REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 111 OF 2017

PHILIP APOLO OSULA::PLAINTIFF

VERSUS

NG'OMBE HOLDINGS LIMITED::DEFENDANT

JUDGEMENT

It is averred that at all material times Defendant has been an estate agent and a property management company engaged in buying and selling real state within the City of Nairobi and everywhere else within the Republic of Kenya. In or about the year 2003, the Defendant offered for sale and the Plaintiff and his wife Angeline Osula (since deceased) agreed to buy a piece of land from the Defendant at the price or consideration of Kshs. 300,000/= and a sale agreement was thereafter executed by the parties in the said year. The piece of land purchased by the Plaintiff and his wife from the Defendant was at the time provisionally numbered as Plot No. 1 and situate on L.R No Nairobi Block 12715/2815 and the purchase price in the sum of Kshs. 300,000/= was paid to the Defendant in full on 19th

December 2003 and the Defendant duly acknowledged receipt in full and final settlement of the consideration.

The Plaintiff was then issued with a letter of allotment by the Defendant dated 23rd December 2003 in which the said allotment was referred to as Certificate No. 323. The Plaintiff therefore took possession of the said piece of land and commenced development of the said plot, and soon thereafter he fenced the same plot and secured it with a gate, sunk a septic tank, planted trees, put up a site house for his workmen and tools and dug and laid the foundation, and thereafter proceeded with the construction of the walls for up to a meter above the ground.

The Plaintiff states that sometime in the year 2005, the Plaintiff borrowed the sum of Kshs. 150,000 from one Mr. Samuel Ndugu Njau a director of the Defendant and tendered a certificate of ownership of the suit property as security which loan was good by the Plaintiff in the month of November 2005 whereupon the Plaintiff was advanced on a friendly basis another loan by the aforesaid director in the sum of Ksh. 70,000 payable within one month at interest of 30% thus bringing the total monies payable at Kshs. 91,000. The Plaintiff states further that Defendant conveniently and deliberately made it impossible for the Plaintiff to reach him for purposes of making good the loan amount of Kshs.91,000 and has deliberately created an impression that the Plaintiff borrowed monies from the Defendant when

the Plaintiff did not to do and has conveniently used the Defendant to dispossess the Plaintiff the suit property which suit property had been wrongly and illegally issued to a third party. On or about the year 2006, while the Plaintiffs' development of the said plot was still in progress, he found another person completing the development he had already commenced, using the Plaintiffs own building plans and building materials.

By that date the Plaintiff had already developed the said plot by buying building materials, fencing the plot and securing it with a gate, sinking a septic tank, planting trees, putting up a site house, digging and laying the foundation and all other developments at a total of Kshs. 2,4999,350/= inclusive of advance payment of Kshs. 175,000/= to the contractor, all of which materials and developments the Defendants illegally converted to its own use or transferred to a third party without the Plaintiff's consent. By reasons of actions of the Defendant, the Plaintiff was denied entry into the said plot and access to his building materials and the Defendants then proceeded to allocate the said plot to a third party who completed developing it and has been in possession since then. The Plaintiff has since pleaded with the Defendants to restore the above plot to the Plaintiff and to return of all of the Plaintiffs building materials and developments but to date the Defendants have refused to do so. The Plaintiff avers that the Defendant's actions were oppressive,

fraudulent, illegal and in breach of contract and has occasioned great loss and damage to the Plaintiff.

The Plaintiff has already demanded that the sold piece of land which was provisionally numbered as plot No. 1 and situate on L.R No. Nairobi Block 12715/2815 be fully restored back to him, he has also served upon the Defendants a notice of intention to sue, but the Defendants have neglected, failed and/or refused to comply therewith.

