



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

LAND CASE NO. 967 OF 2014

(FORMERLY MACHAKOS HCCC NO. 397 OF 2012)

HUMPHREY IHUGO KANG'ETHE.....PLAINTIFF

VERSUS

JOHN MUTISYA MUMO.....DEFENDANT

J U D G M E N T

1. The plaintiff filed this case on **16/10/2012**. In the plaint, he claims that on or about the year 2009 both the plaintiff and the defendant entered into several sale agreements in which the defendant sold to the plaintiff his property in land known as **Donyo Sabuk/Komarok Block 1/20030** (hereinafter alternately called the Komarock land) measuring **10 acres** at **Kshs.3,000,000/=** .
2. The plaintiff further states that on or about **23rdMarch, 2011** the plaintiff and the defendant entered into another sale agreement in which the defendant sold to the plaintiff his plot known as **Plot No. C14 at Kimathi Estate, Nairobi** (hereinafter alternately called the Nairobi land) at **Kshs.4,000,000/=**. During this latter transaction, the plaintiff states, the parties agreed that the **Kshs.3,000,000/=** paid for the purchase of **LR. Donyo Sabuk/Komarock Block 1/20030** be credited to the sale of the Nairobi land and that the plaintiff would top up **Kshs.1,000,000/=** to attain the sum of **Kshs.4, 000,000/=** which was the agreed consideration for the plot to enable the plot be transferred to him.
3. According to the contents of the plaint, the plaintiff's case is that in addition to the **Kshs.3,000,000/=** he has paid a further **Kshs.380,000/=** leaving the balance of **Kshs.620,000/=** but the defendant has refused and/or neglected to facilitate the transfer of **Plot No. C14 at Kimathi Estate Nairobi** into the plaintiff's name.
4. The plaintiff's prayer is for an order of specific performance to compel the transfer of **Plot No. C14 at Kimathi Estate, Nairobi** to the plaintiff and alternatively that the defendant do refund **Kshs.3, 380,000/=**. The plaintiff also prays for the costs of the suit.
5. The defendant filed a defence on **25/10/2012**. The defendant's defence comprises of denials. He states that he has never entered into any sale agreement in respect of LR. No. Donyo Sabuk/Komarock Block 1/20030 or any property in Nairobi and puts the plaintiff to strict proof. The defendant also pleads that the plaintiff's suit is grossly incompetent, fatally defective and legally untenable. He also pleaded that the suit has been filed by an incompetent person who has impersonated Mulinga Mbaluka, Advocate and that it was an abuse of the court process.
6. The plaintiff filed a list of witnesses and a list and a bundle of documents on the same day together with the plaint that is on **16/10/2012**. He listed only himself in the list of witnesses. On **23/11/2012** the

plaintiff filed a further list of 3 witnesses and their witness statements. He also filed his own statement.

7. On **25th October 2012**, the defendant filed his list of witnesses, (in which he only listed himself) his statement and a list of documents in which he listed only one document, a letter dated 11/10/2012 from L.N. Ngolya & Co. Advocates.

8. The issues that arise for determination in this case are as follows:-

1. Is the plaintiff's suit incompetent or fatally defective?

2. Did the plaintiff and the defendant enter into agreements for sale in respect of L.R. No. Donyo Sabuk/Komarock Block 1/20030 for Kshs.3,000,000/=and Plot No. C14 at Kimathi Estate Nairobi for Kshs.4,000,000/=?

3. If so, did the plaintiff pay the consideration sums as required by the agreements.

4. Is the plaintiff entitled to the remedies sought in the plaint?

These issues are addressed as hereunder.

9. (1) Is the suit incompetent or fatally defective?

The defence filed on **25/10/2012** pleaded that the suit is incompetent, fatally defective and “*legally untenable*”. The defence stated that a preliminary objection would be raised. However, it was not raised as a preliminary objection before the hearing. Interestingly, and contrary to the expected practice, these alleged defects in the plaintiff's suit were addressed at the tail end of the proceedings in the defendants submissions filed on **12/6/2017**. It is now a recognized principle that a preliminary objection must be specific as to what kind of objection will be raised at the hearing. The defendant is no less excused from this principle on the basis that the objection is pleaded in the defence.

