



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.139 OF 2017

(FORMERLY NAIROBI CIVIL SUIT NO.521 OF 2010)

CHARLES WAMBICHO KINUTHIA.....PLAINTIFF

-VERSUS-

PLANCHEM LIMITED.....DEFENDANT

JUDGEMENT

By an **Amended *Plaint*** dated **30th March 2012**, the Plaintiff herein **Charles Wambicho Kinuthia** prayed for Judgement against the Defendant on the following terms:-

- a) An Order of Specific Performance that the Defendant do transfer plot No.Thika Municipality Block 9/679 to the Plaintiff herein.**
- b) A permanent injunction do issue restraining the Defendant, its agents, servants and employees and people working under it from selling, entering, leasing or any other way interfering with the current status of plot No.Thika Municipality Block 9/679.**
- bi) In the alternative and without prejudice to (a) and (b) above, the Defendant do refund to the Plaintiff all the purchase price paid, liquidated damages and incidental expenses all totaling to the sum of Kshs.1,848,000.00/=**
- c) Costs of the suit and interest on (bi) at court rate from 19th March 2009, the date of the agreement, till payment in full.**

In his statement of claim, the Plaintiff averred that at all material times, the Defendant herein is the lawfully registered proprietor of **Plot No.Thika Municipality Block 9/679**, and by a **Sale Agreement** dated **19th March 2009**, the Defendant sold the said plot to the Plaintiff for a consideration of **Kshs.1,600,000/=**. He also averred that pursuant to the said agreement, the Plaintiff paid **Kshs.1,300,000/=** to the Defendant and the balance of **Kshs.300,000/=** was payable upon removal of restriction put upon the register and also upon finalization of **CMCC No.961 of 2006**. It was also averred that upon payment of the above deposits, the Plaintiff duly took out the financial obligations from a financial institution with the aim of developing the said plot upon transfer.

However, the Defendant has failed to finalize removal of caution and regularization of registration of the suit property even after conclusion of **Thika CMCC No.961 of 2006**. He further alleged that the Defendant attempted to repudiate the Sale Agreement vide a letter dated **1st November 2010**. However, it was his allegation that the Defendant was the one in breach by failing to remove the restriction. Further that there are no valid reasons given for the invalidation of the Sale Agreement but the said act is fraudulent breach and/or default of the said Contract. The Plaintiff therefore urged the Court to allow his claim.

The suit is contested and the Defendant herein **Planchem Ltd** filed its statement of Defence on **10th April 2013** and denied all the allegations made in the claim. The Defendant averred that it was keen on transacting with the Plaintiff but in the cause of the transaction, they discovered that the land in question had been allegedly sold by one **Mwangi Waigwa** to one **Patrick Karanja Ngugi** and the said transaction brought some complication. The Defendant was therefore not able to finalize the said transaction and it instituted **Thika CMCC No.961 of 2006**, seeking an order for cancellation of the alleged transfer of the lease title by **Mwangi Waigwa** to **Patrick Karanja Ngugi**. It further averred that though the Defendant and Plaintiff entered into the **Sale Agreement** dated **9th March 2009**, the Plaintiff was aware of existence of **Thika CMCC No.961 of 2006**.

Further that the Defendant offered to refund the monies paid to it pursuant to the Sale Agreement in issue as the said sale was *void ab initio*, but the Plaintiff declined the offer. It was also contended that the Plaintiff took possession of the suit property without consent of the Defendant which amounted to breach of the terms of the contract, therefore allowing the Defendant to terminate the agreement. Further that the Plaintiff frustrated the process of collecting the title at the Lands Office by causing the relevant documents to be taken away by his agents and/or servants. Therefore the Defendant was within its rights to terminate the agreement after the realization that the agreement was *void*

ab initio and after the Plaintiff took possession of the suit property in breach of the terms of the contract. Further that the Defendant did not fraudulently terminate the contract as its actions were motivated and guided by the very contents of the agreement signed between the parties herein. Further the Defendant denied having received **Demand** and **Notice of Intention to Sue** and urged the Court to dismiss the Plaintiff's suit with costs.

Hearing of the main suit commenced on **12th July 2017**, wherein the Plaintiff gave evidence for himself and called one more witness. The Defendant called one witness to support its position.

