



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC No. 379 OF 2013

SAMSON NJUGUNA MWAURA PLAINTIFF

VERSUS

JANE CHEROTICH MUTAI DEFENDANT

CONSOLIDATED WITH

ELCC No. 381 OF 2013

JANE CHEROTICH MUTAI PLAINTIFF

VERSUS

SAMSON NJUGUNA MWAURA DEFENDANT

JUDGMENT

1. The parties herein seem to have synchronized the litigation against each other. By plaint dated 22nd May 2013 and filed in court on 23rd May 2013, Samson Njuguna Mwaura (hereinafter “Samson”) commenced proceedings against Jane Cherotich Mutai (hereinafter “Jane”) in ELCC No. 379 of 2013. Almost instantaneously, Jane filed ELCC No. 381 of 2013 against Samson through plaint equally dated 22nd May 2013 and filed in court on 23rd May 2013. It is as if both did an “on your marks, get set, go!” and off they dashed to court. Samson seems to have narrowly outrun Jane, going by the case numbers. The real contest is however unfolding now, in this judgment. The two cases were consolidated by consent and ELCC No. 379 of 2013 was chosen as the lead file.

2. Samson averred in his plaint in ELCC No. 379 of 2013 that through a sale agreement dated 18th March 2009, he sold his parcel of land known as Rongai/Lengenet Block 2/46 (Mawe) together with developments thereon to Jane at a consideration of KShs 1,350,000 out of which Jane paid a total of KShs 750,000 but defaulted as regards payment of the balance of KShs 600,000 within the time stipulated in the agreement. That as a result, he rescinded the agreement on 25th April 2013 and that despite the rescission, Jane continued to put up developments on the suit property. He therefore prayed for judgment against Jane for:

(a) *An order of injunction restraining the defendant by herself, her servants or agents from constructing, developing or in any other way interfering with the (sic) LR Rongai/Lengenet Block 2/46 (Mawe).*

(b) *An order of eviction against the defendant her servants or agents from LR Rongai/Lengenet Block 2/46 (Mawe).*

(c) *Costs of suit and interest.*

3. I have not seen on record any defence filed by Jane against the plaint in ELCC No. 379 of 2013. Nevertheless, Jane’s plaint in ELCC No. 381 of 2013 is in essence her defence. She confirmed therein that the sale agreement was indeed entered into and at the purchase price pleaded by Samson. She added that although it was a term of the sale agreement that the balance of the purchase price be paid in monthly instalments commencing on 31st March 2009 and ending on 30th June 2009, they later agreed due to financial constraints and long illness on her part that she pays the balance in lump sum. That despite having the entire balance ready since mid-2012, Samson declined to receive it and instead demanded KShs 2,800,000 which was unconscionable and a breach of the sale agreement. That she therefore issued to Samson a notice of completion. Consequently, Jane prayed for judgment against Samson for:

a) *A permanent order of injunction restraining the defendant by himself, his agents and his servants from selling, transferring, alienating, disposing or in any way howsoever from disposing or dealing or interfering with Land Title Number Rongai/Lengenet Block 2/46 Mawe.*

b) *An order for specific performance directing the defendant to fully comply with the terms of the sale agreement dated 18th March 2009 and to order the defendant to transfer Land Title Number Rongai/Lengenet Block 2/46 Mawe upon compliance of all the terms in the said agreement, in default an order to be issued to the Deputy Registrar of this Honourable Court to sign all such documents on behalf of the defendant to facilitate transfer of the said land into the plaintiff's names.*

c) *The defendant to meet the costs of this suit and 16% VAT on it.*

d) *Any other relief as the court may deem fit.*

4. The matter thus proceeded to hearing at which Samson testified as the sole witness in support of his case. He stated that he is the registered proprietor of the parcel of land known as Rongai/Lengenet Block 2/46 (Mawe) and that he sold it together with the developments thereon to Jane pursuant to a sale agreement dated 18th March 2009. He produced a copy of the title deed in respect of the plot and a copy of the sale agreement. He added that the purchase price was KShs 1,350,000. Jane paid KShs 430,000 by banker's cheque on execution of the agreement. The next instalment of KShs 300,000 was to be paid on 31st March 2009 but Jane paid it one month later on 22nd April 2009. He produced a copy of the banker's cheque in respect of the KShs 430,000 and a copy of a statement of account in respect of his account at Equity Bank. He further stated that the third instalment was KShs 200,000 and was to be paid on 30th April 2009, the fourth instalment which was KShs 200,000 was to be paid on 31st May 2009 while the last instalment which was KShs 200,000 was to be paid on 30th June 2009. That none of the instalments due from 30th April 2009 to the last one had been paid as at the date of his testimony. That when Jane failed to pay, he tried to contact her but she went underground. After 5 years, he met her at Sagret Hotel in Nairobi on 25th April 2013 whereupon they discussed and she promised to honour the agreement but later failed to honour it. He added that according to the agreement, if a party was in default that party was to pay 20% of the purchase price which translates to KShs 270,000. He further stated that when he filed this case Jane filed another case against him claiming that he had refused to receive the balance, an allegation which he termed untrue since according to him, Jane was to deposit the money in his bank account. He added that Jane defaulted on the agreement. Regarding a letter dated 13th May 2013 said to have been written to him by Wambeyi Makomere & Company Advocates on behalf of Jane, he stated that the letter was never sent to him since it was addressed to c/o Gitundaga Primary School, Subukia but he was not based at that school at the time. He added that despite meeting Jane at Sagret Hotel, she did not deposit the balance and he cannot accept it now since it is about ten (10) years since the agreement was executed. He urged the court to grant him as per his plaint.

