REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO. 360 OF 2017

DAVID KAMAU NJUGUNA.....PLAINTIFF

VS

JACKSON NJUGUNA MACHARIA.....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendant on the 5/5/2017 claiming 0.6 acres of land (hereinafter called the suit land) comprised in Land Reference Number LOC 9/ICHICHI/1275. He averred that on the 25/1/2008 he entered into an agreement of sale with the Defendant to purchase 0.1 of an acre of the suit land. That a further agreement was entered into in August 2008 for the sale of an additional 0.5 acres to make the total acreage of 0.6 acres (suitland) in favour of the Plaintiff. The total consideration for the 0.6 acres was Kshs. 200,000/- out of which he paid Kshs. 190,000/- leaving the balance of Kshs. 10,000/-. That the said land was to be excised from Land Reference Number LOC 9/ICHICHI/1275. The Plaintiff claims that though the Defendant has subdivided the land into many parcels, he has failed to transfer the suit land to him hence this suit.

2. The Defendant denied the Plaintiff's claim in his defence filed on the 2/6/2017. He denied entering into a sale agreement with the Defendant. He further stated that the agreement (if any) was invalid making the Plaintiff's claim unsustainable. He stated that the Plaintiff's claim lacks credibility because of lack of Land Control Board consent to transfer the suit land.

3. In his Counterclaim he stated that in 2008 he entered into an agreement for sale with the Plaintiff for the suit land to be excised from his LOC 9/ICHICHI/1275. That the sale was subject to the Land Control Board consent and the payment of the full purchase price. That the Plaintiff failed to pay the full purchase price hence the Defendant could not obtain the requisite land control board consent to transfer the suit land. He argues that that is the reason why he rescinded the agreement and demanded the Plaintiff to vacate the suit land which he has failed to do so.

4. It is the Defendant's case that the Plaintiff took possession of the suit land and continued to pick tea from 1000 tea bushes and delivered to Githambo Tea Factory for more than 9 years estimated at Kshs. 90,000/-, if the suit land was to be taken as under lease. In addition, he felled trees on the suit land with the estimated value of Kshs. 20,000/- without the authority and consent of the Defendant. That the Plaintiff proved uncooperative in hiring a joint surveyor for purposes of surveying the suit land. That he also declined to pay compensation for the tea and trees to the Plaintiff.

5. The Defendant sought the following orders;

a. A declaration that the Plaintiff is a trespasser on land parcel LOC 9/ICHICHI/1275 and that he should give vacant possession or be forcefully evicted.

b. The Plaintiff do pay the Defendant mesne profits of Kshs. 90,000/- for tea bushes and Kshs. 10,000/- for any year the Plaintiff subsequently picks the Defendants tea bushes till the determination of the suit.

c. Costs of the suit and interest thereon until payment in full.

6. On the 22/2/2018, the case was certified ready for hearing and the hearing was fixed exparte by the Defendant for the 12/4/2018. On the hearing day and after the case had been called out in Court, the Plaintiff and his counsel were absent. No explanation was available for their absence notwithstanding service as evidenced by the affidavit of service filed in Court on the 19th March 2018. The Defendants counsel applied to the Court to have the suit dismissed for non-attendance. The Court having been satisfied that proper service of the hearing notice ordered the Plaintiffs case to be dismissed for want of prosecution and/or non-attendance. The Defendant proceeded with the hearing of his Counterclaim.

7. The Defendant adopted his witness statement filed in Court on the 22/11/2017 and testified that he is the registered owner of the suit land and produced a certified copy of the title in his name which was marked DW1. He admitted that he entered into an agreement for sale for a portion of the suit land measuring 0.6 acres with the Plaintiff at an agreed purchase price of Kshs. 200,000/-. The first agreement was dated the 25/1/2008 for 0.1 acres at the cost of Kshs. 60,000/-. The second agreement for sale was on 15/8/2008 for 0.5 acres for the sum of Kshs. 140,000/-. The total acreage was 0.6 acres at the sum of Kshs. 200,000/-. That as at 15/9/2008, the total purchase price paid was Kshs. 140,000/-. That the Plaintiff paid a further sum of Kshs. 50,000/- in the month of June 2009 leaving a balance of Kshs. 10,000/-. He produced both agreements in Court with their English translation marked DW2 and DW3.

