



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC SUIT NO. 442 OF 2009**

**CONSOLIDATED WITH ELC NO.465 OF 2005**

**SIMON KIRUI GATHUNA.....PLAINTIFF**

**VERSUS**

**DAVID KAVUTI GATIMU.....1<sup>ST</sup> DEFENDANT**

**WACIAMA TIMBER HARDWARE LTD...2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

**INTRODUCTION**

1. The first defendant is a director of the second defendant company. The plaintiff had filed ELC 465 of 2005 against the second defendant. The second defendant filed a defence and counter claim in ELC 465 of 2005. The plaintiff later withdrew his claim against the second defendant in ELC 465 of 2005 but the second defendant herein maintained its counter-claim in ELC 465 of 2005. This is what necessitated the consolidation of the two suits.

2. By an amended plaint dated 24<sup>th</sup> July 2013, the plaintiff sought the following reliefs:-

*i. A mandatory injunction requiring the defendant to forthwith vacate the plaintiff's parcel of land known as Dagoretti/Riruta/4957*

*ii. General damages*

*iii. Costs and interest of the suit*

3. By an amended defence and counter claim dated 9<sup>th</sup> July 2008 in ELC 465 of 2005, the second defendant sought the following reliefs:-

*a) That the plaintiff be compelled to take all the necessary steps and execute all the necessary documents to exercise excise transfer the agreed portion of 100x100sq feet of land being the portion currently occupied by the defendant from the plaintiff's land LR. Dagoretti/Riruta/4957 and to transfer the same to the defendant.*

*b) That this Honourable Court do issue temporary injunction restraining the plaintiff by himself, his servants and/or agent from trespassing on the defendant's plot or from evicting the defendant from alienating, transferring, charging, subdividing, surveying or in any manner interfering with peaceful possession of the defendant's portion of land measuring 100x100sq feet or the defendant's operations till disposal of this suit or until otherwise directed by this Honourable Court.*

*c) That the Honourable Court be pleased to extend the time within which the parties herein may obtain Land Control Board Consent to this sale transaction.*

*d) That failure of the plaintiff to take all necessary steps to complete this transaction including subdivision and transfer within the extended time, the Deputy Registrar of this Honourable Court be mandated to do each and everything necessary action and sign all documents necessary to complete this transaction and transfer the portion subject matter of this suit to the defendant.*

***e) Costs of this suit be provided for.***

4. The first defendant was a tenant of the plaintiff on the plaintiff's land which was originally known as **LR Dagoretti/Riruta/3932**. The first defendant entered into a tenancy agreement with the plaintiff on 20<sup>th</sup> March 1998. Five years later, the plaintiff expressed his intention to sell a portion of the area occupied by the first defendant. The plaintiff entered into a sale agreement with the second defendant for sale of a portion measuring 100x100 feet. The agreement was entered into on 28<sup>th</sup> October 2003.

5. The purchase price was agreed at Kshs.1,400,000/=. Though the sale agreement showed that the sold portion was from LR No.Dagoretti/Riruta/3932, the truth of the matter was that the said title had been closed on subdivision and two new titles given in 2001 as LR Dagoretti/ Riruta/4957 measuring 0.33 hectares and Dagoretti/ Riruta/4956 measuring 0.10 hectares . The portion being claimed by the defendants is on LR. Dagoretti/ Riruta/4957.

**PLAINTIFF'S CASE**

6. The plaintiff testified that the first defendant used to be his tenant on LR No.Dagoretti/Riruta/3932. The plaintiff wanted to sell the land which had been leased by the first defendant. The first defendant expressed interest in the same. The plaintiff agreed to sell him a portion measuring 100x100 ft . The first defendant started paying him in instalments. As at the time when the plaintiff and the first defendant went to a lawyer to draw an agreement, the plaintiff had already been paid Kshs.370,000/=. On execution of sale agreement, an additional sum of Kshs.200,000/= was made. The balance of the purchase price was to be made by 30<sup>th</sup> June 2004.

7. The first defendant made a criminal complaint against the plaintiff which culminated in the plaintiff being arraigned in court where he was charged with the offence of obtaining money by false pretences. The plaintiff was subsequently acquitted of the charges. The plaintiff showed the first defendant a portion where he was to give him but the first defendant declined to take that portion. The plaintiff then went to the first defendant's lawyer where he rescinded the agreement which he had entered into. He asked the first defendant to take a refund of what he had paid but the first defendant declined to take the refund.

**DEFENDANTS CASE.**

8. The defendants stated their case through the first defendant who stated that he entered into an agreement with the plaintiff for purchase of a portion measuring 100x100 sq ft from the plaintiff's property which he had been leasing from the plaintiff. The purchase price was Kshs.1,400,000/=. The plaintiff was paid in instalments. As at the time a formal agreement was made, the plaintiff had been paid Kshs.370,000/=. The first defendant made a further payment of Kshs.200,000/=on execution of the agreement. Further payments were made totalling to Kshs.1,000,000/=.