10. It is now trite that pleadings are meant to bring parties to an issue or issues. When it comes to preliminary objections, specificity is required. It would be unfair and an ambush of a party and contrary to the interests of justice to raise specific issues at the submissions stage while they were not specifically pleaded in the defendant's defence. It is not lost to the court that the submissions in which these issues are raised were filed after the plaintiff had filed his. The defendant has conducted himself inexcusably. Notwithstanding the conduct of the defendant, on a scrutiny of the objections, this court does not deem the three objections fatal to the plaintiff's claim. The defendant's defence does not inform the plaintiff or the court of the exact nature of the objection that is intended to be raised at the preliminary stage but from the submissions of the defendant the court gathered that the preliminary objection is premised on the allegations that the plaintiff does not plead where the cause of action occurred, it does not give a description of the property in question as envisaged by Order 4 Rule 3 of the Civil Procedure Rules and that there is no compliance with Order 4 Rule 1(f) on whether there have been any other proceedings and also the lack of averment that the suit relates to the plaintiff.

Firstly, and this relates to the first objection, the plaintiff has testified, and his evidence has been corroborated by his witnesses, that the events took place at two places, in Machakos and in Nairobi. I also deem express pleading of the place of occurrence of a cause of action as a formal requirement of pleadings which would not affect the merit of the plaintiff's case so as to render it fatally defective.

11. Secondly, on the objection that the plaintiff does not give a description of the property in question as envisaged under **Order 4 Rule 3 of the Civil Procedure Rules**, the court disagrees with the defendant. It suffices to state that **Rule 3 of the Civil Procedure Rules** does not support the defendant's contention. Further, the two properties are properly mentioned in the plaintiff. The plaintiff states at **paragraph (3)** of his plaint as follows:-

“On /or about the year 2009, both the plaintiff and the defendant entered into several sale

agreements in which the defendant sold to the plaintiff his property land known as Donyo Sabuk/Komarok Block 1/20030 measuring 10 acres at Kshs.3,000,000/ (Three Million)”

And at **paragraph (5)** he states as follows:-

“On/or about 23rd March, 2011 the plaintiff and the defendant entered into another sale agreement in which the defendant sold to the plaintiff his plot known as Plot No. C 14 at KIMATHI ESTATE NAIROBI at Kshs.4,000,000/= (Four Million) and further agreed that the Kshs. Three Million paid for the land be deducted from that sale agreement of the plot and the plaintiff to add One Million to the defective and the plot be transferred to him”.

It is sufficient to state the number which the property is recognized by. I find that the plaintiff has sufficiently described the suit properties.

12. As to the third objection that there is nothing in the plaint *“to suggest that this suit relates to the plaintiff”*, with due respect to counsel for the defendant, this court has perused the plaint in this case and found that objection unmeritorious. The plaintiff himself has brought the action. He has pleaded against the defendant and the defendant has found it fit to reply by way of a defence and submissions though no evidence on his behalf was given. At the end of the plaint the plaintiff prays for judgment against the defendant for orders of specific performance to transfer Plot No. C 14 at Kimathi Estate to the plaintiff, or alternatively of Kshs.3,380 Million and costs of the suit.

13. In the case of **Mumo Matemu versus Trusted Society of Human Rights Alliance eKLR**, it was stated as follows:-

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.”

It is not proper for any party to keep silent on preliminary objections for five years and raise them on the last day of conclusion of the trial. However meritorious those objections could otherwise have been if raised at the proper time, I must state that the conduct of the defendant herein is that which would be frowned upon by **Article 159(2) (d)** of our constitution.

However, now that the suit has been heard on merit, in this court’s view the defendant’s objections do not have merit. There is sufficient pleading to entitle the plaintiff, if he proves his case by way of evidence, to the prayers that the court may deem fit. They all fail. The plaintiff’s suit is properly before this court.

