



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 17 OF 2018**

**JAMES MUTUA NYAMAI.....PLAINTIFF**

**VERSUS**

**DIDA TSINGWA.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By a Plaint dated 23<sup>rd</sup> January, 2018, James Mutua Nyamai (the Plaintiff) prays for Judgment against the Defendant for: -

- a) (an order of) specific performance of the agreement dated 8<sup>th</sup> March, 2011, compelling the Defendant to execute transfer of the 1 acre portion out of Portion No. Tezo/Roka/153 in favour of the Plaintiff;**
- b) alternatively the Deputy Registrar Malindi to sign the transfer forms and the Land Registrar be ordered to register the 1 acre portion out of Portion No. Tezo/Roka/153 in favour of the Plaintiff**
- c) Damages for breach of contract in lieu of or in addition to specific performance;**
- d) costs of this suit; and**
- e) any such other or further relief as this Honourable Court may deem appropriate.**

2. Those prayers arise from the Plaintiff's position that on 8<sup>th</sup> March, 2011, he entered into a sale agreement with the Defendant in which the Defendant agreed to sell to the Plaintiff 1 acre of land which was to be excised from the Defendant's parcel of land known as Tezo/Roka/153. It is the Plaintiff's case that the purchase price for the 1 acre portion was agreed at Kshs.190,000/- and that he proceeded to pay the defendant upon execution of the Agreement a deposit of Kshs.65,000/-. The balance was to be paid in affordable instalments.

3. The Plaintiff further avers that while it was an express term of the agreement that the Defendant would provide him land rates clearance certificates to assist in the transfer, the Defendant has to-date failed to do so. It is the Plaintiff's case that despite proceeding to clear the balance of the purchase price, the Defendant has refused to facilitate the transfer of the said portion of land and hence this suit.

4. But in a Statement of Defence dated and filed herein on 22<sup>nd</sup> February, 2018 Dida Tsingwa (the Defendant) maintains that the Plaintiff breached the said agreement by failing to complete payment of the purchase price within the agreed period and further by failing to facilitate the costs for the application for consent, survey, stamp duty and transfer.

5. It is further the Defendant's case that he gave the Plaintiff vacant possession of the suit property on the execution of the agreement and the Plaintiff did take possession and has since erected a house in which he resides to-date.

6. In the alternative, the Defendant asserts that the Plaintiff and his wife caused an acrimonious misunderstanding between the two families and that on 16<sup>th</sup> May, 2017, the parties mutually agreed to terminate the agreement as a result whereof the Defendant was to refund the purchase price. Further and in addition to the foregoing, the Defendant contends that the transaction involved agricultural land and that given that no Land Control Board Consent was obtained, the resultant agreement is null and void.

7. It is the Defendant's case that continued possession of the suit property by the Plaintiff is a criminal act and an offence in the absence of consent from the Land Control Board. He denies owing the Plaintiff the sum of Kshs.1,300,000/- as compensation for the developments

undertaken by the Plaintiff on the suit property.

### **THE PLAINTIFF'S CASE**

8. At the trial herein, the Plaintiff testified as his sole witness. He told the court that he entered into a Sale Agreement with the Defendant on 8<sup>th</sup> March, 2011 for the purchase of 1 acre to be excised from the Defendant's parcel of land known as Tezo/Roka/153. The purchase price was Kshs.190,000/- and the Plaintiff paid a deposit of Kshs.65,000/- at the execution of the Agreement.

9. The Plaintiff testified that for some unknown reasons, the Defendant thereafter refused to execute Land Control Board Consent Forms thereby causing a delay in completion in breach of the Agreement. He told the court that despite the Defendant's failure to co-operate, he went ahead and cleared the balance of the purchase price but the Defendant has since refused to avail the necessary documents to enable them effect a transfer of the suit property.

10. He accordingly urged the court to grant him specific performance of the Agreement or in the alternative order the Defendant to pay him a sum of Kshs.1,300,000/- as compensation being the current Market Value and valuation of the developments he has undertaken so far on the land.

### **THE DEFENCE CASE**

11. The Defendant equally testified as the sole witness in his case. He told the court that he is the registered owner of the parcel of land known as Tezo/Roka/153 and that he had agreed to sell a portion measuring 1 acre to the Plaintiff at Kshs.190,000/=.

12. The Defendant told the court that on 8<sup>th</sup> March, 2011 when they executed the Sale Agreement, the Plaintiff paid a deposit of Kshs.65,000/- leaving a balance of Kshs.125,000/- which was to be paid on or before 15<sup>th</sup> August, 2012. The Plaintiff failed to abide by this condition and only managed to clear the balance on 21<sup>st</sup> October, 2015.

13. The Defendant further testified that the Plaintiff also failed to pay for official search fees, Land Control Board Consents, stamp duty and transfer fees as had been agreed between them.

14. The Defendant testified that the Plaintiff took possession of the portion of land sold to him on the date they executed the Agreement. He has since erected his residential house thereon and resides there with his family despite the fact that no Land Control Board Consent was ever obtained.

15. The Defendant asserted that subsequent to the execution of the Agreement the Plaintiff and his wife caused an "acrimonious misunderstanding" between the parties herein as a result whereof the families agreed on 16<sup>th</sup> May, 2017 to mutually terminate the Agreement and to discharge each other from the obligations thereunder.

