



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 645 OF 2012**

**EMMANUEL NGOLANYA SIMU.....PLAINTIFF**

**VERSUS**

**JANE NDUTA NJOROGE.....DEFENDANT**

**JUDGMENT**

The plaintiff's case is that sometimes in the year 1989, he entered into an agreement with the defendant under which the defendant agreed to sell to him a portion measuring one (1) acre of all that parcel of land known as L.R No. 13460/9 situated at Karen (hereinafter referred to as "the suit property"). The plaintiff has contended that the suit property was sold to him at Kshs.250,000/= of which he was required to pay a sum of Kshs.100,000/= on the execution of the agreement for sale and the balance thereof within seven (7) days of the transfer of the property to his name.

The plaintiff has contended that upon signing the agreement for sale, he paid to the defendant Kshs.100,000/= and took possession of the suit property on which he constructed a two roomed semi permanent house. The plaintiff has averred that he has continued in possession of the suit property awaiting transfer of the same to his name as aforesaid. The plaintiff has contended that he has always been ready and willing to complete the agreement for sale but the defendant has been evasive on the issue. The plaintiff has averred that despite demand and notice of intention to sue the defendant has refused to perform her part of the said agreement for sale.

At the trial, the plaintiff (PW2) told the court that he entered into the said agreement for sale with the defendant in August, 1989 before an advocate by the name Njora Waweru and it was agreed that he would pay a deposit of Kshs.100,000/= upon the execution of the agreement and the balance of the purchase price after the property was transferred to him. He stated that he paid a sum of Kshs.100,000/= to the defendant in cash after which he took possession of the suit property and put up a two (2) roomed temporary house for a caretaker. He stated that he also planted trees.

The plaintiff stated further that he engaged a surveyor and sub-divided L.R No. 13460/9 so that he could have a title for the suit property. He stated that L.R No. 13460/9 was registered in the name of the defendant and one, Grace Nduta Kamau and that the defendant and the said co-owner of L.R No. 13460/9 co-operated with him in the sub-division of the said property. He stated that upon sub-division, the suit property was assigned L.R No. 13460/39. He stated that the defendant refused to transfer the suit property to him without giving any reason. He stated further that he decided to come to court when the defendant entered the suit property and started destroying the fence he had put up around the property. He stated that he delayed in coming to court because the defendant kept promising him that she would transfer the suit property to him. The plaintiff denied that the purchase price they agreed on with the defendant was Kshs.540,000/= and that he failed to pay the balance of the purchase price to the defendant. The plaintiff produced in evidence among others, copies of, Certificate of Title No. I.R 4900 for LR No. 13460/9, agreement for sale dated 4<sup>th</sup> August, 1989, a letter dated 20<sup>th</sup> June, 1992 by the defendant and the co-owner of L.R No. 13460/9, Grace Nduta authorizing the sub-division of L.R No. 13460/9 into three (3) portions, rent clearance certificate dated 5<sup>th</sup> August, 1993 and Deed Plan No. 175185 dated 23<sup>rd</sup> July, 1993 for L.R No. 13460/39.

PW1, PW3 and PW4 corroborated the plaintiff's evidence. PW1 told the court that she was allowed by the plaintiff to stay on the suit property in the two (2) roomed house that the plaintiff had constructed thereon and that she used to cultivate the property. PW3 who was the plaintiff's wife was the one who introduced the plaintiff to the defendant with whom they had been friends for a long time. She corroborated the plaintiff's evidence that the plaintiff and the defendant entered into an agreement for the purchase of the suit property at a consideration of Kshs.250,000/= and that the plaintiff paid to the defendant a sum of Kshs.100,000/= and was to pay the balance upon transfer. PW3 confirmed that the defendant and the co-owner of the suit property, Grace Nduta Kamau who was also known to her co-operated with the plaintiff in the subdivision of L.R No. LR No. 13460/9 into three (3) portions, an exercise that went on until 1993. She stated that it was after the sub-division of L.R No. 13460/9 was completed in 1993 that the defendant allowed the plaintiff to take possession of the suit property. She stated that after taking possession, the plaintiff fenced the suit property and planted cypress trees thereon. She stated that the plaintiff also built a temporary house on the property which was occupied by a caretaker as they assembled building materials to commence construction of a permanent house on the property. PW3 stated that the plaintiff kept following the defendant for the transfer but each time the defendant would promise that she would transfer the suit property to the plaintiff. She stated that it was after the defendant failed to keep her promises that the plaintiff decided to come to court. She stated that the plaintiff occupied the suit property immediately the survey was completed with permission of the defendant. She denied that the purchase price for the suit property was Kshs.540,000/=. PW4 who is an

advocate of the High Court confirmed that he witnessed the agreement for sale between the plaintiff and the defendant.

