



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 81 OF 2015

NIXON KATEMBU MASIKA.....PLAINTIFF

VERSUS

AINEA WATSWENJE MUTSAML.....DEFENDANT

JUDGEMENT

The plaintiff avers that in the year 1999, he bought one acre of land out of the then South Kabras/Chemiche/556 from the defendant at a price of Ksh. 55,000/=. The plaintiff states that as agreed with the defendant, he (the plaintiff) facilitated financially the lodging of succession proceedings in respect of the land vide Kakamega High Court Succession Cause No. 419 of 2001 in order to give effect to the agreements made between them. The plaintiff further states that after the court issued the Grant of Letters of Administration in the aforesaid succession cause, the defendant secretly lodged another succession cause i.e. Kakamega High Court Succession Cause No. 132 of 2003 in order to defraud the plaintiff his share of the land. Particulars of the defendant's fraud are taking the plaintiff's full purchase price of one acre when he knew that he did not have the intention or will of transferring the portion to the plaintiff. Failing to transfer the one acre of land to the plaintiff as agreed between the parties. Hoodwinking the plaintiff into facilitating succession proceedings vide Kakamega High Court Succession Cause No. 419 of 2001 when he knew that he was not keen on finalizing the same. Abandoning Kakamega High Court Succession Cause No. 419 of 2001 after obtaining the Grant of Letters of Administration therein, and secretly lodging Kakamega High Court Succession Cause No. 132 of 2003 in order to con the plaintiff his share of the land. Failing to heed the terms of the agreements executed between him and plaintiff, that is, the defendant vide an agreement dated 2nd March, 2005 accepted to refund Ksh. 90,000/= w.e.f. 25th May, 2005 Ksh. 30,000/= as first installment but has failed to honour the agreement to date. The plaintiff's claim against the defendant is for transfer of the one acre of land he purchased out of South Kabras/Chemuche/556. The plaintiff prays for the following orders:-

(a) Transfer of one acre from LR. No. South Kabras/Chemuche/556.

(b) Costs of this suit be provided for.

The defendant states that the plaintiff never paid him Ksh. 55,000/= in the year 1999 despite entering into a land sale agreement. The defendant states that he was not involved in the filing of succession cause No. 419 of 2001. The defendant states that he filed Kakamega High Court Succession No. 132 of 2003 with his brother for the purposes of inheriting his father's estate and without any intention to defraud the plaintiff since the plaintiff had breached the terms of the agreement. The defendant states that he never entered into any agreement with the plaintiff on the 2nd March, 2005 for a refund of Ksh. 90,000/=.

This court has considered the application and the submissions therein. It is a finding of fact the defendant was the registered as the administrator of Land parcel No. South Kabras/Chemiche/556 in 2003 vide succession cause NO. 132 of 2003. The issue for determination is whether or not he was in of breach of contract as per the plaintiff's claim. **To determine whether or not there was breach of the contract, this Court must first determine whether there was a valid contract in place. The Plaintiff avers that he entered into a sale agreement with the Defendant for the sale of the suit property as per PEx1. That the same was reduced into writing and signed by all the parties. Section 3 (3) of the Contract Act provides that;**

“3(3)No suit shall be brought upon a contract for the 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

(b) 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 a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

The Court has carefully perused the sale agreement produced as Exhibit 1 by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of **Section 3(3)** of the **Contract Act**. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. I find that the sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. In the case of **Nelson Kivuvani Vs Yuda Komora & Another, Nairobi HCCC No.956 of 1991**, the Court held 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”.

On whether or not the Defendant breached the agreement for sale, Black’s Law Dictionary, 9th Edition, Page 213, defines a breach of Contract as;

“a 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 by 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.”

In the case of **Shah -vs- Guilders International Bank Ltd (2003)KLR** the Court in considering the terms of the parties contract stated-

“The parties executed the same willingly and they are therefore bound by it.”

And in the case of **National Bank of Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503**, where the Court held that:-

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.

In the instant case the sale agreement is clear that the purchase price was Ksh. 55,000/=. That the agreement dated 30th October 1999 further stated that the defendant was paid in full. I am satisfied that the defendant did receive the full purchase price and he failed to transfer the same to the plaintiff hence he is in breach of the sale agreement. The defendant admits to receiving Kshs. 51,400/= and testified that he was willing to refund the same. Be that as it may it has come out in evidence that the land is no longer available as it was sold to a third party. The plaintiff in his sworn evidence stated that he wanted the land and in the alternative a refund.

The Court of Appeal in Civil Appeal No. 165 of 1996 between **Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhbuti, Tunoi, JA** (as he then was) said;

“However, the appellants’ conduct has been such as to render it inequitable for specific performance to be granted...There was no evidence that prior to the filing of the suit the applicants tendered the balance of the purchase price to the respondent. This only confirms that they were never ready, able and willing to carry out their part of the contract. Secondly, the appellants simply could not raise the balance of the purchase price on or before the specified time and were in fact in breach of the agreement. Thirdly, the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. The contract not having been completed within the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property, more than four years after the event when its current value has materially appreciated”.

Likewise, I find that the payment of the purchase price was completed way back in 1999 however the land has since been sold to a third party and specific performance is no longer possible. *It is the finding of this court that there is a breach of contract on the part of the defendant in this case. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;*

1. That the defendant is to refund the sum of Kshs 55,000/= plus costs and interest from the date of filing this suit within the next 90 (ninety) days from today.
2. Costs of the suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 6TH DAY OF MAY 2020.

N.A. MATHEKA

JUDGE