**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**LAND & ENVIRONMENTAL DIVISION**

**HCC NO. 7 OF 2014**

**SAMUEL WAINAINA TIRAS ……...……..……. PLAINTIFFS**

**VERSUS**

**BENSON NGANGA NDIRANGU ..... DEFENDANT**

**J U D G E M E N T**

1. This suit was initially filed on 25/8/2014 vide a plaint dated 13/8/2014. That plaint was later amended and re-filed on 7/6/2016. The Plaintiff – **SAMUEL WAINAINA TIRUS** – felt aggrieved by the conduct of the Defendant – **BENSON NG'ANG'A NDIRANGU** – over a land sale agreement entered into between them on 15/11/2012. Precisely, the Defendant was selling to the Plaintiff Land Parcel No. **BUSIA/MUNICIPALITY/530** ("suit property" hereafter) at a price or consideration of 24million shillings. The Plaintiff pleaded that he paid Kshs.10million and the balance – kshs.14million – was to be paid within a given period and only after the Defendant had un-encumbered the land and effected the necessary transfer.

2. At the expiry of the agreed period, it turned out that the Defendant had not honoured his side of the bargain. The property still remained encumbered and this prompted the parties to agree on a new arrangement. The encumbrance on the property was actually a loan that the Defendant had borrowed from a bank – ECO BANK to be specific – using the suit land as security. The new arrangement was that the Plaintiff would ensure payment of the remaining loan balance so that the lending bank could release the title to enable the Defendant effect transfer to the Plaintiff.

3. The Plaintiff cleared the loan balance and the lending bank effected discharge of charge thus releasing the title and all other original documents to the Plaintiff and/or his financier. The Defendant was contacted to effect the transfer. He failed to do so and after several futile attempts, the Plaintiff felt that the Defendant was reneging on the agreement. That is what led to the filing of this suit.

4. It later turned out that the Defendant was disputing the computation of the loan owed to the bank, a matter which, according to the Plaintiff, was essentially between the Defendant and the bank. It is the Plaintiff's position that the Defendant is in breach of contract and has acted malafides and/or is fraudulent. The facts of failing to discharge the title, failing to communicate with the Plaintiff, failing to act in good faith, failing to execute transfer to Plaintiff, and even making arrangements to receive rent for part of the very property he was selling, are all said to be confirmation of the alleged breach of contract, fraud and/or bad faith.

5. According to the Plaintiff, the Defendant has been receiving rent for 50% of the property all amounting in the aggregate to Kshs.2,400,000 per year. The Plaintiff is claiming that rent put at Kshs.200,000 per

month from 1st July 2013 to 31st October 2015. The rent is said to amount to Kshs.5,600,000. From that amount, the Plaintiff wants the balance of purchase price - Ksh.1,051,086.15 - owing to Defendant to be deducted.

6. The Plaintiff seeks various other reliefs from the Defendant as follows:

(a) That an order of mandatory injunction prohibiting the Defendant, his agents and/or servants from demanding, collecting and/or receiving any further rent in respect of the property and to give full uninterrupted possession of the property to the Plaintiff.

(b) An order of specific performance do issue against the Defendant that he execute the transfer documents and obtain all the necessary completion documents within fifteen (15) days of the order of the honourable court failure whereof the deputy registrar of the High Court at Busia do execute the transfer in place of the Defendant and the Land Registrar, Busia, do effect the transfer of land title number BUSIA/MUNICIPALITY/530 in favour of the Plaintiff.

(c) Kshs.5,600,000 being rent from 1st July 2013 to 31st October 2015.

(d) All further rent received by the Defendant from 1/10/2015 onwards.

(e) Damages for breach of contract.

(f) Interest on (b) above at the prevailing commercial rate of 18% per annum to be calculated from 1/10/2015 until payment in full and on (c) at the same rate.

7. The Defendant responded to the Plaintiff's suit vide an amended defence and counter-claim filed on 16/9/2015. The Defendant averred that there was attempted sale of the suit land to the Plaintiff but the Plaintiff frustrated the agreement by failing to pay consideration as agreed. He also agreed that he had charged the property to ECO-BANK but the Plaintiff was neither party nor privy to the arrangement between the Defendant and the bank.

8. The Defendant further denied that he agreed to have his loan paid by the Plaintiff or to have his loan with Ecobank settled between the plaintiff's bank and his own. Any such arrangement, the Defendant said, would be in breach of confidentiality and fiduciary duty between himself and his bank.

9. The Defendant averred that he never breached the sale agreement. It was breached by the Plaintiff and because of that breach the Defendant expressed intention to lodge a counter claim. According to the Defendant, there was no fraud, bad faith, or breach of contract on his part as alleged or at all.

10. And true to the Defendant expressed wish to counter-claim, he counter-claimed while filing the defence. The counter-claim is founded on alleged breach of contract and unlawful taking of rent. According to the Defendant, the Plaintiff breached the sale agreement by failing to pay Kshs.14,000,000 owing as balance of purchase price. He claims that sum together with interests at 18% per annum from 28/2/2013 to the date of full settlement. At the time of filing the counter-claim, the interest was said to have accrued to the tune of Kshs.7,560,000.

11. The Defendant is also claiming rent collected by the Plaintiff for half of the suit property at Kshs.220,000 per month for 36 months together with accrued interests at 18% per annum. The accrued rent is said to amount to Kshs.8,360,000 while interest was said to stand at Kshs.4,514,000 at the time of filing the claim. General damages were also sought for breach of contract.

12. In simple terms, the Defendant desires to have the Plaintiff's suit dismissed. He wants the court to enter judgement for him in terms of his counter-claim.

There was the filing of reply to defence and defence to counter-claim by the Plaintiff on 30/9/2016. Generally, the Plaintiff joined issues with the Defendant regarding the suit and denied also the

Defendant's counter-claim. He is claiming costs of the suit too.

14 .The two disputants are the only witnesses who testified in the case. The Plaintiff testified as PW1 on 22/2/2017. He stated that the purchase price for the suit property was Kshs.24million of which he paid Kshs.10,000,000. The balance – Kshs.14million – was to be paid within 90 days from 26/11/2012. And the payment of the balance would only come upon transfer of the suit property to him. This in effect meant that the latest that the balance could be paid was 26/2/2013 and within that period too, the Defendant was supposed to have honoured his part of the bargain.

15. The date of 26/2/2013 came and passed. The Defendant had not yet honoured his side of the bargain. He explained that he could not present a clean title as he had not yet cleared his loan with the lending bank. The lending bank was ECO BANK. Then, ECO BANK was approached. It confirmed the Defendant's indebtedness to it. It was then agreed that the Plaintiff could make arrangements to clear the loan. Arrangements were then made to clear the loan. The Plaintiff borrowed 14million shillings from Family Bank which he used to clear the Defendants loan with ECO BANK, amounting to over 12million shillings. In exact terms the loan was said to amount to Kshs.12,948,913.

16. The loan was then cleared and there was discharge of title. The money was paid into defendants Account No.0180035008367901 operated in the name of BLUE YORK HOTEL. After the loan was cleared, some balance amounting to Kshs.1,051,000 still remained with the Plaintiff for the Defendant to collect. The Defendant was then called to sign the necessary documents to effect the transfer and also to collect his balance. He never availed himself. The matter then came to court after the Defendant failed to co-operate.

17. After clearing the loan, the Plaintiff also decided to go into possession of the suit property. Eco-bank itself was housed in the property. After the Plaintiff had cleared the loan, Eco Bank took the position that the property now belonged to the Plaintiff. It shifted from paying rent to Defendant to the Plaintiff. But the Defendant refused to release another part of the property to the Plaintiff and even went ahead to make arrangements for tenancy with another client. That is the situation that seems to obtain todate. The Plaintiff still receives rent amounting to over Kshs.200,000 from Eco Bank while the Defendant still receives more or less a similar amount from another tenant.

18. During cross-examination, the Plaintiff was asked many questions including whether he entered into agreement knowing that the property was encumbered, whether he paid Kshs.10,000,000 knowing that the Defendant was indebted to Eco-Bank, whether he knew the agreement forbade variation without writing, and whether he was collecting rent from some portion of the suit property.

19. The court saw and heard the Plaintiff say that he knew the property was encumbered, that he paid Kshs.10million knowing that the Defendant was indebted to Eco-Bank, that the agreement forbid variation of agreement without writing, and that he was collecting rent from a portion of the property.

20. The Defendant testified on 3/5/2017. He agreed that there was arrangement to sell the property to the Plaintiff. They agreed on a price of 25million shillings which the Plaintiff changed to 24million when the Defendant travelled to Nairobi to collect the money. He agreed that he received Kshs.10,000,000 and the balance – Kshs. 14million – was to be paid within a period of 90 days. He explained that this meant that the balance had to be paid by 27/2/2013. That date came and the Plaintiff had not paid. The Plaintiff was said to have known that the Defendant owed money to Eco-Bank. The Defendant said he could not avail the title as he had not cleared the loan.

