



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC SUIT NO. 242 OF 2015

FRED I.M IMBATU.....PLAINTIFF

VERSUS

RASHID K. TOO.....DEFENDANT

JUDGMENT

By a plaint dated 30th July 2015 the plaintiff sued the defendant seeking for the following orders:

- a) Specific performance compelling the defendant to subdivide land parcel known as KAPKANGANI/KAIMOSI/1924 and transfer the disputed portion measuring 3.8 acres to the plaintiff.
- b) An order that the Deputy Registrar of the Honourable Court be granted authority to sign the documents for and on behalf of the defendant which will be necessary to give effect of specific performance in the event that the defendant fails to do so.
- c) Costs occasioned by or incidental to this suit be recovered from the defendant.

Plaintiff's Case

The plaintiff gave evidence and adopted his statement and list of documents that had been filed in court on 28th August 2015. It was his evidence that he entered into a sale agreement with the defendant for the purchase of 15 acres to be excised from parcel No. KAPKANGANI/KAIMOSI/380 for a consideration of Kshs. 500,000/ per acres totaling Kshs. 7.5million which amount was paid in full.

The plaintiff stated that he had secured a bank loan to purchase the land where he projected to set up agriculture production unit with direct outlet to a road for marketing. He further stated that the defendant denied him a portion that projects to the main road measuring 3.8 acres that would make 15 acres.

It was the plaintiff's evidence that on 27th December 2013 the defendant came up with a new agreement to vary the acreage from 15 to 12 acres of which the plaintiff declined and that the defendant did not offer any reason for the variation. He stated that the defendant assured him that he would honour the earlier agreement and went ahead and subdivided the land and transferred to the plaintiff parcel No. KAPKANGANI/KAIMOSI/1925. The plaintiff further testified that he became suspicious when he learnt that the defendant was offering for sale the land that he had already sold to the plaintiff. The plaintiff therefore engaged the services of government and private surveyors who confirmed that the defendant had retained in his name a portion measuring 3.8 acres which connect land parcel No. 1925 to the road thereby undermining the purpose for which the plaintiff bought the land.

The plaintiff stated that he gave instructions to his lawyer who wrote a letter to the defendant but the defendant insisted that he would refund the money paid for the 3 acres. He also stated that he applied to the land Control Board for consent but the defendant has been uncooperative. He therefore prayed for an order for specific performance and costs of the suit.

On cross examination by the defendant's advocate the plaintiff stated that he went with a surveyor on the ground and established that the land was measuring 11.2 acres while the mutation form stated 12 acres. He also stated that he did not agree on any refund as suggested by the defendant. He stated that he could not take a refund as the purpose for buying the land would be frustrated without an access road.

On reexamination the plaintiff stated that he did not forgo his remaining 3 acres when he accepted the 12acres.

PW 2 testified and stated that he is a government surveyor based in Nandi County and was aware of the dispute before the court. He testified that in the course of his duty he met the plaintiff and the defendant also sent his representative to the suit land. It was his evidence that he had received a letter dated 13th October 2014 from the DCIO Nandi Central by the name Samson Thoya to visit the suit parcel of land and ascertain the acreage for their investigation purposes.

It was PW 2's evidence that the complainant was Rashid Too the defendant herein who had sold 15 acres to the plaintiff Fred Imbatu and that a private surveyor had carried out a survey which he was not satisfied with. He stated that he summoned the parties and informed them that he would carry out a survey on 28th October 2014 and both the plaintiff and the defendant's representative were present. It was his testimony that he did the measurement and found out that the acreage was 4.53 Hectares which is equivalent to 11.20 acres. He also stated that the registration at the Lands office gave a different figure of 4.86 Ha which is equivalent to 12 acres leaving a deficit of 3.80 acres. PW 2 therefore stated that he prepared a report and forwarded to the DCIO Nandi County and produced a copy of the report in court.

