



REPUBLIC OF KENYA

IN THE ENVIRONMENT LAND COURT

AT ELDORET

E & L CASE NO. 213 OF 2014

JOHN MARK WANDOLO.....PLAINTIFF

VERSUS

PAUL NGANGA NAGE.....DEFENDANT

JUDGMENT

By an amended plaint dated 16th October 2017 the plaintiff sued the defendant seeking for the following orders:

- a) Permanent injunction to restrain the defendant and / or his servants and / or agents from entering into, remaining on, constructing on, transferring into, charging, leasing, ploughing, cultivating, fencing and/ or in any way dealing with the one acre already sold and to be excised out of land parcel known as ELDORET MUNICIPALITY/BLOCK/ILULA/98.
- b) Specific performance by way of transfer by the Defendant of the one acre out of land parcel known as ELDORET MUNICIPALITY BLOCK /ILULA/98.
- c) Mesne profits against the Defendant.
- d) Costs of the suit.
- e) Any other relief as this Honourable court may deem fit grant.
- f) In the unlikely event that specific performance is not granted by the Honourable court, the plaintiff should be adequately compensated.

PLAINTIFF'S CASE

PW1 John Mark Wandolo testified and stated that he entered into an agreement with the defendant on 11th June 2010 which he produced in court as pex No.1. It was his evidence that he wrote a demand letter and a valuation report was prepared by a Valuer.

On cross-examination he stated that he entered into an agreement with the defendant where he paid a down payment of Ksh.300000/= and later paid the balance of Kshs 125000/= which was acknowledged by the defendant. That the defendant's family members were not witnesses to the agreement and that the defendant never told him of the issue of the refund of the purchase price.

PW1 further stated that he was not aware of a bankers cheque sent to his lawyer in 2014. It was his evidence that the land was agricultural land but did not obtain a Land Control Board consent.

On re-examination he said he had never received any letter in respect of the refund and that there is no development on the land. The plaintiff urged the court to grant the orders as prayed in the plaint.

PW2 Charles Gordon Ochor testified and stated that he was a Community Health worker and a village elder. He stated that the plaintiff and the defendant entered into a sale agreement for the purchase of the suit land.

On cross-examination he stated that the plaintiff did not take possession of the land, and that there was no consent from the Land control Board. He stated that there was a meeting at the chief's office whereby it was agreed the defendant returned the purchase price. In re-examination he stated that the plaintiff was not invited to the meeting at the chief's office.

PW3 Edwin Kipchumba Metto testified and stated that he was a Valuer by profession and had prepared a valuation report in respect of Uasin Gishu/ilula/828 originally plot No. 98. In preparation of the report he adopted a market approach.

On cross-examination he stated that he carried out a search and found out that the property was registered in the name of Paul Ng'ang'a Nage.

DEFENCE CASE

DW1 Paul Ng'ang'a testified and stated that he had entered into a sale agreement with the plaintiff for the purchase of one acre of land but his family objected to the sale. It was his evidence that he would like to refund the purchase price and to that, he sent the plaintiff a banker's cheque but the same was rejected by the plaintiff.

On cross-examination he said he entered into an agreement for the sale of land on 4th October 2010 of which he acknowledged full payment of the purchase price. He also confirmed he entered into the agreement willingly and was not forced to sign it. He further stated that the said agreement has not been revoked or rescinded with another agreement

DW1 testified that his family took him to the chief to complain that he had sold the land without informing them. He urged the court to dismiss the plaintiff's case with costs.

DW2 Veronica Wangui Ng'ang'a testified that the defendant is her husband and that she saw some people who came to survey the land on the ground that the defendant has sold one acre of land. It was her testimony that she did not consent to the sale.

DW3 Joseph Kiragu Ng'ang'a testified and stated that he was a mechanic and the defendant was his father. He stated that he was not aware that the defendant had sold the land to the plaintiff. On cross-examination he stated that the plaintiff was a neighbor and that there was no application forms for consent given to them to sign. He urged the court to dismiss the plaintiff's claim as they did not consent to the sale.

PLAINTIFF'S SUBMISSIONS.

Counsel for the plaintiff submitted that the plaintiff's evidence was consistent with the pleadings. Counsel listed the following issues for determination: whether the plaintiff and the defendant performed their contractual obligations, whether specific performance is a remedy in law and whether the sale agreement was enforceable in law.