(2) Did the plaintiff and the defendant enter into agreements for sale in respect of L.R. No. Donyo Sabuk/Komarock Block 1/20030 for Ksh 3,000,000/=and Plot No. C14 at Kimathi Estate Nairobi for Kshs.4,000,000/=?

14. The plaintiff filed various agreements with his plaint. The plaintiff produced these agreements in court as evidence. He stated that it was upon request by the defendant and his sons, Samson, Mutua and Jonathan that the transaction began. He stated that the three visited his office on 23/12/2009 and told the plaintiff that they intended to sell L.R. No. Donyo Sabuk/Komarock Block 1/20030 for Kshs.3,000,000/=. The land was then said to be 10 acres. The plaintiff paid Kshs.3,000,000/= on different dates. Later the plaintiff found that 8 of the acres were under a dispute in ***Machakos High Court Case No. 129 of 2001*** which was not yet over as at the time of the hearing. The available land was therefore only 2 acres. It was at this point that the defendant and his sons told the plaintiff that House No. C14 at Kimathi Estate,

Nairobi existed and that it was owned by the defendant and a further agreement was made between the defendant and the plaintiff. The copy of the agreement dated **23/3/2011** was produced as “**P. Exhibit 1**”. It is an agreement which states that the defendant and the plaintiff have agreed to transact over a portion of **LR. No. 209/7383** measuring **0.0208** ha. and identified as No C14 on the Block Plan registered in the Registry of Documents Nairobi in Volume D1 Folio 38/166 File D11 Kimathi Estate. The contents of the agreement indicate that the plaintiff had already paid Kshs.3,000,000/= as consideration in respect of the Komarock land and he wished that this amount be credited to the purchase of the Nairobi land if by the date 27/4/2011 the **Civil Suit No. HCCC 129/2001 at Machakos** will not have been finally resolved. The agreement is signed by the plaintiff and the defendant in the presence of witnesses. It is drawn by Gesicho & Nyambane Advocates of Gill House, 3rd Floor RM 23, Nairobi. The plaintiff produced two documents, “**P. Exhibit 2**” and “**P. Exhibit 3**” which were acknowledgements of receipt of **Kshs.270,000/=** and **Kshs.110,000/=** respectively. “**P. Exhibit 1**” acted as an acknowledgement of a further **Kshs.200,000/=** in addition to the **Kshs.3,000,000/=** paid before the agreement. The sum total of the acknowledged sums is **Kshs.3,580,000/=**. The plaintiff also produced a demand notice dated 5/10/2012 as “**P. Exhibit 4**”.

15. I find the plaintiff’s evidence was not shaken upon cross-examination by the defendant’s counsel. **PW2** is the defendant’s son. He gave evidence in support of the plaintiff’s case. He said that he knows that the Kshs.3,000,000/= was paid in installments and that the land comprised in Donyo Sabuk/Komarock Block 1/20030 could not be transferred to the plaintiff because it was the subject of a dispute which was in court. The witness testified that at first his father had asked the plaintiff to await the end of the court case but later on, the father mentioned the house in Kimathi Estate, Nairobi. It was at this point that the parties agreed that the house would be sold to the plaintiff for Kshs.4,000,000/=. The plaintiff, who had already paid Kshs.3,000,000/= in the failed transaction, would add Kshs.1,000,000/= to attain the Kshs.4,000,000/= required as consideration for the house. He testified that he recalled that in the year 2011 he and his father and his brothers went to an advocate’s office accompanied by the plaintiff. An agreement was written there and his father received Kshs.200, 000/= on the date of the execution. His father was also given other monies after that date but the witness cannot recall how much it was.

16. Under cross examination by the defendant’s counsel the witness **PW2** maintained that although his name as per the National Identity Card is written as Samson Mutisya Nduma he was the defendant’s son and that his mother is buried on the defendant’s land parcel.

17. **PW3** testified that he was the plaintiff’s clerk. He gave evidence regarding the purchase of the Komarock land by the plaintiff from the defendant. He corroborated earlier evidence of the plaintiff and **PW2**. He added that when told of the house, the plaintiff asked to first see the House in Nairobi. They were shown the House and the plaintiff agreed to take the House instead of the land. An amount of Kshs.1,000,000/= was to be added as purchase price to make the consideration Kshs.4,000,000/=. At the time of the making of the agreement, the defendant came to the advocate’s office in the company of two of his sons.

