



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KABARNET

ELC CASE NO. E003 OF 2024

CHESANG KABUTIYEI

PLAINTIFF/RESPONDENT

= VERSUS =

KETBONET BOOKSTORES LIMITED

DEFENDANT/APPLICANT

JUDGMENT

1. This suit was filed/instituted by the plaintiff seeking judgment against the defendant for among other reliefs, an order declaring the land sale agreement entered between the plaintiff and the defendant to be voidable on account of breach of its terms by the defendant; an order directing the defendant to refund rental income collected from the suit premises amounting to **Kshs.17, 556,000**; an order of eviction of the defendant from part of the suit premises, an order for mesne profits, costs of the suit and interest.

2. In his amended plaint, the plaintiff acknowledges that he entered into an agreement with the defendant for sale of a portion of the parcel of land known as Kabarnet/Municipality/390 (the suit property) and that pursuant to the agreement he received part payment of the purchase price. Claiming/contending that he was not paid the full purchase price, the plaintiff complains that the defendant committed acts of fraud warranting grant of the orders/ reliefs sought. The acts of fraud allegedly committed by the defendant are particularized in paragraph 12 of the amended plaint as follows: -

- a) Illegally purporting to execute a lease agreement without the consent of the plaintiff;
- b) Fraudulently attempting to cause itself as the registered owner of the whole of the suit land herein;
- c) Illegally colluding with corrupt officials to generate fake mutations and other fake documents;
- d) Fraudulently presenting forged documents to the land registry Baringo in its wicked bid to disfranchise and dispossess the plaintiff from the suit land;

- e) Fraudulently discharging and signing discharge of lease without the consent or knowledge of the plaintiff;
 - f) Illegally collecting rent from 13 unit premises at the suit land at a monthly rent of Kshs.12, 000 from 1st March 2017 to date.
 - g) Fraudulently entering into a lease agreement with Faulu MicroFinance for a period of six years at a monthly rent of Kshs.65,000.
 - h) Committing acts that renders the impugned agreement dated 14.11.2016 voidable.
3. The defendant filed a statement of Defence and Counter-claim, dated 6th June 2024, in which it denies the allegation levelled against it and contends that it fully met the terms of the contract entered between it and the plaintiff and contends that it carried out the alleged fraudulent dealing with the knowledge/consent of the plaintiff.
4. Claiming that it is the plaintiff who is in breach of the agreement, by way of counterclaim, the defendant seeks an

order directing the plaintiff to specifically perform his obligation under the agreement by executing transfer documents in its favour failing which the execution be done by the Deputy Registrar of this court. The defendant also seeks an order of permanent injunction to restrain the plaintiff, his agents, servants and/or employees from demanding for rent and/or in any other manner interfering with the tenants occupying its portion of the suit property.

5. The plaintiff filed a reply to defence and a defence to counterclaim dated 16th October, 2024 in which he reiterates his pleaded case and terms the defendant's counterclaim baseless, frivolous and vexatious.
6. When the suit came up for hearing, it emerged that the suit property had been offered by the plaintiff as security to secure a loan facility that had been advanced by Trans-National Bank (now Access Bank) to him. The plaintiff failed to meet or honour his obligations to the bank causing the bank to threaten to auction the suit property in exercise of its statutory power of

sale. The fact is laid bare by the evidence of the plaintiff, which at the relevant part is captured as follows: -

“...I borrowed money from Access bank (former Transnational Bank) At the time of sale, I had taken several loans from Transnational Bank... and the title was charged to the bank.

In my agreement...

I agreed to discharge the charge for the portion I was selling...

I have not produced any document in court showing how I paid the loans borrowed from transnational Bank...

I am aware that we had a family meeting because the bank wanted to sale my land through an auctioneer. We passed a resolution that we approach the bank for more time to pay the loan...

the bank refused and advertised my land for sale by public auction...

as I was owing 19, 786, 406.96. To date I have never paid the 19million owing and the bank has not sold

it and I believe the money was paid through the agreement entered into with the defendant...”

7. To save the property from the eminent sale by the bank by way of auction, the plaintiff approached the defendant who agreed to buy a portion of the suit property, particularly the developed portion of the suit property. The evidence adduced in this case comprised in the oral testimony of the plaintiff (P.W.1), the plaintiff's son, Jackson Bundotich Chesang (PW2) and Titus Kipkemoi Lessan (an employee of the bank), shows that the total amount owed by the plaintiff to the bank was paid by the defendant to the bank.
8. According to PW3 Titus Kipkemoi Lessan, an employee of the bank, the defendant by itself and/or its directors and/or associates, paid a total of **Kshs.25,275,000/-** to bank accounts opened and operated with the bank, Transnational Bank (now Access Bank), by the plaintiff.

