



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO.155 OF 2014

JOSEPHAT KING'ORI IRUNGU.....PLAINTIFF

=VERSUS=

MARTIN MBOGO GACHERU.....DEFENDANT

JUDGEMENT

1. By a plaint dated 14th February 2014. The Plaintiff prays for judgement against the Defendant for:-

- a) *An order that the Defendant is in breach of the agreement for sale dated 6th November, 2008 and the same be rescinded.*
- b) *An order that the Defendant do pay the Plaintiff damages for breach of the agreement for sale dated 6th November, 2008.*
- c) *An order that the 1st Defendant be compelled to hand over original title deed for NYANDARUA/KAHURU/2766 forthwith.*
- d) *An order that the Defendant do pay general damages to the Plaintiff for the suffering that his actions caused him.*
- e) *Costs of the suit and interest thereon.*

2. The Plaintiff contends that he is the registered owner of all that parcel of land known as land reference Number NYANDARUA/KAHURU/2766 measuring 0.86 hectares, whereas the Defendant is the registered owner of land reference Number MAVOKO TOWN BLOCK 2/5193 measuring 0.0916 hectares.

3. It is the Plaintiff's case that on the 6th day of November 2008, the Plaintiff and the Defendant entered into an agreement whereby they exchanged the plots parcels of land stated above and the Defendant was to top up kshs.900,000/= in thirty six (36) monthly installments of kshs.25, 000/= payable on the 5th of every month starting December, 2008 and terminating on November, 2011. He further stated that the Defendant has only paid kshs.50,000/= out of the balance of kshs.900,000/=.

4. He contended that at the request of the Defendant, he charged NYANDARUA/KAHURU/2766 to Equity bank to enable the Defendant secure a loan of Kshs.500, 000/= but he collected the original title deed for the said land from Equity bank on behalf of the Plaintiff but has to date refused to hand over the same to the Plaintiff.

5. He also contended that on 6th June 2003, he conducted a search over MAVOKO TOWN BLOCK 2/5193 and discovered that there is a caution in favour of Jane Wangui Gachare who is claiming a purchaser's interest over the property.

6. The Defendant entered appearance on 19th March 2014 vide the memorandum of appearance dated 19th March 2014 filed by Nyamu & Company Advocates.

7. He filed the statement of defence dated and counterclaim dated 2nd April 2014. It was his case that he paid the entire purchase price to the Plaintiff. He contended that he charged NYANDARUA/KAHURU/2766 with Equity bank and received Kshs 485,000 out of which he gave the Plaintiff Kshs 305,000 in cash and Kshs 183,000 bank transfer towards partial settlement of the purchase price. He contended that he cleared the aforementioned credit facility with Equity bank and obtained a discharge of the charge registered against the land but since the Plaintiff refused to hand over ownership of the parcel to the Defendant and give vacant possession, he opted to retain the title as lien.

8. He contended that Land parcel MAVOKO TOWN BLOCK 2/5193 was in possession of the Plaintiff as per the agreement dated 6th

November 2008 but the Plaintiff had not effected transfer in his name. After the signing of the agreement, the plaintiff deposited with Teshmo suppliers the Title Deed for land parcel MAVOKO TOWN BLOCK 2/5193 as security. Teshmo suppliers demanded for payment of the loan or in default they would sell the property. The plaintiff hurriedly looked for a buyer using a copy of the Title and found a buyer by the name Jane Wangui who did pay the full amount. Teshmo suppliers got impatient and found a buyer to the land and sold it to one Kenneth Kimathi Kiambi.

9. The plaintiff requested the Defendant to sign the sale agreement and transfer of the land MAVOKO TOWN BLOCK 2/5193 in favor of the said Kenneth Kimathi Kiambi since the title was still in his name. The Defendant did that and that is how the Plaintiff was discharged from his liability to Teshmo Suppliers.

10. The Defendant the refunded the Kshs. 100,000 to Jane Wangui after she filed a suit for recovery of the deposit. She was to the lift the caution registered against the land MAVOKO TOWN BLOCK 2/5193, which she did not. In his Counter claim, the Defendant avers that he has fully complied with his contractual obligation under the Agreement of sale dated 6/11/2008 and is entitled to the transfer of land parcel number NYANDARUA/KAHURU/2766.

