



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 502 OF 2013

SAMMY NDUNGU MUNGAIPLAINTIFF

VERSUS

DANIEL MACUA NDONGA1ST DEFENDANT

NAKURU DISTRICT LAND REGISTRAR.....2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

1. By Agreement for Sale dated 23rd August 2011, the plaintiff herein purchased all that parcel of land known as Nakuru Municipality Block 6/134 measuring 0.0934 hectares (hereinafter the suit property) from the 1st defendant at a purchase price of KShs 25,000,000. The plaintiff paid a deposit of KShs 10,000,000 leaving a balance of KShs 15,000,000 which was to be paid “within 90 days upon charging the [suit property] to Equity Bank”. The agreement further provided that the plaintiff would take possession immediately upon completion of the purchase price; that the 1st defendant would “do all the necessary acts and pay any outstanding rates and land rents to facilitate a smooth transfer and registration of the [suit property] in the names of the [plaintiff]”; that the parties would “take all relevant steps to obtain all the necessary consents” concerning the transaction; that “if any party fails to comply with any term and/or condition [of the agreement] he/she shall suffer liquidated damages in the sum of 20% of the purchase price and shall refund others all expenses incurred pursuant thereto”; and that the sale was “subject to Law Society Conditions of Sale in so far as they are not inconsistent with conditions in this agreement”. However, no specific edition of the said Law Society Conditions of Sale was cited in the agreement.

2. Disagreements arose between the plaintiff and the 1st defendant leading to the filing of this suit on 21st August 2013. An amended plaint was later filed on 22nd May 2018 pursuant to which the plaintiff averred that the 1st defendant breached the agreement by refusing to sign transfer form and refusing to hand over all the documents required to effect the transfer. Additionally, the plaintiff averred that the 1st and 2nd defendants colluded to have the records of the suit property at the lands registry to disappear so as to frustrate the sale.

3. The plaintiff thus sought judgment against the defendants for:

a) An order of specific performance against the 1st defendant requiring him to avail all transfer documents in relation to the sale of Nakuru Municipality Block 6/134.

b) An order requiring the 2nd defendant to avail the records/green card pertaining to Nakuru Municipality Block 6/134.

c) That in the alternative the 1st defendant do refund the plaintiff the sum of KShs 10,000,000 plus interest from the date when the plaintiff paid the money.

d) Costs of the suit and interest.

4. The 1st defendant filed a defence and counterclaim in which he admitted the existence of the sale agreement as well as having received the deposit of KShs 10,000,000. He further averred that the plaintiff rescinded the agreement on 23rd November 2011. Accordingly, he urged the court to dismiss the plaintiff’s case and to enter judgment against the plaintiff for:

a) A declaration that the plaintiff breached and/or rescinded the agreement dated 23rd August 2011

b) *An order that the original title documents for Nakuru Municipality Block 6/134 be released to the 1st defendant upon refund of the deposit.*

c) *Damages for breach of contract as per clause 6 of the sale agreement.*

d) *Costs of the suit and interest.*

e) *Any other relief that the court deems fit to grant.*

5. Although the Attorney General entered appearance for the 2nd and 3rd defendants and was represented at court attendances by litigation counsel, he filed no defence, no pre-trial compliance documents or even submissions. Similarly, the 2nd and 3rd defendants did not tender any evidence at the hearing.

6. At the hearing, the plaintiff testified as PW1. He told the court in his evidence in chief that he is a businessman who operates petrol stations in Nakuru, Elburgon and Nyahururu. Through sale agreement dated 23rd August 2011 entered into between himself and the 1st defendant, he purchased the parcel of land known as Nakuru Municipality Block 6/134. He was the buyer while the 1st defendant was the seller. He intended to build a petrol station on the land. He produced a copy of the agreement as P. Exhibit 1. He referred to the terms of the agreement. These have already been captured at paragraph 1 of this judgment. The agreement was drafted by Ikua Mwangi & Co. Advocates as advocates acting jointly for both the buyer and seller. Among other advocates within the said firm, the plaintiff dealt with Ms Penina Gatei. The purchase price was agreed at KShs 25 million. The plaintiff paid a deposit of KShs 10 million in cash to the 1st defendant. The balance of KShs. 15 million was to be paid within 90 days upon transfer of the suit property to the plaintiff and upon its being charged to Equity Bank. The bank was to finance the said balance. The charge was never registered since both the bank's valuer and the parties' advocates could not get the green card of the suit property so as to obtain a certificate of search. The advocates made a follow up and wrote a letter dated 8th November 2012 to the District Land Registrar (P. exhibit No.3) raising the issue of their inability to obtain a certificate of search or to even transfer the property.

