



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 231 OF 2018

SOLOMON NDEGWA KURIA.....PLAINTIFF

VERSUS

PETER NDITU GITAU.....DEFENDANT

JUDGMENT

By a **Plaint** dated **3rd September 2018**, the Plaintiff herein brought this suit against the Defendant seeking for orders that;

- 1. An order of Specific Performance of the said sale Agreement dated 23rd May 2016 requiring the Defendant to transfer the property known as I.R 23374/62 to the Plaintiff***
- 2. Damages for breach of contract***
- 3. Cost of the suit with interest at Court rates***
- 4. Any other relief that the Court may deem fit to grant with all the necessary and consequential orders and directions***

In his statement of claim the Plaintiff averred that he entered into a sale agreement dated **23rd May 2016**, with the Defendant for the purchase of the suit property wherein the Defendant represented himself to be the owner of the suit property. . He contended that the suit property is on Land Reference **No. 23374/62** as delineated on Deed plan **No. 247578**. He further contended that the terms of the sale agreement between the parties were that , the vendor would hand over the original Deed Plan to the purchaser in receipt of the full purchase price, the purchaser would take full possession of the property bought immediately, the Vendor undertook

to avail the Administrators of the Estate of the late **Geoffrey Gitaka Kimani** and cause them to sign transfer in favour of the Plaintiff, the Vendor undertook to avail all the clearances and consents to facilitate transfer to the purchaser and that in case there is breach of contract, the party in breach would pay the other party **25%** of the purchase price plus all money expended towards the suit property. He further averred that he is in possession of the suit property after paying the full purchase price and substantially developing it into a commercial and or residential home incurring costs of **Kshs.35,000,000/=**.

Though the Defendant was duly served with the suit papers he did not file any defence nor enter appearance in Court. The suit therefore proceeded in his absence to which the Plaintiff herein testified and closed his case on the **1st of April 2019**.

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PW1 Solomon Ndegwa Kuria adopted his witness statement dated **3rd September 2018** testified on **23rd May 2016** he got into a sale agreement for purchase of the suit property with the Defendant at a price of **Kshs.10,000,000/=** and further adopted his list of documents as exhibit 1. It was his testimony that the agreement was that upon payment of the purchase price, the deed plan would be handed to him by the Defendant being the purported owner. He further testified that the Defendant has however remained evasive and sneaky as he has further learnt that he has been mentioned in other fraudulent land transactions.

He further testified that the property was not developed and that he has developed it at the costs of **Kshs.35,000,000/=**. He urged the Court to grant specific performance and damages and the costs of the suit.

On the **1st of April 2019** the Court directed the Plaintiff to file the written submissions and in compliance with the said directive the Plaintiff through the **Law Firm of P. M. Ombamba & Co. Advocates** filed his submissions on the **28th of June 2019** and submitted that he has fully met his obligations as outlined in the sale agreement, but the Defendant neglected to fulfill his part of the contract. It was therefore submitted that the Plaintiff ought to be compensated for breach of contract and the Court was urged to enter Judgment as prayed in the Plaintiff.

The Court has now carefully read and considered the pleadings, the evidence adduced and the exhibits thereto and renders itself as follows;

The Defendant failed to enter appearance and thereby defend the suit. The fact that the suit has not been defended means that the Plaintiff's evidence remained unchallenged and uncontroverted. However the Court will not just enter Judgment without interrogating the veracity of the evidence placed before it as the Plaintiff is still required to prove his case on the required standard of balance of probabilities. See the case of Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR, where the Court cited the case of Karuru Munyororo.....Vs....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988, where the Court held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”

The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with logical conclusion as exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of Kenya Power & Lighting Company Limited... Vs...Nathan Karanja Gachoka & another [2016] eKLR, the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

Further the case of Gichinga Kibutha...Vs...Carooline Nduku (2018) eKLR, where the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

This Court therefore finds that the issues for determination are;

- i) ***Whether there was breach of contract by the Defendant and therefore entitling the Plaintiff to damages for breach.***
 - ii) ***Whether the Plaintiff is entitled to the Order of Specific Performance as prayed.***
- i) ***Whether there was breach of contract by the Defendant and therefore Plaintiff is entitled to damages for breach***

In order to determine whether or not there was breach of the contract, this Court must first determine whether there was a valid contract in place. The Plaintiff has alleged that he entered into a sale agreement with the Defendant for the purchase of the suit property. Further that the same was reduced into writing and signed by all the parties. **Section 3 (3) of the Contract Act** provides that;

“3(3)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:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

The Court has carefully perused the sale agreement produced as Exhibit by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of **Section 3(3) of the Contract Act**. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. See the case of Nelson Kivuvani....Vs....Yuda Komora & Another, Nairobi HCCC No.956 of 1991, where 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”.

The Sale agreement having met all the requirements between the Plaintiff and the Defendant and therefore the sale agreement between the two is valid and it thus met the requirements of **Section 3(3) of Contract Act**. It then follows that the Court must further interrogate whether there was breach of the said Contract. **Blacks 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 promised, by repudiating, or by interfering with another parties performance. A breach may be one by non-performance or by repudiation or 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 unable to show such loss with sufficient certainty he has at least a claim for nominal damages”.

As the Court had earlier held that the Plaintiff’s testimony remained uncontroverted and having held that the contract was valid, the Court will then interrogate whether there was breach of the Contract.

