



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 1193 OF 2001

EDWARD PETER NJOROGE.....PLAINTIFF

VERSUS

OWEN KIMOTHOKA KAIRO.....DEFENDANT

JUDGEMENT

By a plaint dated 3rd July, 2001, the Plaintiff, **Edward Peter Njoroge** has sued the Defendant, **Owen Kimotho Kaire** seeking specific performance of the agreement entered between the Plaintiff and the Defendant on the 26th of October, 1999 for exchange of land. The Plaintiff's other claim is to be awarded damages for breach of the agreement. He averred that it was a term of the agreement that the Defendant would transfer two of his plots namely Dagoretti/ Waithaka/ 1333 and Dagoretti/ Waithaka/1336 measuring approximately 0.10 hectares and 0.11 hectares (hereinafter referred to as '**the Defendant's plot**') respectively to the Plaintiff all carved or excised from L.R. No. Dagoretti/ Waithaka/ 1238 comprising of 0.73 hectares and in return the Plaintiff would give the Defendant his parcel of land Plot No. 1950 Ongata Rongai comprising of 5 acres(hereinafter referred to as '**the Plaintiff's plot**') plus Kshs. 200,000/=. The said Kshs. 200,000/= was payable in two instalments. The first instalment was to be paid after the formal mutation of the plots and the final instalment after the execution of the transfer. The Plaintiff averred that on 27th November, 1999, he caused the change of names of his certificate of land plot ownership of his plot in favour of the Defendant as part of his obligation toward the exchange of land agreement. He further averred that after the Defendant's insistence, he paid to the Defendant Kshs. 60,000/= toward the exchange of the land agreement which money he paid before the formal mutation of the Defendant's plots. That the Defendant developed a sudden reluctance to fulfil his obligations under the agreement which in turn led to the Plaintiff's inability to release the balance of Kshs. 40,000/= to make the first full instalment of Kshs. 100,000/= since the agreement required him to pay to the Defendant the first Kshs.100, 000/= after formal mutation of the Defendant's plots; that the Defendant was and/or is in breach of the agreement.

The particulars of breach have been outlined in paragraph 8 (i) to (vii) of the plaint as follows:

- i. The Defendant failed to cause formal mutation of his plots to be done in time.
- ii. The Defendant refused to disclose to the Plaintiff that formal mutation of his plots had been done which the Plaintiff learnt in July, 2000 through other sources.
- iii. The Defendant in total breach of the agreement disposed of one of his plots (Dagoretti/ Waithaka/ 1336) which was one of the plots meant to pass to the Plaintiff.
- iv. The Defendant thereafter refused to accept any further funds from the Plaintiff who was all along

- willing and eager to see the transaction concluded.
- v. The Defendant later advertised all his pots for sale, including the ones earmarked for transfer to the Plaintiff.
 - vi. To safeguard his interests, the Plaintiff lodged and had a caution registered against two of the remaining plots, Dagoretti/Waithaka/1334 and Dagoretti/ Waithaka/ 1333.
 - vii. The Defendant has never at any time agreed to meet with the Plaintiff or even communicated to him with a view as to what happened concerning the agreement in question despite efforts by the Plaintiff to resolve the problem.

He stated that the Defendant has never agreed to meet with the Plaintiff or even communicated to him with a view to resolve what happened concerning the agreement in question despite efforts by the Plaintiff to resolve the problem. That he has on his part already caused the certificate of his plot changed and registered in favour of the Defendant and that he has always been ready and willing to fulfil all his obligations under the agreement.

The Defendant filed a defence and a counterclaim. In his defence he admitted that he had entered into an agreement with the Plaintiff for exchange of land. He averred that the Plaintiff fraudulently altered the agreement to provide that he was to exchange plot Number B and E instead of D and E as had been agreed by the parties. He denies that the Plaintiff did not fulfil his part of the agreement as he did not pay the Kshs. 200,000/= nor did he pay Kshs. 60,000/= as alleged. He denies that the Plaintiff did not transfer his plot to the Defendant as agreed and further denies the particulars of breach outlined in the plaint. He averred that since the Plaintiff had failed to fulfil his part of the contract he was not under obligation to transfer the plots to him and is within his rights to sell the same to a third party. He also averred that the Plaintiff has unlawfully lodged a caution against Dagoretti / Waithaka / 1333 as there was no contract between the parties for the sale of the said plots. The Defendant urged this court to dismiss the Plaintiff's suit and enter judgment for the counter-claim in which he claims that the Plaintiff has unlawfully lodged caution against Dagoretti / Waithaka / 1333 and Dagoretti/ Waithaka/ 1334. He prays for removal of the caution against Dagoretti/ Waithaka/ 1333 and Dagoretti/ Waithaka/ 1334 and costs for the counter-claim.

