonging to the 1st Defendant being **Plot No. Kitale Municipality Block 1 Lessos/2066** which is within the same locality. Stanley agreed to take up the alternative plot but Juma disagreed and sought for a refund. He said that they decided to sell that portion in land reference **No. 2066** to refund Juma. He produced land sale agreement of that plot as **D. Exhibit 4** the same is dated **20/12/2017**. They then called Juma and advised him to collect his money since it was available only to realize that this case had been lodged against them. Juma told them to wait for him to consult with his advocate only to be served with court papers. He never involved other family members. He dealt with the sale with his father alone since the other family members were not present at home and never knew that a dispute could arise but later the dispute arose. They sold the alternative plot at **Kshs. 800,000/=** in 2017 which was deposited in an account and he does not know the current value of the suit land and that they are ready to refund the sum of **Kshs.800,000/=** only to the Plaintiff as stated in their defence but the Plaintiff has refused to take the money to date.

14. On cross-examination, he confirmed that land **No. 1558** is in the name of the 1st Defendant and it is not his. He confirmed having sold the land to the Plaintiff and that it was the duty of the seller to give vacant possession of the land to the buyer but he never performed that duty; it was also the duty of the seller to avail an access road to the Plaintiff. They called a surveyor to establish the access road but the same passed through the homestead. He was a beneficiary of the land and his father was alive but sold the land on his behalf. The Plaintiff's sale agreement was executed earlier than the registration of the caution lodged by Milka. There was nobody in their family who objected to the sale of the suit property at the time of sale; it was not their wish to deny Juma the portion he purchased. He confirmed that **Clause 4** of the agreement was not just written to enable them obtain money from the purchaser; they had assumed that no family member could object the sale. A complaint arose from Milkah when that portion was sold. He confirmed that they did not have money to refund the purchaser since their father had used it all. Further that money has been in the account since they sold the alternative plot to Edna and they did not intend to defraud Juma.

15. When asked of his assertion that the Plaintiff is seeking for unjust enrichment as per **paragraph 8** of the amended Defence, he said that the transaction year is **2016** and today is **2020, 4 years** down the line. The plot was sold in **2016** and the 2nd one was sold in **2017** and agreed that the money could have earned interest if it were in the bank. He agreed that the witnesses who will testify were not present at the execution of the agreement between the plaintiff and the defendants. They are only brought in as beneficiaries of **Plot No. 1558**. Only **Jack Frank** and **Stephen Cheprot** were witnesses in the agreement. At the end, he assured that the money was available to be refunded to the plaintiff.

16. **DW2, Philemon Kosgei Samoei** testified on the **15/12/2020**. He adopted his statement as evidence in examination-in-chief. It is his evidence that he is the eldest son of the 1st Defendant and he therefore has interest in protecting family property. He admitted that the 2nd Defendant sold the land in unclear circumstances to Juma and Mwangi and they did not understand why the land was sold. The rest of the family were not happy. They later agreed that a surveyor visits the land to carry out survey. They found that the access road would eat up almost **1 acre** of the land thus found it uneconomical to sell it at **Kshs.800,000/=** and lose **1 acre**. They wanted to settle the matter out of court. They sat down and agreed on an alternative parcel with an access road which is almost **100 metres** from the other parcel which resolution was communicated to the purchasers. One of the purchasers, that is Stanley Mwangi, accepted to take up an alternative portion. The surveyor was called and later it was learnt that Juma did not agree to take up the alternative portion of land but opted for a refund. The alternative plot was then sold to Edna for a consideration of **Kshs. 800,000/=** which could be refunded to Juma but he became very evasive.

17. According to him, the agreement which was entered in to by his father and brother ought to have been signed by all family members but not all of them were involved and Emmanuel was not given consent to transact on their behalf. That in the year **2017, Kshs 800,000/=** was available to refund the purchaser-Plaintiff. He deposited the same in his account and later called Juma to collect the money but did not and never communicated only for the suit. Mr. Bungei advised them to negotiate and insisted that ADR should have been allowed to take course. He stated that they cannot get extra money to refund the plaintiff if they were ordered to pay at market rates, claiming that the terms are unreasonable. They are willing to refund the purchase price as at that time and specific performance should not be granted since many parties are involved in **LR. No. 1558**.

18. Upon cross-examination he confirmed that **LR. No. 1558** is registered in the name of the 1st Defendant not his. He also confirmed that he did not participate in the agreement and that they had not agreed as a family to sell the plot though it had been indicated on the agreement that they had agreed. The family was not involved in the sale which they now dispute. He confirmed that he did not sign the agreement but his name is in the caution and that money intended for refund to Juma was ready in **2017**, but he has not been refunded. He does not know the witnesses for the plaintiff and no one from their family signed the agreement.

