



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 333 OF 2017

GEORGE NGURE MWANGI.....PLAINTIFF

VERSUS

ESTHER MURUGI MACHARIA.....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendant on the 6/4/14. The plaint was later amended to include the following orders;

- a. Specific performance of the said agreement for sale and subsequent variation thereto; to wit, the Defendant be compelled by an order of the Court to execute all the necessary documents to effectuate the registration of all that parcel of land known as LOC 16/GATURA/1372 to the Plaintiff and in default the Deputy Registrar be empowered to do so.
- b. In the alternative the Plaintiff be awarded the present (present hereby meaning day of judgment) marked value of the suit land monetarily.
- c. Costs of the suit together with interest at such rate and such period as the Court may deem fit to grant.

2. The cause of action arose from an agreement of sale dated the 25/4/16 in which the Plaintiff and the Defendant agreed to buy and sell the suit land at the consideration of Kshs 1.3 million. The Plaintiff avers that despite paying a substantial sum of Kshs 1.0 million pursuant to the terms of the agreement and its subsequent variation, the Defendant has failed to conclude the transaction. That the actions of the Defendant amount breach of contract for which particulars of breach are set out in para 10 of the plaint. The Plaintiff contends that he has been able and willing to fulfil the obligations of the contract and its variations.

3. The Defendant denied the plaintiff's claim and accused the Plaintiff of breaching the agreement of sale in failing to pay the consideration in accordance with the agreement of sale. That she signed the variation agreement dated the 24/10/16 under duress. She further pleaded that the Plaintiff without her knowledge took possession of the suit land and the title on payment of Kshs 606,000/- and destroyed her crops. She denied any breach of contract on her part. Further she asserts that the Plaintiff acquired the suit land illegally and through fraud.

4. At the hearing the Plaintiff led evidence and informed the Court that the Defendant is the registered owner of the suit land. By an agreement of sale dated the 25/4/16 he agreed to buy and the Defendant agreed to sell to him the suit land at the sum of Kshs 1.3 million. The agreement contained *inter alia* the terms and conditions as to payment mode of the purchase price, acquisition of the land control board consent and default. Pursuant to the said agreement he paid the sum of Kshs 606,000 on execution thereof. On the 24/10/16 an addendum to the main agreement was executed which provided *inter alia*; that the Defendant acknowledged receipt of the sum of Kshs 394,000/0 bringing the total sum paid to Kshs 1.0 million; that the Defendant would be responsible for applying for the Land Control Board consent and procure the requisite transfer documents to effect the transfer of the land to his name by the 20/12/16. He stated that in the interim period and in anticipation of the conclusion of the transaction, with the knowledge of the Defendant he took possession of the suit land and started utilizing it. That notwithstanding making payments as mutually agreed, the repeated requests to the Defendant to complete, the Defendant failed to complete the transaction. He asserted that he is able, ready and willing to fulfill all his obligations pursuant to the agreement and the variation including payment of the outstanding consideration to the Defendant.

5. The Defendant testified and stated that she is the registered owner of the suit land. She confirmed the agreement of sale and the receipt of Kshs 606,000/- from the Plaintiff. She contends that the Plaintiff illegally and without any colour of right took possession of the original title deed and has refused to return it to facilitate the transfer. The Plaintiff failed to pay Kshs 200,000/- on 30/7/16 as agreed and that further installments were paid in total breach of the agreement. That the Plaintiff took possession of the suit land and the title without her knowledge.

6. Further she informed the Court that she did not complete the transaction because the Plaintiff failed to pay the full purchase price. She however acknowledged receipt of Kshs 1.3 million and confirmed that the balance is Kshs 330,000/-.

7. The parties filed written submissions which I have read and considered.

8. Having considered the pleadings, evidence of the parties and the submissions and all the materials placed before me the issues for determination are;

- a. Whether there is a breach of the agreement of sale.
- b. If a) is in the affirmative, who breached and what are the consequences of such a breach.
- c. Whether the Plaintiff is entitled to the prayers sought; specific performance or refund.

9. The following are commonly acknowledged by the parties;

- a. The suit land is registered in the name of the Defendant.
- b. The parties entered into an agreement for sale dated the 24/3/16 and subsequently an addendum dated the 24/10/16.
- c. The purchase price was agreed at Kshs 1.3 million out of which 1.0 million has been acknowledged by the Defendant in evidence.
- d. The Plaintiff is in occupation of the suit land. He also holds the original title of the suit land.

