



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 640 OF 2017

(Formerly Machakos HCCC No. 126 of 2010)

HON. DAVID OLE SANKORI.....PLAINTIFF

VERSUS

MELIARE MPATA.....DEFENDANT

JUDGEMENT

By a Plaint dated 10th June, 2010 and amended on 16th December, 2011, the Plaintiff is seeking for judgement against the Defendant as follows:

- a. An order directing the Defendant to transfer a portion measuring 100 acres and a further portion proportionate to the sum of Kshs. 240, 000.00 from all that parcel of land known as KAJIADO/SOUTH KAPUTIEI / 730 to the Plaintiff and a further order that the Defendant do execute the transfer thereto failing which the same be executed by the Deputy Registrar, High Court Machakos
- b. In the alternative a refund of Kshs. 1, 040,000.00
- c. Refund of Kshs. 1, 500, 000 being the costs of constructing a dam
- d. Costs of this suit and interest at court rates
- e. Any other relief this Honourable Court may deem fit to grant.

The Defendant entered appearance and filed a Statement of Defence on 15th July, 2010 where he admitted that on or about 1996 he entered into a verbal agreement with the Plaintiff to sell a portion measuring 100 acres out of land parcel number KAJIADO/SOUTH KAPUTIEI / 730 for a consideration of Kshs. 8,000. He averred that the deposit was paid by way of exchange whereby the Plaintiff gave 14 cows each valued at Kshs. 9000 totalling Kshs. 126, 000 and six (6) calves each valued at Kshs. 6000 totalling Kshs. 30000 making the total deposit Kshs. 156, 000, with the same being witnessed by elders. He claims the Plaintiff moved into the land, built a dam and continues to be in occupation despite the fact that he has to date never made any further payments in full consideration since 1996 thus greatly inconveniencing the Defendant and is in blatant breach of the said Sale Agreement. He states that it is unreasonable and unconscionable for the Plaintiff to claim any payment or specific performance on account of an incomplete transaction. He denies any of his wives bearing the name alleged in the Plaint and admits he was served with a notice of intention to sue.

The Plaintiff replied to the statement of Defence where he reiterated his claim and insisted that having performed his part, the Defendant is duty bound to reciprocate failure of which he is entitled to claim for the orders sought. He avers that the statement of Defence raises no reasonable Defence but only meant to frustrate the Plaintiff from getting the orders sought.

The Defendant filed a Counterclaim dated the 16th April, 2012 where he sought for the following orders:

- a. An order that the Plaintiff vacates the said portion of LR No. Kajiado/Kaputiei South / 730 upon determination of the suit.
- b. Mesne profits from the date of determination until such time as the Plaintiff shall vacate the land
- c. Compensation for use and occupation
- d. Costs of the suit

The parties filed witness statements as well as documents including pictures and matter proceeding for full hearing.

Evidence of the Plaintiff

PW1 who is the Plaintiff in his examination in chief stated that he entered into an oral agreement in 1996 with the Defendant for the purchase of 100 acres to be excised from KAJIADO/SOUTH KAPUTIEI / 730 (the suit land) at a cost of Kshs. 8,000 per acre, which totaled Kshs. 800,000. He contended that on the first day he paid Kshs. 100,000 and after which he paid the entire purchase price. Further that the Defendant's wife was unwell being at the Nairobi West Hospital, and he guaranteed him on the medical bills which he defaulted in paying, culminating in a suit instituted against him for recovery vide Milimani CMCCC No. 7961 of 2000. PW1 averred that he paid Kshs. 240,000 as the decretal sum plus the auctioneers' charges with the understanding that the Defendant would give him more land equal to the amount paid. He stated that he constructed a dam worth Kshs. 1.5 million on the suit land, which has been used by himself and the Defendant's family. He confirmed that the Defendant allowed him to take possession of the 100 acres and he has been on the suit land from 1996 to date. Further that he fenced the land and the same was beaconed in the presence of the Defendant, his wife and the Plaintiff's brothers. He insisted no balance is unpaid.