The terms of the contract were that the Plaintiff would buy from the Defendant who was allegedly the owner of the suit land at a purchase price of Kshs.10,000,000/=. Amongst the term of the contract was that the Defendant who was the vendor on the agreement acknowledged that he had received the purchase price. He further committed to avail to the Plaintiff all the required consents and the deed plan and also ensure that the suit land was transferred to the Plaintiff by the Administrators of the Estate of Geoffrey Gitaka Kimani.

However the Plaintiff testified that the obligations bestowed and agreed upon by the Defendant as outlined in the sale agreement were never fulfilled. It would therefore mean that the Defendant failed to live upto his obligations under the contract and failed to perform his obligations. In line with the definition of breach, this Court therefore finds and holds that the Defendant was in breach of the contract.

From the Plaintiff’s testimony and as per the sale agreement, it is clear that in case of a breach of contract, the party that is in breach of the Contract will pay the other party damages of 25% of the purchase price.

This Court having held and found that the Defendant was in breach of the said contract further finds that the Plaintiff is entitled to the Damages of 25% of the 10,000,000/= which was the purchase price as parties are bound by the terms of the contract that they signed.

ii) Whether the Plaintiff is entitled to the Order of Specific Performance as prayed.

Before this court determines whether it should award the order of specific performance, it must first satisfy itself that the sale agreement that the Plaintiff seeks to rely on meets the requirements of a contract of sale of land. The Court has already held and found that there was a valid sale agreement as per section 3(3) of the contract Act.

The Granting of the equitable remedy of specific Performance is discretionary and as such the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case to case basis and whether there is an adequate alternative. See the Case of Reliable Electrical Engineers Ltd.....Vs....Mantrac Kenya Limited (2006) eKLR, wherein 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 laid 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 are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”

As already found and held by this Court, there was a valid sale agreement by the parties that was duly signed. Further the said agreement has not been vitiated by any factors nor has there been any allegations or form of illegality that has been alluded to.

However in deciding whether or not to grant the order of specific performance the Court should be careful not to order the grant of specific performance where it will cause severe hardship to the Defendant. In the sale agreement presented before this Honourable Court, the Defendant has been indicated as the owner of the suit property. The only information that this Court holds is that the Defendant had promised to avail the Administrators of the Estate of **Geoffrey Gitaka Kimani** in order to effect the transfer. Further it is clear from the Exhibit presented before this Court that vide a letter dated 7th August 2018, the Advocates of the Administrators of the Estate of **Geoffrey Gitaka Kimani** confirmed that the suit land does not form part of the Estate of **Geoffrey Gitaka Kimani** and therefore cannot be disposed of until it is included in the grant as it was never listed on the grant.

This Court has not been provided with any evidence as to the proprietorship of the suit property. Therefore as it stands this Court cannot determine who the registered and/or legal owner of the suit property is. In that regard therefore this Court would be unable to grant specific performance as it is not clear who is the owner of the suit property. This Court will further not take the risk of ordering specific performance with full knowledge that the Defendant might not be in a position to deliver the necessary documents to effect the transfer of the suit land to the Plaintiff or due to his fraudulent behaviour, might not be the owner of the suit property.

Further, the Court noted that since the suit property is not among the properties that were included in the Confirmed Grant of the Estate of **Geoffrey Gitaka Kimani**, it would not be prudent to issue an Order of Specific Performance as that order is likely to prejudice other parties who are not parties to this suit. It is not clear who is the registered owner of the suit property as no title to the same was availed nor a recent search.

However, it is evident that the Defendant received the purchase price and he is now in breach of the Sale Agreement entered between himself

and the Plaintiff. Parties are bound by the terms of their contract. One of the condition was that whoever was in breach of the Sale Agreement, was liable to pay 25% of the purchase price. Therefore, this Court finds that the Defendant is in breach and is liable to pay the said amount together with the refund of the purchase price.

The Plaintiff has also developed the suit property allegedly to the tune of **Kshs.35 Million**. However, no Valuation Report was availed or any photographic evidence of the development on the suit property. However that does not mean that the court is doubtful of the Plaintiff's evidence of having carried out development on the suit property. However, the court is not certain that the costs of development stands at **Kshs.35,000,000/=** as alleged by the Plaintiff. Nonetheless, the said costs can be ascertained by an independent Valuer who should visit the suit property and carry out valuation of the development on the suit property.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has proved on the required standard of balance of probabilities that he did pay **Kshs.10,000,000/=** to the Defendant for purchase of the suit property but the Defendant is in breach of the Sale Agreement entered between the two parties.

Consequently, the Court enters Judgment for the Plaintiff against the Defendant in the following terms:-

a) The Court declines to grant an Order of Specific Performance but orders that the Defendant do refund the full purchase price of Kshs.10 Million plus a penalty of 25% of the purchase price as per the terms of the Sale Agreement to the Plaintiff.

b) Plaintiff is also entitled to general damages of Kshs.500,000/= for breach of Contract.

c) Further, the Plaintiff is awarded costs of the suit and interest at courts rate from the date of filing of this suit until the date of payment in full.

d) Further, the Plaintiff to appoint an independent Valuer who should carry out Valuation of the development on the suit property and file a Report to court and thereafter the Plaintiff is at liberty to apply.

It is so ordered.

Dated, Signed and Delivered at Thika this 4th day of October, 2019.

L. GACHERU

JUDGE

4/10/2019

In the presence of

Mr. Ombaba for the Plaintiff

No appearance for the Defendant

Lucy - Court Assistant

Court – Judgment read in open court in the presence of the above advocate.

L. GACHERU

JUDGE

4/10/2019