Plaintiff filed a reply to defence and defence to counter-claim dated 28th January 2002 in which he reiterated his averments in the plaint and denied the allegations in the counter-claim stating that the caution was legally lodged as per the agreement and due to the fact that the Defendant had already received part of the payment for the exchange. Further that the Plaintiff had transferred his plot into the Defendant's names.

The parties then filed a list of issues for determination on 23rd January 2003. The agreed issues are, that there was an agreement for exchange of land between the parties, that the Defendant was to give the Plaintiff two of his plots as part of the exchange agreement, that there was an additional Kshs. 200,000/= to be paid by the Plaintiff to the Defendant as part of the exchange agreement and that the Plaintiff was to transfer his plot and pay the additional Kshs. 200,000/= to the Defendant in exchange of the Defendants two plots. The issues in dispute are, when and how was the Plaintiff supposed to pay the additional purchase price of Kshs. 200,000/=:, what or which plots was the Plaintiff supposed to get under the exchange agreement, whether or not the parties performed their obligations under the exchange agreement, whether the Plaintiff paid to the Defendant Kshs. 60,000/= as part of the additional purchase price of Kshs. 200,000/=:, whether or not the Defendant was in breach of the agreement, whether the caution lodged by the Plaintiff against plot Nos. Dagoretti/ Waithaka/ 1333 and Dagoretti/ Waithaka/1334 is lawfully so done, whether the exchange agreement in question is valid and binding to the parties or is null void and of no effect for lack of Land Control Board Consent, whether the Plaintiff is entitled to prayers of specific performance of the agreement and damages for breach, whether the Defendant is entitled to his counter-claim and who should be condemned to bear the costs of this suit.

This case was first heard by my sister Lady Justice Sitati. At the hearing of the case the Plaintiff

was the only prosecution witness. He testified that he had entered into an agreement for exchange of land on 26th October 1999. He produced the original agreement in court which was marked as **Exhibit 1**. He testified that the plaintiff agreed with the Defendant to give him two plots from his undivided 'shamba' in exchange for his 5 acre 'shamba' where he stays. He stated that he changed the name in the share certificate for NEP Commercial Agencies from his name to the Defendant's name because he wanted to perform his part of the agreement. He produced an original certificate of NEP Commercial agencies with the name of Owen Kimotho Kaire dated 27th November 1999 which was tendered as exhibit 2. In addition to the 5 acres, he was to pay the Defendant Kshs. 200,000/= as per clause 1(1) and 1(2) of the agreement for exchange of land. After execution of the agreement, the Defendant was to transfer his plots then give the Plaintiff the mutation forms but the Defendant did not do so. While he was still waiting for the Defendant to do the mutation, he through his agent, Mbugua Itume paid the defendant Kshs. 60,000/= being survey fees (Kshs. 20,000/= by cheque and Kshs. 40,000/= in cash. He lodged cautions on the plots when he learnt that the Defendant failed to avail to him the mutation forms and had already sold the same to a third party on LR No. Dagoretti/Waithaka/1333 dated 9th November 2000. After he placed the said cautions, the Defendant caused the Plaintiff to be called before the Registrar of Lands where he was required to pay Kshs. 750/= being hearing fees. He was so summoned vide two letters dated 7th August, 2002 and 29th June, 2006 respectively by the District land Registrar. After the hearing, the Registrar directed that the parties stick to the agreement for exchange of land. He further testified that the Defendant wanted him to remove the cautions but the Registrar refused to remove the cautions which are in place. He stated that he did not refuse to pay the Defendant the agreed amount rather it is the Defendant who refused to perform his part of the bargain. The Plaintiff produced the mutation form for parcel No. Dagoretti/ Waithaka/ 1238 dated 14th July, 2000 (**Exhibit 5**). He stated that he obtained the said mutation form from John Mbugua Njenga alias Mbugua Itume and that the Defendant did not inform him about the surveyor's map (**P. Exhibit 6**) for parcel No. L.R. Dagoretti/ Waithaka/ 1238. He stated that as per the map the plots were B and E. At the time of the agreement, the numbers of the plots were given as D and E as stipulated at clause C. He stated that the map by the surveyor showed two plots. The plaintiff testified that he and the Defendant did not attend the Land Control Board because he did not want to go and it was not time to attend the Board. The Plaintiff asked the court for order of specific performance against the Defendant as he is ready to pay the balance of the additional Kshs. 200,000/= and he has already transferred his plot to the Defendant. He also prays for costs of the suit.