5. Under cross examination and re-examination, he stated that although the letter dated 13th March 2013 stated that money had been deposited with the advocates, he never went to collect it since I did not receive the letter. He added that he did not issue any notice of revocation of the agreement and that when he visited the land he found that Jane's extended family was living on it.

6. Samson then closed his case.

7. Just like Samson, Jane testified as the sole witness in support of her case. She stated that Samson indeed sold the suit property to her pursuant to the sale agreement which he had produced. She added that she was not able to pay the purchase price as was agreed since she was sick and her business was doing badly. She added that she informed Samson about her health, that he even went to her home and they spoke on the phone severally. That in the discussions, Samson agreed to wait but gave a condition that Jane pays all the balance in one lump sum. That she later travelled to South Sudan and was away there for a year but kept in touch with Samson on phone. Once she returned from South Sudan she called Samson and told him that she was ready with the full amount including the penalty specified at clause 6 of the agreement. She instructed her advocates Wambeyi Makomere & Co. who issued a completion notice dated 13th May 2013 to Samson. She added that Samson's address was stated in the letter as Gitundaga Primary School Subukia since that is where Samson had told her he was teaching. She further stated that she obtained two banker's cheques drawn from Commercial Bank of Africa and dated 9th May 2013. The first cheque was No. 107158 for KShs 600,000 on account of the balance of the purchase price while the second cheque was No. 107159 for KShs 270,000 on account of the 20% penalty. She added that Samson became very elusive and she could not get him. She produced copies of the banker's cheques and added that the agreement did not provide for cancellation in the event of breach. She denied that Samson ever rescinded the agreement and added that as at 22nd May 2013 when Samson filed this case she had committed to paying the balance and the penalty. She added that the agreement did not bar her from doing any development on the land and consequently, when she took possession she initially farmed on the land and later on decided to put up a private primary school on it. That the completion notice required Samson to go to her lawyers with specified documents but he did not comply. She further stated that she even went to Samson's lawyers with her lawyer but Samson refused to take the money, instead insisting on a new agreement at double the purchase price. She urged the court to grant her judgment as per her plaint.

8. Under cross-examination and re-examination, she stated that the letter dated 13th May 2013 was sent by hand delivery through her lawyer's office but there was no delivery since the person who went to deliver it did not find Samson. She conceded that there was late payment and added that her banker's cheques KShs 600,000 on account of the balance of the purchase price and KShs 270,000 on account of the 20% penalty have so far not been received by Samson.

9. Jane closed her case at that point.

10. Parties filed and exchanged written submissions. It is argued on behalf of Samson that Jane is in breach of the agreement by failing to pay the balance of the purchase price by the specifically agreed dates. Regarding Jane's contention that he refused to receive the balance of the purchase price, it is argued that that is totally untrue and that in any case Jane would have simply banked the amount in Samson's account, whose details she had and which details she used to pay the deposit and the second instalment of KShs 300,000. Consequently, Jane's notice of completion dated 13th May 2013 is termed as a document which was conveniently created to give the impression that Jane was willing to pay the balance in 2013 yet the completion date was 30th June 2009. The only remedy available in the circumstances, it was argued for Samson, is for Jane to get the deposit she paid less 20% owing to her breach. Regarding Jane's plea for specific performance, Samson argued that such a relief cannot issue to a party who has breached the agreement. Reliance was placed on the cases of **Mohammed Jawayd Iqbal (Personal representative of the Estate of the Late Ghulam Rasool Jammohamed) v George Boniface Mbogua [2019] eKLR** and **William Kazungu Karisa v Cosmus Angore Chanjera [2006] eKLR**.

