



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC. CASE NO. 08 OF 2017

(Formerly Milimani ELC Case No. 63 of 2017)

JEREMIAH MEPUKORI NAIROWUA.....PLAINTIFF

VERSUS

TUMBES OLE ROIKA KATATO.....1ST DEFENDANT

SAMBERU PARNGATIAN SABURU.....2ND DEFENDANT

JUDGMENT

By a Plaintiff dated the 30th January, 2017 which was later amended on 28th September, 2020 the Plaintiff prays for Judgment against the Defendants for:

- a) *A finding that the 1st Defendant is in breach of the Agreement of Sale dated 25th January, 2016.*
- b) *That the 1st and 2nd Defendants do excise 40 acres from the parcel Title No. Kajiado/Elangata Wuas/932 and provide all necessary completion documents as will enable the transfer of the 40 acres to the Plaintiff.*
- c) *That time be extended to apply to the relevant Land Control Board for the subdivision of parcel Title No. Kajiado/Elangata Wuas/932 to extract the 40 acres and transfer thereof to the Plaintiff pursuant to the Agreement of Sale dated 25th January, 2016.*
- d) *That should the 1st and/or 2nd Defendants fail to comply with the orders for specific performance of the Agreement for Sale dated 25th January, 2016, the Deputy Registrar, Environment & Land Court, Kajiado be at liberty to execute any and all documents as shall be necessary to enable the subdivision and conveyance to the Plaintiff of 40 acres to be excised from parcel Title No. Kajiado/ Elangata Wuas/ 932.*
- e) *General Damages for breach of contract.*
- f) *Costs of this suit.*

The 1st Defendant in the initial Defence dated the 28th April, 2017 denied the averments in the Plaintiff except the descriptive and jurisdiction of the Court. He contended that the Plaintiff neither has interest nor valid claim in respect to land parcel number Kajiado/Elangata Wuas/932 (formerly Kajiado/Elangata Wuas/673) hereinafter referred to as the 'suit land'. He denied that the Plaintiff took possession of and is occupying 40 acres of land without any valid Sale Agreement and or arrangement capable of giving rights over the said land from the year 2006/2007. He confirms that they entered into a valid agreement of sale dated the 25th January, 2016 but the Plaintiff breached the terms therein and he rescinded it. He avers that the decision of the Kajiado Central Land Disputes Tribunal was quashed by the High Court in Machakos vide Judicial Review Miscellaneous Application No. 50 of 2012, for lack of jurisdiction.

The 1st Defendant did not file a Defence to the Amended Plaintiff. Further, the 2nd Defendant never entered appearance nor filed a Defence to controvert the Plaintiff's averments.

The Plaintiff filed a reply to Defence reiterating his averments and insisting he has been in occupation of the 40 acres of land since the year 2006. Further, that he had fully settled the agreed purchase price but 1st Defendant frustrated completion of the agreement.

The matter proceeded for hearing wherein it is only the Plaintiff that participated and had two witnesses.