The plaintiff therefore closed his case. Counsel for the defendant asked the court to order the close of the defence case as they were not present yet the date was taken by consent. The court gave the order closing the defence case and fixed a mention date for filing of written submissions. Before this was done, the defendant made an application for reopening the defence case which application was allowed to give the defendant an opportunity to tender his evidence.

On the date of defence hearing K K ARAP SEGO & CO Advocates filed a memorandum of appearance for intended interested parties. Mr Musiega Counsel for the plaintiff submitted that pleadings in this matter closed long time ago and the proposed interested parties did not file an application to be allowed to join the case. He urged the court to expunge the memorandum of appearance filed by K K ARAP SEGO & CO Advocates from the court records.

Mr. Oduor Counsel for the defendant also aligned himself with the sentiments of Mr. Musiega for the plaintiff and urged the court to expunge the memo from the court records.

The court gave a ruling that it is clear that if a party wants to be enjoined in a suit then they must make a formal application stating their interest in the suit and no such application was made. Court also ruled that Counsel cannot talk from the bar that he has been instructed by the intended interested parties. The court therefore expunged the memo of appearance from the court record and ordered that the matter proceeds for defence hearing.

Defendant's Case

It was the defendant's case that he sold 15 acres to the plaintiff at a consideration of Kshs.7.5 million and wrote an agreement at a lawyer's office. He stated that it later turned out that the land was 12 acres upon survey therefore he wanted to refund the plaintiff Kshs.1.5million which the plaintiff refused. The defendant also testified that he sent his son with Kshs. 1.5million to the advocate's office but the plaintiff refused to sign the agreement for refund. It was his evidence that the suit land is in the plaintiff's name and that the plaintiff occupies the 12 acres. The defendant also told the court that the plaintiff lodged a caution on his parcel of land known as NANDI/KAPKANGANI/1924. He stated that he did not go to the Land Control Board to transfer the 3 acres as the land belongs to the family. He stated that he gave the plaintiff an access road and he is ready to refund him money for the 3 acres. He urged the court to dismiss the plaintiff's case.

On cross examination he admitted that the plaintiff had indicated to him that he was buying the suit land for purposes of farming and that many people have sued him in respect of the suit land. He also confirmed that the agreement was for 15 acres and that he is ready to refund the plaintiff Kshs. 1.5million for the 3 acres.

DW2 testified and adopted his statement as his evidence in chief in court. He stated that he is the one who introduced the plaintiff to the defendant and that has not given the plaintiff the 15 acres as per the sale agreement. He also stated that the plaintiff is his cousin. DW2 also stated that he was a witness in the agreement for sale of the 15 acres between the plaintiff and the defendant and that he has not seen another agreement for refund of Kshs. 1.5 million for the 3 acres to the plaintiff. He also confirmed during cross examination that the 15 acres the defendant was selling was being shared by other people and stated that the plaintiff should be given the 3 acres as per the agreement.

The defendant therefore closed his case.

Plaintiff's Counsel's Submission

Counsel for the Plaintiff reiterated the plaintiff's evidence and submitted that from the defence and the evidence of the defendant and his witness he admits that he entered into a land sale agreement for 15 acres and that he owes the plaintiff 3 acres which he is ready to refund Kshs. 1.5 million being the value of the 3 acres.

Counsel submitted that the only issue for determination is whether the plaintiff is entitled to specific performance over the 3.8 acres he claims? That the terms governing the parties in this matter are those set out in the contract which they signed when the defendant agreed to sell and the plaintiff agreed to buy 15 acres of land at a total consideration of Kshs. 7.5 million.

It was further Counsel's submission that the fact that the defendant is willing to refund money for the 3 acres is an admission that he did not comply with the terms of the agreement. The defendant stated that he prepared another agreement for refund which essentially was to vary the terms of the agreement without consulting the plaintiff.

