



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CASE NO. 630 OF 2012**

**REUBEN MUHAVI MUSUNDI.....PLAINTIFF**

**=VERSUS=**

**URUTAGWO MWIRITU WOMEN GROUP.....DEFENDANT**

**JUDGMENT**

1. The plaintiff brought this suit through a plaint dated 21/9/2012. He sought the following verbatim orders against the defendant:

- a) a permanent injunction to restrain the defendant and the third party either by itself, its agents, servants, employees and/or otherwise from taking possession, constructing, or in any other way interfering with the plaintiff's proprietary rights over Plot No. 13, LR 7340/148.*
- b) Mandatory injunction to forestall any developments and to remove any structures by the defendant and third parties on Plot No. 13, LR 7340/148.*
- c) Father (sic) that this honourable court orders/makes an order for specific performance ordering the defendant to **accept the balance of Kshs 19,000 and transfer the share to the plaintiff's name.***
- d) That in the alternative, that this honourable court issues an order that the defendant refunds the plaintiff's money for the value at the current market rates and/or further orders for restitution on the value of the plot with interest compounded at current commercial rates.*
- e) General damages for trespass and loss of user.*
- f) Cost of this suit interest thereon.(sic)*
- g) Any other relief that this honourable court may deem just to grant.*

2. Hearing commenced and proceeded *ex-parte* before Gacheru J on 4/5/2016. The plaintiff testified and closed his case on that day. The defendant subsequently brought an application for re-opening of the trial. Their plea was granted and trial was re-opened. Defence case was subsequently heard before me on 19/5/2020. At the start of the hearing of the defence case on 19/5/2020, Ms Muhanda, counsel for the plaintiff, orally applied to withdraw prayers (a), (b) and (c) of the reliefs sought in the plaint. The oral application was granted by the court. The court will therefore only be considering whether the plaintiff has proved his case and is entitled to prayers (d), (e) and (f) of the plaint.

**Plaintiff's Case**

3. The plaintiff's case was that, on diverse dates between 2006 and 2007, he entered into an oral agreement with the defendant, for purchase of two plots designated as: (i) *Plot No 92, LR 7340/84* at Kshs 50,000; and (ii) *Plot No 13, LR 7340/148* for Kshs 90,000. He commenced and continued to make payments for the two plots in instalments. After he had paid Kshs 31,000 for *Plot No 92, LR 7340/84*, the defendant informed him that they had sold the said Plot to a third party and they had decided to treat the sum of Kshs 31,000 as payment for *Plot No 13, LR 7340/148*. The two parties agreed that the plaintiff would commence construction on *Plot No 13, LR 7340/148*. The defendant agreed to issue a share certificate to the plaintiff. The plaintiff made a total payment of Kshs 71,000, leaving a balance of Kshs 19,000. When he went to pay the said balance, agents of the defendant declined to accept the money, claiming that *Plot No 13, LR 7340/148* had already been sold to third parties. When the plaintiff visited the plot, he established that a third party had encroached on it. Consequently, he brought this suit seeking the above reliefs.

**Defendant's Case**

4. The defendant filed a statement of defence dated 25/10/2012. They contested the plaintiff's claim. They averred that the plaintiff was to pay contributions towards acquisition of the two plots within reasonable time but failed to do so, hence he was to blame for his predicament. They added that it was a condition precedent that the full contributions (payments) were to be made before possession of the Plots would be given to the plaintiff, but the plaintiff failed to meet his obligations. It was the defendant's case that the plaintiff's only remedy was a refund of his contributions (money) as the suit properties had passed to third parties irretrievably. The defendants further averred that any constructions carried out on the said plots by the plaintiff were done without their authorization and were in breach of the agreed terms and conditions. Lastly, the defendant averred that they lawfully sold the suit properties to third parties because there was no bar as the plaintiff's contract had lapsed by the effluxion of time.

#### **Plaintiff's Evidence**

5. The plaintiff testified on 4/5/2016 as PW1. His testimony was that between 2006 and 2007, he made an oral agreement with the defendant for purchase of the two plots at Kshs 50,000 for Plot No 92, LR 7340/84 and Kshs 90 for Plot No 13, LR 7340/148. He started paying for the two plots in instalments. After paying Kshs 31,000 for Plot No 92, LR 7340/84, the defendant informed him that they had sold the said plot to a third party and had decided to add the sum of Kshs 31,000 to the share contributions towards purchase of Plot No 13 LR 7340/148. He agreed with the defendant that he would start construction on Plot No 13 LR 7340/148 and he would get a share transfer in his name after clearing the balance. When he went to pay the balance, which was Kshs 19,000, agents of the defendants declined to accept his money and told him that the Plot had been sold to a third party. He produced copies of receipts and photographs.