11. On Jane's part, it is argued that the agreement did not provide for rescission or forfeiture and that Samson cannot therefore rescind it since he has not complied with the provisions of **Sections 39 and 41** of the **Land Act**. It is further argued that there was no express provision in the agreement making time of the essence and no completion notice was served on her and Samson cannot therefore rescind. The case of **Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhbuti [1997] eKLR** is cited in support of those arguments. It is also argued that although there was delay in completion, Jane made efforts to complete by holding meetings with Samson who refused to receive the balance of the purchase price together with 20% thereof as penalty. The court is invited to note that Jane has developed the property by putting up a primary school on it and further that she is likely to suffer losses if Samson's prayers are granted. It is therefore prayed that judgment be entered in favour of Jane as prayed in her plaint.

12. I have considered the pleadings, the evidence and the submissions by the parties. The issues that arise for determination are firstly, whether the agreement was rescinded, secondly, whether any of the parties breached the agreement and if so, the consequences of such breach and lastly, whether the reliefs sought by the parties are available.

13. There is no dispute that the parties entered into an agreement dated 18th March 2009 pursuant to which Samson sold to Jane the parcel of land known as Rongai/Lengenet Block 2/46 (Mawe) measuring 1.86 hectares together with developments thereon at a purchase price of KShs 1,350,000. The purchase price was agreed to be paid in instalments of KShs 450,000 on the date of execution, second instalment of KShs 300,000 to be paid on or before 31st March 2009, third instalment of KShs 200,000 to be paid on or before 30th April 2009, fourth instalment of KShs 200,000 to be paid on or before 31st May 2009 and a final instalment of KShs 200,000 to be paid on or before 30th June 2009. The first instalment was paid as agreed while the second instalment was paid on 22nd April 2009, almost a month later than was agreed. The rest of the instalments remain unpaid. Jane took possession pursuant to Clause 5 of the agreement. Clause 6 stated that in the event either of the parties breached the agreement then that party would lose 20% of the purchase price.

14. Samson averred at paragraph 6 of his plaint that he rescinded the agreement on 25th April 2009. He did not offer any evidence as to the circumstances in which he rescinded: was it verbal or in writing? What was the date and place of the rescission? No notice of rescission has been produced. The agreement which was home-made and handwritten did not provide for rescission or forfeiture and did not make time of the essence. To validly rescind it, Samson ought to have made time of the essence by issuing a notice. Although the agreement was made before the enactment of the **Land Act, 2012**, litigation herein started after enactment and commencement of the said statute. As was stated by Tunoi J.A. in **Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhbuti** (supra):

The agreement was unambiguous document. It was drafted in a very simple language. It spelled the contractual relationship between the appellants and the respondent. The most important condition as far as this appeal is concerned is: - "Balance to be paid on or before 31st January, 1993." This condition only specified the time within which the balance of the purchase price was to be paid. This fixation of period per se does not make time of the essence of the contract. ...

In the present case there being no evidence of an express stipulation making time of the essence and the nature of the subject matter or the surrounding circumstances not showing that time should be considered of the essence, the respondent ought, if he felt subjected by the appellants to unreasonable delay, to have given it notice making time of the essence.

It is trite that the element of notice I have referred to in a situation where time has not been made the essence of contract is especially important in that no court of law will allow one party suddenly to turn to the other and say: "time has elapsed, the agreement has been cancelled and the deposit has been forfeited."

15. Consequently, Samson ought to have served a written notice upon Jane as has always been required by equity and as is required by **Section 41** of the **Land Act**. Under cross examination, he stated categorically that he did not issue any notice of revocation of the agreement. I therefore find that the agreement was not rescinded.

16. The second issue for determination is whether any of the parties breached the agreement and if so, the consequences of such breach. I have highlighted above the parties' agreed timelines for payment. The entire purchase price ought to have been paid on or before 30th June 2009. Jane admits that she did not complete the payments by that date. She only paid KShs 750,000, leaving a balance of KShs 600,000. She contends that she was sick, had financial problems and even travelled out of the country for work. Needless to state, the terms of the agreement were clear and had to be complied with, sickness or not, unless of course they were varied in writing. There was no such variation. Jane's own testimony shows that she attempted to pay the balance of KShs 600,000 through a banker's cheque dated 9th May 2013, a date which was 4 years and 11 months later than 30th June 2009 when the entire purchase price ought to have been paid. She further admitted that although she paid the second instalment of KShs 300,000 she did not pay it by its due date of 31st March 2009. Instead, she paid it almost a month late on 22nd April 2009. Her arguments as to sickness travel or even that Samson refused to receive the amounts do not avail her any defence. She would simply have banked the amount in Samson's account, whose details she admitted in her testimony that she had. I therefore find and hold that Jane was in breach of the agreement from as far back as 30th June 2009. As for the consequences of the breach, we need look no further than clause 6 of the agreement which stated that in the event either of the parties breached the agreement then that party would lose 20% of the purchase price. It follows therefore that Jane is liable to pay Samson KShs 270,000. She admitted liability to pay that sum in her testimony and even produced a copy of a banker's cheque for the sum, payable to Samson.

