



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 357 OF 2017

ALIZAUTON MWANGI MAINA - PLAINTIFF

VS

GEOFFREY WANYATURA MWANGI - DEFENDANT

JUDGMENT

1. By an amended Plaint dated 6/11/17 the Plaintiff filed suit against the Defendant seeking the following orders;

a. An order of permanent injunction restraining and barring the Defendant either by himself, his agents, servants or in any manner howsoever from advertising, leasing, charging, selling dealing with, conveying, charging, leasing, subdividing, encroaching on trespassing and/or remaining on 0.75 acres to be carved out of Land reference No. Loc.3/Mukuria/1124 already in occupation of the Plaintiff as a purchaser in possession where the Plaintiff and his family live.

b. An order directing the Defendant to apply for Land Control Board consent to subdivide Land Reference No. Loc.3/Mukuria/1124 and carve out 0.75 acres and consent to transfer the subplot to the Plaintiff and in default the Executive Officer of this Honourable Court to execute all documents to ensure 0.75 acres are transferred to the Plaintiff.

c. Order for specific performance of the sale agreement dated 13th January 2007 between the Plaintiff and the Defendant s.

d. Costs of the incidental to the suit and interest at Court rates.

e. Any other remedy as the Honourable Court may deem fit and applicable in the circumstances.

2. The Defendant denied the Plaintiff's claims in his statement of defence dated 23/11/17 and filed on 4/12/17.

Plaintiff's case

3. The Plaintiff's case is that on 13/1/07 he entered into an agreement of sale to purchase a portion of land measuring 0.75 acres from the Defendant to be exercised from LR No. Loc.3/Mukuria/1124. The purchase price was Kshs. 360,000/= out of which he paid 263,000/= leaving a balance of Kshs. 97,000/= payable on or before 30/5/07.

4. That it was a term of the agreement of sale *inter alia* that the vendor would obtain Land Control Board consent for the subdivision and transfer of the land; that the balance of the purchase price would be paid in exchange of the completion documents and that vacant possession of the land would be delivered to the Plaintiff on or by 30/3/07.

5. It is the Plaintiff's case that the Defendant has failed, neglected and or refused to honour the terms of the agreement and hence the filing of the case.

6. At the trial, the PW1-Alizauton Mwangi Maina led evidence and produced the following documents;

a. Sale Agreement dated 13/1/07.

b. A demand letter dated 17/3/08 requesting the Defendant to comply with clause 3 of the Sale Agreement.

c. Bank withdrawal slip dated 13/4/07 indicating a cash withdrawal of Kshs 40,000/= from Co-operative Bank Ltd.

7. He stated that he has not completed payment of the balance of the purchase price because the Defendant did not avail himself at the joint

Advocate's office on 30/3/07 to complete the transaction. That vide a letter dated 17/3/08 he wrote to the Defendant requesting him to comply with clause 3 of the said agreement. The Defendant did not respond. Secondly the Defendant has not obtained Land Control Board consent to subdivide and transfer the parcel of 0.75 of an acre to him. He averred that the Defendant's land was sold together with the tea bushes and the Defendant did not point out the boundaries of the tea farm. He averred that the Defendant allowed him to construct a house on the land.

8. Further the Plaintiff stated that he took possession of the land in 2013 in accordance with clause 7 of the agreement of sale and started picking the tea in the same year.

9. He stated that in addition to the Kshs. 220,000/= he paid to the Defendant on signing of the Agreement, he later paid Kshs 40,000/= to the Defendant's wife who collected the cash on behalf of the Defendant. That they needed the cash to pay hospital bills. He withdrew the cash from his account at Co-operative Bank and handed over to the Defendant's wife. That no acknowledgement of the cash was executed, thus no documentary evidence.

10. In response to the question whether the title was encumbered at the time he entered into agreement, he stated that the title was free from all encumbrances.

11. PW 2- Beth Gathoni Mwangi stated that the Defendant did not point out to them the boundaries of the land they had purchased. That he showed them general boundaries for the whole land as the land had not been partitioned and/or surveyed. That the $\frac{3}{4}$ of the land they bought is not defined within the larger LR No. Loc. 3/Mukuria/1124. She confirmed that she and her husband were paid by Murang'a County Government in respect to the water pipeline that was constructed through the land.

12. DW 1- Geoffrey Wanyatura Mwangi confirmed the agreement of sale and receipt of Kshs. 220,000/= being the purchaser price. That he did not obtain Land Control Board consent to subdivide and transfer because the Plaintiff has not paid the full purchase price. He denied that he was invited to the Advocates office to effect completion of the transaction. He insisted that he did not allow the Plaintiff to construct a house. That he allowed him to pick tea on the portion of 0.75 acres only and not the whole land.

13. Further that the title of the land was cancelled vide orders of a Court in Thika (details not disclosed). That he has not issued the Plaintiff with notice to vacate the land. That the land was not available for sale due to the cancellation of title and the Plaintiff was aware as the Court case was ongoing at the time of entering into the Agreement for sale.

14. The DW 1 denied authorizing his wife to collect Kshs.40, 000/= on his behalf from the Plaintiff. He confirmed that he obtained the registration of the Plaintiff at the local tea factory to enable him deliver the tea to the factory. He stated that though he did not give the Plaintiff permission to construct the house he did not stop him or report him to the Chief or police when he did.

15. DW 2 – Elizabeth Wanjiku Mwangi denied receiving Kshs. 40,000/- from the Plaintiff on behalf of the Defendant. She stated that though the Plaintiff is picking tea from the whole land he has refused to deliver tea from their portion of 0.45 acres of the land to their account No. 236. That he is picking the tea for himself. She reiterated the contents of evidence of the DW 1.