#### **Defendant's Evidence**

6. The defendant called one witness, Anne Wairimu Ndungu, who testified as DW1. She adopted her witness statement dated 17/11/2020. She said she was the chairlady of the defendant. She confirmed that the defendant entered into an oral agreement with the plaintiff in 2006 for sale of the two plots to the plaintiff. The total purchase price for the two plots was Kshs 140,000. The plaintiff paid a total of Kshs 71,000 leaving a balance of Kshs 69,000. The purchase price was to be paid within one year. The plaintiff had not paid the balance by the close of one year. She added that the plaintiff was in possession of the two plots and he had developed one of the plots. She further testified that the defendant did not have any claim over the one plot which the defendant had developed. Further, she stated that the defendant had repossessed the second plot although it was still vacant. She added that they had not allocated the plots to any other person and **that the plaintiff was in possession of both plots.**

#### **Submissions**

7. Parties filed and exchanged written submissions which I have considered.

#### **Analysis and Determination**

8. I have considered the parties' pleadings, evidence and submissions. The plaintiff having withdrawn prayers (a), (b) and (c), the single question falling for determination in this suit is whether the plaintiff is entitled to a refund of the monies and to general damages for trespass and loss of user as sought in the plaint.

9. The plaintiff seeks a refund of monies paid to the defendant towards acquisition of the two plots based on the current value of Plot No 13, LR 7340/148. He also seeks damages for trespass and loss of user. Parties to this suit elected to enter into a land sale contract that did not conform with the mandatory requirements of **Section 3 of the Law of Contract Act**. It is not therefore surprising that the plaintiff abandoned the plea for an order of specific performance.

10. The defendant submitted that they were willing to refund the plaintiff the amount of Kshs 71,000/- on "humanitarian grounds as he is wholly to blame for non-performance of his part of the bargain".

11. In the absence of clear terms of contract, the court has no basis for finding either of the two parties to be in breach of the alleged oral land sale contract. Secondly, in the absence of clear terms of contract, there is no proper legal basis for awarding the plaintiff the equivalent of the current market value of Plot No 13, LR 7340/148. In any event, no evidence was tendered in relation to the current market value of the said Plot. Similarly, no evidence was tendered relating to the applicable commercial interest rates.

12. I will in the circumstances award the plaintiff Kshs 71,000 together **with interest at court rate from the date of filing this suit. I will award interest at court rate because the defendant did not tender the money in court at the time they were served with summons to enter appearance.**

13. The plea for "general damages for trespass and loss of user" fails wholly because of lack of evidence of a valid and enforceable land sale contract.

14. Trial of this suit would not have been necessary or taken the time it took had the defendant agreed to refund to the plaintiff the sum of Kshs 71,000/- from the word go. The defendant put forth a defence which they subsequently abandoned by leading evidence that was in sharp contract with the position they had taken in their defence.

15. Lastly, the defence questioned the jurisdiction of this court to adjudicate this dispute. They contended that this court lost jurisdiction when the plaintiff withdrew prayers (a), (b) and (c) of the reliefs originally sought. I do not think withdrawal of the three prayers divested this court of jurisdiction to adjudicate this dispute because the remaining limbs of the plaintiff's claim relate to land in the context of restitution; trespass to land; and loss of user of land [see prayer (d), (e) and (f)].

16. It is therefore my finding that the plaintiff's claim against the defendant succeeds only in terms of refund of the sum of Kshs 71,000 paid to the defendant as part-payment of purchase for the two plots. Because the defendant did not tender the said sum in court at the time they were served with summons, they will pay interest on the money at court rate from the date of filing suit. The defendants will also bear costs of the suit.

**Disposal Orders**

17. In the end, Judgment is entered for the plaintiff against the defendant for:

*a) Kshs 71,000*

*b) Interest on (a) above at court rate from the date of filing suit.*

*c) Costs of the suit.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25<sup>TH</sup> DAY OF MAY 2021.**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Ms Muhanda for the Plaintiff

Court Assistant: June Nafula