



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MAKUENI**

**ELC CASE NO.6 OF 2018**

*(formerly nairobi elc case no. 930 of 2015)*

**JAMES NJOGU MUNGAL.....PLAINTIFF**

**VERSUS**

**FRANCIS KITUNGO MUTISYA.....DEFENDANT**

**JUDGEMENT**

1. By his plaint dated 29<sup>th</sup> September, 2015 and filed in court on even date, the Plaintiff prays for judgement against the Defendant for:-

- (a) An order of injunction restraining the Defendant from dealing in any manner whatsoever with the parcel of land known as plot No.94 KIBOKO 'B' SETTLEMENT SCHEME.**
- (b) An order for Specific performance compelling the Defendant more specifically in transferring or causing to be transferred to the Plaintiff Plot No.94 KIBOKO 'B' SETTLEMENT SCHEME.**
- (c) General Damages for breach of contract in lieu of or in addition to specific performance as prayed in (b) above.**
- (d) Costs of this suit.**
- (e) Interest on (c) and (d) above at court rates from the date of filing suit until payment in full.**
- (f) Any other relief the court may deem just to grant.**

2. The Plaintiff has pleaded in paragraphs 3, 5, 6, 7, 8 and 9 of his plaint that at all material times to this suit, he entered into a sale agreement dated 12<sup>th</sup> September, 2008 with the Defendant for the purchase of plot No.94 Kiboko B Settlement Scheme at Kshs.212,951/=, that in paragraphs 4 and 8 of the agreement, it was specifically indicated that completion date was 90 days of execution of the agreement or such other date as the parties may agree in writing and time was of essence, that on execution of the agreement, the Plaintiff made a deposit of Kshs.174,193/= in cash whereof the vendor acknowledged receipt and the same was expressly indicated in paragraph 1(a) of the agreement, that the sale agreement expressly indicated that the balance of Kshs.38,758/= was to be paid to the vendor upon completion, that the sale agreement expressly indicated at paragraph 2 that on 10<sup>th</sup> March, 2005, the Plaintiff pays Kshs.1,362/= to the land registry as settlement as 10% of the allotment fees to facilitate taking possession of the property which possession was later taken by the Plaintiff and they commenced construction works and that since compliance by the Plaintiff of his part as per the sale agreement, the Defendant has failed to meet his end of the transaction and the Plaintiff has over the years visited Makindu on various occasions in an effort to trace the Defendant for purposes of completing the transaction to no avail.

3. The Plaintiff's claim is denied by the Defendant vide his statement of defence dated 18<sup>th</sup> November, 2015 and filed in court on 20<sup>th</sup> November, 2015. In paragraphs 5, 6, 13 and 14, the Defendant has averred that the letter of offer dated 30<sup>th</sup> June, 1999 stipulated that the Defendant would pay 10% deposit within 90 days failure of which the said offer would be cancelled, that the Defendant paid the said 10% and was issued with a letter of acceptance dated 11<sup>th</sup> February, 2002, that the contents of paragraph 9 of the plaint are denied and that since September, 2005 when the Plaintiff paid the deposit, he did not attempt to trace the Defendant until 13<sup>th</sup> January, 2014 when the latter received a letter from the Plaintiff's advocate compelling him to take the balance which the Plaintiff ought to have paid by November, 2008, that the contents of paragraph 16 of the plaint are denied and that due to the failure of the Plaintiff to complete payment, the Defendant instructed his advocates to refund the deposit which they tried in vain and that the Defendant later sold the land to Lochab Transport Ltd on or about October, 2014 hence he does not own any land.

4. During the hearing, the Plaintiff adopted his statement which he recorded on 29<sup>th</sup> September, 2015 as his evidence. He went on to produce the 13 documents in his list of documents dated 29<sup>th</sup> September, 2015 as P.Exhibit Nos.1 to 13 respectively.

5. In brief, the Plaintiff's evidence was that he paid the installment of the purchase price as was required of him in the agreement. He said that the Defendant surrendered to him the original allotment letter to him. That he was to pay the balance once the Defendant had cleared the balance of the fees that he owed to the Lands and Settlement office. The Plaintiff pointed out that the Defendant was to give the land documents to Plaintiff's lawyer but failed to do so. That when he visited the office of Land and Settlement in 2014, he realised that the seller had not paid the rates forcing him to pay the rates and took the clearance certificate to his advocate, Njenga Mbugua & Njagua & Co. Advocates. That his advocate wrote several letters to the Defendant but all was in vain. That in the year 2009, he began construction on the plot but on going back to the plot in 2013, he found his house having been demolished.

