



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NYAHURURU

ELC CASE NO. 45 OF 2017

(Formerly ELC Nakuru No. 96 OF 2013)

FREDRICK MACHARIA NGARRARIGA.....PLAINTIFF

-VERSUS-

JOHN NGINYA MWANGLI.....DEFENDANT

JUDGEMENT

1. This suit was instituted on 30th January, 2013 at the Environment and Land Court sitting at Nakuru by the Plaintiff vide a Plaint dated 29th January, 2012 where he sought for the following orders:-

- i. A declaration that the Defendant is not entitled to enter or use the said property at all.
- ii. Possession of the property.
- iii. Damages for trespass.
- iv. A permanent injunction restraining the Defendant whether by himself his servants or agents or otherwise howsoever from entering into or using the said property.
- v. Costs of the suit.
- vi. Such other or further relief on this Honourable Court may deem just to grant.

2. Further to the said Plaint, the Plaintiff filed an Application by way of Notice of Motion dated the 29th January, 2013 seeking interim injunctive orders claiming that the Defendant had continued to trespass on his land and was in breach of the terms and conditions of the sale agreement.

3. Upon hearing the application the Court declined to certify it as urgent noting that the Defendant had been in occupation of the land for the past 10 years and nothing much had changed. Parties were thus directed to prepare and confirm the suit for hearing in the ordinary way.

4. Upon being served, on 14th May, 2013, the Defendant entered appearance and filed a Defence and Counter Claim plus witness statements and list of documents on the 10th June, 2013 in compliance with the provisions of Order 11 of Civil Procedure Rules.

5. On 6th November, 2013, the Plaintiff and Defendant entered a Consent to the effect that they dispense with the interlocutory application seeking interim orders wherein they fixed the matter for full hearing maintaining the status quo to the effect that the Defendant would continue being in occupation of the suit land on condition that he would not cause any construction on it.

6. Upon the establishment of the Environment and Land Court at Nyahururu, the matter was transferred herein. From the records it will be noted that the parties had for some time indicated their willingness to attempt an out of court settlement and/or negotiation. Indeed there was even a draft consent prepared but later on the Defendant indicated that the terms of the draft Consent were different from what they had agreed upon.

7. When parties failed to agree on the terms of the draft consent, the matter was fixed for hearing wherein the Defendant successfully sought leave to file an amended Defence and Counter Claim. On the 24th January, 2018, the Plaintiff also sought leave to reply to the averment raised in the amended Defence and Counter Claim.

8. It will be noted that the absence of the Plaintiff in court on a regular basis for reason that he was based abroad caused numerous adjournments. Be that as it may, on 24th June, 2019, the matter proceeded on for full trial. By consent it was agreed since the Plaintiff had not filed Witness statement to have the Supporting Affidavit sworn and dated on 29th January, 2013 and attached to the Notice of Motion dated 30th January, 2019 be adopted as his witness statement.

Plaintiff's case.

9. PW1, Fredrick Macharia Ngararinga testified that from the year 2002 he resided and worked for gain at the United States of America as a Care Giver. He attested that the Defendant had been his good friend for a long time such that he had left the Defendant in his home but that they had kept contact via phone.

10. That parties had orally agreed to sell off the Plaintiff's Land Reference No. Laikipia/Maramanet/2085 measuring 7 acres at a sum of Ksh. 115,000/= per acre making it a total Ksh 805,000/= wherein they had entered into sale agreement in year 2000 to this effect but that there had been no witnesses to attest to the agreement.

11. That the Defendant had then deposited Ksh. 480,000/= and was to clear the balance within the following 6 months but had he failed to do so and kept on giving him empty promises 8 years on.

12. That it had been then that the Plaintiff had sought legal advice from his advocate who wrote a demand letter to the Defendant dated the 9th August, 2010 herein produced as Pf Exhibit 1

13. The Plaintiff testified that the agreement had since become void as he had not sought the Land Control Board Letter of Consent for reason that they had no written Sale Agreement. The Plaintiff stated that he later tried to enter into a second sale agreement but the Defendant had refused.

14. On 12th January, 2011, his Advocate advised the Defendant to pay rent for the remaining portions but by 31st December, 2011, the sale agreement had not been completed whereby his Advocate wrote a reminder to the Defendant who never responded.