11. Equity bank Limited was initially sued as an interested part but the case against it was withdrawn entirely by the Plaintiff.

12. In his counterclaim the Defendant seeks for orders that:-

(a) The Plaintiff's suit be dismissed with cost to the Defendant.

(b) A declaration that the Defendant is entitled to a legal lien on the Title Deed in his possession and an equitable lien on the parcel of land known as Nyandarua/Kahuru/2766.

(c) A permanent injunction restraining the Plaintiff either by himself, his servants and/or agents or anyone else claiming under him from transferring, alienating, charging, wasting or dealing with the parcel of land known as Nyandarua/Kahuru/2766.

(d) An order of specific performance directing the Plaintiff to supply the Defendant with all completion documents as are or would be necessary to facilitate the transfer of the parcel of land known as Nyandarua/Kahuru/2766 to the Defendant forthwith and in default, an order do issue authorizing the Deputy Registrar to execute the said documents.

(e) Further or other reliefs.

(f) Costs.

The Plaintiff's evidence.

13. The Plaintiff, Joseph Kingori Irungu testified on 9th May 2019. His witness statement dated 14th February 2014 was adopted as part of his evidence in chief. He produced documents in the bundle of documents dated 4th February 2014 as exhibit P1 to P9 respectively.

14. He told the court that the Defendant never gave him the original title to MAVOKO TOWN BLOCK 3/5193 and that he later sold the plot. He denied knowing Teshmo suppliers and that he never took any loan from them. He further stated that he does not know Jane Wangui Gachare and Kenneth Kimathi Kiambi and that he never entered into any transaction with any of them.

15. He stated that the Defendant only paid Ksh.75,000/= in total and that cheque No. 85 for Kshs.183,200/= has nothing to do with the subject suit as it was in respect of refund . He had given the Defendant money as a loan to pay cash bail as he was facing a charge at city court.

16. He also stated that Rufus Mindumbi is one of the people who bought his house in Kitengela. He added that since the Defendant was a close friend, he informed him he was selling the house and he introduced Mr. Rufus to him but he did not give the Defendant authority to negotiate with Mr. Rufus on his behalf and that there is no agency fee agreement between him and the Defendant. He added that he gave the Defendant kshs.20,000/= as a token of appreciation.

17. He stated that in regard to the Nyandarua parcel, he gave the Defendant title as security; but the Defendant was supposed to offset the loan. He added that the Defendant was given the original title deed by Equity bank since the Plaintiff was away in Pokot working. He stated that the Defendant did not honour the agreement. He prayed that he be awarded the prayers in the plaint.

18. When cross-examined; He stated that he went to Kenyatta University with the Defendant and that in 1996, they went separate ways but met again in 2005 when he bought a plot in Syokimau. He stated that the sale of 2008 was his first transaction with the Defendant. He emphasized that he had only received Kshs. 75,000/= from the Defendant in three installments of kshs.25, 000/= in 2009.

19. When referred to paragraph 6 of the sale agreement dated 6th November 2008, he stated that it was drafted by M/S Kanyi Ndurumo Advocates who represented him and the Defendant in the transaction and that he could not transfer the title to himself since he had not been given the original title.

20. He stated that in May 2009, the Defendant asked for the to Nyandarua Kahuru/2766 title to obtain a loan from Equity bank and that he gave him as a friend and that all instruments pertaining to the loan are with the Defendant but he signed some documents at the bank and at the land control board.

21. He also stated that he was paid kshs.183,200/= but it was a refund of a loan he had given the Defendant to pay cash bail as he was facing a charge in court.

22. When re-examined, he stated that criminal charges against the Defendant were in August 2008 and that the Defendant refunded via a cheque issued by Briman Investment Limited.

The Defendant's evidence

23. DW1, Martin Mbogo Gacheru the Defendant testified on 22nd July 2019. He adopted his witness statement and bundle of documents dated 2nd April 2014. He stated that he paid the Defendant kshs.10,000 in cash, kshs.183,200 through Briman Investment Limited and that it was not a refund of cash bail as he has never been arrested for any criminal offence but for traffic offences.