Evidence of the Plaintiff

The Plaintiff claims he is a beneficial owner of 40 acres of land from the suit land, which he purchased from the 1st Defendant in the year 2006 – 2007. He explained that the Defendants are the registered proprietors of the suit land. It was his testimony that after payment of the full purchase price, he took possession and proceeded to occupy the forty (40) acres of the suit land in the year 2006. He states that the survey and subdivision of the land to excise his portion was done and the issue remaining was transfer. Further, the 1st Defendant became evasive, declined to effect transfer and is now attempting to evict him. He confirms filing a claim for his forty (40) acres of land at the **Kajiado Central Lands Dispute Tribunal** in the year 2001 wherein he was awarded twenty (20) acres subsequently the 1st Defendant filed a Judicial Review Misc. Application Number 50 of 2012 at the High Court at Machakos culminating in the said Award being quashed. He insists the excision of his portion of land has not been done to date as the process has been frustrated by the 1st Defendant under the pretext that his family wishes to only transfer twenty (20) acres to him. Further, the 1st Defendant requested him to increase the purchase price to represent the increased value of the land and this was reduced to an agreement dated the 25th January, 2016 for sale of forty (40) acres of land to be hived from the suit land. He claims the consideration was supposed to be money and 10 cows plus 50 goats. He avers that he paid Kshs. 80,000 and prepared the 10 cows plus 50 goats but the 1st Defendant declined to pick them. To support his case, he tendered the following documents as exhibits: Copy of title of Kajiado/Elangata Wuas/673; Mutation of Title No. Kajiado/Elangata Wuas/673; Copy of title of Kajiado/Elangata Wuas/932; Copy of Green Card for Kajiado/Elangata Wuas/673; Certificate of Official Search conducted on 10th February, 2012; Copy of proceedings and Ruling in SRMC Land Dispute Tribunal No. 114 of 2011 – Kajiado; Copy of Pleadings and Ruling in Judicial Review Misc. 50 of 2012 Machakos; Copy of proceedings and Ruling in Kajiado Central Land Disputes Tribunal Case No. T. C 656/07/2011; Agreement for Sale dated 25th January, 2016 and Letters dated 5th February 2016 and 22nd June, 2016.

Evidence of the Defendants

The Defendants failed to cross examine the Plaintiff nor tender any evidence in support of their claim.

The Plaintiff filed his submissions but the Defendants failed to do so.

Analysis and Determination

Upon consideration of the Plaintiff, 1st Defendant's Defence, Witness Testimonies, Exhibits and Submissions, the following are the issues for determination:

- Whether the 1st Defendant is in breach of the Agreement of Sale dated 25th January, 2016.
- Whether the Plaintiff is entitled to orders of specific performance as well as extension of time to apply for Consent of the Land Control Board.
- Who should bear the costs of this suit.

The Plaintiff in his submissions contended that the 1st Defendant was in breach of the Sale Agreement dated the 25th January, 2016 as he paid the Kshs. 80,000/= he was required to pay before execution of the said Agreement as well as prepared the balance of the 10 cows plus 50 goats which the 1st Defendant declined to receive. He laid emphasis on Special Condition B in the aforementioned Sale Agreement. He reiterates that he is entitled to orders of specific performance in respect to the forty (40) acres of land to be excised from Kjd/Elangata Wuas/932 and that the Defendants should effect transfer of the same to him. Further, that due to the delay by the Defendants to effect transfer, he seeks an extension of time to enable him apply for consent to transfer from the Land Control Board. He further submits that in the event the Defendants failed to sign the necessary documents, the Deputy Registrar, be directed to do so.

I will proceed to deal with all the issues jointly.

I note the 1st Defendant failed to file a Defence to the Amended Plaintiff to controvert the Plaintiff's averments. Further, except for filing the first Defence, he did not tender any evidence in respect to the dispute herein. The 2nd Defendant though duly served failed to file a Defence to controvert the Plaintiff's averments. During the hearing of this suit, the advocate for the 1st Defendant declined to cross examine the Plaintiff.

The Plaintiff claims to have purchased forty (40) acres of land from the 1st Defendant in the year 2006 and paid the full purchase price, after which he took possession of the said land. The 1st Defendant declined to transfer the said land to him claiming the family was opposed to it and that the purchase price was too low. The Plaintiff sought the intervention of the Kajiado Central Land Disputes Tribunal that directed the 1st Defendant to transfer only twenty (20) acres to him, which decision was later quashed by the Machakos High Court. Noting that the Plaintiff was in possession of the suit land, the 1st Defendant demanded more consideration culminating in the execution of a Sale Agreement dated the 25th January, 2016. Further, the Plaintiff proceeded to pay Kshs. 80,000/= as part consideration and prepared the 10 cows and 50 goats which the 1st Defendant was to pick but he declined to do so, claiming he had rescinded the said Agreement. I wish to reproduce an excerpt from the proceedings in the Tribunal where it stated as follows: **3. That both parties entered into agreement of Sale of 40 acres in different times of 20x20 with Kshs. 10,000 per acre totaling Kshs. 400,000 of which the Claimant paid Kshs. 360,000 and the remaining balance calculated to be survey fee on the side of the objector (Tumpes Roika). 5. That the claimant (Jeremiah Nairowua) took the surveyor into the ground to annex the Forty (40) acres, a process which was very much disputed by the objector's family in reason that they were not aware.**