Mr. Musiega submitted that the defendant even attempted to introduce the CID by alleging that the portion of twelve acres (which turned out to be in fact 11 .2 acres) already transferred to the plaintiff was in excess of 15 acres and that the plaintiff was stealing from him. The defendant cannot hide behind family interest. He transferred twelve acres and has not told the court he brought in other people to enable him do that. Counsel further submitted that the fact that the plaintiff took twelve acres without variation of the initial agreement in writing did not prejudice his right to pursue recovery of the balance which has turned out now to be 3.8 acres. If a person was to pay part of a liability owed to another the action of the other accepting part payment does not operate against him with regard to his pursuit to recover the balance. Counsel cited the case of OLE MEIKOKI -VS OLE SIRERE [1981] KLR 593 which held that:

When a party fulfills his obligation under a contract, he must be allowed to benefit from the contract without impediment.

Further that the Court of Appeal held in the case of KUKAL PROPERTIES DEVELOPMENT LTD -VS- MALOO AND THREE OTHERS that:

"Where the contract is in writing and its terms clear and unambiguous, no extrinsic evidence may be called to add or detract from it"

In the above cited authority the court held that since the respondents had accepted a refund of the deposit, the appellant was discharged from liability but in the present case the plaintiff declined a refund and the defendant is not discharged. He therefore prayed for judgment as per the plaint as the plaintiff has proved his case against the defendant.

DEFENDANT'S COUNSEL'S SUBMISSIONS.

Counsel for the defendant filed submission and also reiterated the evidence of the defendant which confirmed that he had entered into a sale agreement with the plaintiff for sale of 15 acres of the suit land for a consideration of Kshs. 7.5 million which was paid in full.

Counsel submitted that the defendant realized that the acreage on the ground was less than the 15 acres and opted to refund Kshs. 1.5 million to the plaintiff which the plaintiff refused to accept opting to file this case for specific performance. Counsel further submitted that upon engaging the services of a County surveyor it was confirmed that the land was 11.2 acres leaving a deficit of 3.8 acres.

Counsel listed the following issues for determination by the court as

- a) Whether or not the agreement dated 2.12.2013 was void on the basis of a mutual/unilateral mistake.
- b) Whether or not the defendant breached the agreement dated 2.12.2013 and the plaintiff is entitled to an order for specific performance.

In response to the 1st issue Counsel stated that the parties entered into the agreement in the belief that the land was 15 acres but it turned out to be less than 15 acres and that is why the defendant opted to refund the money for 3 acres. Counsel cited the case of BELL VS LEVER BROS LTD (1932) AC 161, (1931) AL ER 1 a quoted in PURPLE ROSE TRADING COMPANY LTD VS. BHANOO SHASHIKANT JAI (2014) e KLR. Where it was held that:

"it was submitted that a contract is void if the parties proceed on a false and fundamental assumption and that the parties were clearly acting on a mutual mistake of fact that a contract of sale was in existence when there was none.

Counsel further cited the case of NABRO PROPERTIES LTD VERSUS SKY STRUCTURES LTD & 2 OTHERS (2002) KLR 299 wherein issues of validity of the contract entitling one to an order for specific performance was under interrogation. The Court of Appeal held inter alia that:-

"As stated above and since I have found that the sale agreement was impossible to perform, it could not have formed a cause of action for specific performance. "

Counsel therefore urged the court to find that the contract was impossible to perform. On the 2nd issue as to whether or not the defendant breached the agreement dated 2/12/13 and as to whether the plaintiff is entitled to an order for specific performance, Counsel submitted that the defendant did not breach the terms of the agreement as it was a mutual and unilateral mistake and that the defendant made efforts to rectify the mistake but the plaintiff frustrated the same.