During cross examination he admitted that there was no written agreement and he does not have a receipt for the Kshs. 100,000 paid. He stated that he paid 10 cows, 10 calves, 10 heifers with the value of each cow being Kshs. 15,000, each calve Kshs 10,000 and the heifer Kshs. 15,000 respectively and the total amount paid was Kshs. 400,000. He reiterated that the other bits of the purchase price were collected by the Defendant's wives at different times and that he took possession of the suit land with the Defendant's permission.

PW2 Susan Tileeyio Meritei

During examination in chief, she stated that she is the wife to the Plaintiff who bought 100 acres of land in 1996 from the Defendant, at a purchase price of Kshs. 800,000. She confirmed that the negotiation and agreement were in their house in the presence of the Plaintiff, Defendant and the Defendant's wife. She averred that they paid Kshs. 100,000 to the Defendant and his wife which they acknowledged orally and later paid the balance. Further that the Defendant requested to be given 20 grown cows and 10 calves and she particularly paid Kshs. 200,000 to the Defendant as she was authorized by the husband to do so. She confirmed that they took possession of the 100 acres, brought in a surveyor to show them the beacons. The Defendant never complained.

During cross examination she confirmed that she witnessed the oral agreement between the parties and Kshs. 100,000 was paid but no receipts issued. She reiterated that she paid to the Defendant several monies amounting to Kshs. 30,000 and Kshs. 40,000 but do not have a record. She stated that she could

report to the Plaintiff about each payment and also paid Kshs. 200,000 to the Defendant which was verbally acknowledged.

The Plaintiff thereafter closed their case.

Evidence of the Defendant

DW1 who is the Defendant herein stated during his examination in chief that he sold the Plaintiff 100 acres of land at a purchase price of Kshs. 8000 per acre which totaled to Kshs. 800,000. He confirmed that the Plaintiff gave him 20 heads of cattle which included 14 fully grown cows and 6 calves which were all valued at Kshs. 156, 000. He stated that one Ole Nenkash witnessed when he received the heads of cattle from the Plaintiff. He admitted that his wife fell ill and the Plaintiff paid the bill amounting to Kshs. 187, 300 because he still owed him part of the purchase price but has never concluded paying it. He confirmed that after payment of the purchase price, Plaintiff moved into the suit land, has cut down trees, dug a dam and has been utilizing the land as has cattle thereon. He denied granting his consent for the Plaintiff to occupy the suit land and it has been over 20 years since the Plaintiff moved thereon. Further that his wives were absent when he was selling the land and that they have never gone to get money from PW2 who is the Plaintiff's wife. He stated that the Plaintiff had threatened him with a gun, used the Chief to harass him and he has never benefitted from his land since the Plaintiff occupied it. He produced pictures as exhibit 'D2' to show the Plaintiff's properties on his land. He produced the letter from Nairobi West Hospital showing the bill the Plaintiff paid as exhibit 'D2' He reiterated that the Plaintiff still owes him Kshs. 500,000.

During cross examination he confirmed they had an agreement with the Plaintiff to sell a portion of 100 acres of the suit land to him. He said when they made the agreement, they were with the Plaintiff but the witnesses only came in at the time of receiving the cows. The witnesses were Ole Parsali Parmutia and his son Kungat Meliari. He stated that he had given the names of Justus Lenkalash and Yiakate Meliari as his witnesses. He reiterated that the value of the cows was kshs. 156, 000 and that the Plaintiff paid his wife's medical bill amounting to Kshs, 187, 300. Further that they agreed the medical bills was go towards offsetting the purchase price. He insisted the Plaintiff owes him Kshs. 500,000 and when he sought for it, he refused to pay. He is claiming for compensation for the Plaintiff's use of his land but not the balance of the purchase price. Further that the Plaintiff entered his property without his consent and that the counterclaim for eviction is not an afterthought. He denied any knowledge of the order of the court dated the 11th July, 2016.

