



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 27 OF 2017

PHILLIP MUTISO MULALYA.....PLAINTIFF

VERSUS

SAMUEL DOMINIC MUATHE.....1ST DEFENDANT

JAMAL ABDALA.....2ND DEFENDANT

ABDI ABDALA.....3RD DEFENDANT

JUDGMENT

1. In undated Plaintiff filed on 3rd February, 2017, the Plaintiff averred that on or about 19th November, 2013, he entered into a Sale Agreement with the 1st Defendant over parcel of land known as Donyo Sabuk/Komarock Block 1/16 (*the suit property*); that the agreed purchase price was Kshs. 22,000,000 and that the parties agreed that the Plaintiff would transfer the suit property in favour of the 1st Defendant to enable him get financing for the balance of the purchase and that the balance of the purchase price was Kshs. 14,555,000.
2. The Plaintiff averred that based on the two Agreements, he transferred the suit property to the 1st Defendant; that the 1st Defendant has never made any effort to obtain the financing in respect to the balance of the purchase price as agreed and that instead, the 1st Defendant has transferred the suit property to the 2nd and 3rd Defendants.
3. The Plaintiff averred that the 1st Defendant is in breach of the Agreements that they entered into; that the 2nd and 3rd Defendants have trespassed on the suit property; that the 1st Defendant should be compelled by this court to pay the balance of the purchase price with interest and that in the alternative, the suit property should be re-transferred to him.
4. Although the Defendants were served with the Summons to Enter Appearance together with the Plaintiff by way of advertisement in the Standard newspaper of 9th June, 2017, they neither entered appearance nor filed a Defence. The suit proceeded for hearing as undefended.
5. In his evidence, the Plaintiff, PW1, informed the court that he sold to the 1st Defendant land known as Donyo Sabuk/Komarock Block 1/16 (*the suit property*); that the agreed purchase price was Kshs. 22,000,000 and that the 1st Defendant only paid him Kshs 4,000,000.
6. It was the evidence of PW1 that on 14th January, 2014, he agreed with the 1st Defendant that he transfers the suit property to him to enable him obtain financing for the payment of the balance of the purchase price and that despite the suit property being transferred to the 1st Defendant, he has failed to pay the balance of the purchase price. The Plaintiff produced in evidence the Agreement for sale dated 19th November, 2013; the Memorandum of Understanding dated 14th January, 2014 and the Title Deed for parcel of land known as Donyo Sabuk/Komarock Block 1/16 (*the suit property*).
7. In his submissions, the Plaintiff's advocate submitted that the Plaintiff has proved that he entered into a Sale Agreement with the 1st Defendant; that the requirements of Section 3(3) of the Law of Contract Act were adhered to and that the Plaintiff's Plaintiff should be allowed.
8. The 1st Defendant has not controverted the Plaintiff's evidence that he entered into two Agreements with the 1st Defendant dated 19th November, 2013 and 14th January, 2014 respectively. The Agreement of 19th November, 2013 shows that the Plaintiff agreed to sell to the 1st Defendant the suit property for Kshs. 22,000,000. The Agreement further shows that the sum of Kshs. 4,000,000 was to be paid to the Plaintiff within ten (10) days, and the balance was to be paid within 90 days from the date of execution of the Agreement. The Plaintiff has admitted that he was paid Kshs. 4000,000 by the 1st Defendant.

9. The Memorandum of Understanding dated 14th January, 2014 shows that the Plaintiff agreed with the 1st Defendant that upon being paid Kshs. 4,000,000, the Plaintiff was to transfer the suit property to the 1st Defendant to enable the 1st Defendant obtain financing. The Agreement further provided as follows:

“2. That in the event no funds are obtained in support of the project hence making it impossible to carry out the project and meet the balance of the purchase price, the buyer shall re transfer the subject land to the seller, in exchange for a refund of the deposit of Kshs. 4,000,000 paid to the seller and members of his family.”

10. The evidence produced in court shows that the Title Deed for parcel of land known as Donyo Sabuk/Komarock Block 1/16 was issued in favour of the 1st Defendant on 23rd January, 2014. However, there is no evidence before me to show that the Plaintiff was ever paid the balance of the purchase price. Indeed, the 1st Defendant did not adduce any evidence to controvert the Plaintiff's assertion that he has never paid him the balance of the Purchase price.

11. The Plaintiff performed his part of the bargain by transferring the suit property to the 1st Defendant. It is the 1st Defendant who is in breach of the two Agreements that he entered into with the Plaintiff. In the case of *Gurdev Singh Birdi & Another vs. Abubakar Madhbuti (1997) eKLR*, the Court of Appeal held as follows:

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487v of volume 44 of Halsbury's Laws of England, Fourth Edition, a Plaintiff seeking equitable remedy of specific performance of a contract:

‘must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action...Where a condition or essential term ought to have been performed by the Plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance but dismisses the claim.’”

12. The Plaintiff in this case has proved on a balance of probability that he is entitled to an order of specific performance. In the circumstances, I allow the Plaintiff's Plaint as follows:

a) The Defendants be and are hereby compelled by this court to re-transfer to the Plaintiff land known as Donyo Sabuk/Komarock Block 1/16, or sub-divisions of the said land, measuring 8.750 Ha.

b) Upon the transfer of land known as Donyo Sabuk/Komarock Block 1/16, or sub-divisions of the said land, measuring 8.750 Ha to the Plaintiff, the Plaintiff to refund to the 1st Defendant Kshs. 4,000,000.

c) The 1st Defendant to pay the costs of this suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE