



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 94 OF 2014

ANTHONY KIBETU MUNENE.....PLAINTIFF

VERSUS

RICHARD KIPRONO TARUS.....DEFENDANT

JUDGMENT

Introduction

1. The plaintiff commenced this suit vide a plaint dated **30th May, 2014** and filed in court on the same date seeking the following orders:

(a) **An order of specific performance directing the defendant to execute all the relevant instruments of transfer and applications for consents to facilitate the issuance of title deed in favour of the plaintiff for a portion measuring four and half (4 ½) acres or thereabouts forming part of Land Title No. KITALE MUNICIPALITY BLOCK 1/LESSOS/1019 purchased by the plaintiff and consequently the defendant be paid by the plaintiff outstanding balance of the purchase price in the sum of Kshs.4,000,000 only forthwith.**

(b) **Alternatively, the defendant be ordered to refund the plaintiff the deposit so far paid to him in the sum of Kshs.2,30,000/= only plus all the damages incurred for breach of contract by the defendant.**

(c) **Costs and interest of the suit**

(d) **Any other relief this honourable court may deem just and fit to grant.**

2. The defendant filed his defence dated **26th June, 2014** on the same date and the plaintiff's reply to this defence was filed on **15th August, 2014**.

3. The hearing of this suit proceeded on the **2/11/2016, 5/2/2018** and on **31/5/2018**. The plaintiff filed his submissions on the **26/9/2018** and the defendant his on **11/10/2018**.

The Plaintiff's Case

4. The plaintiff's case is that the defendant is the registered owner of all that land known a Land Title No. **Kitale Municipality Block 1/Lessos/1019** containing by measurement Nineteen Decimal Eight Four Two (**19.842**) Hectares and situated within Kitale Municipality in Trans-Nzoia County; that vide a sale agreement dated **11/6/2012**, the defendant willingly and voluntarily sold to the plaintiff part of his aforementioned parcel of land measuring **4 ½** acres at an agreed consideration of **Kshs.6,300,000/=** only; that it was a term of agreement between the parties that the agreed consideration of **Kshs.6,300,000/=** be paid in three instalments, with the 1st instalment of **Ksh. 2,000,000/=** being paid on execution thereof, the 2nd instalment of **Kshs.2,000,000/=** to be due on **15/7/2012** and the final instalment of **Kshs.2,300,000/=** to be paid upon successful transfer and issuance of a title deed in favour of the plaintiff; that the plaintiff's effort to pay to the defendant the 2nd instalment of the balance of the purchase in the sum of **Kshs.2,000,000/=** has been futile and in vain owing to lack of co-operation on the part of the defendant; that the plaintiff is willing to settle the outstanding balance of the purchase price if the defendant fulfills his part of the obligations and that the defendant is in total breach of the contract between themselves as particularized herein; that the defendant failed to avail a surveyor to oversee the survey works so as to facilitate the transfer of the portion sold to the plaintiff and issuance of the title deed in favour of the plaintiff; that the defendant totally refused to receive payments from the plaintiff towards offsetting of the balance of the purchase price as agreed; that the defendant failed to surrender immediate vacant possession of the four and a half (4 ½) acres of land purchased as stipulated in **Clause 3** of the sale agreement and that he failed to execute all the relevant instruments of transfer and application for consents to the Land Control Board to facilitate the issuance of a title deed in favour of the plaintiff.

The Defendant's Defence

5. The defendant denies the plaintiff's claim and avers that if the plaintiff was ready and willing to pay, he had bank account details of the defendant and nothing could have stopped him from banking in the defendant's bank account where the 1st instalment was made; that the plaintiff did fail and/or ignore and/or refuse to pay the 2nd instalments of **Kshs.2,000,000/=** that was due on **15/7/2012** despite numerous demand made thereof hence breaching the terms of the agreement dated **11/6/2012**; that the defendant has since repudiated and rescinded the agreement dated **11/6/2012** and therefore the subject agreement is not available for enforcement; that the defendant denies the alleged particulars of breach of the contract itemized in the plaint; that **Kshs.300,000/=** alleged to be paid to the defendant was not part of the contractual agreement; that the defendant admits relief sought of the refund of **Kshs.2,000,000/=** which was paid on **11/6/2012** at the execution of the subject agreement and denies addition of **Kshs.300,000/=** plus damages and that the plaintiff is an author of the breach of the agreement dated **11/6/2012**. The defendant prays that the plaintiff's suit be dismissed with costs to the defendant.