Plaintiff's Case

PW1 – Charles Wambicho Kinuthia, the Plaintiff herein adopted fully his witness statement which is dated **27th October 2013**. He averred that one of the **Directors of Planchem Ltd, Rebecca Mwicigi**, whose husband was **George Mwicigi**, and who was unwell at the material time, informed him that she wanted to sell the suit property, **Thika Municipality Block 9/679** to meet the medical expenses and treatment of her ill husband. That the Plaintiff agreed to purchase the suit property for **Kshs.1,600,000/=**. That before the purchase, he was taken to the suit plot by one **Mwaura**, and was also shown the certificate of lease. The land in issue was **0.005 Hectares**. That after he was shown the land and the certificate of lease, he carried a search and noted that there was a caution placed by one **Patrick Karanja Ngugi**, and the suit property was then registered in the name of **Mwangi Waigwa**. He was also informed that there was a case at **Thika Court** being **Thika CMCC No.961 of 2006**, for cancellation of the said title and reverting it to the name of the Defendant. Further that they agreed to carry on with the sale and the purchase price was agreed at **Kshs.1,600,000/=**.

It was his testimony that he first paid **Kshs.500,000/=** by cheque and another **Kshs.280,000/=** which came to a total of **Kshs.780,000/=**. It was his testimony that all this time, the Civil Suit was on-going and the Sale Agreement was signed on **19th March 2009**. The written agreement pointed out the encumbrances. Further, he paid **Rebecca Mwicigi Kshs.200,000/=** and later **Kshs.20,000/=**. The total purchase price paid was **Kshs.1,300,000/=**. The balance of **Kshs.300,000/=** was payable upon removal of the caution. That he deposited building materials on the suit property with the consent of **Rebecca Mwicigi**. Further that the trenches dug on the suit property were for draining rain water but not for construction. He denied ever frustrating the Sale Agreement in issue nor breach the contract. He testified that he was very willing to complete the contract and he urged the Court to allow him complete the contract through an Order of Specific Performance.

It was his further testimony that he was aware that **Thika CMCC No.961 of 2006**, was finalized and the caution was removed on **12th October 2010** and the property reverted to the name of the Defendant. He further stated that the value of the property now is about **Kshs.16,000,000/=** and he stated that in the alternative, the Defendant can pay him damages in the tune of **30%** of the purchase price plus interest at court's rate. He also sought for costs of the suit and interest thereon.

In cross-examination, he admitted that the sale agreement of **19th March 2009**, had no completion date. He denied that he was the one who delayed in completing the transaction.

PW2 – Peter Njoroge Mwaura, told the Court that he recorded his statement on **27th October 2013**, and he adopted it fully as part of his evidence. He also testified that he knows the suit plot herein **Thika Municipality Block 9/679**, and that he also knows one **Rebecca Mwicigi**. That the said **Rebecca Mwicigi**, told him that she wanted to sell the suit property and he in turn informed **PW1** about the said sale. That **Rebecca Mwicigi** was selling the plot because her husband was unwell. Further that the said **Kinuthia (PW1)** bought the parcel of land for **Kshs.1,600,000/=**. He therefore witnessed the signing of the Sale Agreement.

He also testified that there was a caution on the suit property which the parties knew about and there was a case in court seeking removal of the said caution being **Thika CMCC No.961 of 2006**. That **PW1** paid part of the purchase price and the balance was to be completed upon removal of the caution. The said caution on the suit property had been placed by **Patrick Karanja Ngugi**. He also testified that the Plaintiff put materials on the suit property to secure it and that was done with authority of **Rebecca Mwangi**. That the Plaintiff herein did not breach any contract on the contract in issue.

In cross-examination, he admitted that he was just a middle man and not privy to the contract. He did not know what happened after the agreement.

