



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO 603 OF 2017

PETER WARIIRE KANYIRI.....PLAINTIFF

VERSUS

CHRISPUS WASHUMBE..... 1ST DEFENDANT

SAMUEL MURIGI WAINAINA.....2ND DEFENDANT

FREDRICK KITUYIAN MARIPET.....3RD DEFENDANT

JUDGMENT

1. Vide the amended plaint dated the 5/7/2017 the Plaintiff filed suit on the 16/6/2017 seeking the following orders;

a. General damages.

b. Mesne profits from the 21/7/2006 at the monthly rate to be assessed by the Court from the date of occupation to the date of determination of suit.

c. The Defendants by themselves their agents and or servants be restrained from further interfering with the land parcel Plot No Z13, Thika Municipality (suit land).

d. The Defendants to demolish the temporary structure they have put up on the land parcel.

e. Cost of the suit

2. The Plaintiff's case is that he is the registered owner of the suit land and that the Defendants have been sued as the representatives of River of Life Centre Church, the current occupant of the suit land.

3. That vide an agreement dated the 21/7/2006 he avers that he entered into an agreement of sale with the Defendants for the purchase of the suit land at Kshs. 1.2 Million, out of which the sum of Kshs. 800,000/- was paid leaving a balance of Kshs. 400,000/- unpaid to date. That the completion date was the 31/7/2007 but the Defendants failed to complete the transaction despite constant reminders. It was his case that the Defendants have breached the agreement and consequently are liable to damages.

4. The Defendants denied the Plaintiffs claim and contended that the transaction has not been completed because of the breach of contract occasioned by the Plaintiff in submitting the completion documents in exchange of the balance of the purchase price. In addition, that the Plaintiff has been adamant to proof ownership of the suit land. Under paragraph 9 of the statement of defence, the Defendants have particularized various breaches of contract by the Plaintiff. The Defendants contend that the Plaintiff's cause of action offends Section 4(1) (a) and 8 of the Limitations of Actions Act. They accused the Plaintiff of frustrating the transaction on account that the market value of the suit land is now at Kshs. 14 Million.

5. It is their case that they are duly licensed to occupy the suit land as they had the unconditional possession and the Plaintiff is estopped from demanding rent. In their counterclaim they sought the following orders;

a. Specific performance of the agreement

b. Damages for breach of contract in lieu of or in addition to specific performance

c. Costs of the suit

6. The Plaintiff testified as a sole witness and relied on his written statement dated the 5/7/2017. He informed the Court that he owns the suit land which he purchased on 1/8/2012 from one Benson Njuguna Nganga. The property is described as Thika Residential Plot No Z 13 (allotment letter Ref 23126/XXVII/66). That he entered into an agreement of sale with the Defendants on 21/7/2006 which agreement the Defendants have failed to honour by failing to pay the balance of the purchase price which was due on the 31/8/2007. He admitted that he has not served the Defendants with a completion notice of the sale agreement. He confirmed that the Defendants are in occupation of the land having constructed a church building.

7. The Defendants case was led by Samuel Murigi Wainaina, DW1 who informed the Court that he is a member/official of River of Life Centre Church. That from 2000 the church rented the suit land and in 2006 entered into an agreement for sale in the sum of Kshs 1.2 million with the Plaintiff, out of which the sum of Kshs 850,000/- was paid leaving a balance of Kshs 350,000/- pending the delivery of completion/title documents by the Plaintiff. That time was not of the essence in the agreement because the completion date was varied by the conduct of the parties wherein the Plaintiff continued to receive the purchase monies way past the completion date. He stated that none of the parties have served each other with a completion notice. He informed the Court that they are ready and willing to pay the balance of the purchase price in exchange of completion documents. On the issue of rent payment, he confirmed that no rent is payable as the same was not provided for in the sale agreement.

8. The firm of **Kamiro & Company Advocates** filed the submissions on behalf of the Plaintiff while **Kariuki E & Co Advocates** filed on behalf of the Defendants. I have read and considered the written submissions.