On cross examination, the Plaintiff stated that before the signing of the agreement, the Defendant showed him his plots on the ground and he too took the Defendant to his. The Plaintiff's plot was 10 acres. It had no beacons and was undeveloped at the time. He only had a share certificate and no title deed for his 10 acres plot. At the time of the agreement he had his certificate for the 10 acres plot from NEP Commercial Agencies to which he surrendered the original certificate and was issued with two (2) certificates. He affirmed that the signature on the share certificate is not his and that on the verifying affidavit is his. Referring to a cheque dated 16th June, 2000 he indicated that he had erred when he said he had paid Kshs. 60,000/= by the time the parties signed the agreement. The cheque was from NEP Commercial Agencies. He had the authority to sign because he was the one in the field as Sales Manager. He was the only signatory as sales manager but carried the responsibility of Director. He stated that the signature on the cheque resembles the signature on the share certificate. He agreed with the contents of the mutation form which refers to plot Nos. A, B, C and E. According to the agreement, the plots he was to buy were E and B and that he erred if he had mentioned D and E. Plot B is 1333 while E is 1336 and these are the plots that were meant to be his. Referring to the cautions he stated that one of the applications was for plot 1333 which is plot B on the mutation. The reason for placing caution on 1334 was because he had discovered 1336 had already been sold so he cautioned the unsold plots. He confirmed that there was no agreement with the Defendant to caution the unsold plots. He agreed that he had no evidence that the Defendant had transferred plot 1336 to a third party. He stated that the mere fact that a plot is undeveloped does not mean it has not been sold and said further that he went to the Registrar and confirmed that 1334 had not been transferred. He admits he was the one who gave the reasons for placing the caution. He confirms that the application for the caution refers to an agreement dated

27th November, 1999 while **P. Exhibit 1** is dated 26th October, 1999 but that he does not understand the discrepancy in the dates. He stated he and the Defendant first agreed on plots B and E. That he placed cautions to secure the plots and that if the said plots really belonged to a third party then he would have been sued by now. He denied that the allegations in the letter dated 28th February, 2001 are not true. He confirmed that the signature in **P. Exhibit 2** was his and that according to the agreement made on 26th October, 1999 he was to get plot B and E.