16. Parties elected to file written submissions. The Plaintiff filed on 8/3/18 whilst the Defendant filed on 30/4/14. I have read and considered the respective submissions.

Determination

17. Upon assessing the pleadings, the evidence and the written submissions in the case, the following issues are for determination by the Court.

- A. Whether or not there is breach of the agreement of sale. If so, by whom?
- B. Whether the Plaintiff's claim is barred by Limitation of Actions Act?
- C. Whether the Plaintiff is entitled to the orders sought in the plaint?

Whether or not there is breach of the agreement of sale. If so, by whom?

18. The subject agreement for sale provided as follows;

1. That the Vendor has sold $\frac{3}{4}$ of an acre out of land parcel Loc. 3 Mukuria/1124 together with all the developments therein to the Purchaser.
2. That the Sale price is Kenya Shillings Three Hundred and Sixty Thousand Only (Kshs. 360,000/=) payable as follows;-
3. The Purchaser has paid Kenya Shillings Two Hundred and Twenty Thousands only (Kshs. 220,000/=) receipt of which the vendor acknowledges by signing this agreement.
4. The balance of Purchase price Kshs. One Hundred and Forty Thousand (Kshs. 140,000/=) to be paid on or before 30th of May 2007 which is the completion date.

5. The vendor to obtain land board consent to subdivide the land and obtain land board consent to transfer into the Purchasers name at his own expense and execute all necessary document.
6. The balance of Purchase price to be paid in exchange of completion document to effect transfer and registration into the Purchasers names.
7. The Purchaser to be responsible of payment of Stamp Duty and Registration fees of his portion into his own names.
8. The Law society conditions of sale 1989 edition to apply herein in so far as it's not inconsistent with the terms and conditions contained herein.
9. The vendor to deliver vacant possession of the land portion $\frac{3}{4}$ of an acre to the Purchaser at completion on or by 30th March 2007 which is the completion date.
10. The land is sold free from all encumbrances.
11. That should the transaction fail to go through by default on the part of the Purchaser to pay the balance of purchase price to pay 10% per month of the remaining balance until payment in full.
12. That should the transaction fail to go through by reason of the Vendor failing to fulfil his part of the bargain to refund all money received with a default penalty of 10% per month until payment in full.

19. From the said agreement the completion date was 30/5/07. According to the evidence on record the transaction was not completed as per the completion date agreed by the parties. The reason given for non completion by the Defendant was that firstly that this title had been cancelled by the Thika Court (details not disclosed). Secondly that the Plaintiff had not completed paying the full purchase price; Thirdly because of the 2nd reason he did not obtain Land Control Board to subdivide and transfer the portion being sold to the Plaintiff. The reasons advanced by the Plaintiff for non completion are that he was waiting for the Defendant to obtain the completion documents, one of which was the Land Control Board consent to subdivide and transfer the suit land to him.

20. The cause of action therefore commences on 30/5/07 which date the parties had agreed as the completion date.

21. As set out in Para 18, the agreement provides certain actions to be undertaken by the parties on or before the 30/5/07. On account of the Defendant he was to deliver documents of title to the suit land to the Plaintiff. Whereas upon receipt of the documents of title the Plaintiff was obliged to pay the balance of the purchase price in exchange of the documents received. It is common ground that the Defendant did not deliver any or all or at all, the documents of title to the Plaintiff on the date agreed.

22. By reason of the Defendant having failed to deliver the documents of title on the date agreed, the Defendant's right to recover the balance of the purchase price from the Plaintiff has not crystallized to date. It is noteworthy that the Defendant allowed the Plaintiff to take possession and occupation of the suit land pending completion of sale by way of exchange of the documents of title and purchase price. In such circumstances the Defendant became a trustee of the Plaintiff in so far as it relates to the suit land subject to payment of the balance of the purchase price. Such payment would legitimately crystallize upon the delivery to the Plaintiff by the Defendant of the documents of title as agreed.

23. Ideally parties in a contract are bound by the terms of the contract. Nevertheless the rule is not of strict application. The contract may be varied by consent or conduct of the parties. In this case as stated above the completion date was 30/5/07. It is common ground that pending the completion date the Defendant by consent of the Plaintiff allowed the Plaintiff to take possession and/or occupation of the suit land pending completion. Such actions created a constructive trust of the Defendant as a trustee of the Plaintiff in respect of the suit land subject to full payment of the balance of the purchase price. The Court has found that the payment of the balance of the purchase price has not crystallized for reason of the Defendant's breach of the sale agreement.

24. In view of the matters stated in the preceding two paras the Court does not find merit in the application of the limitations of the actions Act pleaded by the Defendant in the face of constructive trust held by the Defendant by the Plaintiff.

25. Final orders;

- a. An order of permanent injunction restraining and barring the Defendant either by himself, his agents, servants or in any manner howsoever from advertising, leasing, charging, selling dealing with, conveying, charging, leasing, subdividing, encroaching on trespassing and/or remaining on 0.75 acres to be carved out of Land reference No. Loc.3/Mukuria/1124 already in occupation of the Plaintiff as a purchaser in possession where the Plaintiff and his family live.
- b. An order directing the Defendant to transfer 0.75 of an acre to the Plaintiff within 30 days from the date hereof, in default the Deputy Registrar to be mandated to execute all documents necessary to effect transfer to the Plaintiff.
- c. Upon transfer and registration of the suit land to the Plaintiff whichever is earlier, the Plaintiff to pay the balance of the purchase price within 30 days.
- d. The Defendant shall pay the Plaintiff the costs of the suit.

It so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 27TH DAY OF SEPTEMBER 2018.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Odawa for the Plaintiff.

Defendant – Absent but served with Judgement notice.

Irene and Njeri, Court Assistants.