9. Having read and considered the Pleadings, the evidence and the written submissions, the key questions for determination are; whether the Plaintiff has a cause of action; whether the agreement of sale was breached, if yes, by whom; whether specific performance can be granted; who is liable for mesne profits and general damages, if any; costs of the suit.

10. A cause of action is defined by Black law dictionary as a group of operating facts giving rise to one or more grounds for suing. It is a factual situation that entitles a person to maintain an action in Court or a tribunal so as to obtain a remedy in Court from another person.

11. It is not in dispute that the Plaintiff leased the premises to the Defendants in 2000 and later in 2006 entered into an agreement for sale of the property with the Defendants which agreement is alleged to have been breached by the Defendants, according to the Plaintiff and vice versa.

12. In this case the Plaintiff's cause of action is predicated on his assertion that he is the legal owner of the suit land, a subject to the agreement of sale between him and the Defendants dated the 21/7/2006. The Defendants have argued that the agreement has been frustrated by two issues; the failure by the Plaintiff to deliver completion documents and the Plaintiffs insistence for more money on account that the market value of the land has appreciated from Kshs 1.2 Million in 2006 to Kshs 14 Million currently. On the other hand, the Plaintiff's view is that the Defendants have failed to complete the agreement and sought orders for eviction, general damages, mesne profits from 2006 to the date of actual vacation and inter-alia demolition of the current structures on the land.

13. I have perused the transfer documents produced by the Plaintiff and note as follows; the transferee is Benson Njuguna Nganga and the land reference is Thika Residential plot No Z 13. The transferor is the Plaintiff. The transfer is in draft and in unregistered format. A transfer form for land under the Registered Land Act (now repealed), is for the transfer of a right /interest in registered land. In this case the Plaintiff admitted to the Court that he does not hold any title nor is he registered as proprietor of the land. He relies on a letter of allotment dated the 3/10/1990 issued to one Benson Njuguna Nganga for unsurveyed Industrial Plot No Z 13. The allotment is predated 1990 and it contains a disclaimer that if acceptance and payment of the stand premium and other charges respectively are not received within 30 days from the 3/10/1990, the offer will be considered to have lapsed. There is no evidence that the allottee accepted the letter of offer, paid the stand premium, obtained an approved part development plan for the land or that a title was finally prepared and issued to the allottee. It is therefore safe to hold that the letter of offer lapsed and the allottee Benson Njuguna Nganga acquired no interest by way of the letter of offer aforesaid. In any event a letter of offer is such, incapable of vesting any interest in an offeree on face value.

14. Section 26 of the Land Registration Act provides as follows;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

15. In the case at hand, in the absence of any title registered in the name of the Plaintiff, the Court is unable to hold that the Plaintiff is the registered proprietor of the land. This is because the letter of allotment lapsed within 30 days and the same is of no legal consequences. The transfer form relied upon by the Plaintiff, in the absence of registration is incapable of conferring any interest in the land. The truth of the matter is that the Plaintiff had no interest to convey to the Defendants in 2000 by way of lease nor in 2006 by way of a sale. It is also true that the Plaintiff neither acquired any interest estate or right in the suit land in 2012 by way of the unregistered draft transfer form from Benson Njuguna Nganga.

16. In the absence of any demonstrable right or interest in the suit land by the Plaintiff, there is no cause of action to warrant enforcement by this Court against the Defendants.

17. Consequently, the Defendants' counterclaim also rests on quick sand because they acquired nothing from the Plaintiff in 2000 and 2006. The counterclaim therefore must fail.

18. In the end, I find for the reasons stated above that the Plaintiff's suit and the Defendants' counterclaim are untenable and the same are dismissed.

19. Each party to meet their costs of the suit.

20. Orders accordingly

DELIVERED, DATED AND SIGNED AT THIKA THIS 8TH DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS PLATFORM.

J. G. KEMEI

JUDGE

DELIVERED ONLINE IN THE PRESENCE OF;

MR. KAMIRO FOR PLAINTIFF

MR. KARIUKI FOR 1ST, 2ND AND 3RD DEFENDANTS

MS. PHYLLIS MWANGI – COURT ASSISTANT