



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**HCC NO. 602 OF 1994**

**DORMEL GOWNS LTD.....PLAINTIFF**

**VERSUS**

**PETER MBUGUA KIMANI.....DEFENDANT**

**JUDGMENT**

1. By a plaint dated 14<sup>th</sup> February 1994, the plaintiff has sued the defendant for:-

***(a) Specific performance as per the sale agreement.***

***(b) An injunction restraining the defendant, his agents and/or servants from selling, transferring, advertising and/or in any way dealing with LR No. 7660/133 until the determination of this suit and/or further directions of this honourable court.***

***(c) Damages for breach of contract.***

***(d) Costs of this suit interest at court rates.***

***(e) Such other or further relief as this honourable court may deem fit to grant.***

2. Upon being served with copies of plaint and summons to enter appearance the defendant filed a statement of defence dated 14<sup>th</sup> March 1996.

3. The plaintiff filed a reply to defence dated 20<sup>th</sup> March 1996.

4. PW1, the plaintiff, Margaret Wairimu Magugu testified on 4<sup>th</sup> June 2008 and on 30<sup>th</sup> June 2008 before Kubo J (retired). She told the court that in 1992 the defendant went to her office and informed her that he was selling four acres out of his land measuring (8) eight acres. He stated that the reason was to offset the loan due to Agricultural Finance Corporation. They negotiated and the defendant agreed to sell her 3.94 acres out of the suit property. She told the court that in order to purchase the said portion she applied for a loan of Kshs.2.5 million from Housing Finance Corporation of Kenya. They then appointed S. W. Waweru Advocate to act as their joint advocate. The said advocate drafted a sale agreement. The purchase price was agreed at kshs.1,733,600/-.

5. The loan of Kshs.2.5 million from Housing Finance Corporation of Kenya was paid to the firm of M/S S.W. Waweru & Co. Advocates who was to pay the defendant. The said advocate paid the loan owing to Agricultural Finance Corporation by cheque dated 16<sup>th</sup> June 1994- Number A304206 for Kshs.750,000/-. Agricultural Finance Corporation issued a receipt for the said amount. The receipt is dated 17<sup>th</sup> June 1994. PW1 further told the court that S. W. Wweru made several payments to the defendant. She exhibited letters from S. W. Waweru Advocate informing her of the same. It is her case that she paid a total of Kshs.1,400,000 of the purchase price. She also told the court that the first cheque drawn in favour of Agricultural Finance Corporation for Kshs.750,000 by S.W. Waweru Advocate was dishonoured prompting her to report the said advocate to the CID. The advocate later replaced the dishonoured cheque. Later on the said advocate passed on. She then asked the defendant to transfer the portion to her but he refused claiming he had not been paid. She produced the bundle of documents she was relying on as exhibit P1.

6. On the 13<sup>th</sup> June 2018, the court with the consent of the parties directed that the matter proceeds from where it had reached.

7. Matter was then fixed for hearing on 26<sup>th</sup> September 2018.

8. On the 26<sup>th</sup> September 2018, Mr. Kobia who was holding brief for Mr. Maina for the plaintiff sought an adjournment on the grounds that Mr. Maina had not received instruction from the plaintiff. Mr. Begi for the defendant opposed the application for adjournment on the ground that it was an old matter. The court considered the rival submissions and found that no sufficient reason had been advanced to warrant an adjournment. The court then directed that the matter proceed at 12.40 pm. When the time came there was no appearance for the plaintiff. The defendant was then allowed to proceed with her case after praying that the plaintiff's case be closed. The court granted the prayer as sought. It should be noted by this time the defendant had since passed on. The estate is now represented by Janet Wangari Kimani.

9. DW1 Janet Wangari Kimani told the court she was relying on the statement of defence filed on 14<sup>th</sup> March 1996. She also relied on the list of documents dated 24<sup>th</sup> February 2010. She produced the said documents as exhibit D1 to D17 Respectively. She also told the court that the completion date on the sale agreement between Peter Mbugua Kimani and Dormel Growns Limited was 28<sup>th</sup> February 1993. That by that time the plaintiff had not paid any money to the defendant. She told the court that the contract could not be enforced as the completion date had passed.

10. The sale agreement for the sale of LR No. 7660/133 between Peter Kimani Mbugua and Dormel Growns Limited dated 14<sup>th</sup> December 1992 was produced as exhibit D1. She also produced several correspondences between the plaintiff and S.W. Waweru Advocate touching on the said sale. She has also relied on the charge sheet where the said advocate Samuel Waruma Waweru was charged with an offence of stealing by agent contrary to section 283 of the penal code. The complainant is Margaret Wairimu Magugu. It was alleged he stole Kshs.1,755,748/-. This is the amount that was to be paid to the defendant as the purchase price. The charge sheet is on page 8 in the list of documents. There are also correspondences to the effect that the plaintiff and Agricultural Finance Corporation complained against the said advocate to the Advocates Complaints Commission. DW1 also relied on the disciplinary cause no. 17 of 1995 in the Advocates Complaints Commission against S.W. Waweru Advocate. She prays that the plaintiff suit be dismissed with costs.

11. The parties tendered written submissions.

#### **The Plaintiff's submissions**

12. The agreement of sale is dated 4<sup>th</sup> December 1992 between Peter Mbugua Kimani (Deceased) and the plaintiff for the sale of LR No.7660/133. The purchase price was kshs.1,733,600/-. The plaintiff paid the consideration in full as per the agreement through the firm of S. W. Waweru & Co. Advocates who were acting for the vendor and the purchaser. The plaintiff's director obtained Kshs.2.5 million from Housing Finance Corporation of Kenya which money was disbursed to S. W. Waweru & Co. Advocates. The said advocate paid Kshs.750,000/- to Agricultural Finance Corporation in order to release the title several monies were paid to the defendant (vendor) amounting to about Kshs.335,000/=.