8. The Defendant further stated that the suit land contained tea bushes and trees which were not included in the earlier two agreements as it was the intention of the parties to mutually agree on the consideration later. He stated that the Plaintiff on taking possession felled around 15 trees without his consent estimated at Kshs. 20,000/-. In his witness statement he stated that the Plaintiff was to pick the tea and not interfere with the trees growing on the suit land until the costs of the tea bushes and the trees was agreed and fully paid for. At the hearing the Defendant testified that the Plaintiff has without his authority and consent been deriving income from sale of the tea leaves delivered to the local tea factory estimated at Kshs. 90,000/- for a period of over 9 years. Further that the Plaintiff failed to pay the Kshs. 10,000/- being the balance outstanding on the sale of the land. That the Plaintiff breached the agreement for sale.

9. The Defendant further stated he visited the Plaintiff at his home to discuss the cost of the tea bushes and the trees as well as the balance of the purchase price but the Plaintiff declined to discuss the matter arguing that the land that had been sold to him formed part of the Plaintiff's land. He sought the help of the area Chief namely Kihang'a Apollo who summoned the Plaintiff to his office. In their presence the Plaintiff reiterated that he cannot pay because the land sold to him was part of his land. He stated that he is willing to refund the deposit paid to him to the Plaintiff in exchange of the Plaintiff paying him Kshs. 110,000/- being mesne profits for the tea bushes and the trees.

10. It is the Defendant's case that he put the Plaintiff in possession in 2009. He testified that the Plaintiff vacated the suit land in 2017 when he filed the suit in Court.

11. DW2- Leah Mugure Njuguna testified and adopted the evidence of DW2 in its entirety. I find no reason to repeat it.

12. On the 17/5/2018 the Defendant through Counsel elected to file written submissions which were duly filed on 17/5/2018. The Defendant submitted that he is the registered proprietor of the suit land. In answer to whether or not there was an agreement between the parties, the Defendant submitted that there indeed was a valid agreement in existence. He stated that in accordance with that agreement, the balance of the purchase price was to be paid between 15/8/2008 and 15/9/2008. That even though the balance was not paid by the 15/9/2008, Kshs 50,000/- was paid in the month of September 2009 leaving a balance of Kshs 10,000/-. He submitted that failure by the Plaintiff to pay the outstanding balance by the 15/9/2008 as stipulated by the agreement of sale dated the 15/8/2008 amounts to breach of contract on the part of the Plaintiff. He relied on the case of **Kyangavo Vs Kenya Commercial Bank Limited & Anor (2004) 1 KLR 126** in support of his claim.

13. Contending that as the registered owner of the suit land, he has a right of possession, use and enjoyment to the exclusion of others, the Plaintiff included, as stipulated under section 24 of the Land Registration Act, 2012, the Plaintiff's activities including picking tea and felling trees on the land were carried out without his knowledge and consent and amounts to trespass.

14. The Defendant further submitted that as a result of the trespass, he has suffered loss in the form of special damages for loss of teas and trees in the sum of Kshs 110,000/-. In respect to general damages the Defendant urged the Court to award him general damages arising out of trespass in the sum of Kshs 500,000/-

15. Having considered the written submissions, the evidence adduced at the hearing and the legal authorities submitted the issues for determination are;

a. Whether there was a breach of agreement of sale and by whom?

b. Whether the Plaintiff was a trespasser on to the suit land.

c. Whether the Defendant is entitled to the prayers in the Counterclaim.

d. Who meets the costs of the suit?

16. As to whether there was breach of the agreement of sale and by whom, it is not in dispute that the Defendant is the registered owner of the suit land as evidenced by the certified copy of the title on record. It is not in contention that the parties entered into two sets of agreements; the first one was for 0.1 acres dated the 15/1/2008 at the cost of Kshs 50,000/-, out of which Kshs 40,000/- was paid and acknowledged by the Defendant; The second one was for additional 0.5 acres making it a total of 0.6 acres. The total cost of the land was agreed at Kshs 200,000/- (inclusive the Kshs 40,000/-) paid earlier. The agreement of August 2008 provided *interalia* that the land would be subdivided by a surveyor on the 16/8/2008. The balance as at August 2008 stood at Kshs 60,000/- which was payable between the 15/8/2008 and 15/9/2008. It was agreed that the Defendant would obtain the Land Control Board consent in the month of September 2008.