19. **DW3, Isaac Kimutai Samoei** testified on the same date as **DW2**. He relied on his statement in evidence-in-chief. He said that he learnt of the sale of part of plot **No. 1558** after the purchaser appeared at their home. Emmanuel is his younger brother who stays with his father. He (Emmanuel) sold the land but never informed all family members. The other part of his evidence is similar to that of **DW2**, only that he is not aware that caution had been registered against the title.

20. Upon cross-examination, he reiterated what **DW2** had said but added that the plaintiff/purchaser never took possession of that land. He agrees that the family members occasioned the breach of the agreement. The refund was not done promptly as the plaintiff had resorted to a refund but has never been refunded to date. He did not witness the agreement and does not know anything about the agreement.

21. Upon questioning by court, he stated that the alternative land is about **200 metres** from the portion shown to Juma at first. That their home is about **50 metres** from the main Kitale-Kwanza road. The plot first offered to Juma is about **100 metres** from the homestead; only boma rhodes grows on the said plot.

22. That marked the close of defence case.

DETERMINATION

Issues for Determination

23. The issues for determination that arise out of the pleadings in this suit are:

- (a) Whether there was a valid contract between the plaintiff and the defendants?*
- (b) Whether there was breach of the contract?*
- (c) Whether the order for specific performance can be granted upon the plaintiff as prayed?*
- (d) Whether the Plaintiff is entitled to general damages and if so how much?*
- (e) What orders should issue?*
- (f) Who bears the cost of the suit?*

24. The issues are addressed as here below:-

(a) Whether there was a valid contract between the Plaintiff and the Defendants

25. As to whether there was a valid contract between the plaintiff and the defendants, the plaintiff pleaded that he entered into an agreement with the Defendants for purchase of the suit property. He produced the agreement in evidence as **P. Exhibit 1**.

(a) Section 3 (3) of the Contract Act provides “No suit shall be brought upon a contract of disposition of an interest in land unless-

(a) The contract upon which the suit is founded:-

(i) Is in writing

(ii) Is signed by all the parties thereto and

(iii) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party. “.....provided that this subsection shall not apply to a contract made in the course of the public auction by an auctioneer within the meaning of Auctioneers’ Act.....”

26. I have carefully considered the evidence on record and the exhibits produced and I do not doubt that there was a valid agreement between the plaintiff and the defendants. The agreement dated 3/8/2016 produced as **P. Exhibit 1(a)** was reduced down in writing, signed by all the parties who were present at the execution of the agreement and witnessed by two witnesses before an advocate. Therefore it meets the conditions set down in **Section 3 (3)** of the **Contract Act**. Further the agreement contains the names of parties who have signed it, the description of the property, the purchase price and the conditions imposed upon each party to perform for successful completion of the agreement.

27. In the case of **Broadspect Investment Limited v Francis Njoroge Mwangi 2017 eKLR** the court quoted the following passage from the case of **Nelson Kivuvani vs Yuda Komora & Another, Nairobi HCC No. 956 of 1991** the court observed that:-

“.....the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract.”

28. The sale agreement having met all the aforementioned requirements of law amounts to a valid contract. I find that there was a valid contract between the plaintiff and the defendants.

(b) Whether there was Breach of Contract?

29. **Blacks Law Dictionary 8th Edition** at **Page 200** defines breach of contract as:-

“Violation of a contractual obligation by failing to perform one’s own promise, by repudiating it, or by interfering with another party’s performance. A breach may be one by non-performance, or by repudiation, or both. Every breach gives rise to a claim for damages, and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or is unable to show such loss with sufficient certainty, he has at least a claim for nominal damages. If a court chooses to ignore a trifling departure, there is no breach and no claim arises.”

30. I have perused through the land sale agreement dated 3/12/2016. What I can derive from it is that the agreement has imposed obligations on both the seller and the purchaser. **Paragraph 3** requires the seller to give vacant possession to the purchaser upon completion of the purchase price. It says.... *“The purchaser shall take possession of the said portion of land after paying the balance of the purchase price.”*

The defendants confirm receiving the purchase price in full.

31. The plaintiff paid the whole purchase price on the **20/12/2016**. However the defendants failed to give vacant possession as agreed. The defendants failed to honor and or discharge their obligations under the contract. Instead they came up with a raft of excuses on why they had not given up vacant possession to the plaintiff: an acre would be lost to the road of access; family members being the brothers and sister of the 2nd Defendant had protested the sale and subsequent occupation of the plaintiff.