Defendant's Case

DW1 – Rebecca Wanjiru Mwicigi a retired **MCA** stated that she is one of the **Directors** of the Defendant Company. She also stated that she recorded her statement on **21st November 2012**, and adopted it fully as part of her evidence. Further she admitted that the Plaintiff and the Defendant did enter into a Sale Agreement for sale and purchase of **Thika Municipality Block 9/679**, which was owned by the Defendant Company. She testified that the Plaintiff was introduced to her by **Patrick Njoroge Mwaura** and the purchase price was **Kshs.1,600,000/=**. The Plaintiff initially paid **Kshs.780,000/=** and further payment of **Kshs.500,000/=**. The total amount paid was **Kshs.1,280,000/=**. She denied having been paid another **Kshs.20,000/=**. It was her testimony that the agreement was never finalized as there were conditions not fulfilled. That there was **a Civil Suit at Thika Law Courts** being **Thika CMCC No.961 of 2006**, as the suit property had earlier been fraudulently transferred to a third party.

That she had even disclosed the existence of that suit to the Plaintiff.

Eventually the suit property was never transferred to the Plaintiff as many things happened. However before the order to withdraw the caution was registered, the Plaintiff took possession of the suit property before finalizing payment of the purchase price and without her consent. Further the Plaintiff reported the matter to the **Thika Police Station** and she was arrested. Thereafter, she wrote a letter to the Plaintiff and repudiated the Sale Agreement. She offered to refund the purchase price already paid, that is **Kshs.1,280,000/=**. However, the Plaintiff returned the cheques to her. That she has already sold the suit property to a 3rd Party and transfer has been effected. That she is

ready and willing to refund **Kshs.1,280,000/=** and she is not liable to pay penalties as it was the Plaintiff who breached the contract. Further she testified that the Plaintiff is not entitled to any interest or costs of the suit. She urged the Court to compel the Plaintiff to take back his **Kshs.1,280,000/=** which is still in the bank. She also urged the Court to award the Defendant costs of this suit.

The parties thereafter filed their **written submissions** which this Court has carefully read and considered. The Court has also considered the pleadings in general and the evidence adduced in court and the exhibits produced thereon. The Court too has also considered the cited authorities and the relevant provisions of law and it renders itself as follows;-

There is no doubt that the Plaintiff and the Defendant herein did enter into a **Sale Agreement** on **19th March 2009**. The said agreement was over the sale of **Thika Municipality Block 9/679**, which was allegedly owned by the Defendant. However at the time of entering this Sale Agreement, the suit property was registered in the name of **Mwangi Waigwa** who the Defendant had accused of fraudulently transferring the suit property to himself. Further there was a restriction placed on the title by one **Patrick Karanja Ngugi** who had allegedly been sold the suit property by the said **Mwangi Waigwa**. It is also evident that there existed **Civil Suit No.961 of 2006**, which had been filed at **Thika Law Court** by the Defendant herein, seeking cancellation of the registration of the suit land in the name of the said **Mwangi Waigwa**.

From the Sale agreement in issue, it is clear that the Defendant did disclose to the Plaintiff the existence of the said **CMCC No.961 of 2006** at **Thika Law Courts**. Further, the terms of the contract were very clear that the purchaser was to take possession of the suit property upon completion of payment of the purchase price. There is also no doubt that the Plaintiff paid part of the purchase price and the balance was to be paid upon removal of the restriction and that meant upon finalization of **CMCC No.961 of 2006**.

It is also evident that the Sale Agreement was not finalized and the Defendant allegedly repudiated the contract (sale agreement) and attempted to refund the purchase price that had already been paid to her. The Plaintiff declined to accept the refund of the purchase price and filed this suit.

The above being the undisputed facts, the Court finds that the issues for determination are as follow;-

- i) Did the parties herein enter into a valid Sale Agreement?**
- ii) If so, was the said Sale Agreement breached and by whom?**
- iii) Is the Plaintiff entitled to the prayers sought in the Plaint?**
- iv) Who is to bear costs of the suit?**

i) Did the parties herein enter into a valid Sale Agreement?

The parties herein were entering into an agreement for sale of land. As provided by **Section 3** of the **Law of Contract**, such agreement should be in writing. The said Section provides as follows:-

“...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...”

However, the stated contract should adhere to the terms of what entails a valid contract. The contract herein was for sale of **Thika Municipality Block 9/679**. From the said Sale Agreement the Vendor was **Planchem Ltd**, the Defendant herein and the purchaser was **Charles Wambicho Kinuthia**, the Plaintiff herein. The **Sale Agreement** in **paragraph 3** states as follows:-

“Whereas, the vendor is the registered proprietor of all that parcel of land known as and/or otherwise described as Thika Municipality Block 9/679.