13. The firm of S. W. Waweru acted for both parties. The defendant benefitted from the sale transaction by receiving monies at different times and his loan with Agricultural Finance Corporation paid by the plaintiff and the vendor ought to be compelled to transfer the said land to the plaintiff. The consideration was paid to the defendant and Agricultural Finance Corporation who in turn released and discharged the title documents.

#### **The Defendant's submissions**

14. The plaintiff's evidence was not tested by cross examination. The absence of the plaintiff's witness for cross examination diminished the probative value of her case and such evidence should not be admissible. It has put forward the case of **Paritosh Ghosh vs Ashmir Kumar Gupta AIR 2003 NOC 14(cal) 2003 AIHC 291**.

15. The agreement binds both parties to the contract and each party is obliged to honour his part of the contract. She has put forward the case of **Curtis vs Chemical Cleaning & Dyeing Co Ltd [1951], All ER 631**. According to the sale agreement clause 5 stipulated the completion period to be 28<sup>th</sup> February 1993. The said transaction was not completed on this date as the purchase price had not been paid to the defendant.

16. The plaintiff failed to honour its part of the bargain to ensure that the purchase price was paid to the defendant, she has put forward the case of **Union Eagle Ltd vs Golden Achievement Ltd [1997] AC 514**. The plaintiff failed to comply with the terms of the contract by failing to pay the purchase price to the defendant hence its prayer for specific performance must fail.

17. Exhibit D17 is a letter dated 16<sup>th</sup> June 2008 from the department of registrar general to S. G. Mbaabu & Co. Advocates. It states that plaintiff is not registered with the registrar of companies. She prays that the plaintiff's suit be dismissed with costs.

18. I have considered the pleadings, the evidence on record, the written submissions filed on behalf of the parties and the authorities cited.

19. The issues for determination are:-

*(i) Whether there was a binding agreement between the plaintiff and the defendant for the sale of LR NO. 7660/133 being a subdivision of LR No. 7660/20.*

*(ii) Whether consideration was paid as agreed.*

*(iii) Whether the plaintiff was in breach of the said agreement.*

*(iv) Is the plaintiff entitled to the reliefs sought.*

(v) *Who should bear costs?*

20. There is no doubt that by an agreement dated 4<sup>th</sup> December 1992 Peter Mbugua Kimani now (deceased) agreed to sell LR No. 7660/133 measuring 1.593 hectares to the plaintiff. The purchase price was agreed at KShs.1,733,600/-. It is also not in doubt that at the time the title documents were held by the Agricultural Finance Corporation as the defendant had taken a loan. Part of the purchase price was to offset the loan at Agricultural Finance Corporation.

21. It is also not in doubt that the firm of S.W.Waweru had instruction from the plaintiff to pay Agricultural Finance Corporation and the defendant. It appears this was not done. The plaintiff and the defendant have both exhibited several correspondence between the plaintiff and S.W. Waweru Advocate regarding the transaction. It appears that the plaintiff was not sure if the monies had been paid out. This led to the plaintiff to register a complaint with the CID and the said advocate was charged with an offence of stealing by agent contrary to section 283 of the penal code. The complainant is the plaintiff's director Margaret Wairimu Magugu. The amount alleged to be stolen is KShs.1,755,748/-. Almost the exact amount that was to be paid as the purchase price.

22. It is not clear what transpired later but it is on record that the said S. W. Waweru advocate passed on. It is also on record that the plaintiff reported the said advocate to the Advocates Complaints Commission resulting in disciplinary cause no. 17 of 1995. Again the outcome is not known as the advocate has passed on. It is clear from the above happenings that the plaintiff has failed to prove that it paid the full consideration to the defendant.

23. Clause 5 of the said agreement proves that:-

***“The completion date is the 28<sup>th</sup> day of February 1993”.*** It is not in doubt that by this time the consideration had not been paid. It is therefore clear that the plaintiff did not fulfil its part of the bargain by ensuring the purchase price was paid to the defendant. It was in breach of the said sale agreement. It can only blame the advocate Mr. S. W. Waweru, who I believe action was taken against him.

**Halsbury's Laws of England (4<sup>th</sup> Edition) paragraph 48 Volume 44**, states that:-

***“A plaintiff seeking specific performance must show that he has performed all the terms of contract which he has undertaken to perform whether expressly or by implication and which ought to have been performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance or is in default in some nonessential or unimportant term although in such cases it may grant compensation”.***

In the instant case, I find that payment of the purchase price was an essential term. The plaintiff failure to prove that it had paid the full purchase price to the defendant disentitles it from seeking to enforce the contract.

I find that the plaintiff is not entitled to the reliefs sought. The several correspondences between itself and the said S. W. Waweru advocate and the actions taken against the said advocate confirm that the consideration was not paid.

24. It is important to note that the plaintiff's evidence was not tested through cross examination.

25. All in all I find that the plaintiff has failed to prove its case against the defendant on a balance of probabilities. The plaintiff's suit is dismissed with costs to the defendant.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 28<sup>TH</sup> day of May 2020.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

**No appearance for the Plaintiff**

**No appearance for the Defendant**

**Kajuju - Court Assistant**