18. **PW4** Fred Mariaria testified that in the year 2010 he was working with Gesicho Nyambane Advocates, he stated that on signing the agreement produced as **P. Exhibit 1**, the defendant received Kshs.200,000/= from the plaintiff. He produced the agreement dated 23/3/2011 as evidence. **PW4** identified **PW2** as the witness who signed the agreement dated 23/3/2011.

19. **PW5** also testified that the defendant is his father. He corroborated the evidence of the other witnesses in the case.

20. The defendant did not testify and he did not call any evidence. The defendant’s statement was written and filed in October, 2012, the same month as the letter which preceded it, which proclaimed that the plaintiff was of sufficiently sound mind, enough to comprehend the happenings around him. Without any evidence in support of the defence, which itself is a bare skeleton, the defendant cannot be said to have established his defence. I agree with the plaintiff in his submissions when he quotes the case of **John Wainaina Kagwe –vs- Hussein Dairy Ltd 2012 eKLR, Court of Appeal at Mombasa, Civil Appeal No.**

215 of 2010, where the court stated as follows:-

“Of course under our legal system, he who alleges must prove his averment on balance of probabilities..... The respondent thus never rendered any evidence to prop up its defence. Whatever the respondent gathered in cross-examination of the appellant and his witnesses could not be said to have built up its defence. As it were therefore, the respondent’s defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tendered to exonerate it fully from culpability. It was thus substantially to blame for the accident.”

21. It is incumbent upon each and every party to lay evidence before the court vide which to prove his case or defence. The defendant had ample opportunity to bring forward his evidence. All in all there is no evidence from the defendant’s side to controvert the plaintiff’s evidence. The defendant’s advocate’s letter listed as a potential exhibit in the defendants list of documents confirms that the properties subject matter of this suit do exist when it states the defendant’s *“right of ownership of the two assets in question is sacrosanct.”*

22. That letter confirms that some activity relating to a sale had occurred involving the property. However for reasons known only to him, the defendant failed to call evidence in the matter. His is the conduct of one not sure if to defend the case or not. When this suit came up for hearing on **27/3/2017**, Mr. Musyimi holding brief for Mr. Mbaluka for the plaintiff and Mr. Odhiambo holding brief for Mr. Ngolya for the defendant appeared before the court on that date. On that morning, it appeared that both advocates were not ready to proceed with their respective cases. Mr. Musyimi cited the need to file further documents while Mr. Odhiambo sought an adjournment on the basis that Mr. Ngolya, whose brief he held, believed that this was a case that should be transferred to and heard at the Machakos Law Courts.

23. Upon perusing the court record the court informed Mr. Musyimi that the documents he sought to file were already filed in the court record. Mr. Musyimi then withdrew his application for leave to file further documents. Upon this juncture the court invited Mr. Odhiambo to make his application formally and he did. He reiterated that Mr. Ngolya was not ready to proceed as this was a Machakos case and reported that Mr. Ngolya had asked that the matter be transferred to the Machakos Law Courts. In response, Mr. Musyimi objected saying that the property subject matter of the suit is situate at Kimathi Estate in Nairobi.

24. The court, upon perusal of the pleadings and noting the age of the case, declined Mr. Odhiambo’s application and ordered the hearing to proceed at 10.45 a.m. on that same day. Hearing however took off at 11.45 a.m. **PW1, PW2 and PW3** testified. At the end of each witness testimony, the court invited Mr. Odhiambo to cross examine the witnesses but he declined to do so, but he sat in court throughout the hearing on that day. Record of this fact was made in the proceedings. At the end of the day Mr. Musyimi sought an adjournment to enable him call two witnesses, one of whom he said had been denied permission by his employer on that day. The hearing was thereafter adjourned to **29/3/2017**.

25. On 29/3/2017, Mr. Musyimi appeared for the plaintiff while the defendant was unrepresented. The court ordered that hearing would commence at 10.00 a.m. At exactly 10.00 am while the court was about to begin the session, Mr. Ngolya walked into the courtroom and stated that he was representing the defendant. Mr. Musyimi was present. Mr. Ngolya showed the court a power of attorney dated **10/8/2016** and said that there was need for substitution of the plaintiff, citing health reasons. Mr. Ngolya complained that his client had always thought that only one witness would be called yet on **27/3/2017**, three witnesses had testified in the plaintiff’s case; that he had been held up at the Kangundo Law Courts on 27/3/2017 while dealing with a criminal case in a Magistrate’s court; that the defendant was always under the impression that the plaintiff would proceed with the record *“as it was”*; that he had not been served with the further witness statements; that the extra witnesses were not known to the defence; that there is another suit, **Machakos HCCC 129/2001** where the plaintiff had sought to be brought on board, and that the pleadings herein are not filed by the firm of Mulinga Mbaluka Advocates.

26. In response, Mr. Musyimi pointed out that the witness statements and list of witnesses were already

filed in court by **23/11/2012** and that there was no medical evidence certifying that the defendant was incapacitated. The court adjourned the matter to **30/3/2017** for further hearing at 2.30 pm. On that appointed day **PW4** and **PW5** testified and were cross examined by Mr. Ngolya. However before Mr. Musyimi closed the plaintiff's case, Mr. Ngolya applied to cross examine the witnesses who Mr. Odhiambo had refused to cross examine on 27/3/2017. Mr. Musyimi, as would be expected, of counsel in such a situation, objected to this and urged that the application should be disallowed as it was a delaying tactic. The court exercised its discretion in favour of the defendant and adjourned the matter to 16/5/2017 at 11.30 a.m.

27. On that day Mr. Ngolya cross examined **PW1** and **PW2** and Mr. Musyimi closed the plaintiff's case thereafter. Mr. Ngolya was invited by court to start his client's defence. He instead said his client had not recovered and sought an adjournment. Mr. Musyimi objected again on the basis that no medical evidence had been provided to court. Notwithstanding, the court further adjourned the matter at the instance of the defendant to 23/5/2017 at 2.00 pm for hearing, but made not of the defendant's unwillingness to proceed with the case.

28. On 23/5/2017, Mr. Musyimi appeared for the plaintiff and he said he was ready to proceed. He also alerted court about an application dated 18/5/2017 filed by the defendant. Mr. Ngolya was not present to prosecute that application. Mr. Musyimi applied for the application dated 18/5/2017 to be dismissed for want of attendance or prosecution. The court dismissed the application for want of attendance at 3.10 p.m. Mr. Ngolya did not appear. Mr. Musyimi then urged the court to close the defendant's case as the defendant appeared uninterested. The court considered this submission and at around 3.40 pm, the court ordered that the defendant's case be deemed as closed and that parties do file submissions within 14 days and further that the matter be mentioned before the Deputy Registrar on **12/6/2017** to ascertain compliance with those orders. Judgement was ordered to be upon Notice. The plaintiff filed his submissions on **6/6/2017** and the defendant filed his submissions on **12/6/2017**.

29. I have painstakingly outlined the process of hearing herein in detail because appears to this court that for some reason or other, the defendant did not seem anxious to proceed to the conclusion of this case and give evidence.

30. On the evidence before it, this court finds that there was an agreement between the parties to the effect that the defendant would sell the plaintiff the Komarock land for Kshs.3,000,000/=. When it appeared that this deal would fall through owing to the pending court case, instead of having the defendant refund the sum of Kshs.3,000,000/= both parties decided to have the house in Kimathi Estate in Nairobi transferred to the plaintiff for the sum of Kshs.4,000,000/=. I therefore also find that there was an agreement that the house referred to as C14 in Kimathi House be transferred to the plaintiff by the defendant.

31. (3) Did the plaintiff pay the consideration sums as required by the agreement?