I took over this matter at the defence hearing. The plaintiff's evidence as summarised as above was heard before Sitati J. The Defendant (**DW1**) testified that he had entered into an agreement for exchange of plots with the Plaintiff, he was to give to the Plaintiff 2 plots subdivided from L.R. Dagoretti/ Waithaka / 1238 and the Plaintiff was in exchange to give the Defendant his 5 acres plot at Rongai plus an additional Kshs. 200,000/=. He stated that there were conditions that when mutation form was obtained by the Defendant the Plaintiff would pay the Kshs. 100,000/= then when the titles were out he would pay the additional Kshs. 100,000/=. He stated that they verbally agreed that the Plaintiff would give the Defendant the title to his 5 acre land in Rongai. While the sub-division was going on, he went with the Plaintiff to see the plots. That was in the year 2000. The surveyor sketched that the plot would be divided as A,B,C,D and E. A mutation form to that effect was produced as **D3. Exhibit- 1**. He stated that when he and the Plaintiff went to see the plots he showed him D (1335) and E(1336) which were the plots he was to give the Plaintiff. Subsequently, the Plaintiff took him to Rongai to see his plot. The Plaintiff did not carry along any title document to the plot but upon inquiry on why there were no beacons and after the Plaintiff explained that the beacons had been uprooted by herders they went ahead and signed the agreement dated 26th October, 1999. That the plots E and B as indicated in the agreement are not the plots that were to be given to the Plaintiff by the Defendant rather they had agreed on Plots D and E. Plot B One of the plots in **P Exhibit 1** was not agreed on and he further stated that the agreement on record is not the agreement he signed. That page 1 of the agreement was altered since the agreement had plots E and B as the plots he was to give in exchange to the Plaintiff. After the mutation was done he showed the Plaintiff the mutation form and the Plaintiff showed him the certificate of land and told him that the Title was being processed. Despite being shown the mutation form the Plaintiff failed to pay the first instalment of Kshs.100, 000/=. He stated that he became suspicious when realised that the signature on the certificate, the agreement and the one on the cheque drawn to him by the Plaintiff were similar. He then conducted a search and established that parcel of land Plot No.Ongata Rongai/1950 did not exist, what existed was Ngong /Ngong/ 1950 owned by one Lawrence Nginyo Kariuki. He also established that the plots where the Plaintiff claimed to be having a plot were referred to as Kajiado/ Kitengela and Kajiado / Kitengela / 1950 was owned by one Stephen Kikaride. The Certificate of search dated 8th March, 2002 was produced as **D.Exhibit-2** and extract of properties section as **D. Exhibit-3**. He stated that the cheque for Kshs. 20,000/= dated 16th June, 2000 which cheque was not honoured was given to him before he conducted the search. The Plaintiff advised him to destroy the cheque but he did not destroy it. He got suspicious and reported the matter to the police at satellite. The said cheque was produced as **D. Exhibit-4**. The Plaintiff also refused to see a copy of the mutation form (**D. Exhibit- 5**). The Defendant stated that after realising that the Plaintiff was not the owner of the plot in Rongai he did not transfer his two plots to the Plaintiff. Demand letters dated 20th and 28th February, 2001 were written to the Plaintiff from the Registrar of Lands' office he only complied with the demands of the letter dated 28th February, 2001 (**D. Exhibit-6**). He indicated that plot No. 1334 which is 'C' in the mutation form had been bought by one Peter Nderitu vide an agreement dated 16th November, 1999 (**D.MFI – 1**) but he said has not been transferred to the buyer due to the caution placed on it by the Plaintiff, the title is therefore still in the Defendant's name. Plot No. 1333, 'B' in the mutation form is the plot where the Defendant has been living since the year 1999. A title to the said plot was produced as **D. Exhibit-7** and for plot C was marked as **MFI- 4**. Both plot C and B were not the plots agreed on to be transferred to the Plaintiff yet they are the plots the Plaintiff cautioned (**D. MFI- 2** and **D. MFI-3**). On cross-examination, the Defendant affirmed his testimony in examination-in-chief.

The 2nd defence witness (**DW2**), Peter Nderitu testified that sometime in the year 1999 he approached the Defendant to sell him plot 'C' (1334) sub-divided from L.R. No. Dagoretti / Waithaka / 1238 which plot was the only one that had not been sold. The Defendant and DW1 entered into a written agreement dated 16th November, 1999 for the sale of plot No. 1334 for a consideration of Kshs. 500,000/= which he paid in instalment and he is awaiting transfer since the Plaintiff lodged a caution on the said plot. He stated that he saw the agreement between the Plaintiff and the Defendant but plot 1334 was not subject in the agreement. He stated that the plots the Defendant agreed to transfer to the Plaintiff were D and E. He urged this court to dismiss the plaintiff's suit and enter judgment in the defendant's favour as prayed in the counter-claim. On cross-examination he stated that he made payments to the plot in cash and he has the receipts to that effect. He stated that the plots the Defendant agreed to transfer to the Plaintiff was D and E and the Plaintiff was to give the Defendant his 5acres plot and an additional Kshs. 500,000/=.

The Defendant was re-called to produce the title deeds for plots Nos. 1333 and 1334.and he confirmed that both titles were in his name.

The plaintiff filed his submissions on 13th July 2012 in which he outlined that the in an agreement the defendant was to effect transfer of his two plots E and B on LR No. DAGORETTI/WAITHAKA/1333 and DAGORETTI/WAITHAKA/1336 measuring 0.10 and 0.11 Hectares respectively. In return the defendant was to give his parcel of land Known as Plot No.1950 Ongata Rongai comprising of five acres in size in addition to the sum of Kshs 200,000/= in which the plaintiff was to pay the money in two instalments with the first mutation and subdivision of the defendants plots and the final instalment was to be paid after the execution of transfer in favour of the plaintiff. The plaintiff caused the change of certificate of ownership of plot 1950 Ongata Rongai in favour of the defendant. The plaintiff also paid Kshs 60,000/= in the first instalment and an additional sum of Kshs 100,000/=.The defendant however failed to fulfil his obligations to the plaintiff which led to the inability of the plaintiff to release the remaining Kshs 40,000/=to meet the first instalment as agreed. The plaintiff denied knowledge of agreement produced in court by the defendant. He also stated that the copies of official search for parcel Number NGONG/NGONG/1959 and KJD/KITENGELA/1950 belonged to other persons not party to this suit and that the parcel he was to exchange with the defendant was Plot No. 1950 Ongata Rongai in which he did not have a title deed but a share certificate.