However it is very clear that in the **year 2009**, the suit property was registered in the name of **Mwangi Waigwa** and the Vendor (Defendant herein) had filed **CMCC No.961 of 2006** at **Thika Law Courts** seeking for orders that :-

“The 1st Defendant (Mwangi Waigwa)’s lease title in respect to title No.Thika Municipality Block 9/679 be cancelled and the said lease title be re-transferred to the Plaintiff and the 2nd Defendant (Patrick Karanja Ngugi), be ordered to withdraw the restriction registered against the said title...”

Therefore at the time the Sale Agreement in issue was entered, the suit property was not registered in the name of the Defendant herein. In fact a **Decree** in respect of **CMCC No.961 of 2006** was issued on **9th November 2010** and that was almost **one year after** the Sale Agreement

in issue was entered.

Though the Defendant had alleged that the suit property had been fraudulently transferred to the said **Mwangi Waigwa** and the restriction and caveat were wrongly placed by that time by **Patrick Karanja Ngugi**, no court of law had found that allegation to be true and the suit property was in a third party's name. Evidence of ownership of land is through registration documents such as certificate of title. A Vendor can only sell what is rightfully owned by him/her. By the time the Sale Agreement was entered, the suit property was not registered in the name of the Vendor and this Court cannot hold and find that the Vendor then legally owned the suit property and did enter into a valid Sale Agreement. Therefore for the fact that the suit property was not in the name of the alleged Vendor (**Planchem Ltd**), the Defendant herein, then the Court finds that the said Sale Agreement was **null** and **void ab initio**. See the case of **Delphis Bank...Vs...Sanyu Int. Ltd, Nairobi HCCC No.714 of 1995**, where the Court held that:-

“A contract is illegal as formed if its very formation is prohibited and is void ab initio if it is a nullity”.

The parties herein entered into an invalid Sale Agreement as the suit property was not registered in the name of the Vendor at the time of the said Sale Agreement. The said Sale Agreement was therefore a **nullity** and **unenforceable**.

ii) If the said Sale Agreement was valid, was it breached and if so by whom?

The Court has found that the parties did enter into an invalid and unenforceable Sale Agreement. But supposing it was valid, did any of the parties breach it?

It is trite that parties are bound by the terms of their contract and the Court cannot rewrite the contract for parties. See the case of **Emo Investment Ltd...Vs...Stephanus Petrus Kiinge (2010) eKLR**, which quoted the case of **National Oil...VS...Pipeplastic Samkolit (K) Ltd & Prof Samson K. Ongeru (CA No.95 of 1999**, where the Court held that:-

“A court of law cannot rewrite a contract between the parties. The parties are bound by their contract, unless coercion, fraud or undue influence are pleaded and proved”.

If the Sale Agreement in issue was valid, both the Plaintiff and the Defendant were bound by it. It was acknowledged by the parties that the purchaser (Plaintiff) was to pay part of the purchase price upon execution of the Sale Agreement. The Plaintiff averred that he had already paid **Kshs.1,300,000/=** and the balance of **Kshs.300,000/=** was payable upon removal of the restriction on the suit property. The Defendant through **DW1** averred that the Plaintiff had only paid **Kshs.1,280,000/=** and the balance was **Kshs.320,000/=** and Plaintiff had failed to honour his part of the bargain. However, from the **Sale Agreement**, it was stated in **Clause 2(b)** that:-

“The sum of Kshs.520,000/= shall be paid after restriction and transfer documents are completed”.

From the available documents, the restriction was to be removed after the **Decree** in **CMCC No.961 of 2006**, was issued and the produced exhibits shows that the same was removed on **9th November 2010**. The Defendant was to start the process of removal of the restriction after receipt of the **Decree**. There is no evidence whether she informed the Plaintiff that the said restriction had been removed or not. Further **Clause No.7** states that:-

“The purchaser shall take possession of the parcel of land on payment of the full purchase price”.