Counsel cited the case of AMINA ABDUL KADIR HAWA VS. RABINDER NATH ANAND & ANOR [2012] eKLR where the court held that in order for the relief of specific performance to be availed to the plaintiff the following guiding principles or parameters should be met or demonstrated to exist:-

- (a) The remedy is an equitable remedy meaning that the court has to satisfy itself that on the facts presented to it (the court) it is equitable in the interests of both parties to grant the reliefs,
- (b) It is available where damages will not be an adequate compensation meaning that if damages are adequate, even if all the other prerequisites have been met and favour the granting of the relief of specific performance the court can withhold it and award damages instead
- (c) It is a discretionary relief which discretion should not be exercised arbitrarily but on the basis of applicable principles. The guiding principles applicable to the courts exercise of

its discretion which is trite and which this court has judicial notice of is that the discretion has to be exercised judiciously with a reason.

- (d) Even if the facts of the case demonstrate that a specific performance is a proper remedy to grant in the circumstances, it may none the less be withheld in circumstances where it is likely to cause hardship to the defendant even if circumstance giving rise to the hardship to be suffered by the defendant were not contributed to by the contracting parties and may have arisen even after the

conclusion of the contract.

(e) The party entitled to earn the relief has to demonstrate that he/she has fulfilled all his/her obligations under the terms of the contract. Or alternatively that there is demonstrated proof that he/she is ready and willing to fulfill the same.

It was Counsel's submission that an order of specific performance will create hardship to the defendant and therefore issue an award of damages which is readily available for the plaintiff.

Analysis and determination

This is a case where the plaintiff and the defendant entered into a land sale agreement for purchase of 15 acres which was paid in full by the plaintiff. It is not disputed that the parties entered into a sale agreement for the sale of 15 acres. This is admitted by the defendant and his witness however what the defendant contends is that he wants to refund the plaintiff Kshs. 1.5 million being the amount for the 3 acres which is the deficit of the 15 acres.

From the evidence of the defendant which is on record, he admitted that he had reported the matter to the DCIO Nandi County that the plaintiff wanted to steal his land prompting investigation which unearthed evidence that the suit land was actually less than what he had sold to the plaintiff. PW2 who did the survey on the instruction of the DCIO for purposes of the investigation which was on the basis of the complaint by the defendant herein confirmed in court that he found out that the land was actually 11.20 acres and not 15 acres as per the agreement.

The issue for determination is as to whether the plaintiff is entitled to an order of specific performance of the agreement between him and the defendant. It is not disputed that the plaintiff entered into an agreement with the defendant for the purchase of 15 acres. It is further not in dispute that the plaintiff paid the full purchase price of Kshs. 7.5 million to the defendant. It is also not in dispute that upon the land being surveyed it turned out to be 11.20 acres which was less than the 15 acres purchased. It is further not in dispute that the plaintiff was buying the land for purposes of farming.

From the evidence on record it is also clear that the defendant went to the land Control Board and did a subdivision and transferred the plaintiff's portion to him and remained with his portion. The defendant alleged that he had given the plaintiff alternative access road to his parcel of land which the plaintiff disputed. It was the plaintiff's evidence that without such access road the purpose for which he purchased the land would be frustrated. He told the court that he had taken a loan to purchase the suit land which he was still servicing and expected to use the land for farming for export but without the access road he would go at a loss.

The demeanor of the defendant and actions of the defendant from the onset depicts a person who knew what he was doing and in essence wanted to deny the plaintiff the benefit of his hard earned money in the purchase of the whole 15 acres. This can be seen from his act of reporting the matter to the DCIO Nandi County that the plaintiff had stolen his land which he believed was in excess of the 15 acres agreed upon. To his shock or detriment the investigation which he had instigated worked against him in favour of the plaintiff. The investigation established that the land was less by 3.8 acres which he was supposed to add the plaintiff.

The other act by the defendant which showed his unwillingness to fulfil his part of the agreement was when he went to his lawyer and drafted an agreement for refund of kshs. 1.5million without consulting the plaintiff an agreement which the plaintiff refused to sign.