6. The Plaintiff's evidence in cross-examination by Mr. Anyona for the Defendant was that the purchase price was Kshs.200,000/=. He agreed with the Defendant's Counsel that the purchase price was Kshs.212,951/=. He said that he paid Kshs.174,193/= in cash as per the agreement and that he did so while they were in the advocate's office, that he signed the agreement as the purchaser, that the completion date was 90 days from 12<sup>th</sup> September, 2008 and pointed out that he is yet to pay the balance. He agreed that the demand letter (P.Exhibit No.7) dated 13<sup>th</sup> January, 2014 was written about 6 years from September, 2008. He went on to say that the Defendant vide the letter written by his advocates in reply to his letter indicated that he was no longer interested in the agreement. He said that his advocate never informed him that the Defendant was no longer interested in the agreement.

7. In his evidence in re-examination, the Plaintiff reiterated that he was yet to pay the balance of the purchase price.

8. The Plaintiff called Victor James Njogu (PW1) as his sole witness. Like the Plaintiff, James (PW1) adopted his witness statement dated 29<sup>th</sup> September, 2015 as his evidence in chief. He said that the Plaintiff is his grandfather and that he witnessed the sale agreement between the Plaintiff and the Defendant. That money was paid out in the advocate's office and the balance was to be paid as per the agreement. He was not sure if the same was ever paid. The witness was not cross-examined.

9. The Defendant in his evidence in chief adopted the statement that he recorded on 05<sup>th</sup> April, 2017 as his evidence. He went on to produce his 16 documents in his list of documents dated 05<sup>th</sup> April, 2017 and filed in court on even date as D.Exhibit Nos.1 to 16 respectively.

10. Briefly, the Defendant's evidence was that he acquired a piece of land namely Kiboko B Settlement, Scheme No.94 from the Land Adjudication and Settlement Office Makueni on 30<sup>th</sup> June, 1999. He was issued with a letter of acceptance on 11<sup>th</sup> February, 2002. That he later decided to sell the land and met the Plaintiff who told him that they should meet in the chambers of the Plaintiff's advocates, Ms. Njenga Mbugua & Njagua Advocates. That on the day they signed the agreement in the chambers of the Plaintiff's advocates, the Plaintiff paid a deposit. The Defendant went on to say that the Plaintiff was supposed to pay the balance within 90 days since time was of essence as per clause 8 of the agreement. That after paying the deposit, the Plaintiff disappeared and the Defendant tried to trace him. That he never heard from the Plaintiff until January, 2014 when he got a letter from the Plaintiff's Advocate to compel him to take the balance within 7 days failure of which he would be sued in court. That upon consulting his advocate, they advised him to refund the deposit to the Plaintiff who had breached the contract.

11. The Defendant's evidence in cross examination was that under clause 3(1) of the agreement dated 08/09/08, the vendor was to pay Kshs.12,258/= of the fees to the Settlement Office before completion of the payment of contract sum, an amount he said that he did not pay. He said that he and the Plaintiff did not agree that the latter could use the land and that there were no structures on the ground. That it was his advocate who wrote the letter written in January, 2014 to indicate his change of mind. That after the agreement in 2008, he never got any letter from the Plaintiff until when he got the demand letter threatening to sue him. He agreed that the Plaintiff paid him Kshs.174,000/=.

12. Written submissions were filed by the Counsel on record for the Plaintiff and the Defendant respectively.

13. The submissions by the Plaintiff's Counsel were that parties to a contract they entered into voluntarily are bound by its terms and conditions. To buttress his argument, the Counsel cited the case of *Alton Homes Ltd vs. David Nathan Chelogoi [2018] eKLR* which quoted the case of *Total Kenya Ltd vs. Joseph Ojiem in Nairobi HCCC No.1243 of 1999* among others.

14. The Counsel further submitted that the Plaintiff paid the deposit and completed the balance which he paid to the Settlement office and as such, specific performance is available to him. The Counsel cited the case of *Nabro Properties Ltd. Vs. Sky Structures Ltd Civil Appeal No. 175 of 2000 [2002]2 KLR 299*.

