



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO 4 OF 2012**

**ICHUNG'WAH NGUGI.....PLAINTIFF**

**VERSUS**

**NDIMU FARMERS CO-OPERATIVE SOCIETY....1<sup>ST</sup> DEFENDANT**

**NDIMU D.E.B PRIMARY SCHOOL.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

1. The plaintiff instituted the present suit vide a plaint dated 26<sup>th</sup> September 2012 filed in Court in 8<sup>th</sup> October 2012. The plaintiff averred that on or about 9<sup>th</sup> July 1984, he entered into an agreement with the 1<sup>st</sup> defendant for the purchase of **House No.2 at Ndimu being plot No.541** at the consideration of Kshs.70,000/=. The plaintiff paid a deposit of Kshs.40,000/= and the balance was to be paid on completion in terms of the agreement. The plaintiff stated the 1<sup>st</sup> defendant was to process the ownership documents in favour of the plaintiff but neglected to do so such that the 2<sup>nd</sup> defendant as from 2001 started interfering with the plaintiff's possession and occupation of the plot and forcibly evicted the plaintiff's tenant from the premises.

2. The plaintiff in the suit seeks judgment against the defendants for:-

- (a) Specific performance from the Defendant to complete the transaction and issue a Title to the plaintiff.**
- (b) An injunction against the defendants from interfering with the plaintiff's right to quit possession of the suit property.**
- (c) A declaration that the plaintiff is the absolute owner of the suit property.**
- (d) Accounts for loss of rental income to be paid to the plaintiff from the year 2000.**
- (e) In the alternative of a-d above, the defendant refunds the monies paid by the plaintiff for the suit property being Kshs70,000/= with interest from the completion date or a refund at the current market value of the land.**
- (f) Interest on c above.**
- (g) Any other relief this honorable Court may deem fit to grant.**

3. Though the defendants were served as per the affidavit of service filed herein they did not enter any appearance and/or file any defence. The suit was listed for formal proof hearing before me on 23<sup>rd</sup> September 2019 when the plaintiff attended and testified as the sole witness in support of the plaintiff's case.

4. The plaintiff in his evidence relied on the witness statement he had recorded on 26<sup>th</sup> September 2012 filed simultaneously with the plaint. The plaintiff further relied on the bundle of documents as per the list dated 26<sup>th</sup> September 2012 filed together with the plaint .

5. The plaintiff's suit is predicated on the agreement of sale made on 9<sup>th</sup> July 1984 between the plaintiff and the 1<sup>st</sup> defendant. The agreement related to the sale of a farm house and the adjacent 8 acres at the consideration of Kshs.70, 000/=. The plaintiff paid a deposit of Kshs.40, 000/= and the balance of Kshs.30, 000/= was to be paid in 15 equal installments. The date of completion was provided as 31<sup>st</sup> December 1985. The evidence as per the documents supplied was that the plaintiff was granted vacant possession of the house and he put in a tenant, one Francis Kamau.

6. As can be deduced from “PEX4” and “PEX5” the 2<sup>nd</sup> defendant equally lays claim to the house and the surrounding land as the school wrote to the plaintiff’s tenant asking him to vacate the house to enable the school to make use of it. The letter exhibited by the plaintiff as “PEX4” dated 22<sup>nd</sup> September 2000 from Ndimu DEB Primary School to Francis Kamau ( plaintiff’s tenant ) the school stated that they had been given plot No.541 on which the farm house was located from 1997 and by the letter dated 20<sup>th</sup> December 2000) “PEX5” the school wanted the tenant to vacate the house to enable the school to utilize the same. The bundle of receipts produced by the plaintiff in support of his case clearly do not only relate to the property the subject of the suit. The bulk of the receipts relate to the period before the agreement of sale entered into between the plaintiff and the 1<sup>st</sup> defendant. There are receipts for the year 1979, 1982 and 1983 whose relevance to the present suit has not been explained. There is indication however that other than the property the subject of the suit the plaintiff had purchased another farm within the 1<sup>st</sup> defendant’s farm.

7. On the basis of the pleadings the plaintiff seeks specific performance of the agreement entered into with the 1<sup>st</sup> defendant. Under paragraph 13 of the plaint, the plaintiff pleads as follows:-

**13. The plaintiff’s claim is for specific performance by the 1<sup>st</sup> defendant of the transaction and an injunction against the defendants from interfering with the plaintiff’s right to quiet possession of the suit property.**

8. The plaintiff under paragraph 14 in the alternative pleads for a refund of the money paid with interest from date of purchase and the current market value of the suit property for failure to complete the transaction. The plaintiff under the prayers equally prays for specific performance and/or in the alternative refund with interest and compensation by way of damages at the current value of the property.

9. On the pleadings and the evidence there is no doubt the plaintiff is not in possession or occupation of the suit property and that it is the 2<sup>nd</sup> defendant who had possession and occupation of the suit premises. Under prayer (d) in the plaint the plaintiff prays for loss of rental income from the year 2000 when the tenant left the premises. In the plaintiff’s witness statement at paragraph 10, the plaintiff stated that his demand was that the 1<sup>st</sup> defendant keeps his end of the bargain and procure title for the plaintiff. Further the plaintiff stated that he wanted the defendants to pay him for loss of rental income of the suit property from the year 2000 when his tenant was forcibly evicted from the property.

10. I have made extensive reference, to the pleadings and the evidence as the suit was undefended and in order to demonstrate the basis of the suit. It cannot be denied that the foundation of the suit is the agreement made on 9<sup>th</sup> July 1984. That is the agreement, the plaintiff seeks specific performance of, and the issue for determination therefore must be whether that agreement is capable of being specifically performed. The period provided for completion of the contract was 31<sup>st</sup> December 1985. There is nothing provided in the evidence to show why the contract was not completed as provided in the agreements. There is no evidence further to show that the completion period was extended from the date that had been provided. That being the case, the agreement is deemed to have lapsed as at 31<sup>st</sup> December 1985 and after that period there was no contract capable of being enforced.

11. The contract upon which the present suit is founded having been entered into on 9<sup>th</sup> July 1984, the issue of limitation of the action is a relevant factor to be considered. The issue of limitation goes to the jurisdiction of the Court to entertain the action. If a suit is time barred the Court lacks the jurisdiction to entertain the same. Under section 4(1) (a) of the Limitation of Actions Act, Cap 22 Laws of Kenya actions founded on contract become statute barred after the expiry of six years from the date when the cause of action accrued.

**Section 4(1) of the Act provides:-**

**(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—**

**(a) actions founded on contract;**

**(b) actions to enforce a recognizance;**

**(c) actions to enforce an award;**

**(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;**

**(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.**

12. It being clear that the plaintiff’s suit in the instant matter is founded on the sale agreement dated 4<sup>th</sup> July 1984, it is apparent that the present suit as at the date it was instituted on 8<sup>th</sup> October 2012 was definitely statute barred. The action was brought outside the period of limitation and no leave was obtained to bring the suit out of time. The suit is unsustainable and is accordingly ordered dismissed.

13. As the defendants did not appear or defend the action, I make no order for costs.

**Judgment dated, signed and delivered at Nakuru this 28th day of November 2019**

**J M MUTUNGI**

JUDGE