In her defence to the plaintiff's claim, the defendant admitted that she entered into an agreement for sale of the suit property with the plaintiff. She however denied the terms of the said agreement as presented by the plaintiff. The defendant contended that the agreement between her and plaintiff was verbal and that the purchase price agreed on was Kshs.540,000/= and not Kshs.250,000/= as claimed by the plaintiff and PW3. The defendant admitted that the plaintiff paid Kshs.100,000/= as a deposit. She contended that she did not transfer the suit property to the plaintiff as a result of the plaintiff's failure to pay the balance of the purchase price in the sum of Kshs.440,000/= which the plaintiff was required to pay by the end of the year of their verbal agreement. The defendant denied that any demand or notice of intention to sue was served upon her by the plaintiff. The defendant contended further that the plaintiff's claim was bad in law and incurably defective.

At the hearing, the defendant told the court that L.R No. 13460/9 measures 10 acres and that she owns 90% share of the said property while, one Grace Nduta Kamau owns 10% share thereof. She told the court that Grace Nduta Kamau is deceased. She admitted that the plaintiff and his wife (PW3) were known to her having lived in her house as tenants. She stated that in 1989 at the request of the plaintiff she agreed to sell to the plaintiff a portion of her share in L.R No. 13460/9 measuring 1 acre at a consideration of Kshs.540,000/= of which the plaintiff was to pay a deposit of Kshs.100,000/= leaving a balance of Kshs.440,000/= that he was to pay at the end of that year. She stated that the plaintiff paid to her Kshs.100,000/= but failed to pay the balance of the purchase price. She stated that the portion of L.R No. 13460/9 that she sold to the plaintiff ("the suit property") had a structure that was occupied by a servant who used to work for her on the farm and that the said servant continued in occupation even after the property was sold to the plaintiff. The defendant denied that she entered into a written agreement with the plaintiff. She denied her alleged identity card number and signature in the agreement for sale dated 4<sup>th</sup> August, 1989 that was produced by the plaintiff in evidence. The defendant also denied that she appeared before an advocate to sign the said agreement. She stated that after the sub-division of L.R No. 13460/9, the plaintiff ceased to stay in her premises and as such she did not know where to get him to claim the balance of the purchase price. The defendant stated that in addition to the structure that she had put up on the suit property that was occupied by her servant (PW1), the plaintiff also put up a two (2) roomed temporary structure on the property after the filing of this suit.

The defendant produced in evidence as exhibits, photographs showing the structure she had put up on the suit property and the structure the plaintiff said to have constructed after the filing of the suit. The defendant also produced in evidence a copy of the certificate of title for L.R No. 13460/9. The defendant told the court that the original certificate of title got lost when her house was invaded by robbers in 1985. She produced a police abstract of the report that she made about the loss of the said title. The defendant also produced a copy of the announcement of the death and funeral of Grace Nduta Kamau that appeared in the newspaper on 17<sup>th</sup> January, 2005 and copies of the Nairobi City County rates demand notices and receipts for the payments made up to 2015.

After the close of evidence, the advocates for the parties filed written submissions. The plaintiff filed his submissions on 21<sup>st</sup> September, 2017 while the defendant filed her submissions on 15<sup>th</sup> November, 2017. I have considered the parties respective cases as pleaded, the evidence tendered in proof thereof and the closing submissions. On 2<sup>nd</sup> August, 2015 the parties agreed on and filed in court a list of issues they wished the court to determine. The following are the issues that were agreed upon by the parties:

1. Did the parties enter into oral or written agreement for the purchase of the suit property?
2. Has the plaintiff paid part of the purchase price to the defendant?
3. What type of agreement was entered into by the parties?
4. What were the terms of the agreement?
5. Did the plaintiff take possession of the suit property?
6. Has the defendant frustrated the completion of the agreement between the parties?
7. Is there a breach of the agreement and if so by who?
8. Has demand been made?
9. Who shall bear the costs of the suit?

The foregoing issues capture to a large extent the questions arising for determination in this suit. I will however add one more issue which is raised in the pleadings and submissions by the parties namely, whether the plaintiff is entitled to an order for specific performance of the agreement? These issues can be summarised follows:

1. Did the plaintiff and the defendant enter into a written or verbal agreement for sale of L.R No. 13460/39 ("the suit property")?
2. What were the terms of the agreement between the parties?
3. Did the plaintiff take possession of the suit property?
4. Did the defendant breach the agreement for sale?