9. Whilst the plaintiff and his son PW2, feigned ignorance of the circumstances upon which the amount the plaintiff owed the bank was paid, they both acknowledged/admitted that plaintiff owed the bank approximately **Kshs.19,000,000/-** and stated that they believed that the amount was paid by the defendant.
10. As to whether the plaintiff was paid the whole of the purchase price amounting to **Kshs.27,400,000/-**, it is the plaintiff's case that the defendant did not pay him the full purchase price. According to PW2, the defendant owes the plaintiff **Kshs.4,100,000/-**.
11. John Kimosop PW4, on account of information he received from the plaintiff, believes that the defendant did not complete payment of the purchase price.
12. Under the sale agreement executed between the plaintiff and the defendant, the plaintiff acknowledged that he had been paid **Kshs.4,100,000/-** at the time of signing the agreement; that is on 14th November, 2016. The balance of the purchase price,

being **Kshs.23,300,000/-**, was supposed to be paid on or before 9th December, 2016.

13. The sale agreement executed between the plaintiff and the defendant, clause 4 thereof, shows that the purchaser was to take possession of the portion of the property sold/bought, upon full payment of the purchase price. It was also a term of the sale agreement executed between the plaintiff and the defendant that at the completion date, the vendor was obligated to deliver to the purchaser the following documents: -

- i) The original certificate of lease;
- ii) The transfer duly executed by the vendor in favour of the purchaser;
- iii) Valid consent to transfer;
- iv) Clearance rates and rent certificates;
- v) Passport size photographs;
- vi) Copy of Pin and ID;
- vii) Discharge of charge for the said portion;
- viii) Deed plan (See paragraph 3 of the agreement).

14. The defendant admits that he did not pay the whole of the balance of the purchase price, amounting to **Kshs23,300,000/-**, within the time stipulated in the sale agreement but states/contends that it paid the whole of the purchase price on 7th March 2017 (about 3 months from the completion date indicated in the sale agreement).
15. According to the defendant, the delay in payment does not vitiate the sale agreement executed between it and the plaintiff because the plaintiff did not issue him with a completion notice, thereby making time of essence. In that regard the defendant submits as follows: -

“...the defendant paid the last and final instalment on the balance of purchase price on 7th March, 2017. Indeed, this payment was made way after the agreed date. We however note that that there was no express provision in the agreement that time was of essence. In addition, no notice was served upon the defendant by the plaintiff seeking to enforce the contract on the delayed payment of the

balance of the purchase price...We thus submit that since balance of the purchase price was fully paid before any notice was issued, no remedy crystallized for the plaintiff, including rescission.”

16. Regarding the need to issue a completion notice thereby making time of essence, the defendant has placed reliance on the case of **Housing Company of East Africa Ltd v Board of Trustees of National Social Security Fund & 2 others (2018) eKLR**, where it was stated/held:-

“When time is of essence there is no leeway for delay. Completion must be on the date specified. Failure to complete by the date set in the notice is a breach of contract. In such circumstances, the general principle is that the court will not assist the party served with the notice where he fails to complete within the time specified. It follows that all remedies will be available to the aggrieved party, including rescission.”

17. The court further stated/held: -

“I consider that it is good law that where a purchaser has dragged his feet and has been guilty of unnecessary delay, the vendor is perfectly entitled to serve upon the purchaser a notice limiting time, at the expiration of which the vendor will treat the contract as having come to an end”.

18. The position adverted/referenced above, is aptly captured in **Section 41** of the Land Act, 2012 which provides as follows: -

“41(1) A vendor who proposes to seek to regain possession of private land under section 39 (section 39 provides for vendor’s right to regain possession of land on the ground that the purchaser has breached the contract entered into between them), shall serve a notice on the purchaser which shall inform the purchaser-

a. of the nature and extent of the breach complained of by the vendor;

- b. whether the vendor considers that the breach is capable of being remedied by payment of a stated amount of money owing under the contract;**
- c. whether the vendor considers that the breach is capable of being remedied by the purchaser doing or desisting from doing anything or paying reasonable compensation or both, and of the thing that the purchaser must do or desist from doing or the amount of compensation that shall be paid or both to remedy the breach and the time, being not less than thirty days, within which the actions referred to in this paragraph must be completed;**
- d. of the period within which the purchaser must remedy the breach, if the vendor considers that the breach is capable of being remedied; and**

e. of the consequence where the purchaser fails to remedy the breach or if the vendor does not consider that the breach can be remedied, the vendor may seek an order from the court to possess the land and rescind the contract.”