The Plaintiff prays for judgment against the Defendants for;

a) An order that the plot which was provisionally numbered as Plot No. 1 and situate on L.R No Nairobi block 12715/2815 be restored back to the Plaintiff, and the title documents thereto be transferred and registered in the Plaintiff's name.

b) In the alternative to (a)above damages for breach of contract, and an order that the Defendant do refund the purchase price in the sum of Kshs. 300,000/= to the Plaintiff plus interest thereon at the prevailing commercial rates 14% p.a from 19th December,2003 to the date of payment.

c) An order that all the building materials which the Plaintiff had placed on site and all developments made by him also be restored to him in full, or

in the alternative, compensation for the of all the building materials as well as all other developments made by the Plaintiff on the plot.

d) Costs of this suit plus interest thereon.

The Defendants denies the allegations that the Plaintiff spent Kshs. 2,499,350/= plus 175,000/= towards the development of the suit property. Further and without prejudice to the afore going the Defendant states that the Plaintiff borrowed Kshs. 180,000/= and offered the suit property above said as security by surrendering the ownership certificate above said to the Defendant to be held by the Defendant until the borrowed funds were repaid in full upon terms agreed between the parties. The Defendant states that the Plaintiff failed to repay the borrowed sums on the terms agreed or at all and consequently the property reverted back to the Defendant. The Defendant further contends that the Plaintiff is guilty of concealing material facts (to wit) the issue of the loan account giving rise to the ownership reversion to the Defendant. The Defendant further states that this suit is bad in law as the same having risen from a contact, one of the parties in the contract has sued either through her estate or herself.

I have considered the pleadings and evidence tendered in court. The Defendants did not provide any oral evidence in this matter and the issues for determination are as follows;

1. Whether the sale of the suit property was valid.
2. What prayers can be granted.

This court has considered the evidence and the submissions therein, the Defendant failed to attend court or call any witnesses. PW1 the Plaintiff testified that by an Agreement for Sale entered in 2003 the Defendant offered for sale and the Plaintiff and his wife Angeline Osula (since deceased) agreed to buy a piece of land from the Defendant at the price or consideration of Kshs. 300,000/= and a sale agreement was thereafter executed by the parties in the said year. He produced letters of administration to represent his wife now deceased. The piece of land purchased by the Plaintiff and his wife from the Defendant was at the time provisionally numbered as Plot No. 1 and situate on L.R No Nairobi Block 12715/2815 and the purchase price in the sum of Kshs. 300,000/= was paid to the Defendant in full on 19th December 2003 and the Defendant issued him with an allotment letter.

The Plaintiff testified that sometime in the year 2005, the Plaintiff borrowed the sum of Kshs. 150,000 from one Mr. Samuel Ndugu Njau a director of the

Defendant and tendered a certificate of ownership of the suit property as security which loan was good by the Plaintiff in the month of November 2005 whereupon the Plaintiff was advanced on a friendly basis another loan by the aforesaid director in the sum of Ksh. 70,000 payable within one month at interest of 30% thus bringing the total monies payable at Kshs. 91,000.

On or about the year 2006, while the Plaintiffs' development of the said plot was still in progress, he found another person completing the development he had already commenced, using the Plaintiffs own building plans and building materials.

By that date the Plaintiff had already developed the said plot by buying building materials, fencing the plot and securing it with a gate, sinking a septic tank, planting trees, putting up a site house, digging and laying the foundation and all other developments at a total of Kshs. 2,4999,350/= inclusive of advance payment of Kshs. 175,000/= to the contractor, all of which materials and developments the Defendants illegally converted to its own use or transferred to a third party without the plaintiff's consent. The Plaintiff claims breach of contract and claims specific performance and in the alternative refund of the purchase price and special damages.

The Law of Contract Act clearly stipulates the requirements for a valid instrument to convey an interest in land. Section 3 (3) of the Law of Contract Act (Cap 23 of the Laws of Kenya) stipulates that;

> *"No suit shall be brought upon a contract for the disposition of an interest in land unless—*
>
> *(a) the contract upon which the suit is founded—*
>
> *(i) is in writing;*
>
> *(ii) is signed by all the parties thereto; and*
>
> *(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:"*

In Harris JA in Garvey v Richards {2011} JMCA 16 the court in considering the essential components of a contract reflected the following principles:

> *"It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive*

evidence that a contractual obligation, born out of an oral or written agreement is in existence."