The Plaintiff's Reply

6. The plaintiff filed a reply to the defence joining issues with the defendant on all the matters raised in the defence. In particular he denied that he had refused to pay the 2nd instalment; he also averred that the defendant having received a substantial amount of money the sale is valid and that the sum of **Ksh 300,000/=** was paid to the defendant through one **Teresia Wanjiku** as part of the purchase price for the suit property.

EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

7. The plaintiff testified on **9/7/2015** and on **2/11/2016** as **PW1**. Reiterated the matters contained in his statement and the plaint and produced documents in evidence. His evidence is that he paid **Kshs. 2,000,000/=** upon the execution of the agreement on **11/6/2012**; that he was to pay another sum of **Kshs. 2,000,000/=** on **15/7/2012** so that the plaintiff could bring a surveyor to excise the sold portion; that he was to pay a third lump sum of like amount before the defendant could process title for him.

8. However on before **15/7/2012** the plaintiff called the defendant and asked him to get a surveyor and the defendant told the plaintiff that the surveyor had taken his child to hospital. On **3/8/2012** the defendant called the plaintiff and asked him to deposit **Kshs. 300,000/=** to enable him bring a surveyor and the plaintiff complied; it is the plaintiff's evidence that the balance of **Kshs. 1,700,000/=** was to be paid when the surveyor came to the ground. However the defendant came and told the plaintiff that he was to give him **1.5 acres** in front of a church on his land and **3 acres** at the back of the church. Then the defendant disappeared, or in the words of the plaintiff, went underground. The plaintiff through his lawyer wrote to him asking that he meets his part of the bargain. That letter was produced as **P.Exh 1**. The defendant wrote through his lawyer proposing that the plaintiff agree to take **3 acres** instead of the agreed **4.5 acres** which offer the plaintiff refused. That letter was produced as **P.Exh 2**. The defendant's lawyer also wrote another letter to the plaintiff dated **28/2/2014** which was produced as **P.Exh 3**. The plaintiff stated that the defendant showed the plaintiff the **3 acres** on the lower side of the land which he took possession of the suit land and built a stone wall along the boundary separating the suit land from a nearby slum to protect it from encroachment by the slum dwellers and also put up a chicken house and a store. He produced the agreement as **P.Exh 4** and a copy of a bank statement (**P.Exh 5**) showing that **Kshs. 2,000,000/=** was transferred to the defendant's account on **11/6/2012**. He stated that the perimeter wall and the other developments cost him **Kshs. 3,000,000/=**.

9. **PW2 Suleiman Wanda**, testified on **2/11/2016**. He adopted his statement filed in court record as his evidence-in-chief. In brief his evidence is that he participated in the negotiations leading to the sale, that at first the plaintiff was to buy **3 acres** but due to lack of access to the **3 acres** the defendant added **2 acres** near the tarmac to facilitate access; that it was later agreed that the plaintiff would have **3 acres** at the back and one acre at the tarmac front, that the price was adjusted to **Kshs. 1,400,000/=** from the earlier **Kshs. 1,300,000/=** per acre, that the defendant paid **Kshs. 2,000,000/=** after execution of the agreement; that the balance of the purchase price was to be paid after the execution of all the transfer documents in favour of the plaintiff; that it was also an oral term of the agreement that the vendor was to bring his own surveyor to excise the sold portion to pave the way for the payment of the balance of the purchase price; that the defendant never brought a surveyor, that the plaintiff has developed the land; that the plaintiff sent the **DW2** several times to talk to the defendant to bring a surveyor but the defendant never brought one and that later the plaintiff instructed the **DW2** to deposit **Kshs. 300,000/=** into an account that the plaintiff was given by the defendant;

10. **PW3 Peter Adara Psirmoi** testified on **2/11/2016** and adopted his statement filed in the court record as his evidence-in-chief. His evidence is that he was approached by the defendant's agents to look for a buyer of a portion of the defendant's property which he wished to sell. The rest of his evidence matches that of **PW2**.