The defendant filed his submissions on 12th June 2012. In his submissions, he highlighted that in the agreement he was to exchange plot D and E which translated to Title No. DAGORETTI/WAITHAKA/1335 and DAGORETTI/WAITHAKA/1336 as indicated in the mutation form and which plots were equally acknowledged by both parties. He submitted that the agreement that produced by the plaintiff was for transfer of plot numbers E and B which translated to Title No DAGORETTI/WAITHAKA/1336 and DAGORETTI/WAITHAKA/1333 as per the mutation form. He pointed out that plot B which is title No. DAGORETTI/WAITHAKA/1333 is where his residential house is located and there was no way he would have agreed to exchange the same with the plaintiff. He disputes page 1 of the agreement the plaintiff produced in court but he could not produce his own copy stating that the same was consumed with fire the very year he executed the agreement. He submits that he obtained a copy from the advocate who had drawn the instrument and found it to be the same with the one the plaintiff had. He says that the plaintiff gave him a cheque of Kshs 20,000/= which bounced and that the plaintiff was to transfer to him a title document and not a certificate of ownership. He stated that the plaintiff became very elusive after the defendant informed the plaintiff that he had done a search on title No. Ngong 1950 and when he asked him to transfer the land to the defendant since the mutation process was over. He said that he had sold his plot No.C which was title No. DAGORETTI/WAITHAKA/1334 to one Peter Nderitu Muruthi for Kshs 500,000/= and when he wanted to transfer the same to the purchaser he found that the plaintiff had lodged a caution along with title No. DAGORETTI/WAITHAKA/1336 which he wants this court lifted.

The exhibits produced during the hearing marked as **MFI** were not considered in this decision.

I have stated the issues in dispute as stated earlier in this judgment. On the 1st issue the time within which to pay the Kshs 200,000/= it emerged from the evidence in court that the 1st instalment was to be paid after the mutation had been done and the 2nd instalment was to be paid when the titles had been processed and transfer executed. On the second issue on which plots the plaintiff was supposed to get, the agreement exhibited by the plaintiff clearly shows that the plots the parties had agreed to exchange were Plots B and E .In my view the defendant did not provide a contrary agreement since he claimed that the one produced by the plaintiff had been altered and he did not have his agreement to buttress his submission. On the 3rd Issue on whether the parties performed their obligation under the agreement, I find that the plaintiff has not shown that he paid the full purchase price of the property as stated in the agreement .There is evidence that his cheque bounced .The plaintiff caused NEP Commercial Agencies to issue a certificate of ownership on the defendants land. This alone did not amount to full compliance with the terms of the agreement. The defendant too did not honour his part once the amounts were not paid. On the 4th Issue I am persuaded that the plaintiff paid Kshs. 60,000/= as part of the purchase price through the company as explained in his cross examination. On the 5th Issue I find that none of the parties honoured their part of the agreement and therefore I cannot solely hold that the defendant was in breach of the agreement. On issue no. 6 the plaintiff lodged the cautions for fear of losing the two plots after the defendant sold one plot. His action then was lawful in the circumstances. On issue no.7 agreement is valid and binding being a written agreement for exchange of land and none of the parties made any submissions on the same and in the absence of title this court cannot tell if lack of control board consent had any impact on the parcel of land. On issue no.8 with the above holdings the plaintiff is not entitled to specific performance of the agreement as pleaded as in my view each party breached the agreement. He is also not entitled to damages for breach, however he is entitled to refund of Kshs.60, 000/= which the defendant should pay forthwith. The defendant owns the land that is a subject of this suit and having found that title did not pass to the plaintiff he is entitled to prayer of removal of the caution against DAGORETTI/WAITHAKA/1333 and 1334.Each party to bear their own costs. Orders accordingly.

Dated, signed and delivered this 9th Day of May 2013.

R. OUGO

JUDGE

In the Presence of:-

.....Plaintiff

.....Defendants

.....Court clerk