16. Upon the said termination, the Defendant agreed to refund the purchase price to the Plaintiff who in turn agreed to vacate the suit property. On 11<sup>th</sup> June, 2017, the Plaintiff gave the Defendant particulars of the compensation, he wanted to be repaid for the developments on the land. The Defendant denied that he owes the Plaintiff the sum of Kshs.1,300,000/- as compensation.

### **ANALYSIS AND DETERMINATION**

17. I have perused and considered the pleadings filed by both parties, their oral testimonies before the court and the evidence adduced at the trial herein. I have also studied and considered the written submissions filed by the Learned Advocates for the parties as well as the authorities they referred me to.

18. The Plaintiff's case is that on 8<sup>th</sup> March, 2011, he entered into a Sale Agreement with the Defendant in which the Defendant agreed to sell to him a portion of land measuring 1 acre which portion was to be excised from the Defendant's parcel of land known as Tezo/Roka/153. It was the Plaintiff's case that despite paying the agreed purchase price of Kshs.190,000/- the Defendant has to-date failed and/or refused to transfer to him the subject portion of land.

19. The Defendant admits having entered into the said Sale Agreement. It was however his case that the Plaintiff failed to make payment in time and/or to facilitate payment for the requisite fees necessary to effect the transfer. In the alternative, the Defendant asserted that even though he had complied with the Agreement and granted vacant possession of the suit premises to the Plaintiff upon execution of the Sale Agreement, the parties had subsequently verbally agreed to terminate the Agreement as a result of which he was required to refund the purchase price and to pay him for the development he had so far undertaken on the property. When the parties failed to agree on the amount of compensation due, the Plaintiff filed this suit.

20. The Plaintiff produced a copy of the hand-written Sale Agreement as Pexh 1. A perusal thereof reveals that after the initial deposit of Kshs.65,000/- was paid on the date of execution, the balance of Kshs.125,000/- was to be paid "in affordable instalments" and that the same was to be paid not later than 15<sup>th</sup> August, 2012.

21. As it turned out, the Plaintiff was unable to meet this deadline. At the back of the Sale Agreement, both parties endorsed an addendum thereto dated 5<sup>th</sup> April, 2016 in which the Defendant confirms receipt of the late payments as follows:

**"I Dida M. Tsingwa, ID No. xxx of Box 556 Kilifi confirm receipt of monies in complete (sic) from James M. Nyamai as per**

above agreement under the following:

**1. Note that final payment was supposed to be on the 15<sup>th</sup> day of August 2012 but due to financial challenges and inability by the Buyer, the final payment was made on 21<sup>st</sup> Oct. 2015**

**2. That this be observed as agreement on local arrangement.**

**3. That official agreement shall be made and signed upon confirmation of current procedures of Land Sale Policy by the Registry of Lands and the Land Control Board.**

22. Arising from those endorsements which were not denied by the Defendant, I did not think that he could be heard to claim that the Plaintiff had breached the Agreement by failing to make the payments in time.

23. In **Reliable Electrical Engineers Ltd -vs- Mantrac Kenya Ltd (2006) eKLR**, Maraga J. (as he then was) observed as follows: -

**“Specific performance like any other equitable remedy is discretionary and the court will only grant it on well-known 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 unenforceable....”**

24. From the endorsements on the Agreement made on 5<sup>th</sup> April, 2016, the Defendant admits that he has received albeit late, the entire consideration for the purchase of the suit property from the Plaintiff. In his evidence before this court, he stated that from the initial date of execution of the Agreement on 8<sup>th</sup> March, 2011, he had put the Plaintiff in vacant possession and the Plaintiff had proceeded over time to erect his residential house therein and has since developed the property. It was his evidence that since 2011, the Plaintiff has lawfully occupied the property and that by the time this suit was filed, he had discharged his obligations under the Agreement.

25. In the circumstances of this case, I did not find any valid ground why the sale transaction should be voided. While it may as well be that the Plaintiff and the Defendant who are related by marriage have since fallen out with each other and no longer see eye-to-eye, I was not persuaded that the disagreement coming 6 years after the execution of the contract was a ground to rescind and or void the same. At any rate, the Defendant has neither refunded the purchase price nor paid for the development made by the Plaintiff on the land.

26. As it were, I did not agree with the Defendant’s submissions that the failure to obtain Land Control Board Consent under Section 6 (1) of the Land Control Act was fatal to the Agreement. As the Court of Appeal stated in **Willy Kimtai -vs- Michael Kibet (2018) eKLR**: -

**“... Since the current Constitution has by virtue of Article 10(2)(b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and unenforceable for lack of consent of the Land Control Board.”**

27. In the matter before me, I find and hold that the Defendant has unlawfully denied the Plaintiff the right to acquire title pursuant to the 1 acre that he purchased and in which he has been in physical possession since March, 2011. That denial amounts to an unlawful deprivation of property contrary to the provisions of Article 40 of the Constitution as the Plaintiff is thereby denied the right to enjoy the fruits of his investment for no appropriate reason.

28. Accordingly I find merit in the Plaintiff’s case. Judgement is consequently entered for the Plaintiff as against the Defendant as prayed in Paragraph ‘a’ and ‘b’ of the Plaintiff.

29. The Plaintiff shall also have the costs of this suit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2019.**

**J.O. OLOLA**

**JUDGE**