11. **PW4 Luke Kiprono Toroitich** testified on **5/2/2018**. He stated that he is a valuer and produced a Valuation Report as **P.Exh 6**. He stated that he had been asked by the plaintiff to establish the open market value of the suit land. According to him only **4.5 acres** were to be valued and there were some improvements on the land, namely: a powerhouse, a perimeter wall an access gate, a poultry shed, a dairy shed and two stores. He put value of the land at **Kshs. 11,250,000/=** and the improvements at **Kshs. 1,475,000/=**.

The Defendant's Evidence

12. The defendant testified on **31/5/2018** and adopted his statement dated **26/6/2014**. He stated that his brother was not feeling well and he went and discussed with the defendant. He admitted the agreement for sale was entered into on **11/6/2012** between him and the plaintiff for the sale of **4.5 acres** for **Kshs. 1,400,000/= per acre**. The total was **Kshs. 6,300,000/=**; he stated that payment was to be in **3 instalments: Kshs. 2,000,000/=** immediately or upon the execution of the agreement; a similar sum on **15/7/2012**; and **Kshs. 2,300,000/=** on transfer of title to the plaintiff; that the first payment was made on **11/6/2012** by RTGS into his brother's account; the other payments were to be through the same account; that the 2nd instalment was not paid as required; that **Kshs. 300,000/=** was paid in cash to him on **3/8/2012** and thereafter no further payments were made. He stated that the **Kshs. 300,000/=** was not part of the instalments but in respect of private arrangements between him and the plaintiff separate from the agreement. From then the plaintiff only approached the defendant in **2014** seeking to pay the balance. The defendant cited delay and asked the plaintiff to pay for the **3 acres** he had occupied at the earlier rate and the

plaintiff refused and lodged this suit. He acknowledged receipt of **P.Exh 1** and **P.Exh 2**. He maintained that the plaintiff was in breach of the agreement as **Clause 7** thereof stated that time was of essence.

13. DW2 Simon Kipngetich Aiyabei testified on **31/5/2018** and adopted his statement dated **23/10/2017** filed in the court record on **5/2/18** as his evidence-in-chief. His evidence is that he witnessed the land sale agreement between the parties herein; that the first instalment was to be paid on **15/7/2012** but the plaintiff never honoured that instalment; that later in **2014** the plaintiff offered to pay some balance but the defendant cited breach on the part of the plaintiff and offered the plaintiff sale of only the **3 acres** which he had assumed possession of and developed whereupon the plaintiff declined the offer and filed this suit.

14. DW3 Jonah Kimutai Barboi testified on **18/7/2018**. He stated that he is a Building Surveyor in the Ministry of Urban Housing and Development and that he normally does quantity preparation for contract documents and valuation; that he did a bill of quantities on the developments in the suit land, that there were 2 chicken houses a dairy store, an office store, a perimeter wall; that most of them were incomplete; that the grand total value of the office store is **Kshs. 569,980/=**; that the first chicken house came to a value of **Kshs. 332,870/=**; that the second chicken house came to a value of **Kshs. 59,020/=** the proposed dairy store came to a value of **Kshs. 604,700/=**; the perimeter wall was valued at **Kshs. 995,280/=**. The grand total of all improvements came to **Kshs. 2,714,650/=**. He faulted **P.Exh 6** for omitting specification of all materials and labour and actual measurements of the work done. He stated that he never ascertained the value of the land as he had been informed that there was a pending court case on the same. He produced the valuation report dated **3/1/2017** as **D.Exh 1**.