The Supreme Court of United Kingdom in RTS Flexible Systems Ltd vs Moikerei Alois Muller GMBH & Co K. G. (2010) UKSC 14:

"The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement."

It is not in dispute that the Plaintiff entered into an agreement with the Defendant for the purchase of the suit plot in 2003. The Plaintiff produced a letter dated 21st September 2017 signed by the Defendant offering him an alternative plot which

he did not accept. This evidence has not been controverted by the Defendant. If the Plaintiff could not repay the loan hence the repossession of the suit plot then by was he offered an alternative plot? I find that defence has not been proved and I dismiss it.

The Plaintiff sought specific performance of the sale agreement. In Thrift Homes Ltd vs. Kenya Investment Ltd 2015 eKLR, the court stated that;

> *"specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction".*

I find that the sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. In the case of Nelson Kivuvani vs Yuda Komora & Another, Nairobi HCCC No.956 of 1991**,** the Court held that;

"the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract"**.**

On whether or not the Defendant breached the agreement for sale, Black's Law Dictionary, 9th Edition, Page 213, defines a breach of Contract as;

"a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages."

In the case of Shah vs Guilders International Bank Ltd (2003)KLR the Court in considering the terms of the parties contract stated;

"The parties executed the same willingly and they are therefore bound by it."

And in the case of National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503, the Court held 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 pleased and proved".*

In the instant case the agreement is clear that the purchase price was Ksh. 300,000/=. The Defendant was paid in full and a receipt of payment produced as PEx 3. I am satisfied that the Defendant (and he does not dispute this) did receive the full purchase price and they failed to transfer the property to the Plaintiff hence the Defendant is in breach of the agreement.

In Thrift Homes Ltd vs. Kenya Investment Ltd 2015 eKLR, the court stated that;

> *"specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative*

remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction".

Be that as it may it has come out in evidence that the property belongs to a third party who was not privy to the contract and/or this suit between the Plaintiff and the Defendant. The remedy of specific performance cannot obtain in the circumstances and this court does not have the capacity to transfer the suit plot to the Plaintiff.

In the alternative the Plaintiff sought refund of the purchase price which is not disputed and cost of part development of the suit land. That he had developed the said plot by buying building materials, fencing the plot and securing it with a gate, sinking a septic tank, planting trees, putting up a site house, digging and laying the foundation and all other developments at a total of Kshs. 2,4999,350/= inclusive of advance payment of Kshs. 175,000/=. I have perused the documents in support and all that is attached is an itemized list of the expenses. Special damages must be specifically pleaded and proved. No receipts have been adduced to show that the said expenses were incurred if at all. The same will not be payable as it has not been proved.

The Plaintiff also sought general damages for breach of contract. In Dharamshi vs Karsan (1974) EA 41, it was held that general damages are not awardable for breach of contract in addition to the quantified damages as it would amount to a duplication. In the case of Securicor Courier (K) Ltd vs Benson David Onyango & another (2008) eKLR, the Court of Appeal reiterated that general damages are not awardable for breach of contract. (See also Provincial Insurance Co. EA Ltd vs Mordechai Mwanga Nandwa, (KSM Civil Appeal No 179 of 1995). The said decisions affirm the position that what is suffered or is believed to have been suffered, the damage that is to be compensated by way of damages, can only be known by the party and it is claimed in specific terms which has to be proved. Flowing from the above principles of law, I find and hold that the Plaintiff was not entitled to general damages for breach of contractual obligations, having raised a specific claim for special damages.

It is the finding of this court that there is a breach of contract on the part of the Defendant in this case. I find that the Plaintiff has proved their case on a balance of probabilities and I grant the following orders;

1. An order that the Defendant do refund the purchase price in the sum of Kshs. 300,000/= to the Plaintiff plus interest thereon at the rate of 14% pa from 19th December,2003 to the date of payment.

2. Costs of the suit to the Plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF FEBRUARY 2026.

N.A. MATHEKA

JUDGE