All the parties have admitted that the Plaintiff had not paid the full purchase price by the time of filing this suit. Though the Sale Agreement had indicated the balance was **Kshs.520,000/=**, the Plaintiff alleged he had a balance of **Kshs.300,000/=** and the Defendant alleged the balance was **Kshs.320,000/=**. Whatever amount of balance, the issue is that the Plaintiff had not paid the balance of purchase price and the Defendant had not provided evidence to him that she had removed the caution. As the Court stated earlier, parties are bound by the terms of their agreement. It was alleged that Plaintiff took possession before payment of the full purchase price. The Plaintiff had admitted to have deposited building materials on the suit property and dug trenches for draining rain water. If Plaintiff had done that, he **breached Clause No.7** of the **Sale Agreement**. The Defendant too breached the Sale Agreement by failing to provide evidence of having removed the restrictions. The Court finds that both the Plaintiff and the Defendant were in breach of the said agreement dated **19th March 2009**. The Sale Agreement did not provide what could happen if both parties were in breach of the said agreement.

iii) Is the Plaintiff entitled to the prayers sought in the Plaintiff?

The Plaintiff has sought for various prayers. However having found that the Sale Agreement herein is invalid, it is therefore unenforceable and the Plaintiff cannot enforce it and therefore he is not entitled to the prayers sought. He has sought for an **Order of Specific Performance** which is an equitable remedy granted at the discretion of the court. The said relief compels the defaulting party to carry out his/her contractual obligation. In the instant suit, the Court has found both the Plaintiff and the Defendant having failed to honour their contractual obligations. Even if the Sale Agreement had been found to be enforceable, the Court would have found it impossible to award the remedy of Specific Performance because the Plaintiff had not honoured his part of the bargain. See the case of **Guidev Singh Birdi & Another...Vs...Abubaker Madhubuti, Civil App. No.165 of 1996**, where the Court held that:-

“A party seeking specific performance must show proof that he has complied with his part of the agreement”.

On the prayer for permanent injunction, restraining the Defendant from dealing with the suit property, the Court finds that the Defendant through **DW1** averred that this suit property has been sold to a third party. If that is the case, then the Court cannot issue any restraining

orders as restraining order is never issued against an event that has already occurred. See the case of Jane Kemunto Mayaka....Vs... Municipal Council of Nakuru & Others, HCCC No.124 of 2005, where the Court held that:-

“Injunctions are issued to prevent the occurrence of an event that has not occurred or that is threatened to occur that would likely injure the Applicant and are not issued where such an event has taken place.....”

Further it is trite that Court Orders are never issued in vain.

On the alternative prayer, the Court finds that the Plaintiff is entitled to refund of the purchase price already paid. However, since the Court found both the Plaintiff and Defendant in breach, the Plaintiff is not entitled to any damages. The Plaintiff alleged that he paid **Kshs.1,300,000/=** to the Defendant and Defendant alleged that he only paid **Kshs.1,280,000/=**. Since there is documentary prove of payment of **Kshs.1,280,000/=**, that is what the Plaintiff is entitled to as refund of the purchase price already paid to the Defendant, plus interest at court's rate from the date of this judgment to payment in full.

iv) Who is entitled to costs of the suit?

Ordinarily costs are awarded at the discretion of the court. Further costs normally follow the event. The Court has found that the Plaintiff is not deserving of prayers sought apart from the refund of the purchase price already paid. Therefore this Court finds that the Plaintiff is not a successful litigant and will not award him costs. The Court directs that each party to bear its own costs.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has not proved his case on a balance of probabilities and consequently, the Court dismisses the Plaintiff's case on prayers No.(a), (b), (c) of the **Amended Plaintiff**. However, the Plaintiff is entitled to refund of **Kshs.1,280,000/=** being the part payment of the purchase price with interest at court's rate from the date of this Judgement to payment in full. Each party to bear its own costs.

It is so ordered.

Dated, Signed and Delivered at Thika this 29th day of June 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Irungu holding brief for Mr. Kimamo for Plaintiff

No appearance for Defendant

Lucy - Court Clerk

L. GACHERU

JUDGE

Court – Judgement read in open court in the presence of Mr. Irungu holding brief for Mr. Kimamo for the Plaintiff and no appearance for the Defendant.

L. GACHERU

JUDGE

29/6/2018