17. It is the Defendants case that the Plaintiff did not pay the balance of the purchase price as stipulated in the agreement for sale, that is to say between the 15/8/2008 and 15/9/2008. He argued that as a result of the default the agreement was breached by the plaintiff. It is admitted on record by the Defendant that a sum of Kshs 50,000/- was paid by the Plaintiff to the Defendant in the month of September 2009 which sum was acknowledged leaving a balance of Kshs 10,000/-. This is evidence that the agreement was varied by the payment of the additional purchase price and by the acceptance of the same by the Defendant outside the stipulated completion period. The Defendant cannot be said to term the agreement as breached by the Plaintiff. In the case of **Combe Vs Combe 1951 2KB 215** the Court stated that;

" the principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance

which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal registrations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only his word."

18. In the case of **Attorney General of Belize et al Vs Belize Telecom Ltd & Another (2009), 1WLR 1980** at page 1993, citing Lord Person in **Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609,** held as follows:

> "The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the Court thinks some other terms could have been more suitable."

19. In answer to the issue under consideration, it is my determination that the Plaintiff was not in breach of the agreement.

20.As to whether the Plaintiff was a trespasser on to the suit land, **Black's Law Dictionary 10th Edition at page 1733** defines trespass as an unlawful act committed against the person or property of another; especially wrongful entry on another's real property. **Clark & Lindsell on Torts, 18th Edition on page 923** defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Defendant to proof that the Plaintiff invaded his land without any justifiable reason.

21. The Defendant led evidence that the Plaintiff was put in possession in 2009. In his written statement he states that he was put in possession immediately after the agreement and was only to pick the tea and not interfere with the trees growing thereon. Whichever it is there is no contention that he was put in possession pursuant to the agreement of sale. Both agreements however are silent on the issue of possession. Be that as it may there is no evidence of intrusion, invasion or unauthorized entry of the Plaintiff on the Defendants' land. The entry was permitted by the Defendant in pursuance of an agreement for sale. The Court cannot find for trespass. Similarly, the Defendant led evidence at the hearing that the Plaintiff has vacated the suit land and therefore his prayer for vacant possession is overtaken by events and thus spent.

22. The Defendant pleaded for mesne profits and special damages in the sum of Kshs 120,000/- being Kshs 90,000/- for tea bushes, Kshs 20,000/- for loss of trees and Kshs 10,000/- for every year the Plaintiff picks the tea until the case is determined. . In the case of **(DAVID BAGINE V MARTIN BUNDI CA No. (Nrbi) 283/1996,** the Court of Appeal referring to Lord Goddard CJ in **Bonhan Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177)** held that-

> "It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and to speak, throw them at the head of the Court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it."

23. The Defendant did not lead evidence to proof the special damages. The evidence could have been given in form of an assessment of loss of trees by an agricultural officer or expert in such valuations. The type and nature of trees stated to have been felled is not disclosed to the Court. Further it is in the evidence of the Defendant that he allowed the Plaintiff to pick the tea until such time that they agreed on the costs of the trees and the tea bushes. It must be pointed out that this was not part of the agreement entered by the parties ab initio. The Court takes this to be extraneous and does not flow from the agreement of the parties. In his evidence in chief on trial the Defendant contradicted himself by stating that he did not permit the Defendant to pick tea. In any event there was no evidence led to show that indeed the trees were felled. The Court declines to award any special damages because they have not been proved.

24. In respect to the general damages, it must be noted that this limb of damages were not pleaded at all for the Court to determine the same. It was raised by the Defendant in his submission. No evidence was led to proof this limb of damages. It is a principle of law that parties are not allowed to depart from their pleadings. There was no pleading on general damages. It is declined.

25. In respect of the costs, the Defendant has lost and the Plaintiff case was dismissed. Each party to meet their own costs.

26. The upshot is that the Defendant's counterclaim is dismissed.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 13TH DAY OF SEPTEMBER 2018.

J. G. KEMEI

JUDGE

In the presence of:

Plaintiff – Absent

Ms Kiama HB for Mr Kugwa for the Defendant

Ms.Irene and Ms Njeri, Court Assistants.