DETERMINATION

Issues for Determination

15. The issues that arise from the pleadings in this suit are as follows:-

(a) Who breached the agreement dated 11/6/2012?

(b) What orders should issue?

(a) Who breached the agreement dated 11/6/2012?

16. The normal practice is that where there is a written agreement the court will interpret that agreement to arrive at the meaning that the parties mutually intended, it is not for a court of law to rewrite an agreement between the parties. Where terms of a written agreement are clear they must be applied as they are binding.

17. In the present case the agreement dated **11/6/2012** is admitted by both parties. The defendant is of the view that time was of essence and that the plaintiff breached the agreement by failing to pay the sum of **Kshs. 2,000,000/=** before or on **15/7/2012** as stipulated in the agreement.

18. I have examined **Clause 7** of the agreement. It states as follows:-

“Time shall be of essence in this agreement.”

19. In my view the parties acceded to this clause and were bound by it unless it can be demonstrated otherwise. It is for the plaintiff to demonstrate that he complied with his part of the agreement, especially in paying the second instalment of **Kshs. 2,000,000/=** as provided in **Clause No. 2(b)**. He stated that he did not comply with that clause and before **15/7/2012** the plaintiff called the defendant and asked him to bring a surveyor which he did not. Was the plaintiff within his right to demand for a surveyor before payment of the second instalment? The answer is to be found in clauses generally found in the agreement on the issue. The only one that I find is **Clause 6** which states as follows:

“The survey fees shall be shared equally between the parties.”

20. This leaves the court to examination of **clause 2(b)** to see whether it subjects the payment of the installment to the availing of a surveyor by the defendant. It reads as follows:-

“Kenya shillings two million (Kshs. 2,000,000/= only shall be paid on or before 15th July 2012”

21. In my view **Clause 2(b)** does not require the services of a surveyor to be availed by the defendant before the payment of the second instalment or before **15/7/2012**.

22. When then should the services of a surveyor have been provided? This court will examine the clauses as to the putting of the plaintiff into actual possession. These are **Clauses 3** and **4**. They state as follows:-

“3. The purchaser shall take immediate possession of the land being sold. “

“4. The purchaser shall have quiet possession and enjoyment of the land sold without interference”

23. Ordinarily a seller causes subdivision of his land in a sale. The survey fees clause has been made to come immediately after these clauses.

However the arrangement of these clauses does not deliver to this court the intent of the parties.

24. What the court finds to be the proper interpretation of this agreement is that the parties never focused on the fact that the survey exercise would be a hindrance to both parties in any manner and they therefore never provided for timelines for the exercise yet it was vital that the plaintiff be put into full possession for the defendant to be entitled to be paid as per the agreement. This was a mistake on the part of both parties as the plaintiff would not have known the full extent of the land he was to occupy and the defendant would not be in order to give more land than was stipulated in the agreement.

25. In the case of **Lafey Construction Co. Limited v Prism Investments Limited [2016] eKLR** the court stated as follows:

“I now turn to the other issues of mistake, misrepresentation and fraud, alleged by the Respondents in relation to the said Agreement. Mistake and misrepresentation are factors that vitiate a contract. However, my understanding of the law of contract is that, it is not every mistake or simple error that will have an effect on a contract. There are three types of mistakes; common mistake which occurs when both parties make the same mistake about some fundamental fact; mutual mistake which occurs when the parties misunderstand each other and neither party realizes the mistake of the other; and unilateral mistake which occurs when one party is mistaken as to the fundamental character of the contract and the other party knows of the mistake.”

26. I classify the mistake of the parties in the instant case to be in the second category in the passage quoted above, for neither party appears to have realized at the time of the agreement that they had failed to stipulate timelines for the conducting of survey for the **1.5 acres**. Where there is no meeting of the minds of contracting parties the contract is incapable of performance. This applies to the **1.5 acres**.