10. I have examined the agreement of sale between the parties and the terms are rather straightforward. The land measures 0.04 ha. The purchase price was to be paid in installments as follows; Kshs 606, 000 on execution of the agreement (receipt of which is acknowledged); Kshs 200,000/- on or before the 30/7/16; Kshs 247,000 on or before the 30/10/16; Kshs 247,000/- on or before the 30/12/16.

11. It was a term of the agreement that the purchaser would take possession upon completion of the payment of the purchase price. It would appear that this condition was varied by the parties along the way. The Plaintiff avers that after paying the amount of Kshs 394,000/- it was mutually agreed that he takes over possession in anticipation of completion of the transaction. The exact date of possession is not been disclosed by the parties but going by the evidence this would be around October 2016. The Defendant on the other hand has alleged that the Plaintiff took over possession and custody the original title without her knowledge, an act that she has termed illegal.

12. The Defendant undertook to procure consent from the relevant Land Control board both in the main agreement and the addendum. It is on record that she failed to do this.

13. The parties contemplated breach and included a provision that any party in breach shall pay 20% of the purchase price. Where the vendor would be in breach, in addition to paying the penalty, she would refund the money paid towards the purchase price.

14. The addendum dated the 24/10/16 contained further terms and conditions, key being that the Defendant acknowledged the sum of Kshs 394,000/- on even date and the total purchase price paid to the Defendant then stood Ksh 1.0 million leaving a balance of Kshs 330,000/- out of which Kshs 30,000/- related to the cost of connecting electricity to the suit land. The Defendant too undertook to remove all the temporary structures on the suit land soonest. It was *inter alia* agreed under para 5 of the said addendum that it was the responsibility of the Defendant to apply and obtain the land control board consent before the 20/12/16 when the transfer forms shall be executed by the parties.

15. Turning back to issue No 1, the Court has noted that though the agreement did not contain a completion clause and neither did it disclose the completion date, it can be implied from the agreement and the conduct of the parties that the completion was at the end of December 2016 or on completion of the purchase price. I say so because the payment of the purchase price was to be made on the 30/12/16. Similarly, the addendum obligated the Defendant to obtain the land control board consent before the 20/12/16 when the parties shall execute the transfer.

16. Given the analysis in Para 15 therefore, the Defendant failed to procure the land control board consent. She has attributed this to the fact that the Plaintiff refused to give her the title to facilitate completion and at some point gave failure to complete payments as the reason for failing to obtain Land Control Board. To the extent that she did not obtain the consents, she is in breach.

17. It is her case that the Plaintiff breached the agreement by not making payments in accordance with the agreement. The evidence on record state that the Plaintiff paid the 1st installment on signing of the agreement. The 2nd installment was due on the 30/7/16 but was paid together with part of the 3rd installment on the 24/10/16. The Plaintiff acknowledged these payments. This shows that the parties varied the terms of the agreement in their conduct as they went along. In the case of **Combe Vs Combe 1951 2KB 215** the Court stated that;

“ the principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only his word.

18. The Defendant cannot therefore complain about the late payment of the purchase price when her conduct is that she accepted the purchase price outside the agreed time frames.

19. That notwithstanding the Plaintiff has admitted that he has not paid the full purchase price according to the agreement of sale. In that regard the Plaintiff failed to honour the terms of the agreement.

20. Although the Defendant has alleged that the Plaintiff took possession of the land and title illegally, she did not present any evidence to support the allegation. It is probable that the Plaintiff was given possession and the original title deed by the Defendant as they anticipated the completion of the transaction. If indeed there was any illegality, the Defendant did not take any steps to report to the police that her title was lost or taken illegally by the Plaintiff.

21. Given that both parties are both in breach of the agreement, this Court cannot rewrite the contract for the parties. The agreement is void for non-compliance with section 6 of the Land Control Board consent. None of the parties have applied to extend the time for seeking Land Control Board consent.

22. In the case of **Reliable Electrical Engineers Ltd.....Vs.....Mantrac Kenya Limited (2006) eKLR**, Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles.

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 defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant”.

It is clear that the agreement suffers from defects which the parties have not remedied and as such specific performance cannot be granted.

23. The justice of this case is to order alternative prayer which is the refund of the purchase price. The Plaintiff has been utilizing the land and so he cannot ask for the market price of the land. In any event he has not paid the full purchase price. The Court will do no more than to be guided by the penalty clause in the agreement as consented by the parties.

24. In the end I grant prayer b of the plaint.

a. The Defendant shall refund the sum of Kshs 1.0 million to the Plaintiff together with 20% interest from the date of this judgement until payment in full.

b. Each to meet the costs of the suit.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 27TH DAY OF JUNE, 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff: Present in person. Advocate is absent.

Defendant: Present in person. Advocate is absent.

Kuiyaki and Njeri, Court Assistants