



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 28 OF 2015**

**FRANCIS H. SHIABA.....PLAINTIFF**

**VERSUS**

**MORRIS M. ISIYE .....DEFENDANT**

**JUDGEMENT**

By a plaint dated 9<sup>th</sup> February 2015, the parties herein executed an agreement on the 3<sup>rd</sup> day of August, 2012 wherein for the consideration of Ksh. 3,000,000/= the plaintiff disposed of L.R. No. Isukha/Lubao/2952 (suit land) to the defendant. That the agreement further stated that the parties had agreed to have the developments on the suit land assessed at Ksh. 50,000/=. That on the day of execution of the agreement the plaintiff received the sum of Ksh. 350,000/= being the initial deposit as regards the consideration and a further amount of Ksh. 30,000/= being the deposit in respect of the developments. That the agreement provided that the balance of the consideration was to be paid in 2 instalments of Ksh. 1,200,000 on or before the 31<sup>st</sup> day of August, 2012 and Ksh. 1,450,000 on or before the 15<sup>th</sup> day of October, 2012. That the agreement also recognized the fact that the plaintiff had earlier on agreed to transfer the suit land to the defendant who was as a result issued with its title deed on the 20<sup>th</sup> day of February, 2012. That however, to date the defendant is in breach of the contractual terms as he has not paid the instalments as agreed upon. The plaintiff prays for judgment against the defendant for;-

1. Cancellation of the defendant as the proprietor of L.R. No. Isukha/Lubao/2952 due to breach of the contractual terms of the agreement dated the 3<sup>rd</sup> day of August, 2012.
2. Costs of the suit.

The defendant denies that he breached the contractual terms of the agreement and or that he refused to pay the instalments as agreed upon and avers that he has paid the plaintiff a total of Ksh. 1,394,000 which payments the plaintiff acknowledges safe receipt. The defendant avers that he was prevented from completing the purchase price by the children of the plaintiff who demanded that the plaintiff had 2 houses and the plaintiff was not entitled to any further payment and the said children demanded that the defendant stops any further payment until the family dispute is resolved and went ahead and lodged a caution on the aforesaid land. The plaintiff avers that he is the rightful owner of Land Parcel No. Isukha/Lubao/2952 and the defendant's remedy is to sue for the balance of the purchase price after sorting out issues with his children.

This court has carefully considered the evidence and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

*“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”*

Section 26 (1) of the Land Registration Act states as follows:

*“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –*

*a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to

challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

It is a finding of fact the defendant is the registered proprietor of Land parcel No. Isukha/Lubao/2952. The issue for determination is whether or not he holds a valid title in light of the plaintiff's claim of breach of contract. To determine whether or not there was breach of contract, this Court must first determine whether there was a valid contract in place. The Plaintiff avers that he entered into a sale agreement with the Defendant for the sale of the suit property. That the same was reduced into writing and signed by all the parties. Section 3 (3) of the Contract Act provides that;

*“3(3)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:*

*Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.*

The Court has carefully perused the sale agreement produced as Exhibit 1 by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the Contract Act. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. I find that the sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. In the case of Nelson Kivuvani Vs Yuda Komora & Another, Nairobi HCCC No.956 of 1991, the Court held that:-

*“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.*

As to whether or not the Defendant breached the agreement for sale, Black's Law Dictionary, 9<sup>th</sup> Edition, Page 213, defines a breach of Contract as;

*“a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”*

In the case of Shah -vs- Guilders International Bank Ltd (2003)KLR the Court in considering the terms of the parties contract stated-

*“The parties executed the same willingly and they are therefore bound by it.”*

And in the case of National Bank of Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503, where the Court held that:-

*“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.*

In the instant case the sale agreement is clear that the purchase price was Ksh. 3,000,000/=. That the agreement further stated that the parties had agreed to have the developments on the suit land assessed at Ksh. 50,000/=. It is not in dispute that on the day of execution of the agreement the plaintiff received the sum of Ksh. 350,000/= being the initial deposit as regards the consideration and a further amount of Ksh. 30,000/= being the deposit in respect of the developments. That the agreement provided that the balance of the consideration was to be paid in 2 instalments of Ksh. 1,200,000 on or before the 31<sup>st</sup> day of August, 2012 and Ksh. 1,450,000 on or before the 15<sup>th</sup> day of October, 2012. It is the plaintiff's evidence that the defendant paid a total of kshs. 950,000/= and failed to pay the balance to date. He issued cheques which were not honoured. The defendant disputes the same and states that he has paid a total of kshs. 1,394,000/= and is willing to pay the balance but the plaintiff's sons have refused to accept the balance. He however failed to adduce proof of payment of the said total sum and testified that some amounts were through bank transfers. He also adduced no evidence that he tried to pay the balance and his money was not accepted by the plaintiff and or his sons. It is trite law that he who alleges must prove. See Sections 107 and 109 of the Evidence Act, which provide:-

*107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

109. "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that

*the proof of that fact shall lie on any particular person".*

The Court of Appeal in Civil Appeal No. 165 of 1996 between Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhbuti, Tunoi, JA (as he then was) said;

*"However, the appellants' conduct has been such as to render it inequitable for specific performance to be granted...There was no evidence that prior to the filing of the suit the applicants tendered the balance of the purchase price to the respondent. This only confirms that they were never ready, able*

*and willing to carry out their part of the contract. Secondly, the appellants simply could not raise the balance of the purchase price on or before the specified time and were in fact in breach of the agreement. Thirdly, the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. The contract not having been completed within the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property, more than four years after the event when its current value has materially appreciated".*

Likewise, I find that the payment of the purchase price was not completed on or during the specified time which was way back in 2012. Even though the property was transferred to the defendant and he is currently the registered owner, it would be oppressive, unjust and financially injurious to require the plaintiff, to part with his property, more than eight years after the event when its current value has materially appreciated. On the other hand, the plaintiff can also not benefit from the amount already received by him especially when he continued to receive money from the defendant as late as 2015 as per the documentary evidence produced in court. It is the finding of this court that there is a breach of contract on the part of the defendant in this case. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. That the plaintiff is to refund the sum of Kshs 950,000/= paid to him by the defendant within the next 90 (ninety) days from today.
2. Thereafter Cancellation of the defendant as the proprietor of L.R. No. Isukha/Lubao/2952 due to breach of the contractual terms of the agreement dated the 3<sup>rd</sup> day of August, 2012.
3. Each party to bear their own costs of the suit.

It is so ordered.

**DELIVERED, DATED AND SIGNED ON THE 28<sup>TH</sup> DAY OF APRIL 2020.**

**N.A. MATHEKA**

**JUDGE**