In reexamination he confirmed that there were witnesses present when he received cows from the Plaintiff. He insisted he wants the Plaintiff out of his land because he is harassing him.

DW2 Yiakale Meliare Rukai who is the Defendant's wife stated during her examination in chief that the Plaintiff bought their land and has not paid for it. She confirmed knowledge of the transaction since her husband brought 14 cows and 6 calves to their home and told her he got the same from the Plaintiff who he had sold to land. She claimed she went to the Plaintiff's home together with her co – wife to seek the balance of the purchase price, which the Plaintiff promised to pay but never did so. She further confirmed knowing Susan Merite as the Plaintiff's wife and denied that she paid them any money as being part of the purchase price. She insisted that apart from the cows, she has no knowledge of whether any other monies were paid. She sought the court's intervention to remove the Plaintiff from their land.

During cross examination she insisted she wants the Plaintiff to move from their land as he has not paid them and destroyed their land for 20 years. She denied any knowledge of payment of the purchase price. She confirmed that it is the Plaintiff with their son who came with the cows but she did not ask for the value. She claimed the husband did not tell her the amount of money owed to him by the Plaintiff and that they have never evicted him. She confirmed that the Plaintiff has constructed a dam on the suit land and is selling water. Further that he has cut down trees thereon and they asked him to stop doing so but she cannot remember the year. She denied that the Plaintiff's wife gave them any money but admitted going to the Plaintiff to demand for the purchase price which he promised to pay, although he never did so. Further that she was not present at the time of negotiation.

DW3 Justus Lemaron Lenkalash stated during his examination in chief that in 1996 the Defendant informed him that he had sold land to the Plaintiff and taken some heads of cattle as purchase price. He stated that the Defendant showed him the heads of cattle paid by the Plaintiff and asked him to be his witness in the said land transaction. He confirmed that the Defendant showed him 14 big cattle and 6 calves and told him they had agreed with the Plaintiff that each cow cost Kshs. 9000 while a calf cost Kshs 5,000. He reiterated that Defendant informed him there was no written agreement but verbal. He stated that there is a time the Defendant's wife was sick and Defendant informed him the Plaintiff settled the bill and the amount paid was used to offset the balance of the purchase price. He reaffirmed that he has never witnessed any other payment except for the heads of cattle.

During cross examination he confirmed that all the evidence he has provided in court was information from the Defendant as he was not present. He said the Defendant told him there were two witnesses who witnessed the sale. He intimated that he sought for a written agreement from the Defendant but there was none, so he relied on information he was told but he was shown the payment of the hospital bill.

The Defendant thereafter closed their case.

Parties filed submissions, which I have considered.

Analysis and Determination

After perusal of the pleadings including documents filed herein and upon hearing the testimony of PW1, PW2, DW1, DW2 and DW3 I find that the following are the issues for determination:

- Whether the oral agreement between the Plaintiff and the Defendant for the purchase of a portion of 100 acres of the suit land is valid.
- Whether the Plaintiff should vacate the portion of the 100 of the suit land
- Whether the Plaintiff is entitled to Specific performance from the Defendant
- Whether the Defendant is entitled to mesne profits
- Who will pay costs of the suit.

Validity of the Sale Agreement

It is the Plaintiff's contention that he bought a portion of 100 acres from the suit land, took possession in 1996 and has developed it including constructing a dam. He insists that he paid the full purchase price and even settled the Defendant's wife's medical bill at the Nairobi West Hospital, with an understanding that he would get more land. The Defendant refutes being paid the whole of the purchase price and insists he wants the Plaintiff evicted from the suit land as he is harassing him, cutting town trees and burning charcoal. He however admits that the Plaintiff has constructed a dam thereon.