The plaintiff produced "**P. Exhibit 1**", "**P. Exhibit 2**" and "**P. Exhibit 3**". "**P. Exhibit 1**" is the original agreement between the parties. It was executed before an advocate. Attached to it are copies of identity cards of the defendant and **PW2**. There is no explanation from the defendant as to how his National Identity Card came to be in the possession of the plaintiff. **PW2** who is said to be a son of the deceased, testified that he knows that the amount of **Kshs.3,000,000/=** was paid in installments. He also testified that on the day of execution of the agreement, **Kshs.200,000/=** was paid by the plaintiff to his father.

32. PW4 testified that the National Identity Card copies attached to the agreement were given by **PW2** and the defendant in the Advocates Office at the time of execution of "**P. Exhibit 1**". **PW4** also stated as follows:-

"They agreed that the amount that had been paid for the ten acres.... Mumo had a house in Kimathi which he valued at Kshs.4,000,000/= and they agreed to transfer the house to Kangethe for 4 million. They agreed on how to pay the Kshs.1,000,000/=. On signing the vendor received Kshs. 200,000/= and was to received the balance on 27th April, 2011. The two

parties agreed and executed the agreement.....another person, Samson Mutua Nduma also witnessed the agreement. The vendor and the witness also gave their ID Card copies. I saw some acknowledgement of moneys paid after the agreement was signed”.

33. The acknowledgements mentioned by the witness are contained in “**P. Exhibit 2**” and “**P. Exhibit 3**”. They are for Kshs.270, 000/= and Kshs.110,000/= respectively. I find the documents “**P. Exhibit 1**”, “**P. Exhibit 2**”and“**P. Exhibit 3**” to be credible evidence. This Court finds that the plaintiff paid various sums to the defendant. This court also finds that the total sum paid to the defendant vide these agreements is **Kshs.3,580,000/=**.

34. **Clause 10** of the agreement dated **23rd March 2011** provided that the vendor shall release the documents numbered (a)-(f) upon receipt of the part payment of the purchase price amounting to Ksh 1000,000/=. Ksh 580,000/= of that additional sum has been paid. The vendor has not released the said documents. I find that the vendor is in breach of that agreement.

35. (4) Is the plaintiff entitled to the remedies sought in the plaint?

This court has already found that the agreements between the plaintiff and the defendant in respect of the suit properties existed and that **P. Exhibits 1, 2 and 3** are believable. In the prayers, the plaintiff seeks either specific performance to transfer the Plot No. C14 Kimathi Estate to the plaintiff or alternatively, the defendant do refund **Kshs.3,380,000/=** and costs of the suit. If the plaintiff was supposed to pay Kshs.4,000,000/= being the total consideration in respect of Plot No. C14, and he only paid a portion of it, that is Kshs.3,580,000/= as he admitted at the trial, it would be improper to order specific performance in this matter without ordering that the outstanding balance of the purchase price be paid first.

36. The most appropriate remedy in the circumstances is that which will ensure that each of the parties get what was envisaged by the agreement dated 23rd March 2011.

37. The final orders of this court shall be as follows:

a. The plaintiff shall pay into court the sum of Ksh.420,000/=being the balance of the consideration.

b. Upon the deposit of the sum required in (a) above, the defendant shall execute and furnish the plaintiff with all the documents necessary for the effecting of the transfer of House No C14 Kimathi Estate, Nairobi, being a portion of LR. No. 209/7383 measuring 0.0208 ha. and identified as No C14 on the Block Plan registered in the Registry of Documents Nairobi in Volume D1 Folio 38/166 File D11 Kimathi Estate in default of which the Deputy Registrar of this court shall execute all necessary documents required to effect the said transfer.

c. Upon the transfer of the property to the plaintiff, the sum of Ksh 420,000/= deposited in court as required in (a) above shall be released to the defendant.

d. The defendant shall also bear the costs of this suit.

It is so ordered.

Signed at Kitale on this 21st day of July, 2017

MWANGI NJOROGE

JUDGE

Dated, signed and delivered at Nairobi on this 14th day of August, 2017

K. BOR

JUDGE

Judgement read in open court at Nairobi on this 14th day of August, 2017

In the presence of:

No appearance for the Plaintiff.

Ms. Kinyanjui for the Defendant.

Court Assistant – John Okumu

K. BOR

JUDGE