On the first issue counsel submitted that the plaintiff had paid the full purchase price yet the defendant had refused to transfer title to him. Counsel further submitted that the defendant's allegation that the family had objected to the said transaction was not tenable as one of the family members Francis Kiragu was a witness to the sale agreement.

On delay to have the title transferred Counsel referred the court to the case of *Sagoo v. Dourado*[1983] KLR 365 where the court held that :

“The modem law in the case of contracts of all types, may be summarized as follows. Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence or (3) a party who has been subjected to unreasonable delay give notice to the party in default making time of the essence.”

It was their submission that the plaintiff has always been ready and willing to perform his contractual obligations.

In addition, counsel submitted that since the plaintiff had performed his obligation, the defendant ought to be estopped from not performing his part. He had sought for specific performance and the same could only be granted if he had performed all the parts of the contract. In *Manzoor v. Baran*(2003) 2 E.A the court stated as follows:

“ specific performance is an equitable remedy grounded in the equitable maxim that “equity regards as done that which ought to be done”. As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed whereas common law remedy such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard , the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course.”

Counsel urged the court to find that the sale agreement was enforceable by the defendant as the court cannot re-write an agreement for parties. Counsel relied on the case of **Simba Corporation Ltd v. Caetano Formula East Africa**[2019] eKLR, where the court held that parties were bound by their contract unless it was under coercion, fraud or undue influence if pleaded and proved. Counsel therefore urged the court to allow the plaintiff's claim as prayed in the plaint with costs.

DEFENDANT'S SUBMISSIONS

Counsel submitted that clause 9 of the sale agreement dated 11th June 2010 stated, ***“that both parties hereby confirm that their family members have no objection to this transaction”*** and clause 10 stated that, ***“ parties hereby covenant to be bound by the agreement”*** It was Counsel' s submission that the plaintiff had made payment on 4th October outside the 6 months stated in the contract.

Further that the suit land is situated in an agricultural zone and therefore consent from the Land Control Board was required, which both

parties had not done. That the transaction was therefore void for lack of the consent as provided by section 6 and 7 of the Land Control Act.

Counsel also submitted that the consent of the family was paramount. Article 45(3) of the Constitution places family as very fundamental. It provides as follows: “ *parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage*”

Mr. Angu submitted that the wife (DW2) and son (DW3) testified that they had not given their consent to the sale of land. That the plaintiff could not benefit from his wrongdoing as there was no consent from the Land Control Board which is provided by section 6(1) of the Land Control Act,

Counsel relied on the case of **David Njonjo Kariuki v. Njoroge Kariuki alias Benson Njonjo, C.A no. 26 of 1979**, the held that once the land in question was proved to be agricultural land within a controlled area, transactions affecting it were controlled transactions which in law became void in the absence of consent from the land control board. That the defendant had drawn a cheque in the defendant’s name which was returned.

Counsel urged the court to dismiss the plaintiff’s case with costs.

ANALYSIS AND DETERMINATION

I have considered the pleadings, the evidence and the submissions by parties and find the issues that arise for determination are as follows:

- a) Whether the land sale agreement is enforceable.
- b) Whether the plaintiff is entitled to specific performance.

It is not in doubt that the plaintiff and the defendant entered into an agreement for sale of the suit land vide an agreement dated 11th June 2010 whereby the defendant sold one acre of land to the plaintiff at a consideration of Kshs. 525,000/ which was paid in full. The defendant however said that the balance of was paid after the expiry of the agreed date. There is no evidence that the defendant complained of receiving the money after the agreed date. If he was aggrieved by this then he should have declined to receive the balance and rescinded the agreement. This never happened and he admitted in his evidence that he received the purchase price in full. Why raise this issue belatedly.

From the evidence on record it is clear that the plaintiff performed his part of the bargain with the defendant by payment of the full purchase price. The defendant should not be allowed to hide behind the claim that the family did not consent to the sale. When the defendant entered into the sale agreement he knew what the terms were and that he was to part with possession after receipt of the full purchase price.

Clause 9 of the sale agreement dated 11th June 2010 stated clearly, “*that both parties hereby confirm that their family members have no objection to this transaction*” and clause 10 stated that, “ *parties hereby covenant to be bound by the agreement*” What were both parties confirming in respect of consent by their families? This clause means that both families had consented to the sale and that is why they entered into the agreement and paid the purchase price and receipt was acknowledged. This clause binds both the plaintiff and the defendant as the agreement states. The defendant cannot renege on the agreement for selfish purposes.