9. Two months to the completion date, the first defendant asked the plaintiff to accompany him to their common lawyer to make a final payment. The plaintiff declined to do so. The first defendant left the Kshs.400,000 with the lawyers and asked the plaintiff to pick it up but the plaintiff did not do so. The first defendant has constructed permanent houses on the portion he purchased and he is living there. The first defendant has spent about Kshs.5,000,000/= to develop the property which he had purchased.

**ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION.**

10. I have considered the evidence adduced by the plaintiff and the defendants as well as the submission by the parties to this suit. The issues which emerge for determination are as follows:-

- i. How much did the plaintiff receive from the defendants towards the purchase price.***
- ii. Is the portion which the defendants purchased non-existent?***
- iii. Was the sale agreement signed between the second defendant and the plaintiff valid?***
- iv. Whether the sale agreement is void for want of consent of the Land Control Board.***
- v. Are the defendants entitled to an order of specific performance?***
- vi. Who is to bear the costs of the two suits?***

**How much did the plaintiff receive from the defendants towards the purchase price.**

11. There is no contention that the purchase price was Kshs.1,400,000/=. The Plaintiff had received Kshs.370,000/= prior to signing of the agreement. The plaintiff received a further payment of Kshs.200,000/= on execution of the agreement making a total of Kshs.570,000/= . The first defendant in his evidence stated that the plaintiff at times could get paid by his wife or himself. In all the plaintiff received Kshs.1,000,000/=. This is clear from the plaintiff's lawyer's letter dated 8<sup>th</sup> April 2005 in which the plaintiff's lawyers confirmed that the plaintiff had already received Kshs.1,000,000/= and that the plaintiff's lawyers were aware that the balance of Kshs.400,000/= was with the first defendant's advocate. It is therefore clear that the plaintiff had received Kshs.1,000,000/= from the defendants. The balance of Kshs.400,000/= was deposited with the first defendant's lawyer and the plaintiff was duly asked to collect the same but he has not done so to date.

**Is the portion which the defendants purchased non-existent?**

12. As I pointed out in the introductory part of this judgement, the plot which the 2<sup>nd</sup> defendant purchased through the first defendant was described as a portion measuring 100x100ft out of LR Dagoretti/Riruta/3932. There is evidence that the first defendant had leased the plot which he later decided to purchase in his company's name. He had leased the particular portion as from 1998. As at the time of lease, the land part of which he had leased was on LR Dagoretti/Riruta/3932. This parcel was later subdivided and the portion where the first defendant had leased became LR Dagoretti/Riruta/4957. The second defendant was purchasing the portion with the improvements erected and being thereon. The subdivision was carried out in 2001. The agreement was made in 2003. It was therefore clear that title No. LR Dagoretti/Riruta/3932. was non-existent as it had ceased to exist on subdivision but the specific portion which the second defendant purchased was still there and that is the portion which fell on No. LR Dagoretti/Riruta/4957 which is the subject of this suit. The plaintiff cannot therefore claim that the second defendant purchased a non-existent land. If the second defendant bought a non-existent land, why are the defendants being asked to vacate from LR No. Dagoretti/Riruta/4957.

13. It is clear that LR No. Dagoretti/Riruta/4957 is bigger than what the defendants are occupying. The defendants are not claiming the whole of it. They are claiming a plot measuring 100x100ft which they purchased. This portion is identifiable and can be excised from LR No. Dagoretti/Riruta/4957.

**Was the sale agreement signed between the plaintiff and the second defendant valid?**

14. The plaintiff is raising the issue of the agreement not being sealed with the company seal for the first time in submissions. The issue of the agreement not being sealed with the company seal never arose in the pleadings and this issue cannot be raised in submissions. Parties are bound by their pleadings and if a matter is not raised in the pleadings or evidence, it cannot be raised in submissions. In the case of **Global Vehicles Limited Vs Lenana Road Motors (2015) eKLR** the Court of Appeal held this to say regarding unpleaded issues:-

*“ Again we must emphasize that the respondent was obliged , if its defence was that the agreements were not duly executed or were otherwise vitiated, to plead the same and give particulars of the facts vitiating the agreement. That was never done. The issue of the validity of the agreements was not raised expressly or even obliquely by any parties in their pleadings. Order 2 Rule 4 of the Civil Procedure Rules obliged the respondent to specifically plead facts , which it alleged made the appellant's claim unmaintainable. This, the respondent did not do so, and having failed to satisfy the requirements as to pleadings it could not purport to lead evidence to prove facts that were contrary to its pleadings. It was clearly misdirection on the part of the judge to rely on issues that were not pleaded and constitute them the basis upon which the suit turned.”.*

The plaintiff has all along recognised the agreement the basis of which he received payments. He is now estopped from attacking it on grounds that it was not sealed with the company seal. I find that the agreement signed by the first plaintiff on behalf of the second defendant was valid.

**Whether the sale agreement is void for want of consent of the Land Control Board.**

15. There was no evidence adduced by the plaintiff to show that the land in issue falls within an agricultural area which is subject to consent of the Land Control Board. However be that as it may, I can see from the prayers in the counter-claim, the defendants are seeking extension of time for obtaining consent of the Land Control Board. The land in issue may therefore be subject to consent of Land Control Board. It is clear that no consent of the Land Control Board was applied for within six months from the time the agreement was made. This notwithstanding, section 8 of the Land Control Act gives this court power to extend the period if there is sufficient reason to do so.