I note in the instant suit there was no written agreement produced in court as proof of the sale of the land. Further both the Plaintiff and the Defendant dispute the amount paid as purchase price. PW1 and PW2 confirmed they paid various animals including monies to the Defendant which DW1 disputed. However, I note that DW2 and DW3 stated that it is DW1 who informed them of what PW1 had paid as they were not present during the transaction. The Plaintiff contends that he even paid the Defendant's wife medical bill at the Nairobi West Hospital and has paid over and above the purchase price. Except for the parties acknowledging that cows were paid as part of the purchase price, the Defendant denied receiving the balance of the purchase price and claims the Plaintiff owes him Kshs. 500,000. PW2 claimed she paid the Defendant's wives Kshs. 200,000 but this was denied by DW2 who said when they sought for the purchase price, the Plaintiff promised to pay it and failed to do so. What is interesting is that none of the parties had even any acknowledgement of payment in a plain sheet of paper. I further note that in so far as the Plaintiff entered into an agreement with the Defendant to buy a portion of the 100 acres of the suit land, he never obtained the consent of the land control board to enable him effect the transfer.

Section 3(3) of the **Law of Contract** provides as follows: **'(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:’

Section 6 (1) (a) of the Land Control Act provides that: ‘ **(1) Each of the following transactions that is to say—**

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.’

Based on the above provisions, and in relying on the facts above, I find that the agreement for the sale of a portion of 100 acres from the suit land was void as it was not in writing. In terms of payment, it is not in dispute that certain number of cows were paid. It is further not in dispute that the Plaintiff settled the Defendant’s wife’s medical bill. I note the Plaintiff was even sued by the Nairobi west hospital vide Nairobi CMCCC No 7961 of 2000 for the Defendant’s wife medical bill. From the warrant of attachment which is part of the Plaintiff’s documents, I note that there Decretal Amount was Kshs. 236, 891 and this was minus the auctioneers costs. I hence find that the Plaintiff indeed paid the Kshs. 240,000 plus Auctioneers costs as stated in his examination in chief. However, the Plaintiff did not state how much the auctioneer’s charges were. In line with the evidence presented by PW1, PW2 and DW1, I find that the Plaintiff indeed paid the Defendant a total of Kshs. 810, 000 being the purchase price of the suit. I note the Plaintiff is demanding for Kshs.1,500, 000 for the construction of a dam which I deem exorbitant. Even if there were no receipts produced, DW1who is the owner of the land, did not deny the existence of the dam. In the circumstance I award the Plaintiff the nominal cost of Kshs 800,000 for the construction of the said dam.

Specific performance

The Plaintiff has demanded for specific performance from the Defendant to transfer the portion of the 100 acres from the suit land but if he fails to do so, then the Deputy Registrar to sign the transfer form. In the case of *Gurdev Singh Birdi & Anor –vs- Abubakar Madhbuti C.A. No.165 of 1996 the Court of Appeal held as follows;*

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been under all the obtaining circumstances in the particular case, it is just and equitable to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of volume 44 of Halsbury’s Laws of England., Fourth Edition, a Plaintiff seeking the equitable remedy of specific performance of a contract:

‘ must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the Plaintiff has failed in literal performance, or is in default in some non- essential or unimportant term, although in such cases it may grant compensation. Where a condition or essential term ought to have been performed by the Plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance but dismisses the claim.’

The Plaintiff claims to have paid the whole purchase price and was allowed to take possession of the suit land and even constructed a dam. A fact admitted by DW1. Since the agreement was not reduced in writing and no consent of the Land Control Board obtained within six months from the date of sale, this renders the transaction void. The Plaintiff claims for specific performance orders to have the suit land transferred to him. The Defendant's counsel has submitted that the Plaintiff's claim is time barred in view of section 7 of the Limitation of Actions Act Chapter 22 but I note that the claim herein is not based on adverse possession but is for specific performance in terms of the oral agreement entered into in 1996. I note that the Plaintiff was even allowed to take actual possession of the purchased land.

In relying on the Court of Appeal decision above, I find that the Plaintiff cannot have a remedy on specific performance but is only entitled to receive a refund of the purchase price that he had paid and the cost of development on the suit land.

Compensation for use and occupation and Mesne profits

On the question of mesne profits, the Defendant sought for the Plaintiff to pay him mesne profits after determination of this suit.