24. He stated that on 8th June 2009, he took a loan of kshs.485,000 from the Equity bank using the Nyandarua title which was still under the Plaintiffs name. He stated that on 9th June 2009, he paid Kshs.100,000/= in cash and a further 205,000 on 10th June 2009 in cash.

25. When cross-examined, he stated that when he was doing transport business, his vehicles would be apprehended but the Defendant never paid any money towards this.

26. He stated that by 2011, he had paid kshs.943,000/= being instalments of Kshs.480,000/= in June 2009, Kshs.183,200/= Kshs.10,000/= Kshs.380,000 as commission for the Defendant's sale of the Plaintiff's house in Kitengela. He stated that he did not have evidence that he sold the house in Kitengela since their agreement was a gentleman's agreement.

27. He stated that was the registered proprietor of MAVOKO TOWN/BLOCK 3/5193 and that there was no written agreement that he was to sell the property to Jane Wangui Gachare. He added that the sale to Jane did not go through as Jane only paid him a deposit of Kshs.100,000/=. She did not pay the balance in time. He stated that Jane took him to court and he refunded the kshs.100,000/= she had paid as deposit.

28. When referred to the sale agreement dated 5th October 2009 between him and Kenneth Kimathi Kiambi, he stated that the Plaintiff is not mentioned as the suit property was in his name but the money was paid to Teshmo suppliers limited. He stated that he had no evidence to show that the plaintiff had a relationship with Teshmo suppliers Limited.

29. DW2; Stephen Kimani Mungai a customer service supervisor at Equity Bank told the court that the letter dated 6th September 2016 emanated from the bank indicating transactions relating to the Defendant's account.

30. At the close of the oral testimonies parties tendered written submissions.

The Plaintiff's submissions

31. They are dated 31st May 2021. The plaintiff raised the following issues for determination:-

a) Is the Defendant in breach of the agreement?

b) What remedies are available to the parties?

32. The Plaintiff submitted that the Defendant defaulted on the purchase price since as at December 2011, he had only paid Ksh. 75,000. He added that the sums alleged to have been paid by the Defendant are denied and remain unproved.

33. He pointed out that kshs.183, 200/= paid on 10th June 2009 was a refund of a friendly loan advanced to the Defendant to pay for cash bail when his business was in conflict with the law.

34. He also submitted that the allegation that the Defendant paid Kshs.400,000 was not proved by way of evidence. He further submitted that there is no evidence that MAVOKO TOWN BLOCK 3/5193 was sold on instructions from the Plaintiff and there is no evidence that the Plaintiff took a loan from Teshmo suppliers, defaulted and instructed the Defendant to dispose the Mavoko property.

35. He submitted that the right to lien over the original title to the Nyandarua property terminated when the Defendant breached the agreement dated 6th November 2008. He added that enforcing the agreement dated 6th November 2008 only in favour of the Defendant would in effect unjustly enrich him at the expense of the Plaintiff while the courts have held that equity shall suffer no wrongdoing without a remedy and equity detests unjust enrichment .

36. He also submitted that specific performance like any other equitable remedy is discretionary but its jurisdiction is based on the existence of a valid enforceable contract, thus; it will not be ordered if the contract suffers from some defect.

37. He added that the contract for sale of **NYANDARUA/KAHURU/2766** has a defect and void and unenforceable for want of a consent to transfer within 6 months since it is agricultural land therefore the prayer for specific performance is untenable. He pleaded with the court to order for rescission of the agreement so that parties are restored to their positions before the agreement. He relied on the case of **Kenneth Kipruto Chebet v Laban Kipkering Murei [2013] e KLR**.

38. He also submitted that having proved the Defendant's deliberate breach the Plaintiff should be granted damages to mitigate loss suffered. He relied on ground that the Defendant's conduct was oppressive, outrageous, callous and underhanded for selling the Mavoko property to two more people while the contract dated 6th November 2008 was subsisting. He relied on the court of Appeal's decision in **Delilah Kerubo Otiso v Ramesh Chander Ndingra [2018] e KLR** where the court of Appeal upheld an award of kshs.20,000,000/= as general damages for breach of contract.