19. **Section 42** of the Land Act, on the other hand, provides for relief against rescission of contract for sale of land. The section provides as follows: -

“42(1). If the vendor, after serving on the purchaser a notice under section 41 applies to court for an order for possession of the land or if the vendor has peaceably entered on to the land in order to regain possession under section 39, the purchaser may apply to court for relief against rescission of the contract either-

a. In the proceedings for an order of possession; or

b. In proceedings brought by the purchaser..."

20. **Subsection 5 of section 42** (supra), provides as follows: -

"Any, express or implied, term in a contract or other instrument to which this section applies that conflicts with or purports to set aside or negate this section shall be inoperative."

21. Neither the pleadings filed by the plaintiff nor his evidence and/or submissions indicate that the plaintiff issued the defendant with the statutory notice contemplated in **section 41** of the Land Act thereby making time within which the defendant ought to have completed payment of the purchase price of essence. In his submissions, the plaintiff submits as follows concerning the delay in making the final payment: -

"...Clause (b) of the agreement expressly made time of the essence by requiring the final instalment to be paid 'on or before 9th December 2016'. In Kenyan law, where time is stipulated as essential in a land sale agreement, failure to comply constitutes a

fundamental breach warranting rescission...The defendant's final payment on 17th March 2017 was over three months late, and even then, incomplete. PW3's testimony confirmed a shortfall of 2,130,000/-, contradicting the defendant's claims. This breach is compounded by the defendant's attempt to offset the balance with pre-agreement supplies from 2015, which DW4 himself refuted as unrelated. Such conduct amounts to repudiation of the contract's terms...The defendant's incomplete payment triggers this right."

22. It is clear from the above excerpt of the plaintiff's submissions, that the plaintiff's claim that time was of essence, stems from clause (b) of the sale agreement executed between the plaintiff and the defendant and not the statutory notice contemplated under **section 41** of the Land Act, 2012.

23. My reading of the provisions of **section 41** and **42** of the Land Act, 2012 is that it is the statutory notice issued under **section**

41 of the Land Act that makes time of essence and not any clause in the sale agreement purporting to do so. I hasten to point out that **subsection 5** of **section 42** of the Land Act, makes any provision in a sale agreement that ousts or purports to oust the requirement of the statutory notice contemplated under **section 41** inoperative. What that means is that, in the absence of any notice issued on the plaintiff under **section 41** of the Land Act, the plaintiff's claim that the defendant's breached the terms of the agreement executed between them by paying for the purchase price late, may not found a cause of action in his favour.

24. The evidence adduced in this case comprised in the conduct of the parties and in particular, the handover of keys to the premises that were occupied by Faulu Micro-Finance to the defendant, the collection of rent in respect of the suit property by the defendant without any complaint or action being taken by the plaintiff, until many years later when the plaintiff filed the instant suit claiming refund of the rent paid by tenants in respect of the suit property, negates a finding that the use and

occupation of the suit property by the defendant was without knowledge or consent of the plaintiff.

25. I do find the evidence by DW5 Titus Lesan, to the effect that the title for the suit property was released to the plaintiff upon discharge of charge, on the plaintiff's request, to be more believable than the claim by the plaintiff that he was not involved in the process that led to discharge of the charge in respect of the suit property.

26. I also find the evidence of DW2 regarding the circumstances upon which the suit property was surveyed to be plausible and believable. The testimony of DW2, a surveyor based at Kabarnet Lands office in the period between 2012 and 2018 was as follows:

“...I met the plaintiff in 2012 when I was assisting him sort an issue about a different parcel of land.

In 2016, the plaintiff visited me in my office and requested me to subdivide his land

Kabarnet/Municipality/390. He explained that he wanted to give part of the land to DW1's father...

Pexbt 9 is a letter from the Land Administration Officer from Uasin Gishu in respect of subdivision of Kabarnet/Municipality/390. The letter is addressed to the plaintiff and the land officer is giving his final approval to the plaintiff's acceptance of the proposal. In the letter, the land officer has attached a scheme plan.

It is noteworthy that at the time the land officer was covering Uasin Gishu, Elgeyo Marakwet and Baringo County...

The subdivision process for Kabarnet/Municipality/390 followed due process."

27. On cross examination, DW2 inter alia stated: -

"I am not the surveyor who undertook the survey and subdivision of parcel number 390 but I am aware that the plaintiff was following up the subdivision as he kept consulting me."