7. The plaintiff added that he enquired from the 1st defendant as to what was the cause of the complications but the 1st defendant kept quiet. Owing to the lack of documentation, the bank did not give the plaintiff the loan. Although the original of the title document for the suit property was deposited with M/s Ikua Mwangi & Co advocates, the 1st defendant never signed the transfer so that it could in turn be charged in favour of the bank. When the plaintiff realised that the bank loan was not forthcoming he looked for money from elsewhere and deposited it in his account. He then notified Ikua Mwangi & Co that he had the balance of the purchase price. The advocates wrote to Githiru & Co Advocates who were then acting for the 1st defendant on 5th April 2013 (P. exhibit No.4) and informed them about the availability of the balance of the purchase price. They also asked the 1st defendant to forward the duly signed transfer as well as the relevant consents. The 1st defendant did not forward the documents as requested.

8. The plaintiff further testified that he had the KShs 15 million as at the date of his testimony and that he was ready to complete the transaction. He added that the 1st defendant was still in possession of the suit property as at the date of his testimony and that the 1st defendant had not deposited the sum of KShs 10 million in a joint account as was ordered by the court on 21st January 2014 and on 20th January 2016.

9. Penina Muigai Gatei, Advocate, testified as PW2. She told the court that in the year 2011 she was practicing in the firm of Ikua Mwangi & Co. Advocates and that she prepared the subject sale agreement. She acted for both the buyer and the seller. As stated in the agreement, Equity Bank was to finance the balance of KShs 15 million. Ikua Mwangi & Co. Advocates was to act for Equity Bank in the transaction. Before Equity could release the funds, a transfer of the title to the purchaser needed to be done so that the bank could charge it as security. The transfer was however not effected since the 1st defendant failed to sign the transfer, surrender passport photos and copies of his ID card despite being asked to do so. The transaction could not progress without the 1st defendant signing the transfer. No charge was therefore registered. She added that it was never the arrangement that the 1st defendant be paid the balance prior to signing the transfer and releasing the other documents and that it was explained to him that the balance would be paid to him after transfer and a charge are registered. She further stated that it was not necessary that there be an undertaking from the bank since the same firm of advocates was acting for vendor, purchaser and the bank. It was not practical and it did not make any sense for the firm to give an undertaking to itself. It would not have served any purpose. She referred the court to condition No. 8.61 of the Law Society Conditions of Sale 2009 edition and stated that registration of transfer had to precede the release of the balance of the purchase price.

10. Under cross examination, PW2 told the court that she had nothing to show that Equity had instructed the firm of Ikua Mwangi & Co. Advocates and that she did not see any letter of offer of a loan from Equity Bank addressed to the plaintiff. She added that Ikua Mwangi & Co. wrote a letter to the 1st defendant dated 23rd November 2011 demanding a refund of the deposit of Kshs.10 million and Kshs.5 million being 20% liquidated damages in terms of the agreement. The letter told the 1st defendant that he was in breach of clause 4 and 5 of the agreement. According to the letter and demand for refund of the deposit, the agreement was effectively being rescinded. The letter was written after the 90 days completion period. She further stated that she did due diligence before the agreement was signed. She conducted a search which showed that the registered proprietor was the 1st defendant and that the documents at the land registry were intact at that point. I do not know at what point the documents went missing. She further testified that she did not bring it to the attention of the land registrar that the records in respect of the suit property at the lands office were missing. According to her, the registrar was not aware that the documents were missing.

11. The plaintiff's case was thereby closed.

12. The 1st defendant testified on his own behalf as DW1. He did not call any other witness. He told the court that he indeed signed the subject sale agreement and received the deposit of KShs 10 million from the plaintiff. He further stated that he deposited rates clearance

certificate, rent clearance certificate, original title deed, a copy of his national identity card, 3 passport photos and PIN certificate with Ikua Mwangi & Co. Advocates. According to him, the balance of the purchase price was not paid within the agreed period and the advocates never asked him to go and sign any transfer document. He also did not receive any professional undertaking from Equity Bank in respect of the balance of the purchase price and did not see any letter of offer addressed to the plaintiff by the bank. On the 90th day after the signing of the sale agreement, he received a letter dated 23rd November 2011 (Defence Exb7) from Ikua Mwangi & Co demanding that he refunds the deposit and that he pays an additional 20% of the purchase price. The letter stated that he was in breach of the sale agreement and that the advocates were unable to deal with the land since its records were missing from the land registry.