The Defendant's submissions.

39. They are dated 23rd September 2021. The Defendant raised the following issues for determination:-

a) Whether there has been a breach of the agreement dated 6th November 2008 and which party caused the breach.

b) Exercise of right of lien by the Defendant

c) Defendant's remedy of specific performance.

40. The Defendant submitted that beyond the formality of a sale agreement, parties had extra informal covenants and actions between them towards executing their different obligations owing to their long friendly relations.

41. He added that the timing of the loan from Equity Bank, the Plaintiff's readiness to comply and assist in the processing of the loan & the disbursements immediately thereafter would lead any reasonable person to observe that the loan transactions were made towards the purchase price.

42. He submitted that it would be inconceivable that the Plaintiff would be doing the Defendant a favour in May 2009 while the Defendant was in active breach of the terms of the sale agreement, by offering title to NYANDARUA/KAHURU/2766 to guarantee the Defendant for a loan.

43. He added that it is easier to believe that the amount being taken out as a loan was for the benefit of the Plaintiff; which is what is the Defendant's contention that the amounts were given to the Plaintiff in cash of kshs.305,000/= & a bank transfer of Kshs.183,200/=.

44. He faulted the Plaintiff for admitting receipt of Kshs.183,200/= yet alleging that it was a refund of cash bail paid for the Defendant yet he did not plead in his plaint or prove by way of a receipt.

45. He submitted that the last payment was by way of commission pursuant to a sale of property that he helped the Plaintiff make. He added that the Plaintiff confirmed he sold a property in Kitengela town and that the Defendant was the one who brought him a buyer and in appreciation he paid the Defendant Kshs.20,000/= From this, he submitted that it would be inconceivable that the Plaintiff would give the Defendant money while he allegedly owed him. He submitted that it would be easier to believe that the Defendant had overpaid.

46. He also submitted that the Mavoko property was in the hands of the Plaintiff after execution of the sale agreement in November 2008 thus he cannot be heard to say otherwise.

47. The Defendant also submitted that his assertion that it was the Plaintiff who took the documents of title to the Shylocks to secure a loan and subsequent sale by the shylock is easy to believe as it is consistent with the fact that at execution of the sale agreement, the Plaintiff was given the title to the Mavoko property in down payment of the purchase price to the Nyandarua property.

48. He submitted that the Plaintiff was comfortable at the release of the Title Documents to the Nyandarua property by Equity bank to him thus his conduct suggests clearly that the Defendant completed in settlement of the purchase price.

49. He also submitted that that he has a right to lien over title to the property known as NYANDARUA/KAHURU/2766 as he awaits for the Plaintiff to fulfill his end of the agreement. He cited **Dhanji vs Machani; Dar Es-Salam HCCMCC No.34 of 1969**.

50. He cited **Reliable Electrical Engineers Limited v Mantrac Kenya Limited [2006] eKLR** to submit that the Defendant was entitled to an order of specific performance since he was at the verge of suffering adversely and greatly due to breach of the Plaintiff.

51. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Is the Defendant in breach of the Sale Agreement dated 6th November 2008?

(ii) What remedies are available to the parties?

(iii) Is the Plaintiff entitled to the reliefs sought?

(iv) Who should pay cost of this suit?

52. It is not in dispute that the Plaintiff and the Defendant have known each other for many years. The genesis of this dispute is the sale

Agreement dated 6th November 2008. It was produced as exhibit P1 in this case.

Clause 3 of the said Agreement provides that:-

“The buyer has given the seller a plot in Mavoko (Title No. Mavoko Town Block 2/5193) valued at Kshs.500,000/- (Five Hundred Thousand Shillings) as a down payment”

Clause 4; provides that;

“The buyer has agreed to pay the balance of Kshs.900,000/- (Nine Hundred Thousand only) on instalment basis of Kshs.25,000/- (Twenty Five Thousand only) per month to run for 36 months starting from 5th November 2008 and subsequently every other 5th of each month”.