Further DW2 who gave evidence on behalf of the defendant but his evidence was in support of the plaintiff's case. He confirmed that he is the one who introduced the plaintiff to the defendant for the sale of the 15acres of which the defendant did not fulfil. He stated that the plaintiff is entitled to the remaining 3.8 acres.

The defendant obtained a consent of the land Control Board to carry out a subdivision and transfer of the land to the plaintiff. During this subdivision he registered the portion for the plaintiff in the plaintiff's name and a title was issued while he remained with the other portion which he registered in his name. This must have been the time when the acreage was reduced by 3.8 acres. The defendant should not be heard to claim that the land belongs to the family and cannot transfer the remaining 3.8 acres. When he entered into the agreement he was aware that the land belongs to him and the purported family must have been in the know when he sold the 15 acres. If they had an objection, then they should have done so at the Land Control Board to block the issuance of the consent. I find this argument that the land belongs to the family to be an afterthought to defeat justice.

I had earlier expunged a memorandum of appearance purportedly filed by Sego & Co Advocates for intended interested parties whom Counsel stated was the wife of the defendant. This came too late in the day and the right procedure for enjoining interested parties was not followed. This was another gimmick by the defendant to derail the hearing by introducing other parties to claim an interest in the suit land.

The question that the court must answer is whether the sale agreement between the plaintiff and the defendant for 15 acres is enforceable. From the evidence on record and the admission by the defendant it is my view that the agreement is enforceable. The agreement is not tainted with some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable.

It was held in the case of **Reliable Electrical Engineers Ltd.....Vs....Mantrac Kenya Limited (2006) eKLR**, where Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles”

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the

contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

In the current case the plaintiff adduced evidence that he bought the land for purposes of farming for export and he required an access road for that purpose. Without the access road, his venture would not be tenable and he would go at a loss. The 3.8 acres are on the side of the access road which he had identified for that purpose. Compensation by way of damages would not be adequate and that is why he refused a refund when the defendant wanted to do so. His project and purpose would be frustrated and the other acreage would not be of the use that he intended it for. The plaintiff has also been incurring losses by servicing the loan that he secured to purchase the land without the project giving returns.

The remedy of specific performance is an equitable remedy which is discretionary and courts must use their discretion judiciously. There would be no hardship caused to the defendant if an order for specific performance is granted as this was the intention of the agreement to sell and transfer 15 acres of land to the plaintiff of which the plaintiff paid in full. The other side shows by the defendant are theatrics which he is engaging in to divert attention having admitted that he has been sued by other parties in respect of land transactions. This might be a person who wants to refund the money and sell the land to highest bidder. The court will not allow such injustice to be occasioned to parties who have put their hard earned money to a project only to be told that, sorry we have gotten another buyer and we can refund your money and pay you damages.

On the issue of lack of land Control Board for the remaining 3.8 acres I will rely on the Court of Appeal case in Eldoret **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** where the Court held that

*“.....we are in agreement with the **Macharia Mwangi Maina decision** that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance”.*

That Court of Appeal further held that the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust. In this respect I reject the defendant’s assertion that the transaction was void for the lack of the land Control Board consent. The court shall apply the doctrine of constructive trust to do justice.

I have considered the pleadings, evidence and the submission of Counsel and I come to the conclusion that this is a case where I would exercise my discretion to order for specific performance of the agreement entered into between the plaintiff and the defendant. I order that the defendant do transfer 3.8 acres of the suit land to the plaintiff within 30 days from the date of this judgment. I further order that the Deputy Registrar of the Honourable Court is hereby authorized to sign the document for and on behalf of the defendant which will be necessary to give effect to the order of specific performance in the event that the defendant fails to do so. The defendant to pay costs of this suit to the plaintiff.

Dated and delivered at Eldoret this 12th day of July, 2018.

M. A. ODENY

JUDGE

Judgment read in open court in the presence of Mrs Nderitu holding brief for Mr. Musiega for Plaintiff and Mr. Cheruiyot holding brief for Mr. Alwanga for defendant.