5. Is the plaintiff entitled to specific performance of the agreement?

6. Who shall bear the costs of the suit?

**Whether the agreement between the plaintiff and the defendant was written or verbal:**

It was not disputed that the plaintiff and the defendant entered into an agreement for the sale of the suit property. What was in dispute was the nature of the agreement and its terms. The plaintiff's position was that he entered into a written agreement with the defendant on 4<sup>th</sup> August, 1989 that was witnessed by an advocate. The defendant on the other hand maintained that the agreement between her and the plaintiff was verbal and that she did not appear before an advocate in respect of the agreement. On the evidence before me, it is my finding that the agreement between the plaintiff and the defendant was written. The plaintiff produced in evidence (P.Exh.1) a written agreement for sale dated 4<sup>th</sup> August, 1989 between him and the defendant. The agreement bears the parties' identity card numbers and signatures. The signatures in the agreement are witnessed by an advocate one, Njora Waweru (PW4). Although the defendant denied having signed the agreement and also denied the identity card number in the agreement that was said to be hers, the defendant did not place any evidence before the court to challenge what was claimed to be her signature and identity card number in the said agreement. The defendant did not place before the court evidence showing that her signature on the said agreement was forged. The defendant did not also tell the court the number of the identity card that she was using in 1989. The evidence tendered by the defendant on these issues was mere denial. The plaintiff having produced an agreement for sale bearing what was said to be the defendant's signature and identity card number and also tendered evidence through PW3 and PW4 who testified that they saw the defendant signing the said agreement, the burden shifted to the defendant to prove that the signature and identity card number on the said agreement did not belong to her. In the absence of evidence of forgery, the evidence tendered by the plaintiff on the execution of the said agreement by the defendant remains unshaken. Due to the foregoing, my answer to the first issue is that, the parties entered into a written agreement on 4<sup>th</sup> August, 1989.

**What were the terms of the agreement between the parties?**

According to the plaintiff, the terms of the agreement he entered into with the defendant were set out in the agreement for sale dated 4<sup>th</sup> August, 1989 that I have referred to earlier. The purchase price for the suit property was Kshs.250,000/= of which he was to pay Kshs.100,000/= on the execution of the agreement and the balance within 7 days of registration of the property in his name. These terms were confirmed by the testimony of PW3 and PW4. The defendant had contended that the purchase price for the suit property was Kshs.540,000/= of which Kshs.100,000/= was to be paid upon the execution of the agreement and the balance by the end of 1989. Having held that the written agreement dated 4<sup>th</sup> August, 1989 was the agreement the parties entered into, I find no basis for the defendant's alleged terms and conditions of sale which are not part of that agreement. It is my finding therefore that the terms and conditions of sale of the suit property by the defendant to the plaintiff were set out in the agreement for sale dated 4<sup>th</sup> August, 1989.

**Whether the plaintiff took possession of the suit property:**

On the evidence before me, I am satisfied that the defendant gave possession of the suit property to the plaintiff. There is uncontroverted evidence that the plaintiff planted trees on the suit property and also brought building materials to the property with the intention of constructing a permanent house thereon. PW1 who used to be an employee of the defendant told the court that she was in occupation of the suit property with the permission of the plaintiff. Commenting on the evidence of PW1, the defendant stated that:

**“I am the one who gave PW1 to the plaintiff. PW1 used to work for me. When the plaintiff purchased the portion of land on which the structure which was occupied by PW1 was situated, I asked him to allow PW1 to continue occupying the structure. That is how PW1 came to work for the plaintiff.”**

This is a clear admission that the defendant had given the plaintiff possession of the suit property and that it was the plaintiff who was exercising authority over the property. My answer to the third issue is in the affirmative.

**Whether the agreement dated 4<sup>th</sup> August, 1989 was breached by the defendant:**

It was common ground that the agreement between the plaintiff and the defendant was breached. The dispute was over who caused the breach. The plaintiff accused the defendant of the breach and the defendant did vice versa. On the evidence before me, I am satisfied that the plaintiff fulfilled his obligations under the agreement for sale dated 4<sup>th</sup> August, 1989. He paid to the defendant a deposit in the sum of Kshs.100,000/= and also surveyed and subdivided L.R. No. 13460/9. What remained was for the defendant to transfer to him the suit property so that he could pay the balance of the purchase price. As I have stated earlier in this judgment, the defendant contended that he was waiting for the plaintiff to pay the balance of the purchase price in the sum of Kshs.440,000/= before transferring the suit property in his favour. This contention as I have observed had no basis. The balance of the purchase price according to the agreement between the parties was Kshs.150,000/= and the same was not payable until the property was transferred to the plaintiff. There is no doubt from the foregoing that the defendant failed to fulfill her part of the agreement for sale.