The *Black's Law Dictionary* defines *mesne profits* as: - ***“the profits of an estate received by a tenant in wrongful possession between (2) two dates.”***

The Plaintiff insists he entered into the suit premises in 1996 when he had paid the Defendant the full purchase price. Further, that he even settled a medical bill on behalf of the Defendant's wife, a fact which is admitted.

In the case of **Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR** the Court of Appeal stated as follows: **“Mesne profits” are the rents and profits which a trespasser has or might have received or made during his occupation of the premises, and which therefore he must pay over to the true owner as compensation for the tort which he has committed. A claim for rent is therefore liquidated, while a claim for mesne profit is always unliquidated. It follows therefore that a claim for mesne profit is inappropriate when the occupier is still a tenant. It can only be maintained when his tenancy has been duly determined according to law and he becomes a trespasser. In this respect, a tenant such as the Respondent, cannot properly be adjudged to be liable for mesne profit unless and until his tenancy has been duly determined according to law because the element of wrongful and tortious occupation is absent. It is also instructive to point out that in the counter claim, the appellant sought for an order of vacant possession which was granted. Thus, the tenant would become a trespasser once the court orders him to vacate and he fails or once a proper notice takes effect whichever comes first. Thus, the learned magistrate was right in awarding mesne profits in the event the Respondent failed to vacate as ordered in the judgement.’**

From the evidence presented, I note that the Defendant never took any action to evict the Plaintiff from the suit land from 1996 upto 2012. He even watched the Plaintiff developing the suit land and never took any action. It is hence my finding that the Plaintiff cannot be deemed to be a trespasser and must have obtained consent from the Defendant to enter the suit land. The Defendant never furnished court with the loss he incurred when the Plaintiff was using the suit land. The Defendant further never denied using the water from the dam the Plaintiff had constructed. It seems the relationship between the parties was amicable and only became stormy when the Plaintiff demanded for specific performance. In the circumstances, I find that the Defendant is not entitled to a compensation from the Plaintiff for the use of the suit land.

On the issue of mesne profits, I find that the Defendant will be entitled to the same once he has refunded the Plaintiff in full for the damages awarded by the Court, after which the Plaintiff will be deemed a trespasser on the suit land and expected to pay for the said mesne profits.

Vacant possession

I note the Plaintiff entered into the suit premises in 1996 and commenced development thereon including building a dam. The Defendant denied granting his consent to the Plaintiff to enter the suit land. However, what is curious is that the Defendant never sought to evict the Plaintiff and only filed a counter claim in 2012 which is almost 20 years later, seeking to do so when the Plaintiff demanded for specific performance. The Plaintiff had brought in a surveyor to identify the beacons, fenced the suit land and put up a dam. The Defendant did not controvert this evidence provided by the Plaintiff. Neither did he controvert evidence on the cost of constructing a dam. I find that the Defendant is taking advantage of the lack of a written contract to unjustly enrich himself. I further find that since the contract between the parties is void, even though the Plaintiff had paid certain amounts as purchase price, it will only be just and equitable if the Plaintiff moved from the suit land once he is refunded the monies paid and compensation for developments thereon, including interest settled.

Costs

Since the Plaintiff has been inconvenienced, I find that he is entitled to costs and will award him the costs of this suit.

In the circumstances I find that the Plaintiff has proved its case on a balance of probability and proceed to make the following order:

- a. The Defendant do refund to the Plaintiff Kshs. 810,000.00
- b. The Defendant do refund to the Plaintiff Kshs. 800, 000 being the costs of constructing a dam
- c. The amounts stated in (a) above to attract interest from 1996 to date at court rates
- d. Upon refund of the amounts indicated in (a), (b) and (c) above, the Plaintiff to immediately vacate the suit land, failure of which the Defendant will be entitled to mesne profits
- e. The costs of the suit is awarded to the Plaintiff

Dated signed and delivered in open court at Kajiado this 23rd day of January, 2018.

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Tahito for Defendant

N/A for Plaintiff