15. That it had been on the 19th January, 2012 that the Defendant responded indicating his willingness to occupy the whole land although he declined to the new terms the Plaintiff had given but acknowledged that the 6 months to have obtained the Land Consent Board letter of Consent had lapsed.

16. On the 21st February, 2012, the PW1's Advocate again wrote to the Defendant a second demand letter urging him to restrain himself from using the suit land and demanded that the Defendant vacates therefrom. Vide his letter dated the 10th April, 2012, herein produced as Pf exh 2, the Defendant responded to the effect that he had bought the suit land and hence he would not vacate. He however never made any efforts to pay the balance wherein the instant suit was filed.

17. It was the Plaintiff's testimony that the Defendant knew his bank account and had agreed that he would deposit the money there and thereafter give the Plaintiff's wife the deposit slip, but for 8 years from the year 2002 to 2010 he had not done so.

18. It was further his evidence that the suit land was registered in his names wherein he had been issued with the Title deed on 7th October, 2003. That although the Defendant had access to the land and had occupied the same, cultivating it in the process, yet he had been in breach of their contract for failure to pay the balance of the purchase price. The Plaintiff prayed for the orders sought in his plaint.

19. When cross examined, the Plaintiff admitted that their Agreement was done in May, 2002 wherein the initial one was verbal. He held that the Defendant was to have paid the balance within six [6] months which lapsed in November, 2002.

20. That he had left for the USA in October, 2002 but returned to Kenya in November 2017. That he had instructed his advocate to issue demand letters to the Defendant but as per August 2010, the Plaintiff had not signed the transfer forms nor obtained the letters of Consent from the Land Control Board. The Plaintiff disagreed with the Defendant's Counsel's assertion that the Defendant had been ready to pay the balance as he kept on changing goal posts. It was the Plaintiff's position that he never applied to transfer the 4 acres to the Defendant as the money he had paid was inadequate.

21. That subsequently, the Defendant had refused to agree with the new terms of the agreement as the land had now appreciated. He held that since the agreement had been void he had applied the current market rate. It was his testimony that although the Defendant repeatedly called him, yet he had never paid up the balance yet he had his bank account details and his wife had the Power of Attorney. The Plaintiff testified that he had no intention of selling the land to the Defendant anymore.

The Defendant's case

22. In his amended statement of Defence and Counter-Claim the Defendant sought for the following orders that :-

i. A permanent injunction restraining the Plaintiff by himself, his servants, agent from transferring, entering, remaining, taking up, repossessing, evicting, selling, leasing out and /or interfering with the Plaintiff's quiet use enjoyment possession and occupation of the suit Land No. Laikipia/Maramanet/2085 measuring approximately 2.833 Hectares.

ii. The Court be pleased to grant an order enlarging and/or extending the time within which the consent of the Land Control Board in

respect of the sale of the suit land parcel No. Laikipia/Maramanet/2085 can be obtained by the Plaintiff.

iii. An order of specific performance to issue for the Plaintiff to accept receipt of the balance on purchase price of Ksh. 325,000/=, to sign transfer forms, to sign consent form and to surrender original documents of title for the suit land so as to facilitate its registration into the names of Defendant John Nginya Mwangi or ALTERNATIVELY the Plaintiff be ordered to refund to the Defendant the entire consideration paid together with interest at court rates from May 2002 until payment in full.

23. The Defendant testified on the 26th June, 2019, as DW 1 where he stated that he knew the Plaintiff well as they had been friends since the year 1966 when they moved to that settlement scheme together. It was his testimony that in the year 2002 he had agreed to buy the Plaintiff's land Reference No. **Land reference No. Laikipia/Maramanet/2085** measuring 7 acres for Kshs. 115,000/= per acre thus making it a total of Kshs. 805,000/=. That he had deposited of Ksh. 480,000/= leaving a balance of Ksh 325,000/=. That they had then agreed that the Plaintiff travels to the United States and upon his return after 6 months, he would start the transfer process because the Certificate of Title deed had not been ready by then.

24. That after the expiration of 6 months the Plaintiff did not return but instead he had caused a demand letter to be served upon him (Defendant) by his Advocate whereupon he had gone to meet the said Advocate who had informed him that he had been instructed by the Plaintiff to receive the balance from him. He did not deposit the said balance with him because the Advocate had changed his mind.

