



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 238 OF 2015

DANIEL MAINA KIRAGU.....PLAINTIFF

-VERSUS-

GEORGE MAINA MURAGE.....DEFENDANT

JUDGMENT

1. The plaintiff herein who claims to have entered into two agreements with the defendant for sale of portions of the parcel of land known as Nyeri/Warazo/250 brought this suit seeking judgment against the defendant for:-

- (a) Specific performance of the contracts executed between himself and the defendant over the suit property, Nyeri/Warazo/250;
- (b) In alternative to prayer (a) above, an order compelling the defendant to refund to him the purchase price in respect of the portions he bought plus liquidated damage in respect thereof;
- (c) Further or in the alternative, damages for breach of the contracts executed between them over portions of the parcel of land herein;
- (d) Costs of the suit;
- (e) Any other and or further orders that this court may deem fit and just to grant.

2. It is the plaintiff's case that vide an agreement for sale of the suit property dated 22nd August, 2011 the defendant agreed to sell and to transfer to him 0.5 acres of land from the suit property at a consideration of Kshs.175,000/=.

3. Vide a second agreement dated 2nd July, 2012 the defendant further agreed to sell and transfer to the plaintiff 1 acre of land from the suit property at a consideration of Kshs.375,000/=.

4. According to the plaintiff it was a term of the agreements referred to in paragraphs 3 and 4 above that in the event of default in his obligations under the agreements referred to herein above, the defendant would refund to him the purchase price plus agreed liquidated damages of Kshs. 43,750/= and 93,750 for the respective agreements including all expenses incurred expenses owing to the breach.

5. It is the plaintiff's case that despite having met his obligations under the agreements executed between them, the defendant failed to meet his obligations and despite demand and notice of intention to sue having been made, failed and/or refused to meet his obligations under the agreements referred to herein above rendering this suit necessary.

6. Despite having been issued with summons to enter appearance, the defendant failed to enter appearance within the time stipulated in the summons.

7. A statement of defence was filed on 10th November, 2015 by the firm of Gori & Ombongi on behalf of the defendant without leave of the court. This firm of advocates applied to cease acting for the defendant on 10th April, 2017 and their application was allowed. By the time the matter was set down for hearing, the defendant had not moved the court to admit his defence filed out of time.

8. On 28th March, 2017 this court directed the plaintiff's advocate to serve the defendant personally with a hearing notice since he was no longer represented by counsel. Despite been served with the hearing notice on 22nd November 2017, when the matter came for hearing, the defendant did not attend court and the hearing proceeded in his absence.

9. During the hearing, the plaintiff relied on his statement filed on 11th September, 2015 and on the list of documents filed on the same date which he produced as Pexbts 1 to 5.

10. At the close of hearing, the plaintiff's advocate filed submissions in which he highlighted the plaintiff's claim and the evidence adduced in support thereof and submitted that the statement of defence filed on behalf of the defendant, was filed out of time and without leave of the court.

11. Arguing that the plaintiff had proved his case against the defendant on a balance of probabilities, the plaintiff's counsel urged the court to allow the plaintiff's suit as prayed.

12. The plaintiff produced the following documents in support of his case;

- (i) Pexbit 1-agreement dated 22.8.2011;
- (ii) Pexbit 2-agreement dated 2.7.2012;
- (iii) Pexbit3-mutual agreement dated 9.7.15;
- (iv) Pexbit 4-acknowledgement dated 23.7.2015; and
- (v) Pexbit 5-demand letter dated 1.9.2015.

13. I have looked at the two agreements between the plaintiff and the defendant dated 22nd August, 2011 produced as Pexbt 1 and 2nd July, 2012 produced as Pexbt 2. From the two agreements, I find that the plaintiff purchased a total of 1.5 acres out of Nyeri/Warazo/250. The total purchase price for the two portions was Kshs.550,000 (Kshs.175,000 for 0.5 acres and Kshs.375,000 for one acre). The plaintiff paid a total of Kshs.586,800 for the two portions leaving a balance of Kshs.54,190 to be paid before the completion date (for purchase of the 1 acre) and a balance of Kshs.10,000 to be paid upon the transfer been effected (for purchase of the 0.5 acre).

14. On 23rd July 2015, the defendant having failed to honour his part of the agreement in transferring the suit property to the plaintiff, gave an undertaking to refund Kshs.587,500/- to the plaintiff being the purchase price of 1.15 Ha out of Nyeri/Warazo/250 failing which he would transfer 1.25 acres to the plaintiff to be hived from LR No. Nyeri Warazo/250 (Pexbt 4).

15. Having considered the uncontroverted evidence of the plaintiff and the exhibits produced, I find the plaintiff has proved his case on a balance of probabilities and is therefore entitled to the orders sought.

16. Ultimately, this court orders that there be specific performance by the transfer of 1.5 acres out of Nyeri/Warazo/250 to the plaintiff. In the alternative, the defendant to refund the plaintiff the purchase price paid of Kshs. 586,800/- plus 25% interest per annum as agreed in the two agreements.

17. Costs of the suit to the plaintiff.

Orders accordingly.

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

L N WAITHAKA

JUDGE

Coram:

Mr. Kinuthia h/b for Mr. Warutere for the plaintiff

Daniel Maina Kiragu – plaintiff

N/A for the defendant

Court assistant - Esther