15. On the other hand, the Defendant's Counsel framed three issues for determination namely: -

**(a) Whether the Plaintiff is entitled to orders of injunction.**

**(b) Whether the Plaintiff is entitled to orders of specific performance.**

**(c) Who is to bear costs of the suit.**

16. On whether or not the Plaintiff is entitled to orders of injunction, the Defendant's Counsel cited the case of *Nguruman Ltd. Vs. Jan Bonde Nielsen & 2 others [2014] eKLR* where the Court of Appeal enunciated the conditions for the grant of a permanent injunction as:-

“in an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) Establish his case only at a prima facie level,
- (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour.

*These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd vs. Afraha Education society [2001] Vol. 1 EA 86.*

The Counsel further cited the case of **Keziah Njambi Maingi t/a Arrivals Textile Shop vs. Barclays Bank of Kenya Ltd [2016] eKLR** where the Court of Appeal considered an appeal in which the High Court had refused to grant a permanent injunction to a chargor who had defaulted on her repayments on a loan as follows: -

*“in this case, the appellant paid only one instalment of Kshs.329,627/= out of Shs.16 million borrowed to purchase the charged property. No further payment has been made since the death of the appellant’s husband in September, 2012.*

*The injunction sought by the appellant is an equitable remedy. Thus, the appellant invoked the equitable jurisdiction of the court. Since equity normally follows the law, grant of permanent injunction could not have been appropriate. In addition, according to principles of equity an equitable relief which would have the result of unjustly enriching the appellant could not have been granted.”*

The Counsel pointed out the Applicant had not established his case has a high probability of success.

17. On whether or not the Plaintiff is entitled to specific performance, the Counsel cited the case of **Reliable Electrical Engineers Ltd vs. Mantrac Kenya Ltd [2006]** where 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 influence or where it will cause severe hardship to the Defendant.”*

Arising from the above, the Counsel submitted that the contract between the Plaintiff and the Defendant was terminated in January, 2014 while the consideration was refunded on 20<sup>th</sup> November, 2014.

18. Having read the evidence on record and the submissions filed, I do note that it is common ground that both the Plaintiff and the Defendant entered into a sale agreement on 12<sup>th</sup> September, 2008 for the purchase of the Defendant’s land parcel No.94 Kiboko B Settlement Scheme. The purchase price was Kshs.212,295/= of which the Plaintiff paid to the Defendant a deposit of Kshs.174,193/=. The express term of the agreement (clause 4) set the completion as 90 days from the date the agreement was signed. The Plaintiff has admitted that he did not pay the balance within the 90 days for the reason that he could not trace the Defendant. In my view, that tenous taking into consideration that he never made any efforts to visit the Defendant in his home so as to pay the same. The Plaintiff knew where to find the Defendant. If anything, the evidence on record shows that it is only in the year 2014 that the Plaintiff through his advocate wrote to the Defendant to demand that the latter takes the balance of the purchase price. That was clearly outside the completion date. Given those circumstances, the Defendant was entitled to terminate the contract. On the basis of the two authorities cited to me by the Defendant’s Counsel, I hold that the Plaintiff is not entitled to an order of permanent injunction which in effect is the one that he craves for in prayer (a) of his plaint.

19. As for specific performance, there is no doubt the Plaintiff did not comply with the formal requirement of clause 4 of the agreement (D.Exhibit No.1) that he and the Defendant entered into on 12<sup>th</sup> September, 2008. Specific Performance being an equitable remedy, the Plaintiff cannot be heard to pray to be granted the same when he himself is in breach of the sale agreement. There is evidence to show that the Defendant sold land parcel No.94 Kiboko B Settlement Scheme and despite knowledge of the sale, the Plaintiff did not amend his plaint to include a third party said to have purchased the said land. Under those circumstances, the grant of the order of specific performance would not only cause hardship to the Defendant who will not be able to transfer the suitland to the Plaintiff but would also prejudice a third party who has not been enjoined in these proceedings.

20. Arising from the above, my finding is that the Plaintiff has not satisfied this Court that on a balance of probabilities, he has a cause of action against the Defendant. His claim against the Defendant must therefore fail. In the circumstances, I hereby proceed to dismiss the Plaintiff’s suit with costs to the Defendant.

Signed, Dated and Delivered at Makueni this 14<sup>th</sup> day of **October, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Anyona for the Defendant

No appearance for the Plaintiff

Ms. C. Nzioka – Court Assistant

**MBOGO C. G., JUDGE,**

**14/10/2019.**