From the said Tribunal proceedings which were conducted in 2011, it emerged that the 1st Defendant indeed sold land to the Plaintiff, and received the consideration for the said forty (40) acres. Further, in the Sale Agreement dated the 25th January, 2016 at clause 2, it confirmed the vendor already received Kshs. 80,000 and the remaining balance to be paid was fifty (50) goats and ten (10) cows. Further, at Clause E, the Vendor (1st Defendant) was expected to furnish the purchaser (Plaintiff) with various completion documents upon payment of the initial deposit.

I note in the Letters dated 5th February 2016 and 22nd June, 2016 respectively addressed to the vendor and purchaser's joint advocate, the Plaintiff informed the 1st Defendant that the 10 cows and 50 goats were ready but he declined to pick the same. Further, the 1st Defendant failed to furnish the Plaintiff with the completion documents as had been agreed upon. From the evidence presented, it is very clear that the Defendants' failed to act in good faith, despite receiving consideration twice from the Plaintiff in respect to the suit land and allowed him to take possession of the forty (40) acres. The Plaintiff hence filed this suit seeking specific performance.

In the case of **Gurdev Singh Birdi & Marinder Singh Gatora vs. Abubakar Madhubuti**, the Court of Appeal in Civil Appeal No. 165 of 1996, held that the underlying principle in granting the equitable relief of specific performance is that, **"the Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action."**

While in **Thrift Homes Ltd V. Kenya Investment Ltd 2015 eKLR**, the court stated that, "specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. **The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy.** The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction."

Based on the evidence presented, I find that the Plaintiff had indeed been in possession of the forty (40) acres of land from 2006. Further, that the 1st Defendant is indeed in breach of the Agreement of Sale dated 25th January, 2016. I opine that an element of constructive trust was also created when the 1st Defendant allowed the Plaintiff to take possession of the suit land in 2006 and cannot make a turnaround now. It is against the foregoing while relying on the abovementioned decisions and also anchoring my determination on the principles enshrined in Articles 2, 4 and 10 of the Constitution in respect to social justice and equity, I find that since the 1st Defendant continued to receive the purchase price, while the Plaintiff had taken possession of the suit land to safeguard his interest; and the Defendants having failed to tender evidence to controvert the Plaintiff's averments, he is indeed entitled to the orders sought in the Plaintiff.

On the issue of costs, I find that since the Plaintiff is the inconvenienced party he is entitled to costs of this suit.

It is against the foregoing that I find the Plaintiff has proved his case on a balance of probability and will enter judgement in his favour. I will proceed to make the following orders:

- i. A finding be and is hereby made that the 1st Defendant is in breach of the Agreement of Sale dated 25th January, 2016.*
- ii. The 1st and 2nd Defendants be and are hereby directed forthwith to excise 40 acres from the parcel Title No. Kajiado/Elangata Wuas/932 and provide all necessary completion documents as will enable the transfer of the 40 acres to the Plaintiff.*
- iii. Time be and is hereby extended for six (6) months to enable the Plaintiff apply to the relevant Land Control Board for the subdivision of parcel Title No. Kajiado/Elangata Wuas/932 to extract the 40 acres and transfer thereof to him, pursuant to the Agreement of Sale dated 25th January, 2016.*
- iv. That should the 1st and/or 2nd Defendants fail to comply with the orders for specific performance of the Agreement for Sale dated 25th January, 2016, the Deputy Registrar, Environment & Land Court, Kajiado be at liberty to execute any and or all documents as shall be necessary to enable the subdivision and conveyance to the Plaintiff of 40 acres to be excised from parcel Title No. Kajiado/Elangata Wuas/932.*
- v. Costs of this suit is awarded to the Plaintiff.*

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 18TH DAY OF NOVEMBER, 2021

CHRISTINE OCHIENG

JUDGE