13. DW1 further testified that he neither interfered with the records at the land office nor colluded with the 2nd defendant to cause disappearance of the documents as was alleged. He thus responded to Defence Exb7 through a letter dated 5th December 2011 (Defence Exb.6) from his then advocates Githiru & Co. and stated in the letter that the plaintiff was in breach for failing to pay the balance of the purchase price within the agreed period. Some two years later, Ikua Mwangi & Co advocates wrote a later dated 5th April 2013 (Defence Exb.4) to DW1's advocates stating that the balance of the purchase price was now available and also asking for the transfer documents. DW1 stated that he was not ready at that point to continue with the transaction since the plaintiff had earlier on rescinded the agreement. In conclusion, DW1 stated that he is still ready to refund the deposit less 20%.

14. Under cross examination, DW1 stated that he never signed the transfer since there was no commitment or any letter from Equity Bank or anybody showing availability of the balance of KShs.15 million. He also conceded that he was ordered by the court on 21st January 2014 to deposit the KSh.10 million but he did not comply since he was not able to secure the money. He further conceded that on 20th January 2016 the court ordered that if he did not deposit the said amount within 90 days from that date it would attract interest at 35% per annum. He had not deposited the amount as at the date of his testimony.

15. The 1st defendant's case was thus closed. The 2nd and 3rd defendants also closed their cases. They did not tender any evidence. Parties thereafter filed written submissions. The plaintiff and the 1st defendant filed submissions while the 2nd and 3rd defendants did not file any.

16. For the plaintiff, it is argued in the submissions inter alia that the 1st defendant having acknowledged in the agreement that the balance of the purchase price was to be paid within 90 days of the suit property being charged to Equity Bank, he was under an obligation to sign the transfer so as to facilitate the said charge; that his failure to sign the transfer stalled completion of the agreement and; that he was therefore in breach and liable for the consequences. The plaintiff therefore urged the court to order specific performance of the agreement and in the alternative to order the 1st defendant to the deposit of KShs 10 million, interest thereon at 35% as was ordered on 26th January 2016 as well as liquidated damages at KShs 5 million being 20% of the purchase price in terms of clause 6 of the agreement.

17. On his part, counsel for the 1st defendant submitted that the plaintiff breached the agreement by failing to pay the balance of the purchase price within 90 days; that the plaintiff rescinded the agreement through his advocates' letter dated 23rd November 2011; that the plaintiff's blame of the lands office and the 1st defendant are just excuses as the plaintiff vide his advocates' letter dated 5th April 2013 changed tune and stated that he was now ready for completion notwithstanding his earlier stand that the records were not available at the lands office; that the plaintiff is guilty of breach and that therefore the equitable relief of specific performance is not available to him; and that in the circumstances the 1st defendant is willing to refund the deposit paid less 20% liquidated damages. The 1st defendant also prayed for judgment as sought in the counterclaim.

18. I have anxiously considered the pleadings, evidence and the submissions herein. At the core of the dispute is the Agreement for Sale dated 23rd August 2011. The terms of the agreement as well as several aspects of the plaintiff's and the 1st defendant's actions in the matter are not in dispute. I have highlighted the non-contentious matters at the 1st paragraph of this judgment and I therefore need not restate them here. Although the parties made the sale subject to Law Society Conditions of Sale, no specific edition of the said Law Society Conditions of Sale was cited in the agreement and none of the parties adduced evidence to assist the court determine which version of the said conditions is applicable.

19. Two issues emerge for determination: Firstly, did any of the parties breach the contract and; secondly, what relief should issue?