21. The Plaintiff further averred that at no point did he agree with the Plaintiff that the Plaintiff could clear his loan with the Bank. He also said he was disputing the amount said to be owing from him to the bank. Also clear from the Defendant's evidence is that he collects rent from some part of the property while the Plaintiff is the one collecting rent from the portion of the property utilized by Eco-bank. Infact according to the Defendant, the bank has not paid rent to him from 1st July, 2013.

22. According to the Defendant, the sale agreement failed. He said he could not understand how the

Plaintiff got to clear his loan with Eco-Bank as that was not part of their agreement. As far as the Defendant is concerned, the Plaintiff has never paid him the balance of Kshs.14million and has no business collecting rent from the suit property. He complained that the Plaintiff accessed his account without his knowledge and paid money to the bank instead of paying it to him.

23. During cross-examination by counsel for the Plaintiff, the Defendant agreed that he had charged the suit property to Eco-Bank, that about 12million shillings was shown as having been paid to his account with Eco-Bank, that he could not transfer the property to the Plaintiff as he was still awaiting to be paid Kshs.14million by him, and that he never introduced the Plaintiff to Eco-Bank.

24. Both sides filed written submissions. The Plaintiff's submission were filed on 12/7/2017. The submissions are, firstly, an attempted rendition of what the Plaintiffs pleadings and evidence contain and, secondly, an appreciation of all the evidence adduced in the entire case and an attempted exposition of the applicable law. According to the Plaintiff, the balance of Kshs.14million was to be paid to the Defendant upon delivery of title by the Defendant to Plaintiff. And that title had to be free from any encumbrances. That did not happen within the stipulated period.

25. And when that did not happen, a subsequent arrangement was made. The Defendant explained that he could not deliver title as it was still held up by Eco-Bank because of a loan he still owed. It was agreed that the Plaintiff could make arrangements to ensure repayment of the loan. That was done and the title was discharged and/or released. But instead of the Defendant signing the requisite forms to ensure transfer, he changed tact and started raising the issue of computation of the loan owed. And that was now happening after the Plaintiff had cleared payment of the loan amount. The issue of computation, the Plaintiff submitted, was a matter between the Defendant and Eco-Bank.

26. According to the Plaintiff, time ceased to be of essence when the Defendant failed to deliver the title document free from any encumbrances and both sides opted to disregard that and continued with the contract. The Defendant was said never to have issued a notice cancelling the contract. The Plaintiff submitted that he has already paid the purchase price and is therefore entitled to the orders he is seeking, including specific performance.

27. The Defendant was faulted for continued collection of rent of half of the suit property yet he has received consideration of the suit property. The Plaintiff is claiming that rent, among other prayers.

28. The Defendant's submissions were filed on 12/7/2017. According to the Defendant, the mode of payment should have been by cheque, which the Defendant would then acknowledge. That is how the Plaintiff paid the first Kshs.10,000,000 and that is why the Defendant is not disputing the payment. The Defendant argued that the mode of payment for the balance of Kshs.14,000,000 should have followed that mode of payment and the payment itself needed to be done within 90 days from 15/11/2012. The Defendant submitted that the Plaintiff was being mischievous by choosing to pay in a manner different from the one agreed upon.

29. It was wrong, the Defendant submitted, for the Plaintiff's counsel to seek details of his account from his tenant and banker and to proceed to transact on the same without Defendant's authority. It was alleged that this was done in flagrant breach of the fiduciary relationship between Eco-Bank and the Defendant. The payment then made by the Plaintiff into the Defendant's account at Eco-Bank was said to be illegal. In furtherance of that mischief, the Plaintiff and Eco-Bank decided to shift payment of rent then being paid to the Defendant to the Plaintiff herein.

30. It is the position of the Defendant that the Plaintiff breached the agreement of sale. Such agreement no longer exists and the Plaintiff should claim his money from Eco-Bank. From the Defendant's standpoint, when payment failed within the stipulated period, the Plaintiff's only recourse was to terminate the agreement and demand the Kshs.10,000,000 he had paid to Defendant. The Defendant urged the court to dismiss the Plaintiff's claim with costs. He also averred that the rent being collected by the Plaintiff is illegal and he is claiming that rent. More specifically, the Defendant is saying that the Plaintiff is to blame for doing what the agreement did not allow. If he has to get the building, he has to

pay Kshs.14,000,000 to the Defendant. He has further to pay a sum of Kshs.10,560,000 that he has received as rent from Eco-bank. And that he has to be paid with interests at Bank rates. In simple terms the Defendant wants his counter-claim allowed.