32. It is the Defendant's admission that they have not given up vacant possession to the purchaser to date. The contract was valid even without the consent of the other family members. The 1st Defendant is the registered owner of the suit property and all rights are bestowed upon him to deal with the property in any way he wishes without consulting any person apart from his wife; which was not the case in this contract. The 2nd Defendant was given authority to contract by the 1st defendant. In this court's view, the lack of consent or otherwise by other family members does not render the contract repudiated/violated. Parties are bound by their obligation expressed in the contract. I therefore find the Defendants are in breach of the contract. The proposal for refund to the Plaintiff was an afterthought. Claims by the Defendant that the family was not agreeable to the sale are not convincing. **Paragraph 4** of the sale agreement is very clear that **"the vendor hereby covenants that no member of his family objects to the transaction"**. Besides the land is registered in the name of the 1st defendant who is at liberty to deal with it as he wishes. It has been confirmed that even when a refund was mooted, the money paid as consideration had been used up by the 1st defendant. It follows therefore that anything said contrary to this express covenant is unsustainable and is incapable of invalidating the contract.

33. The caution lodged was after the sale. Therefore the same did not affect the agreement. The Defendants are merely being evasive so as not to discharge their obligation under the contract with the intention of depriving the Plaintiff his right to own and enjoy his property.

(c) Whether the Plaintiff is entitled to the remedy of Specific Performance?

34. The court in awarding the remedy of specific performance must satisfy itself that there was a valid sale agreement capable of being enforced. This court has already held and found that the contract was valid and compliant with the requirement of **Section 3(3)** of the **Contract Act**.

35. In the case of **Oscar Ochieng & Another -v- Prilscot Company Limited [2018] eKLR** the court stated that:-

"An order for Specific performance is guided by common law principles. An order for specific performance decrees the due completion of a contract in its proper form. As a common law rule, the court will not decree specific performance where, if at trial, evidence is tendered to the effect that the vendor is unable to convey the land. This rule is informed by the Philosophy of that it is the essence of the remedy of specific performance that the purchaser should obtain land. Secondly, an order for specific performance is an equitable remedy and is granted at the discretion of the court. This discretion is governed by certain principles. For instance it cannot be granted if its enforcement would entail great hardship or if the vendor's title is in doubt or if its enforcement would entail protracted or difficult litigation and that the essence of an order of specific performance is that the contract remains in force and the parties are required to discharge their obligations under the contract."

36. I find the agreement entered into between the plaintiff and the Defendant free from any defect, mistake or illegality thus valid and enforceable. I also find that, the 1st Defendant is the registered owner of the land and the portion is available for occupation and transfer to the plaintiff. The defendants will not in my view suffer any hardship because the land has already been surveyed and there is an access road that the surveyor had already carved out. The road does not pass through any of the defendant's houses but passes through a boma rhodes plantation.

37. In view of the increased scarcity of land required for farming purposes in this nation, this court would have hoped that alternative thinking would have prevailed amongst all the parties to this litigation before this judgment so that no needless waste of the one acre of land to be converted into a road of access would occur. This alternative thinking and good will appear to be lacking on the part of both parties for now, and this court is compelled to determine this suit according to law.

38. As the plaintiff has established that he deserves it in law, this court is inclined to order specific performance.

(d) Is the Plaintiff entitled to General Damages for Breach of Contract and if so how much?

39. It is now settled law that indeed, in appropriate cases, general damages for breach of contract can properly be awarded in addition to an order of specific performance. A claimant for general damages for breach of contract who does not prove that he suffered a loss is all the same entitled to damage, though nominal.

40. In the **Anson's Law of Contract, 28th Edition**, at page **589** and **590**, the law is stated to be that:-

"Every breach of contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not in fact, suffered any loss by reason of that breach is nevertheless entitled to a verdict but damages recoverable will be purely nominal."

41. In the case of **Kimakia Co-operative Society vs. Green Hotel (1988) KLR242**, the Court of Appeal held that:

“.....where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not he cannot have more than nominal damages.”

42. In the instant case, the Plaintiff indicated to the court that he would have developed the land if he was given vacant possession, though he did not prove the same; however he must have suffered some loss which he could not quantify. The court will proceed to award nominal damages to the Plaintiff.

(e) What Orders should issue?

43. I find that the plaintiff has proved his case on a balance of probabilities and enter judgment in favour of the plaintiff against the Defendants and order as follows:-

(a) The Defendants herein shall give immediate vacant possession and subsequently transfer within a reasonable period to the Plaintiff the plot measuring 50 by 100 feet from PLOT NO. KITALE MUNICIPALITY BLOCK 1/LESSOS/1558 which the plaintiff purchased from the defendants.

(b) The defendants shall pay to the plaintiff general damages of Kshs. 40,000/=

(c) The costs of the suit shall be borne by the defendants jointly and severally.

(d) Further the cautioners are hereby ordered to remove the caution forthwith to facilitate transfer as ordered in (a) above in favour of the Plaintiff.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 26th day of February, 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.