25. The Defendant held that later on he received a letter dated 9th August, 2010 where the Plaintiff had altered their terms of the Sale Agreement and now demanded that the Defendant takes 4 acres for the money which he had already paid for and surrenders to him 3 acres.

26. He inquired whether the transfer documents had been ready but had been answered in the negative. That he had deposited a sum of Kshs. 325,000/= to the Plaintiff's Advocates' account. He denied having breached the terms of their contract which had no written terms and no time frame. He refuted the allegation that he was a trespasser because after paying Ksh. 480,000/= the Plaintiff had allowed him to occupy the land.

27. When cross- examined, the Defendant testified that he was expected to have paid the balance of the purchase price by September, 2002. He insisted that he had always been ready to pay the balance. He denied having been given the Plaintiff's bank account but admitted that they had been in frequent communication on phone with the Plaintiff. He further testified that all their agreements had been oral and that he knew one could only apply for consent from Land Control Board upon a written agreement.

28. He maintained that he would have paid the balance had the Plaintiff obtained the original certificate of title deed, which was released in the year 2013, Land Control Board Consent and signed the transfer forms. That on several occasions, he had tried inquiring from the Plaintiff's wife on the completion process but she had always stated that she had neither had instruction nor the Power of Attorney to deal. The Defendant conceded however that their contract was void and that was the reason he was seeking for an extension of time.

29. Upon the closure of the Defendant's case parties filed their written submissions summarized as herein under:

The Plaintiff's Submissions

30. The Plaintiff framed up two (2) issues for determination namely:-

- i. Whether the Defendant was in breach of the contract.
- ii. Whether the Plaintiff was entitled to the orders sought.

31. On the first issue for determination, the Plaintiff, referred the court to the 8th Edition of the Black's Law Dictionary on the definition of the term Contract as having been used indifferently to refer to three [3] different things namely:-

- i. The series of operative acts by the parties resulting in new legal relations.
- ii. The physical document executed by the parties as the lasting evidence of them having performed the necessary operative acts and also an operative fact as itself.
- iii. The legal relations resulting from the operative acts, consisting of a right or rights in persona and their corresponding duties, accompanied by certain powers, privileges and communities.

32. The Plaintiff submitted that the above attributes were also found in oral Contracts. He argued that an oral contract was subject to the common law principle that a writing intended by the parties to be a final embodiment of their agreement could not be modified by evidence of earlier or contemporaneous agreement that would add to, vary a contract in writing.

33. Further that both parties had agreed orally to the sale of the suit land where the terms of the contract had included the completion of payment of the purchase price by September 2002. According to the Plaintiff it was upon the completion of payment that he would have applied for the letter of Consent from the Land Control Board and hence transfer the land to the Defendant.

34. It was the Plaintiff's submission that the Defendant had failed to honour his part of the bargain and never made any efforts to pay the outstanding balance which had led to the lapse in the application to the Land Control Board hence the land transaction became void. With the passage of time and in the year 2010, he had sought the Defendant for the alterations of the terms to their earlier agreement in 2010 but the

Defendant had objected and it had been after the lapse of 8 years that the Defendant had now wanted to complete the payment. According to the Plaintiff this was blatant breach of agreement for non-performance. Upon the Defendant occupying the land and Plaintiff leaving the country the Defendant had deliberately become unavailable.

35. To buttress his argument, the Plaintiff relied on the Civil Appeal Case No. 154 of 2009 in **Delilah Kerubo Otiso & Charles Otiso Getugi vs Ramesh Chander Ndingra** where the Court had held that the Appellant was in breach of contract when he did not claim or demonstrate that he was ready, able and willing to complete his part of the bargain were it not for the actions or omissions of the Respondent.

36. On the second issue as to whether he was entitled to the orders sought, the Plaintiff cited the provisions of Sections 6 (1) of The Land Control Act to submit that the sale agreement had been voided by failure of the parties to seek the consent of the Land Control Board within the six (6) months of their agreement.