16. In the instant case, the second defendant has made an application for extension of the period in the counter-claim. The reason why the application for consent was not made within the stipulated time is clear. There are still outstanding issues to be sorted out before such an application to the Boards can be made. Since I have power to extend the period and there is reason for doing so, I will do so shortly in this judgement. I therefore find that the transaction herein is not void for want of consent of the Land Control Board.

**Are the defendants entitled to an order of specific performance?**

17. The evidence of the defendants is that the plaintiff had been paid a total of Kshs.1,000,000/=. The balance of Kshs.400,000/ was available two months prior to completion date of 30<sup>th</sup> June 2004. The first defendant in his testimony in court is clear that he deposited the balance at the offices of their common lawyer and the plaintiff was asked to collect the money from their common lawyer. There is a letter dated 8<sup>th</sup> July 2004 asking the plaintiff to collect the money which had been deposited with Messers Alex Karanja & Co. Advocates. This letter goes to confirm the evidence of the first defendant that indeed he deposited the kshs.400,000/- prior to completion date. This evidence was not shaken even during cross – examination of the first defendant.

18. The plaintiff had sworn an affidavit in ELC 465 of 2005. This affidavit was sworn on 21<sup>st</sup> April 2005. It was even produced in evidence in the criminal case which the plaintiff faced. In this affidavit, the plaintiff had clearly stated that M/s Alex Karanja & Co. Advocates was their common Advocates and that he was aware that Kshs.400,000/= had been deposited there for his collection. The plaintiff's only reason for not going to pick the money is that the first defendant had made a criminal complaint against him which resulted in his arraignment in court.

19. The plaintiff purported to rescind the agreement vide letter dated 8<sup>th</sup> April 2005. Time in the instant case was not of essence in this case. If the plaintiff wanted to rescind the agreement he should have issued notice making time of essence in which case he should have asked the defendants to comply within a certain period and as the agreement herein was subject to the Law Society of Kenya conditions of sale, that notice should have been a 21 days notice . In the case of **Sisto Wambugu Vs Kamau Njuguna ( 1983) eKLR Justice Chesoni JA** as he then was stated as follows:-

*“ I have been unable to get the case of Roberts Vs Wyatt (1810) 2 Tannt 268 cited at 9 Halsbury's Laws of England ( 4<sup>th</sup> Edition)*

***P 366, paragraph 532 F2 but the relevant statement says that contracts for sale of the land commonly give the vendor the right to rescind the sale if the purchaser does not pay on the appointed day. The law is that this right can only be exercised where time is of essence or if it is not, after the party who is not at fault has given reasonable notice to the defaulting party making time of the essence. The position is explained by the following passage: Halsbury's Laws of England (Idid) paragraph 485:***

***“ In cases where time is not originally of the essence of the contract, or where stipulation making time of the essence has been waived, time may be made of essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance and stating that in the vent of non-performance within the time so fixed, he intends to treat the contract as broken”.***

20. As at the time of the purported rescission, the plaintiff was well aware that the balance was available for collection. His only reason for purporting to rescind the agreement was that the first defendant had made a criminal complaint against him. The criminal case came in the year 2005. The balance of the purchase price was available before the end of the appointed time for payment. The plaintiff had been notified of the availability of the balance in writing on 8<sup>th</sup> July 2004. I therefore find that the defendant in ELC 465 of 2005 is entitled to an order of specific performance.

## **CONCLUSION**

21. Having analysed the evidence adduced herein, I find that the plaintiff in ELC No.442 of 2009 has failed to prove his case which is hereby dismissed with costs to the defendants. On the other hand I find that the defendant in ELC 465 of 2005 has proved its claim on a balance of probabilities. I enter judgement in favour of the defendant in the counter-claim as follows:-

***a. The plaintiff is hereby compelled to take all necessary steps and execute all necessary documents to excise and transfer the agreed portion of 100x 100 sq feet of land being currently occupied by the defendant from the plaintiffs land known LR No.Dagoretti/ Riruta/4957 and transfer the same to the defendant.***

***b. The period for applying for consent of the Land Control Board is hereby extended by a period of six months.***

***c. If the plaintiff does not take all the necessary steps to complete the transaction including subdivision and transfer within the extended time, the Deputy Registrar of this Court is hereby mandated to sign all necessary documents to ensure that a plot measuring 100x100ft is excised from LR No.Dagoretti/ Riruta/4957 and transferred to the defendant.***

***d. Plaintiff to pay costs of this suit to defendant.***

Dated, Signed and delivered at Nairobi on this 26<sup>th</sup> day of July 2018.

**E.O.OBAGA**

**JUDGE**

In the presence of :-

Mr Angwenyi for Mr Nyakiangana for Plaintiff

M/s Chege for Defendants

Court Clerk: Hilda

**E.O.OBAGA**

**JUDGE** \_\_\_\_\_