20. As already stated, there is no dispute that purchase price in respect of the suit property was agreed at KShs 25,000,000 out of which the plaintiff paid a deposit of KShs 10,000,000 leaving a balance of KShs 15,000,000. The sale agreement provided that the balance was to be paid within 90 days upon charging the suit property to Equity Bank. There is further no dispute that the suit property was never charged as contemplated in the agreement and that the balance remains unpaid. According to the plaintiff, the 1st defendant breached the agreement by refusing to sign transfer and by colluding with the 2nd defendant to hide the green card relating to the suit property, with the result that the suit property could not be charged as had been contemplated. The 1st defendant responded to all this by stating that the plaintiff rescinded the agreement through his advocates' letter dated 23rd November 2011, by further stating that he was never asked to sign the transfer, that the plaintiff is the one that breached the agreement by failing to pay the balance within 90 days, that he was never shown any evidence that Equity Bank had offered to lend the plaintiff the balance, and by denying any collusion with the 2nd defendant as alleged.

21. Regarding the allegation that the 1st defendant colluded with the 2nd defendant to hide the green card relating to the suit property, no evidence was tendered to show such collusion. Indeed, the plaintiff's own witness (PW2) told the court that she was able to conduct a search prior to the signing of the sale agreement. The search showed that the registered proprietor of the suit property was the 1st defendant. She also told the court that the documents at the land registry were intact and that she did not later bring it to the attention of the land registrar that any records in respect of the suit property at the lands office were missing. She further testified that the registrar was not aware that any documents were missing. In the circumstances, I find that there was no collusion between the 1st defendant and the 2nd defendant to hide the green card relating to the suit property as is alleged.

22. A reading of the sale agreement herein reveals that it would have benefitted from better drafting. Nevertheless, it is clear that the parties

intended that the plaintiff would purchase or acquire the suit property upon paying the balance of KShs 15 million “within 90 days upon charging” the suit property to Equity Bank. The parties thus contemplated that completion would be within 90 days from the date of the agreement and that during the said period, the suit property would be charged to the said bank. Thus completion was to be by the end of the day on 21st November 2011. Although the agreement does not expressly state so, arising from the evidence tendered by both sides, it is manifest that the balance of the purchase price was to be borrowed by the plaintiff from the bank and that the suit property was to be the security. Obviously, that would require that the property be first transferred to the plaintiff so that he could then offer it to the bank as security. Naturally, the lending transaction between the plaintiff and the bank would be separate and distinct from the transaction between the plaintiff and the 1st defendant.

23. The 1st defendant has raised an important point: he was not shown any evidence that Equity Bank had agreed to lend the plaintiff the balance of the purchase price. Indeed, this court has not been shown any such evidence. No application for a loan addressed to the bank and no letter of offer from the bank has been produced. It is such a letter which would confirm the amount the bank had offered to lend, the security for the loan and the terms of the lending. Similarly, the court has not been shown any letter of undertaking issued on behalf of the bank in respect of the balance. In the absence of such evidence the only conclusion that I can reach is that no such loan was offered by Equity Bank.

24. I am aware that the plaintiff has explained that it was not practical for the firm of Ikua Mwangi & Co Advocates to issue an undertaking to itself since it was acting for both the vendor and the purchaser and since it was also on the panel of advocates acting for Equity Bank and that it expected to receive instructions to act for the bank in the preparation of the anticipated charge. Suffice it to state that no letter of instructions or any such document was produced to show that Equity Bank had instructed the said advocates. Again, it is not easy to appreciate the wisdom of the same firm of advocates representing the vendor, the purchaser, the borrower and the lender in the same transaction.

25. Pursuant to the agreement between the parties, the obligation of paying the balance of the purchase price rested squarely on the plaintiff. He could pay it from his own pocket or borrow it from the bank. As vendor, the 1st defendant could not be expected to sign transfer of the suit property in favour of the plaintiff without first receiving the balance of the purchase price or obtaining an acceptable assurance in the form of a letter of undertaking or some other acceptable form that the balance would be paid to him. There being no evidence of such assurance as at the completion date of 21st November 2011, I find that the 1st defendant cannot be faulted for not signing the transfer. I further find that by not paying the balance of the purchase price by the end of the day on 21st November 2011, the plaintiff was in breach of the Agreement for Sale dated 23rd August 2011. In the circumstances, the plaintiff is liable to pay the 1st defendant KShs 5 million being 20% of the purchase price in terms of clause 6 of the Agreement for Sale. That resolves the first issue.

26. The last issue for determination is: what relief should issue? The plaintiff sought judgment against the 1st defendant for an order of specific performance, for an order requiring the 2nd defendant to avail the records/green card pertaining to the suit property, and for an order that the 1st defendant refunds the plaintiff the sum of KShs 10,000,000 plus interest. On the other hand, the 1st defendant sought judgment in the counterclaim against the plaintiff for a declaration that the plaintiff breached and/or rescinded the agreement dated 23rd August 2011, an order that the original title documents for Nakuru Municipality Block 6/134 be released to the 1st defendant upon refund of the deposit and damages for breach of contract as per clause 6 of the sale agreement.

27. I have already found that there was no collusion between the 1st defendant and the 2nd defendant to hide the green card relating to the suit property as is alleged. In the circumstances, the plaintiff’s claim against the 2nd and 3rd defendants cannot succeed. It is hereby dismissed with costs to the 2nd and 3rd defendants.

28. Regarding the plaintiff’s prayer for an order of specific performance requiring the 1st defendant to avail all transfer documents in relation to the suit property, I begin by restating the principles applicable, which were aptly summarised by Gicheru JA (as he then was) in Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhbuti [1997] eKLR 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.”

The latter was the position taken by Lord Esher, M. R. in COATSWORTH V. JOHNSON, (1886) 54 L. T. 520 at page 523 when he said that:

“The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract... the court of equity would refuse to grant specific performance and would leave the parties to their other rights. Then if the court of equity would not grant specific performance, we are not to consider specific performance as granted. Then the case is at an end.”

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.

29. I have found hereinabove that the plaintiff breached of the Agreement for Sale dated 23rd August 2011 owing to his failure to pay the balance of the purchase price by the end of the day on 21st November 2011. Indeed, even as at the date of the hearing, the plaintiff had not paid the balance of the purchase price. Although the plaintiff stated that he was ready and willing to pay, no evidence of availability of KShs 15 million being the balance of the purchase price was placed before the court. In such circumstances, an order of specific performance cannot issue. The plaintiff's prayer in that regard is dismissed.

30. There is no dispute that the plaintiff paid a deposit of KShs 10,000,000 to the 1st defendant. The plaintiff has urged the court to order in the alternative that the said amount be released to him with interest thereon at 35% as was ordered on 20th January 2016. The record herein shows that a consent order was recorded before my sister Waithaka J on 21st January 2014 pursuant to which the 1st defendant was ordered to deposit the sum of KShs 10,000,000 in a joint interest earning account in the names of advocates on record for the plaintiff and the 1st defendant by 20th February 2014. The 1st defendant did not comply and as a result, another consent order was recorded on 22nd October 2015 before my brother Munyao J pursuant to which the 1st defendant was ordered to deposit the said amount within 14 days of that date. There was still no compliance. Yet again a consent order was recorded before Munyao J on 20th January 2016 pursuant to which the 1st defendant was ordered to deposit the amount within 90 days of the order and in default, the amount would accrue interest at 35% per annum. The 1st defendant admitted during his testimony that he has so far not complied with the order. I will therefore award the plaintiff interest at 35% per annum from 21st April 2016 which is after the expiry of the 90 days ordered on 20th January 2016.

31. The plaintiff is entitled to a refund of the KShs 10 million deposit that was paid, less KShs 5 million being 20% of the purchase price in terms of clause 6 of the Agreement for Sale. The net effect therefore is that the plaintiff entitled to KShs 5 million plus interest.

32. In the end, I make the following orders:

- a) The plaintiff's prayer for an order of specific performance requiring the 1st defendant to avail all transfer documents in relation to the suit property is dismissed.
- b) Judgment is entered for the plaintiff against the 1st defendant for KShs 5 million plus interest to be calculated at court rates from the date of filing this suit until 20th April 2016 and at 35% per annum from 21st April 2016 until payment in full.
- c) Since the plaintiff and 1st defendant have each had a measure of success in their respective claims against each other, I order that each of them bears own costs.
- d) The plaintiff to release to the 1st defendant the original title documents for Nakuru Municipality Block 6/134 upon payment in full of the amounts ordered above.
- e) The plaintiff's claim against the 2nd and 3rd defendants is dismissed with costs.

33. Delay in delivery of this judgment, which was occasioned by the fact that I proceeded on medical leave, is regretted.

Dated, signed and delivered in open court at Nakuru this 30th day of April 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Ndegwa holding brief for Mr Matiri for the plaintiff

Mr J M Kariuki for the 1st defendant

No appearance for the 2nd and 3rd defendants

Court Assistants: Beatrice & Lotkomo