37. It was the Plaintiff's Case that the Defendant took occupation of the suit upon payment of the deposit and had remained in occupation after the transaction was rendered null and void by the Provisions of Section 8 (1) of Land Control Act; depriving the Plaintiff of the use of the land and profits thereto. He therefore argued that he was entitled to the relief sought.

The Defendant's submission.

38. The Defendant filed in court his Submissions dated 3rd December, 2019 on the equal date where he submitted that there was no doubt that the parties entered into a Sale Agreement. He further admitted that there was a balance for a sum of Ksh. 325,000/= which ought to have been paid on a later date. According to him, what was in dispute was when the balance ought to have been paid and under what conditions.

39. It was the Defendant's contention that although the Plaintiff claimed that the balance was to have been paid within six (6) months, yet there had been no documentary evidence to support the said allegation. That in other words, there was no such condition or requirement for settling the outstanding balance and within a particular time frame.

40. The Defendant submitted that he had responded to the Plaintiff's demand letters and various letters produced as exhibits. In particular the one dated the 19th January, 2012 whereby he had indicated that he would be ready to settle the balance as long as the Plaintiff availed the completion documents to wit:- a letter of consent from Land Control Board, the transfer forms and surrendered the original Certificate of Title Deed. It was the Defendant's contention that he had deposited the balance with his Advocate Messrs. G. M Mwangi and Co Advocates for onward transmission to the Plaintiff's Advocate once the aforesaid completion documents were availed. The Defendant argued that instead of the Plaintiff meeting his part of the obligation or bargain, he had kept on changing the goal posts where he had demanded for a fresh agreement with terms and conditions.

41. The Defendant asserted that from the time they had entered into an oral agreement in the year 2002 it had only been in the year 2010 that the Plaintiff had demanded for the payment of the balance. The Defendant held that the Plaintiff left for the United States in the year 2002 and only came back to Kenya in the year 2017 which was close to 15 years and past the 6 months provided for by law to have obtained the Land Control Board letters of consent. It was the Defendant's contention that the Plaintiff had never signed any Land Control Act prescribed application from Land Control Board and therefore he could not have on his own, moved the Land Control Board without a signed prescribed application form by the Plaintiff.

42. That he could therefore not be blamed for the mistake committed by the Plaintiff. To support his argument he relied on the **Court of Appeal Case No. 51 of 2015 in Willy Kimutai Kitilit vs Michael Kibet** where court held that lack of the Land Control Board Consent could not be the sole basis for denying specific performance of a contract for sale of land or declaring the sale transaction null and void. The Defendant also relied on the case of **ELC (Nakuru) No. 26 of 2013 in Caroline Cherono Kirui vs Liner Cherono Towett** on extension of time for Land Control Board and prayed for the orders sought in his Defence and the Counter-Claim.

The Analysis and Determination

43. Having considered the testimony of the parties herein, the Documents herein produced, the applicable laws, the authorities as well as the submitted submissions, I find that the issue for determination before the court as being:-

- (i) Whether the Plaintiff had a title to pass to the Defendant.
- (ii) Whether there was a valid sale agreements entered into by the parties herein.
- (iii) Whether the parties are entitled to reliefs sought in their respective pleadings

44. To begin with, I must point out the undisputed facts herein being that both the Plaintiff and the Defendant had been friends from the year 1966 when they settled within the Laikipia Settlement Scheme.

45. That in May the year 2002 parties had entered into a verbal sale agreement where the Defendant had agreed to purchase the Plaintiff's parcel of Land Reference No. LAIKIPIA/MARMANET/2085 measuring 2.833 Hectares. (Approximately 7 acres), the suit land herein.

46. Parties had agreed that the consideration would be Ksh 115,000/= per acre thus totaling Ksh. 805,000/= The Defendant had paid a deposit of Ksh. 480,000/= wherein he had taken possession of the land. There had been an outstanding balance of Ksh 325,000/= That the plaintiff had then left for the United States of America in the year 2002 and the outstanding amount has since not been paid by the Defendant .

47. The court has discerned the main bone of contention which led to the filing of this case to be twofold:-

- (i) The failure to pay the outstanding balance of the purchase price as per the oral agreement by parties which led to the preparation of a 2nd sale agreement.
- (ii) The inherent condition placed for the settlement of the balance being the provisions of the letter of Consent from the Land Control Board by the Plaintiff, the transfer forms and the original Certificate of title deed.