Parading a wife and a son to come and give evidence that they were not aware that he was selling the land confirmed that this was a collusion to deny the plaintiff of his hard earned money and the land that he had bought.

Parties have been entering into sale agreements, receiving monies and later claim that the family has objected to the sale and ask the purchaser to take a refund. Parties have also done this and refuse to obtain the consent from the Land Control Board within the stipulated period. This has brought a lot of injustice to the purchasers.

In the case of **Willy Kimutai Kitilit Vs. Michael Kibet (Eldoret), CA No. 51/2015 (2018)Eklr**, in paragraph 27 where the court held that;

“As we have held in essence that, the lack of consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust...”

The court cannot watch as injustice is occasioned to parties. The court is not precluded from giving effect to the principles of equitable remedies especially the doctrine of constructive trust. The defendant sold the land to the plaintiff and received the full purchase price. The defendant cannot hide behind the lack of Land Control Board consent requirement to defeat justice as he was the one under a duty to ensure that the same was sought and obtained within the six months stipulated period. I find that the defendant was holding the land in trust for the plaintiff.

On the issue whether the plaintiff is entitled to the remedy of specific performance, the same can be granted if a party meets the threshold. The principles of granting the equitable remedy of specific performance were set out in the case of **Reliable Electrical Engineers Ltd. ...Vs. ...Mantrac Kenya Limited (2006) eKLR**, wherein Justice Maraga (as he then was) stated that:-

“Specific Performance like any other equitable remedy is discretionary and the Court will only grant it on well principles”... “The Jurisdiction of specific Performance is based on the existence of a valid enforceable contract. It will not be ordered the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific Performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the

claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.

The plaintiff has performed and accomplished his part of the bargain and therefore in entitled to the relief.

In the case of Thrift **Homes ltd v. Kays Investment Ltd[2015] eKLR**, the court quoted the following,

“a plaintiff seeking specific performance must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implications and which ought to have been performed at the date of the wit in action”

In the case of **Manzoor v. Baram(2003) 2 E.A** the Court of Appeal held that *"Specific Performance is an equitable remedy grounded in the equitable maxim that "equity regards as done, that which ought to be done". As an equitable remedy, it is decreed at the discretion of the court, The basic rule is that specific performance will not be decreed where a common law remedy such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course. In the instant case, I find no circumstances that would make it inequitable to order the respondent to complete the contract. On the contrary, it seems to me that to deny the appellant that relief would be to give unfair advantage to a respondent, who sought to avoid his contractual obligations through false claims, as found by the trial court, and through inapplicable technicalities. After taking into consideration the equities of this case, I am satisfied that the discretion ought to be exercised in favour of the appellant. I would hold that the appellant is entitled to specific Performance...*

Further in the case of Civil Appeal No. 165 of 1996 **Gurdev Singh Birdi and Marinder Singh Ghorta and Abubakar Madhbuti where Gicheru, JA** noted that:-

"When the appellants sought the relief of specific Performance of the respondent's Property...they must have been Prepared to demonstrate that they had Performed or were ready and willing to Perform all the terms of the agreement...which ought to have been Performed by them and indeed that they had not acted in contravention of the essential terms of the agreement... "

The plaintiff prayed for mesne profits which is a special damage which must be specifically pleaded and proved. The plaintiff did not lead evidence to prove the loss that he has suffered and how much he should be compensated.

Having considered the pleadings the evidence and submission by counsel, I find that the plaintiff has proved his case on a balance of probabilities and make the following orders:

- a) An order of permanent injunction is hereby issued restraining the Defendant and / or his servants and / or agents from entering into, remaining on, constructing on, transferring, charging, leasing, ploughing, cultivating, fencing and/ or in any way dealing with the one acre already sold and to be excised out of land parcel known as ELDORET MUNICIPALITY/BLOCK/ILULA/98.
- b) An order of specific performance is hereby issued directing the defendant to transfer to the plaintiff one acre out of land parcel known as ELDORET MUNICIPALITY BLOCK /ILULA/98.
- c) The claim for mesne profits fails
- d) Costs of the suit.

DATED and DELIVERED at ELDORET this 12TH DAY OF MARCH, 2020

M. A. ODENY

JUDGE

JUDGMENT read in open court in the presence of Mr.Maina holding brief for Mr.Ogola for Plaintiff and Mr.Kipkurui holding brief for Angu for Defendant

Mr.Yator – Court Assistant