17. Samson has prayed for judgment against Jane for an order injunction and her eviction from the suit property. On the other hand, Jane prays for judgment against Samson for a permanent injunction and specific performance. Samson having received KShs 750,000 towards the purchase price and the contract not having been rescinded, there would be no basis upon which to evict Jane from the property or to restrain her from using the property considering that she took possession pursuant to an express term of the contract. Jane's breach as at 30th June 2009 notwithstanding, and considering that Samson did not rescind the agreement, she has demonstrated that she was ready and willing to pay the balance of the purchase price and even the penalty of 20% of the purchase price as at 9th May 2013. Evidence of her readiness is found in the copies of the banker's cheques which she produced and which were in Samson's name. Ordinarily, a banker would not issue a banker's cheque unless funds are available.

18. The principles applicable to the remedy of specific performance were summarised by Gicheru J.A. in Gurdev Singh Birdi & Narinder Singh Ghatara as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhbuti (supra) 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 487 of Volume 44 of Halsbury's Laws of England, Fourth Edition, a plaintiff seeking the 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, 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 non-essential or unimportant term, although in such cases it may grant compensation.

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.”

... When the appellants came to court seeking the relief of specific of the agreement, they had not performed their one essential part of the agreement. Namely; payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In those circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice.

19. The important cut off point as emphasised by the authors of Halsbury's Laws of England is the date of filing of the suit. The twin suits herein were filed in court on 23rd May 2013. As noted above, Jane had the balance of the purchase price ready as at 9th May 2013, before the filing of the suits. She was thus ready and willing to perform her part of the contract as at 9th May 2013, prior to the filing of Samson's case, even though she had been previously in breach. An important consideration in determining whether to grant the equitable relief of specific performance is whether in the circumstances of the case it is just and equitable to do so in order to do more perfect and complete justice. The duty of the court to see to it that a just, expeditious, proportionate and accessible resolution of disputes is attained and that substantive justice prevails is emphasized under **Section 3** of the **Environment and Land Court Act**, **Sections 1A** and **1B** of the **Civil Procedure Act** and **Article 159 (2)** of the **Constitution**. In that regard, I take into account that Jane took possession pursuant to a term of the contract. Samson agrees in his witness statement dated 29th August 2019 which he adopted as part of his evidence that she has since developed the property by putting up a school on it. While seeking her eviction in his prayers, Samson has not included any prayer as to what he wants done with the portion of the purchase price which he received. The justice of the case requires that Samson be paid the balance of the purchase price and the agreed penalty and that the contract be completed. I will award the sums to Samson even though he has not prayed for them since the sums are not in dispute. I am persuaded that Jane is entitled to specific performance and permanent injunction.

20. In view of the foregoing discourse, I make the following orders:

a) Samson Njuguna Mwaura's prayers for orders of injunction and eviction are dismissed.

b) Judgment is entered against Jane Cherotich Mutai and in favour of Samson Njuguna Mwaura for:

i) KShs 600,000 being balance of the purchase price.

ii) KShs 270,000 being 20% penalty as per the sale agreement.

c) The amounts under (b) above to be paid to Samson Njuguna Mwaura within 21 (twenty one) days from the date of delivery of this judgment. If Samson Njuguna Mwaura declines to receive the amounts, Jane Cherotich Mutai to deposit the amounts in court within the stated period.

d) Upon Jane Cherotich Mutai paying or depositing the amounts under (b) above, Samson Njuguna Mwaura to transfer the parcel of land known as Rongai/Lengenet Block 2/46 (Mawe) to Jane Cherotich Mutai by signing the transfer and all necessary documents and taking all necessary steps to facilitate the transfer within 21 (twenty one) days from the date of payment or deposit. In default of Samson Njuguna Mwaura complying, the Deputy Registrar of this court to sign all such documents and take all necessary steps on behalf of Samson Njuguna Mwaura.

e) A permanent injunction is hereby issued restraining Samson Njuguna Mwaura by himself, his agents or servants from selling, transferring, alienating or in any way whatsoever disposing the parcel of land known as Rongai/Lengenet Block 2/46 (Mawe) to any person other than Jane Cherotich Mutai.

f) Considering that both parties are responsible for the situation that led to the filing of the cases and further considering that each party has had some measure of success, I make no order as to costs.

21. It is so ordered.

Dated, signed and delivered at Nakuru this 8th day of October 2020.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff (Samson Njuguna Mwaura)

No appearance for the defendant (Jane Cherotich Mutai)

Court Assistants: Beatrice Jelimo & Julius Lotkomoi