Can it be said however that the defendant breached the agreement for sale dated 4<sup>th</sup> August, 1989? The answer is no. The agreement between the parties was subject to the Law Society Conditions of Sale. The agreement did not provide that time was to be of essence in respect of the contractual completion date. In the circumstances, time was to be made of the essence through service of a completion notice under condition 4(6) of the said Conditions of Sale. Condition 4(6)(b) of the Law Society Conditions of Sale provides that if the sale is not completed on the contractual completion date, a party who is ready, able and willing to complete the agreement is to serve on the defaulting party a notice to complete the transaction. Condition 4(6) (c) of the said Conditions of Sale provides that once that notice is served, the agreement must be completed within 21 days and time becomes of essence. It is after service of the completion notice and the party in default's failure to comply within the said 21 days that the party is said to be in breach of the agreement and it is this breach that entitles the innocent party to pursue the remedies that are provided for under the said conditions of sale. Although the plaintiff claimed that he was ready and willing to

complete the agreement between him and the defendant, the plaintiff did not place any evidence before the court that he served the defendant with a completion notice and that the defendant failed to comply with the same. The plaintiff did not even serve the defendant with a demand letter before filing this suit. In the absence of a completion notice and the defendant's failure to comply with the same, it is my finding that the defendant did not breach the agreement for sale dated 4<sup>th</sup> August, 1989.

**Whether the plaintiff is entitled to specific performance:**

In view of my finding above, this issue must be answered in the negative. For the plaintiff to be entitled to an order for specific performance, he had to prove that the defendant was in breach of the agreement for sale. The plaintiff could only sue for specific performance under Condition 4(6) (f) of the Law Society Conditions of Sale if the defendant failed to comply with a completion notice issued under Condition 4(6) (b). In the absence of such notice there is no evidence before the court that the plaintiff was ready, able and willing to complete the agreement so as to be entitled to an order for specific performance. I wish to add that even if the plaintiff had established that the defendant was in breach of the agreement for sale, I would still not have made an order for specific performance. Specific performance is a discretionary remedy. Even where the conditions for grant of the order are met, the court can still decline to issue the order if in the circumstances of the case, it would not be appropriate to do so. In the circumstance of this case, I am of the view that two factors militate against the grant of an order for specific performance. First, the plaintiff has come to court after inordinate delay to enforce his rights. The evidence on record shows that L.R No. 13460/9 was subdivided in 1993 to give rise to the suit property. As from 1993, the defendant was supposed to transfer the suit property to the plaintiff and if she failed to do so, the plaintiff was at liberty to come to court for specific performance. The plaintiff brought this suit in 2012 after a period of 19 years after his right to seek specific performance had accrued. In the circumstances, I am of the view that the plaintiff is guilty of laches and as such not entitled to this court's discretionary remedy of specific performance.

The second factor that would deny the plaintiff an order for specific performance is the death of the co-owner of the suit property, Grace Nduta Kamau with whom the defendant could have transferred the property to the plaintiff. It is not clear whether the estate of Grace Nduta Kamau would be willing to transfer the suit property to the plaintiff. Even if I was to make the order, the order would not be enforceable because the suit property is co-owned with Grace Nduta Kamau deceased in undivided shares and the defendant alone cannot transfer the property to the plaintiff without the involvement of the estate of Grace Nduta Kamau which is not a party to this suit. A court of law cannot make an order in vain and would resist any urge to do so.

**Who is liable to pay the costs of the suit?**

Costs normally follow the event. However, the court has discretion in the matter. Although the defendant has emerged as the winner, I am of the view that she contributed to the filing of this suit. The suit would not have become necessary if the defendant had performed her part of the agreement for sale. The defendant's conduct disentitles her to the costs of the suit. In the circumstances, I am of the view that each party should bear its own costs of the suit.

Conclusion:

In conclusion, the plaintiff's suit fails and the same is dismissed with each party bearing its own costs. It is so ordered.

**Delivered and Dated at Nairobi this 19<sup>th</sup> Day of July 2018**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in presence of:**

Mr.Kivuva h/b for Mr. Gichomo for the Plaintiff

N/A for the Defendant

Catherine Court Assistant