28. Concerning the circumstances upon which Faulu Micro-Finance Bank handed over possession of the suit property to the defendant and began paying rent to the defendant, Boniface Simuyu DW6, led evidence that Faulu Micro-Finance Bank, which was one of the tenants of the plaintiff in the suit property, vide a letter dated 25th April 2017, got communication from the plaintiff and Kimulwa Chesang that the property had been sold to the defendant and that from 1st July, 2017 they (Faulu Microfinance Bank) were to deal with the defendant and pay rent to it.
29. It is the testimony of DW6 that from 1st July 2017, Faulu Microfinance Bank began paying rent to the defendant.
30. DW6 informed the court that when a decision was reached by the bank to vacate the premises, they (Faulu Microfinance Bank) decided to sell off some of the assets to the plaintiff; that handing over was done in respect of the items purchased by the

plaintiff and that they handed over the keys to the premises to the defendant.

31. The totality of the evidence adduced in this case shows that the defendant took possession of the suit property with the full knowledge of the plaintiff and upon payment of the purchase price as agreed between them in the sale agreement executed between the plaintiff and the defendant.
32. The plaintiff cannot, therefore be heard to feign ignorance of the circumstances upon which the defendant took possession of the suit property and began collecting rent therefrom. His pleaded claim that he was only paid **Kshs.4,100,000/-** being the deposit of the purchase price cannot stand as the evidence adduced before this court shows that he had debt obligations owed to Transnational Bank (now Access Bank) which debt was paid by the defendant as a condition for discharge of the charge executed by the plaintiff in favour of the bank. The evidence adduced in this case further shows that the balance of the

purchase price was used in paying the debt the plaintiff was owed by Trans-National Bank (now Access Bank).

33. The submission by the plaintiff that the evidence of PW3 shows that the defendant owes **Kshs.2,130,000/-** is neither supported by the plaintiff's pleadings nor his evidence. According to the evidence of the plaintiff, he was only paid **Kshs.4,100,000/-** through his bank account at Trans National Bank (now Access Bank). That notwithstanding, during cross examination, the plaintiff admitted that he owed Transnational Bank (now Access Bank) more than Kenya shillings19 million which amount he believed was paid by the defendant.

34. The plaintiff's son, Jackson Bundotich Chesang (PW2), informed the court that he is aware that the defendant paid about 24 to 25 million owed by the plaintiff to the bank but claimed that there is an outstanding amount of **Kshs.4,100,000/-**.

35. Whereas PW3 led evidence to the effect that the total amount received by the bank in the plaintiff's bank accounts is

Kshs.25,270,000/-, I do find that evidence on its own, to be incapable of proving the plaintiff's claim that the defendant did not finish paying the purchase price and/or that the plaintiff is owed by the defendant **Kshs.2,130,000/-** or any amount

36. I agree with the defendant that the burden of proof was on the plaintiff to prove on a balance of probabilities, his pleaded case, and as regards any unpaid amount, to prove that indeed, the defendant did not meet his part of the bargain.
37. Upon reading and considering the totality of the evidence adduced in this case, comprised in oral testimonies of witnesses, documentary exhibits produced and the conduct of the parties, I do find that the plaintiff has failed to prove his case on a balance of probability. Consequently, I dismiss it with costs to the defendant.
38. The defendant on the other hand, has demonstrated that he gained interest in the suit property by way of purchase of a portion of the suit property. In spite of the delay in payment of

the balance of the purchase price, the defendant fulfilled his part of the bargain. Consequently, I do find and hold that the defendant has made up a case for being granted the prayers sought in its counterclaim, which prayers I hereby grant to it in the following terms: -

- i) An order of specific performance be and is hereby issued, directing the plaintiff to transfer the portion of the property comprised in land registration number Kabarnet/Municipality/ 390 sold to the defendant;
- ii) An order of specific performance be and is hereby issued directing the plaintiff to execute leases and transfer documents for purposes of finalizing the subdivision and processing the transfer of the portion of the property comprised in land registration number Kabarnet/ Municipality/390 sold to the defendant.
- iii) That in the event that the defendant does not undertake the actions required to be undertaken by him in (i) and (ii) above, within 30 days from the date of delivery of this judgment, an order do issue and is hereby issued directing the Deputy Registrar of this

Court to execute the lease and transfer documents for the purpose of finalizing the subdivision and processing of transfer of a portion of the parcel of land known as Kabarnet/Municipality/390 sold to the defendant.

- iv) That an order of permanent injunction do issue and is hereby issued, restraining the plaintiff by himself, his agents, servants and/or employees from demanding for rent and/or interfering in any manner, with the tenants occupying the defendant's portion of the suit property, Kabarnet/Municipality/390.
- v) Costs of the counterclaim and interest in respect thereof be and are hereby awarded to the defendant.

39. Orders accordingly.

**Judgement dated, signed and delivered virtually at Busia this
13th day of April, 2026.**

L. N. WAITHAKA

JUDGE

In the presence of:

Mr. Kiptoo for the Plaintiff.

Ms. Muyuka h/b for Mr Ngaiwa for the Defendant

Court Assistant: Tracy

ORIGINAL