53. It is the Plaintiff's case that the Defendant has so far paid Kshs.75,000/- out of the Kshs.900,000/-. This means he has only paid three instalments. He also admitted that he got Kshs.183,200/- paid by cheque No 85 through Briman Investment Limited. The Plaintiff claims that this was a refund of monies lent to the Defendant to pay cash bail at City Court after he was charged with an offence. The Defendant has denied that he was ever arrested and got the money from the Plaintiff to pay as cash bail. The Plaintiff was unable to prove that this money was lent to the Defendant for purposes of cash bail. No document was adduced to confirm this fact. The court will take it that it was part of the purchase price for Nyandarua/Kahuru/2766.

54. The Defendant on the other hand states that he gave cash to the Plaintiff Kshs.100,000 on 9th June 2009 and Kshs.205,000/- on 10th June 2009 at Equity Bank. The Plaintiff has denied this. I find that there is no evidence that he handed over the said cash to the Plaintiff. The Defendant has produced the Bank statements for Equity Bank to show that he withdrew the said amounts but there is nothing to show the cash was handed over to the Plaintiff.

55. The Defendant also stated that he was entitled to Kshs.380,000/- after he sold the Plaintiff's house at Kitengela. That the said amount was his commission. He however, produced no agency agreement to show that he was entitled to the said commission. There is nothing to show he sold the house on behalf of the Plaintiff.

56. The Defendant also stated that the proceeds from the sale of Mavoko Town/Block 2/5193 was remitted to Teshmo Suppliers Limited who had advanced a loan to the Plaintiff. There is no evidence of any relationship between the Plaintiff and Teshmo Suppliers Limited or how much loan he had taken. This is the Defendant's word and the Plaintiff has denied. He admitted on cross examination that he had no instructions from the Plaintiff to sell the Mavoko Plot to Jane Wangui Gachare or anyone else.

57. He (Defendant) also admitted that in the sale agreement between himself and Kenneth Kiambi, the Plaintiff is not mentioned as he (Defendant) was the registered owner of the suit property.

58. As things stand, there is a caution registered over Mavoko Town Block 3/5193 in favour of Jane Wangui Gachare. This defeats the Plaintiff's interest on the suit plot.

59. In summary, the Defendant did not pay the entire purchase price in respect of Nyandarua/Kahuru/2766. He has not given the Plaintiff possession of Mavoko Town Block 3/5193. I find that the Defendant is in breach of the sale Agreement dated 6th November 2008. The Plot known as Mavoko Town Block 3/5198 was sold to Kenneth Kimathi Kiambi on 5th October 2009. There is no evidence that it was with the authority of the Plaintiff or that he received the proceeds of the sale or that he transmitted to Teshmo Suppliers Limited, the shylock who had allegedly advanced monies to the Plaintiff. There is no evidence that the original title of the Mavoko plot was handed over to the Plaintiff as per execution of the sale agreement.

60. As stated hereinabove the Defendant is in breach of the sale agreement dated 6th November 2008. He has no right to hold onto the Title for LR No Nyandarua/Kahuru/2766. He ought to release it to the Plaintiff. He is not entitled to any legal or equitable lien over the parcel of land known as Nyandarua/Kahuru/2766. His counterclaim fails.

61. The Plaintiff ought to refund Kshs.158,200 to the Defendant which amount he admitted to have received.

62. In conclusion, I find that the Plaintiff is entitled to the reliefs sought in the Plaintiff's claim and Kshs. 50,000/- being damages for breach of contract.

63. Accordingly, judgment is entered in favour of the Plaintiff as against the Defendant as follows:-

(a) An order is hereby issued that the Defendant is in breach of the agreement for sale dated 6th November, 2008 and the same be rescinded.

(b) An order is hereby issued that the Defendant do pay the Plaintiff damages for breach of the agreement for sale dated 6th November, 2008 of Kshs.50,000/-.

(c) An order is hereby issued directing the 1st Defendant to hand over original title deed for NYANDARUA/KAHURU/2766 forthwith.

(d) Costs of the suit and interest thereon.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF DECEMBER 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Njoroge for Mr. Mongeri for the Plaintiff

Mr. Kinyua for the Defendant

Steve - Court Assistant