27. At first glance, focus is on the plaintiff as he was to pay another instalment by **15/7/12**. I find that the plaintiff was put into possession of **3 acres** and that he never provided written proof of insistence on the availing of a surveyor before the payment of the second instalment which makes his claim of breach by the defendant weak. However the defendant has corroborated the plaintiff's evidence that the plaintiff asked for a surveyor and yet the defendant never put the plaintiff into possession of **1.5 acres**.

28. I find that the lack of clarity in the agreement regarding the demarcation of the **1.5 acres** was a mistake of both parties and none of them can be blamed more than the other as they were represented in the agreement by only one advocate.

29. In normal circumstances where time was expressed to be of essence and where there was a clear date of payment the plaintiff would have been expected to pay the amount stipulated before pursuing the surveyor issue.

30. However, this court finds the defendant to have no good reason to decline all overtures towards demarcation of the land which demarcation would have enabled the plaintiff to take possession of his full entitlement under the agreement which would have entitled the defendant to a claim for rescission for breach if the plaintiff defaulted even once.

31. I therefore find that there was a mutual mistake and both parties are equally to blame for the hardline stance they took in regard to the survey issue.

CONCLUSION

(b) What orders should issue?

32. I have found that the defendant can not be considered to be in breach. The plaintiff is also not in breach. There was a mutual mistake but despite that mistake part of the agreement that has been complied with can be formally completed; the plaintiff has taken possession of **3 acres** and the defendant has ceded the three acres peacefully and taken part of the consideration commensurate with the terms of the entire agreement.

33. The plaintiff and the defendant are neighbours. It is understandable that monies that were meant for medical purposes as in this agreement required to be paid in time. Were it not for the mutual mistake on the part of the parties in the expression of the terms as to survey services there would have been no other reason for delay as the plaintiff has indicated that he was willing to pay and he still is.

34. The plaintiff has developed the land in a substantial manner and the defendant may not know what to do with the developments even if he were made to pay for them. The developments by the plaintiff are also said to occupy only a quarter acre of the land and apparently he has use for them. The perimeter wall is a bit more extensively done.

35. In this case, the contract is capable of partial performance for two reasons: one is that three acres were not to be affected by the survey as they were already demarcated on the ground. The extra **1.5 acres** were to merely be added to the three acres which had already been surveyed and occupied by the plaintiff as admitted by the defendant; secondly the defendant had already pointed out the three acres and put the plaintiff into possession thereof. In addition during the hearing the defendant admitted that he had at one point asked the plaintiff to accept a settlement as follows: the plaintiff to remain content with and pay the balance outstanding for the three acres only and forfeit the option to purchase the extra **1.5 acres**.

36. In my view it is only proper in the circumstances of this case to order that the parties proceed with the transaction only in so far as the agreement can be honoured that is, to the extent that the plaintiff has occupied and that the defendant needs to be paid the balance of the purchase price payable for the occupied land.

37. The sum of **Kshs. 300,000/=** was not demonstrated by the plaintiff to have been part of the agreement and the court will accord the defendant the benefit of doubt on the same.

38. In the final analysis this court finds that the plaintiff has only partially established his claim against the defendant and therefore enters judgement for the plaintiff against the defendant and issues the following orders:-

(a) An order of specific performance compelling the defendant upon payment of the balance of purchase price in the sum of Kshs. 2,200,000/= for the 3 acres occupied by the plaintiff, to execute all documents necessary to effect transfer of the 3 acre portion occupied by the plaintiff to the plaintiff and in default thereof the Deputy Registrar of this court do execute all such documents as will effect the transfer of the 3 acres to the plaintiff;

(b) Each party shall bear their own costs of this suit

It is so ordered.

Dated, signed and delivered at Kitale on this 14th day of November, 2018.

MWANGI NJOROGE

JUDGE

14/11/2018

Coram:

Before -Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mrs. Ambutsi for plaintiff

Mr. Kiboi for the defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

14/11/2018