48. On the first issue for determination, I find that there is no dispute that the parties herein entered into an oral sale agreement in May the year 2002 for the sale and purchase of land Reference No. LAIKIPIA/MARMANET/2085 measuring 2.833 Hectares. (Approximately 7 acres), the suit land herein for a the consideration of Ksh. 805,000/=

49. From the documents herein produced namely Pf Exh 7 which was title to the suit land registered to the Plaintiff, it is clear that the same was issued 7th October 2003 almost a year after parties had entered into the agreement to sale. In essence therefore by the time parties had entered into the oral agreement, the Plaintiff had no title to pass to the Defendant as at the time he had no title to the suit land as he was not the registered owner of the suit property and therefore he had no title to pass to the Defendant.

50. The suit land herein was controlled under agricultural land which is governed under The Land Control Act Cap 2 of Laws of Kenya.

51. Section 6(1) of the Act defines controlled transaction as being “*the sale, transfer lease, mortgage, exchange partitions or other disposed of or dealing with any agricultural land which is situated within a land control area*”.

52. Since the suit land fell within the purview of the afore stated definitions, for any of these transactions to take place, there needed to be a letter of consent obtained from a Land Control Board from within the area where the land was situated by filing an application in a prescribed form without which the controlled transaction becomes null and void.

53. The Provision of Section 8 (1) of the Act provides that:-

“An application for Consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land Control Board within six (6) months of the making of the agreement for the controlled transaction by any party thereto.

54. Arising from this Provision of the Law, it is presupposed that all controlled transactions are precipitated by making an agreement. This position was highly emphasized by the Court of Appeal in **Willy Kimutai Kitilit vs Michael Kibet [2018] eKLR**

55. Clearly from the facts of this case the Plaintiff and Defendant had an Oral mutual understanding and assent between themselves for the sale of the suit land.

56. The provisions of Section 3 (3) of the Law of Contract stipulates that

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:

57. In this particular case, the Plaintiff and Defendant entered into an oral agreement in the year 2002- on the terms and conditions stated as above. There was neither formal written sale agreement signed by all parties nor any witness present to have witnessed the signatures. For this reason alone, it makes whatever mutual assent or agreement between them for purposes of this suit and disposal of an interest in the suit land unattainable, null and void.

58. In the case of **Thrift Homes Limited vs Kays Investment Limited [2015] eKLR**, the court stated that:

“Specific performance like any other equitable remedy is discretionary and the court will only grant it on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from defect; such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid on unenforceable”

59. From the facts and the surrounding inferences of this case, apart from the production of these correspondences between the parties, there were no other tangible documentary evidence produced before court to support the parties’ claims. The engagements between the parties herein did not crystalize to a sale agreement capable of enforcement by the court.

60. On the issue as to whether the parties are entitled to reliefs in their respective pleadings, I find that going by the facts and interferences

surrounding this case, apart from a few correspondences exchanged between the Plaintiff and the Defendant, the court has been subjected to very scanty documentary and tangible evidence to support the allegations and counter allegations meted against each other.

61. In conclusion, I find partly in favour of the plaintiff's case as against the Defendant. On the other hand, I find that the Defendant has failed to prove his case, on a balance of probabilities, as against the Plaintiff in his counterclaim and the same is herein dismissed. The upshot therefore is that Court finds as follows:

i. The Plaintiff do refund the Defendant, all the deposit received for the intended purchase of the suit land being the sum of Ksh. 480,000/= (Four Hundred and Eighty Thousand) and the interest accrued at the court rate from the year 2002 to the date of this judgment.

ii. An order is herein issued that the Defendant himself, his family, servants and/or agents herein do vacate the suit land within the next three (3) months from this date hereof, a period which will enable him remove any development on the land in accordance with the Provisions of Section 152 E of The Land (Amendment) Act of 2012. In default forceful eviction to ensue at the expense of the Defendant herein.

iii. An Order is issued to the Officer in Charge of the Nyahururu police station and the Commander of the County of Nyandarua to ensure that these orders are fully complied without failure.

iv. Each party bears their own costs of this case.

It is ordered.

Dated and Delivered at Nyahururu this 3rd day of March 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE