



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 216 OF 2014

JONATHAN KIPLAGAT MUIGEL.....PLAINTIFF

VERSUS

KIPNGETICH LELMEN.....DEFENDANT

JUDGMENT

By a plaint dated 8th April 2014 and amended on 8th April 2016, the plaintiff herein sued the defendant seeking for the following orders:

- a) Specific performance of the agreement.
- b) An order directing the County Surveyor to subdivide and or cause subdivision of property known as ELDORET MUNICIPALITY BLOCK xx/xxx into two equal parcels measuring 0.20625 Hectares.
- c) An order compelling the defendant to sign transfer forms to facilitate transfer of one portion of the said parcel.
- d) In default of prayer (b),above the Executive Officer or Deputy Registrar to sign the transfer forms of on behalf of the defendant to transfer one portion of the said parcel in favour of the plaintiff.
- e) In the alternative and without prejudice to prayer (a), (b) and (c) the plaintiff prays' that a declaration be made and such he be awarded compensation at the market value of ELDORET MUNICIPALITY BLOCK xx/xxx in the sum of Ksh 11,000,000/ million.
- f) Damages for breach of contract and costs of the suit
- g) Any other or further relief that this honourable court may deem fit and just to grant.

Plaintiff's Case.

The plaintiff adopted his statement as part of his evidence in chief and stated that he entered into a written sale agreement dated 18th January 2013 with the defendant for the suit land in Elgon view in Eldoret. It was the plaintiff's further evidence that the defendant had informed him that he owned the parcel of land known as Eldoret Municipality Block xx/xxx measuring 0.412 Ha. jointly with Dr. Yusuf Kimutai Kibet and that the parcel was registered in the names of defendant and Yusuf Kimutai Kibet

The plaintiff further stated that it was a term of the agreement that the defendant would execute and organize for subdivision of the suit land and effect transfer in favor of the plaintiff. It was the plaintiff's evidence that the defendant gave him a copy of the original title deed which he produced as an exhibit in court.

The plaintiff stated that the defendant acknowledged receipt of the full purchase price. He also produced an addendum sale agreement dated 14th January 2014. It was the plaintiff's testimony that after making payment the defendant allowed him to start construction on the suit land. PW1 also stated that he went to the defendant on several occasions to perform his part of the agreement but he did not do so. He further stated that the agreement has no relation with a motor vehicle the defendant claims to have sold.

The plaintiff therefore prayed that judgment be entered against the defendant as per the plaint as the defendant had breached the terms of the agreement.

On cross-examination by the defendant's Counsel, the plaintiff stated that they entered into an agreement with the defendant in an advocate's

office whereby they both signed. He further confirmed that he conducted an official search which indicated that the suit land was registered in the name of the defendant and one Yusuf Kimutai Kibet.

PW 1 further stated that he had sold a motor vehicle to the defendant who paid him Kenya shillings 600,000/cash. That the defendant took possession of the motor vehicle but was later arrested as it was suspected to be a stolen motor vehicle. PW 1 also stated that it is not true that the defendant had borrowed money from him.

On re-examination PW 1 confirmed that there was no one residing on the suit land and that Yusuf Kibet had not complained about the sale.

PW 2 Mr. Joseph Songok and advocate who prepared the sale agreement gave evidence and confirmed that the agreement dated 8th January 2013 between the plaintiff and the defendant was done in their offices. He further stated that the defendant was selling the suit land at a consideration of Kenya shillings 3.5 million of which the plaintiff paid Kenya shillings 3.1 million on execution of the agreement and the balance was to be paid on or before 31st August 2013. PW 2 further stated that the parties came to the office on 14th January 2014 and acknowledged that the balance had been paid. He therefore produced the sale agreement and the addendum.

On cross-examination by Counsel for the defendant, PW 2 confirmed that by the time the parties came to the office the money had been paid and they signed the agreement in his presence. The plaintiff therefore closed his case.

Defense case

The defendant adopted his statement which he had recorded on 2nd September 2014 as part of his evidence in chief. It was his evidence that the plaintiff had lent him Kenya shillings 200,000/which he was unable to pay and therefore agreed that he would give him a portion of his land. The defendant further stated that the motor vehicle that he had given as security was not able to repay the amount.

DW 1 testified that they owned the suit plot jointly with Yusuf Kimutai Kibet who was not present when they entered into the sale agreement with the plaintiff and therefore he did not sign. He further stated that he did not seek for the consent of his family members to sell the suit land who later objected to the sale.

DW 1 further stated that he was paid Kenya shillings 2.1 million by installments and was given a motor vehicle registration number KAS as part of the consideration but one year later he was arrested by Flying squad claiming that the vehicle was a stolen one. DW 1 stated that the court ruled that they sell the motor vehicle and divide the proceeds. DW 1 also stated that the plaintiff only paid him a total of Kenya shillings 2.3 million and that he has been paying rates to the County government. He therefore prayed that the plaintiff's suit be dismissed with costs and that he is ready to refund the plaintiff the amount paid.

On cross-examination the defendant stated that the parcel of land was 1 acre and that he owned half acre. He stated that there is a semi-permanent structure on the suit land and that he is not willing to refund the plaintiff the current value of the suit land which is Kenya shillings 11 million.

DW2 adopted a statement dated 15th June 2015 and stated that she is the wife of the defendant herein. She stated that the defendant did not consult her when selling the suit land therefore she wanted the court to order that the defendant refunds the purchase price to the plaintiff. The defendant therefore closed his case.

Plaintiff's Submission

Counsel for the plaintiff submitted that the defendant having failed to file a defence to the amended plaint, the defendant's defence would be deemed to be the one dated 2nd September 2014 where he denied that he entered into an agreement with the plaintiff for the purchase of the suit land at the consideration of Kenya shillings 3.5 million.

Counsel further submitted that the defendant admitted in his defence and evidence that he was ready and willing to refund all monies that the plaintiff paid less costs charges on damages.

Mr. Korir Counsel for the plaintiff submitted that specific performance is an order of the court requiring the defendant to carry out his obligations under a contract according to its terms and conditions. Counsel further the submitted that the general rule is that specific performance will be granted where the common law remedy of damages is inadequate and that equity will not interfere if damages be sufficient remedy.

Counsel cited the case of NAIROBI CIVIL SUIT No, 700 of 2006 PURPLE ROSE TRADING CO. LTD vs BHANOO SHASHIKANT JAI cited with approval by Court of Appeal decision in Civil Appeal No. 165 of 1996 GURDEN SINGH GHATORIA AND ABUBAKAR MADHBUTI where the court set out the principles of granting of orders of specific performance, as follows:

"when the appellants sought the relief of specific performance of sale of the respondent's property they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement.. ...which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement. it was never in dispute that the appellants were in breach of an essential s term of the agreement in that they had failed to deliver up to the respondent the balance of the purchase price of the suit property.. ...as stipulated in the agreement indeed a plaintiff 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 actionwhere 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 moment the plaintiff went into equity, an asked for specific performance, and it was proved that he himself was guilty of

the breach of contract ...the court of equity would refused to grant specific performance and would leave the parties to their other rights when the appellants came to court seeking the relief of specific performance 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 these circumstances, no court of equity property directing its mind to the same would have been 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."

Counsel therefore submitted that from the evidence adduced by the plaintiff it is clear that the plaintiff and the defendant entered into a sale agreement and that the defendant conceded to that fact. Further that the subject matter being land, which has a fixed location and no pieces of land are similar as each land is unique and special in nature, specific performance would be the appropriate remedy to be granted to a party.

That damages would not be adequate compensation to the plaintiff in this particular case. Counsel cited the case of KISUMUWLLAH OIL INDUSTRIES LTD vs PANASIATIC COMMODITIES PTA LTD & ANOTHER CIVIL APPEAL No. 100 OF 1995 where it was held that:

'in a contract relating to the sale of land, the law takes the view that the purchase of a particular piece of land or a particular house cannot on vendor's breach obtain a satisfactory substitute so that specific performance is available to him."

Mr. Korir Counsel for the plaintiff submitted that it is clear that the plaintiff performed his part of the agreement by payment of the purchase price of the suit property and that the defendant breached the terms of the agreement. Counsel urged the court to disregard the defendant's evidence that he introduced in respect of Eldoret CMCC No. 274 of 2013 and motor vehicle registration No. KAS 013D as they are not related to the suit land.

Counsel further cited the case in MALINDI COURT OF APPEAL CIVIL APPEAL No. 41 of 2013 BRUCE JOSEPH BOCKLE vs COQUERO LTD to buttress the issue of unpleaded issues whereby the Court referred to Order 4(1) of the civil procedure Rules while upholding the Superior court decision held as follows

"As highlighted by the judge in the judgement, the appellant failed in his defence and submissions had failed to rise to the occasion to plead specifically and adequately on issues touching on coveats, lis penden, fraud, misrepresentation and irregularities.

The court went on to observe;

"with general allegations and bare denials that have failed to meet the legal threshold of proper pleadings lack of particularity in the appellants allegations of fraud or illegality or infer liability on the part of the respondent who is alleged fraudulent actions and the appellant looking to raise issues that were never pleaded in the trial, we are satisfied that the trial court did indeed enter an appropriate judgement based on the weight of evidence and law placed before it.

Mr. Korir therefore submitted that the defendant having failed to plead issues of illegality, he is thus estopped from relying on it. On the issue of compensation Counsel urged the court to grant an order of compensation of the plaintiff for the current value of the suit land at Kenya Shillings 11,000,000/ Million as the defendant neither filed a defence to the amended plaint nor rebutted the claim for compensation by the plaintiff.

On the counterclaim, Counsel submitted that the defendant did not prove the allegations of fraud in the counterclaim and that the plaintiff had proved that the defendant breached the terms of the agreement. He therefore urged the court to enter judgment as prayed in favour of the plaintiff and dismiss the defendant's defence and counterclaim with costs.

Defendant's Submission

Counsel filed submissions on behalf of the defendant and stated that the defendant admitted to having entered into an agreement with the plaintiff but denied the amount that he had received as the purchase price which according to the defendant was Kenya shillings Two Million Seven Hundred Thousand (2,700,000/=) and not Three Million Five Hundred Thousand (3,500,000/=) as reflected in the sale agreement dated 8th January,2018. Further that the the balance of Kenya shillings Four Hundred Thousand (400,000/) was agreed to be paid by instalments which the Defendant denies ever being paid the said amount.

Counsel submitted that the parties agreed to increase the amount to Three Million One Hundred Thousand in the agreement. Mr. Chepkwony submitted that it is the plaintiff who breached the terms of the agreement and pursuant to the breach of the contract on the part of the plaintiff the defendant is ready to refund all the monies to the plaintiff less all the costs, charges and damages he has incurred as a result of the breach.

Counsel listed two issues for determination as follows;

- a) Whether specific performance remedy should be granted.
- b) Whether all the necessary consents to transfer the land were obtained.

On the 1st issue as to whether specific performance should be granted, Counsel submitted that specific performance is an equitable remedy that requires a party to approach the court with clean hands and in this case the plaintiff failed to pay the purchase price as agreed on or

before 31st August, 2013. Counsel relied on the case of **Mwangi V Kirio as cited in Nairobi civil suit No. 1512 of 1998; Thrift Homes Limited V Kays Investment 15) eKI R.** where the Court of Appeal held that

' If the purchaser failed to pay the balance of the purchase price on the agreed date, the vendor was discharged from further performance of the contract, the purchaser's failure to pay the balance of the purchase price which was not done.'

Counsel submitted that even though clause I (a) of the Land sale agreement dated 8th January 2013 states that the plaintiff paid the purchase price Kenya shillings Three Million One Hundred Thousand (3,100,000/-) the Defendant did not receive that amount of money. Further that the defendant did not receive the Kenya shillings 400,000/ in the addendum agreement dated 14th January 2014.

Mr. Chepkwony also cited the case of **National Bank of Kenya Ltd Vs Pipe plastic Samkolit (k) Ltd & another (2001) eKLR** where it was the view of the court that "A court of Law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved. Counsel submitted that the plaintiff deceived the Defendant into agreeing to sign a written contract with higher amount of purchase price than the agreed amount and also into payment mode of the said purchase price by suggesting that he sells his motor vehicle Registration number KAS 0131) to the Defendant. Counsel therefore submitted that the plaintiff failed to discharge his part of the bargain and he is therefore not entitled to specific performance.

Counsel relied on the case of **Reliable Electrical Engineers Ltd vs Mantrace Kenya ltd (2006) eKLR as cited in Nairobi E & I, case No. 59 of 2012 Henry Mwangi Gatal & another Vs Margaret Wanjiku Godwin & 2 others (2018) eKLR;** where the court held that the jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defects, such as failure to comply with the formal requirements or mistakes or illegality, which makes the contract invalid or unenforceable. In this respect damages are considered to be adequate alternative remedy when the claimant can readily get the equivalent of what he contracted for from another source." It was further held in this case that even when damages are inadequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant.

On the 2nd issue as to whether the necessary consents were obtained ,Mr. Chepkwony submitted that the disputed land is the Defendant's matrimonial home which is defined in the Land Act 2012 to mean ' 'any property that is owned or leased by one or both spouses and occupied by the spouses as their family home'. That the defendant did not obtain any consent from his wife to dispose of the land. The said land has a house and the Defendant's Children are living there. Further that the land was jointly owned by the defendant and one Yusuf Kibet and therefore cannot be transferred to the plaintiff by the defendant alone. Counsel therefore urged the court to dismiss the plaintiff's case with costs to the defendant.

Analysis and determination

The plaintiff filed this case seeking for specific performance of an agreement dated 8th January 2013 between him and the defendant for the sale of land parcel know as ELDORET MUNICIPALITY BLOCK xx/xxx and that the County Surveyor be directed to subdivide the land into two equal portions. The plaintiff amended his plaint and sought for compensation of Kenya shillings 11,000,000 Million being market value of the suit plot plus damages for breach of contract.

It should be noted that the defendant never filed a defence to the amended plaint therefore the earlier defence filed was the one relied upon.

It is not in dispute that the plaintiff and the defendant entered into a sale agreement for the sale of half portion of the suit land. What is in dispute is the amount stated on the agreement and how much was paid.

The court has considered the evidence and submissions of Counsel and finds that the following are the issues for determination:

- a) Whether the sale agreement dated 8th January 2013 is enforceable?
- b) Is the Plaintiff entitled to an order of specific performance?
- c) Whether the plaintiff is entitled to compensation of Kenya shillings 11,000,000 Million.
- d) Whether the plaintiff is entitled to damages for breach of contract.
- e) Whether the defendant has proved his counterclaim.

The first issue that the court must deal with is the issue of the agreement between the plaintiff and the defendant. The agreement was produced in court and it is not denied that the parties appeared before an advocate who prepared the same. The terms in an agreement are binding upon the parties and if there is any variation then another agreement or an addendum must be entered into to change the terms of the agreement upon the parties agreeing to do so.

A written agreement cannot be varied by a verbal agreement. In the case of **Purple Rose Trading Limited...Vs... Bhanoo Shashikant JAI (2014) eKLR**, with regards to variation of a contract and that a contract can only be varied in writing by consent of both parties as enunciated in **Kenya Breweries Ltd....Vs....Kiambu General Transport Agency Ltd, Civil Appeal No 9 of 2000 (2000) EA 398.**

Further in the case of **Attorney General of Belize et al Vs Belize Telecom Ltd & Anoter (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609,** it was held as follows:

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”

An agreement is the expression of the desires of the parties put in writing with an intention of binding the parties. It should not be used to further any illegality. Why would parties enter into an agreement where the fundamental terms are misleading? In land sale agreements, the fundamental terms are the description of the parcel of land to be sold, the measurement, the consideration, the terms of payment of the consideration, the completion date, and taking of possession and transfer.

In this case the defendant wants the court to believe that the plaintiff indicated a higher figure than the amount that they had agreed upon. The defendant was not coerced or forced into signing the agreement. Was he under duress while entering the agreement? He appeared willingly before an advocate and signed the agreement. This is further buttressed by evidence that they later went to the same advocate to acknowledge receipt of the balance of Kenya shillings 400,000/. If he had earlier been forced to sign the initial agreement he could not have gone back to receive the money and prepare an addendum. This shows that having signed an addendum agreement he had varied the completion date of the agreement on the initial agreement. He cannot be heard to claim breach of the agreement and fraud on the amount on the agreement.

If there was any fraud then the defendant could have reported the matter to the police that the plaintiff had defrauded him of money. When the defendant advanced the line of signing an agreement where the figures were different, this shows that the defendant does not see the seriousness of adhering to terms of an agreement. The agreements produced in court indicated that the plaintiff paid Kenya shillings 3.1Million on execution of the agreement and a further Kenya shillings 400,000/ which was acknowledged by an addendum. What was the defendant acknowledging to have received? I find that the defendant entered into an agreement with the plaintiff and was paid the full purchase price.

The second issue for determination is whether the plaintiff is entitled to specific performance. Specific performance like any other equitable remedies is discretionary in nature and can only be granted where a party has met the threshold for grant of such an order. It will only be granted where damages are an inadequate remedy.

Further Chitty on Contract, 30th Edition volume 1 states;

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contractit will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable .”

There was no evidence that the contract suffered from any illegality or fraud to render it unenforceable. The court while exercising the discretion for grant of an order of specific performance it should also take into consideration that the performance should not cause undue hardship in the implementation of the order. It is on record that the land was owned jointly with one Yusuf Kimutai Kibet who was not a party to the agreement. PW 2 the wife of the defendant also gave evidence to the effect that this is matrimonial property where they reside with their children and that the defendant did not consult her when he entered into the sale agreement. This should not sway the court as when the defendant sold the land he knew that this was matrimonial property if that assertion is to be believed. The only reason why the court would not grant specific performance in this case is because the property is jointly owned by a party who has not been sued. It would cause hardship in the implementation of the order and further that the plaintiff has asked for an alternative prayer for compensation at market value of the land. The defendant has also prayed to be allowed to refund the purchase price to the plaintiff. I find that an order of specific performance would not be an appropriate remedy in this case as damages would be adequate.

On the issue as to whether the plaintiff is entitled to Kenya shillings 11,000,000/ as compensation being the value of the market price of the plot, I find that this is not proved as a valuation report or a valuer did not give evidence to support that claim. How did the plaintiff arrive at that figure? The court cannot guess the current value of the suit land.

On the issue as whether the defendant breached the terms of the agreement, the evidence on record shows that the plaintiff and the defendant entered into a sale agreement with specific terms which were to be adhered to by both parties. The plaintiff was to pay the purchase price and the vendor who is the defendant was to execute and organize for the subdivision of the suit land to excise the half portion and obtain all the conveyancing documents to enable a transfer to be effected to the plaintiff which he never did.

The plaintiff fulfilled his part of the bargain but the defendant failed to do so therefore I find that he was in breach of the agreement. In the case of **Millicent Perpetua Atieno Vas Louis Onyango Otieno (2013) e KLR**, the Court of Appeal quoted with approval **Halsbury's Law of England, Volume 12, 4th Edition at paragraph 1183** on the type and measure of damages recoverable by a purchaser upon breach by a seller of land.

“where it is the vendor who wrongfully refuses to complete the measure of damage is similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain.....”

It is clear from the general law of contract that it did not provide for general damages as a remedy for breach of contract. Having considered the pleadings, evidence, submissions of Counsel, I find that the plaintiff and the defendant entered into a sale agreement for the purchase of the suit plot, that the plaintiff paid the purchase price in full and the same was acknowledged by the defendant, that the defendant breached the terms of the agreement and that there was no fraud or coercion on the part of the plaintiff and therefore the plaintiff is entitled to a refund

of the purchase price of Kenya shillings 3,500,000/ Million together with interest from the date of payment plus costs of the suit. The defendant's counterclaim is hereby dismissed with costs.

Dated and delivered at Eldoret on this 11th day of April, 2019.

M.A ODENY

JUDGE

JUDGMENT READ IN OPEN COURT in the presence of Mr.Korir for the Plaintiff and the Defendant and in the absence of Mr.Chepkwony for Defendant.

Mr.Koech – Court Clerk