31. I have considered the suit as filed, the evidence adduced, and rival submissions. It seems clear to me that the agreement for sale of the suit property between the parties started on the right footing but supervening factors or circumstances cropped up to derail its successful completion. The disputants are trading blame over who is responsible for not ensuring that the contract was completed within the stipulated period. To the Defendant, the Plaintiff is to blame for not paying the balance of Kshs.14million within the agreed 90 days. To the Plaintiff, the Defendant is to blame for not delivering up duly filled and completed documents of transfer within the same period and/or not causing the discharge of title from Eco-bank. It is clear then that this is a case of blame and counter-blame.

32. In my view the starting point should be a look at the agreement to ascertain how the balance of the purchase price was supposed to be paid and how parties were supposed to handle any problem arising. In this regard, clause 2.4 of the agreement is clear that the balance of Kshs.14million was supposed to be paid within 90 days after 26/11/2012. The payment was supposed to take place only if the Defendant was ready to deliver title documents free of any encumbrance. Essentially then, the payment arrangement was like on-the-spot exchange. The Plaintiff would pay the money and immediately receive the title documents free of any encumbrance.

33. Clause 4 provided for termination or rescission of the contract. It stated, *interalia*, that a party could terminate or rescind the contract if the other party breached the agreement or defaulted in payment. And according to clause 4.1 the termination was supposed to be by Notice in writing giving the other party 21 days to rectify the breach or default. Termination or rescission would then become effective upon expiry of 21 days without the desired rectification of breach or default.

34. Then the vendor, as per clause 4.2, was supposed to refund all the money paid by the purchaser within 14 days.

35. Crucial also in the agreement is clause 5 which states time to be of essence and clause 13, which requires variation of the agreement to be in writing. But the requirement as to writing seems to be diluted by a proviso in the same clause that the variation is still valid regardless of how it is effected.

36. It is necessary now to consider the circumstances obtaining in this case. By the end of the 90-day period required for the parties to have completed the transaction, it is clear that neither the Plaintiff nor the Defendant was ready to complete his part of the bargain. The Plaintiff would have the court believe that he would have been ready but for the Defendants failure to discharge the title so that he could use it as security to raise the balance of the purchase price. The Defendant on the other hand intimates that he would have been ready but for the Plaintiff's failure to pay him the remaining balance so that he could discharge the title.

37. It is important to note that none of these averments by the parties was put in writing in the contract of sale. And this would seem to suggest that apart from the written letter of the contract, the parties had mutual verbal understanding that was not part of the written agreement. Be that as it may, it is clear that no party was ready at the end of the 90-day period. What then was the import of this? In my view, if any party desired to terminate the sale because of the alleged default of the other, he required to issue a 21 day notice for that is what clearly clause 4.1 provided. No party issued such notice and that in effect meant that there was no termination of the agreement.

38. What appears apparent is that even after the expiry of the 90-day period, parties continued to engage each other concerning the sale. The Plaintiff alleged that the Defendant told him he was in financial difficulties and could not discharge the title. The Plaintiff was then given a go-ahead to make arrangements to discharge the title from Eco-Bank. The Defendant denies this. According to him, he never gave such go-ahead and what transpired between the Plaintiff and Eco-Bank was purely an agreement between the two without Defendant's blessings. But is this true?

39. Consider this: In a letter dated 30/5/2013 to ECO-BANK by the Defendant, the Defendant complained about the computation of his loan by Eco-Bank and also expressed displeasure that the bank had already released the title to the Plaintiff. He asked the bank to stop dealing with the Plaintiff until the issue of computation of his loan was resolved. The Defendant promised a smooth handover of the premises after the issue of computation was resolved. Then in another letter dated 13/6/2013, the Defendant expressed himself as follows:

> BENSON N. NDIRANGU
>
> T/A BLUE YORK HOTEL
>
> BUSIA
>
> 13/6/2013
>
> THE MANAGER ECO-BANK LTD
>
> BUSIA BRANCH
>
> RE: SALE OF ECO-BANK PRESMISES BRANCH IN BUSIA
>
> Reference is made to the above matter.
>
> We have recomputed the figure of the amount to Kshs.10,669,218.
>
> I hereby write to confirm that I have withdrawn the letter dated 30/5/2013.
>
> The transaction may now proceed.
>
> Yours faithfully
>
> BENSON N. NDIRANGU
>
> CC: Susan Kahoya Advocates

40. By these two letters, the knowledge by the Defendant of the transaction between the Plaintiff and Eco-Bank becomes self-evident. In the first letter, the Defendant is disputing the computation of his loan by Eco-Bank. In the second letter he is expressing satisfaction concerning a re-computation. In the first letter too, the Defendant refers to "smooth handover of the premises". In the second letter, the Defendant gives the go-ahead by stating thus: "The transaction may now proceed".

41. In all these, the "smooth handover of the premises" obviously refers to putting the Plaintiff into possession and ownership of the suit property and the "transaction" allowed to proceed obviously refers to the clearance by the Plaintiff of the loan owed to Eco-Bank by the Defendant. These letters by the Defendant were written long after the 90-day period within which the sale was supposed to have been completed.

42. It is important to remember that time was stated to be of essence. It is important to remember too that variation, though required to be in writing, was still deemed valid "howsoever effected" (see clause 13 of the agreement). It seems to me therefore that when the 90 day period expired the parties can be deemed to have varied the agreement without writing. And this is so because correspondence by the Defendant himself is clear that the parties continued to engage each other over the issue of sale. And the variation in agreement consisted in not only the aspect of the essence of time but also the manner or mode of payment.

43. In light of all these, the Defendant comes across as a less than honest when he avers that he was not

aware of the transaction between the Plaintiff and Eco-Bank or that he did not give a go-ahead to that transaction. The truth seems to be that the Plaintiff's cleared the Defendant's loan with the full knowledge of the Defendant. The Defendant's protestations on this issue therefore seem dishonest and/or hypocritical.

44. But even assuming, for the sake of argument, that the money paid by the Plaintiff into the Defendant's account was not authorized by the Defendant, the Defendant would have done himself good if he had placed an order with Eco-Bank to return the money to the depositor, source, or sender. In that manner, the money would have found its way back to the Plaintiff.

45. As things stand now, the Defendant does not pay loan money to Eco-Bank because the Plaintiff cleared it. The Plaintiff cleared the loan in order to possess and/or own the suit property. The Defendant then turned around to frustrate possession and/or ownership of the premises by the Plaintiff. This is not proper; it is not fair.

46. In law, deeds are more powerful than words (*Facta Sunt Potentiora Verbis*). Lack of notice by the Defendant in this case terminating the contract and subsequent correspondence by him referring to the transaction between his bank and the Plaintiff as an indication that both sides had agreed to proceed with the contract even though the period agreed for payment had expired. It is also an indication that the Defendant had given a go-ahead to the transaction. And the transaction was none other than that of clearing the Defendants loan owed to Eco-Bank. The correspondence showed further that there continued to be a binding contract between the two disputants which was enforceable.

47. In my view therefore, the Defendant's pleadings and evidence in rebuttal to the Plaintiff's suit and in support of his counter-claim is clearly shown as wishy-washy and unhelpful. It is all wind and fury but no substance. He enjoyed all the benefits of the Plaintiff's money but continues to hold on to the suit property deriving benefits thereof that should clearly be entitlements to the Plaintiff. I therefore hereby find and hold that the Defendants counter-claim has no merit and I dismiss it with costs.

48. When it comes to the Plaintiff's suit, I find it well proved on a balance of probabilities. In my view, Plaintiff should have taken possession and ownership of the suit property immediately he cleared the Defendant's loan with Eco-Bank. I therefore grant the Plaintiff prayers (a), (b), (c), (d) and (f). When it comes to (f) however, interests should be calculated at court rates and not as proposed. Also granted is prayer (g) with interests again being calculated at court rates. I have not granted prayer (e), which is for general damages, because I was not addressed on that. In my view too, the prayers already granted are sufficient remedies to the Plaintiff. I would need to add that the Defendant is still entitled to the balance of purchase price that remained after the Plaintiff cleared the loan. The Plaintiff should pay that balance.

**Dated, signed and delivered at Busia this 18th day of October, 2017.**

**A. K. KANIARU**

**JUDGE**

**<u>In the Presence of</u>:**

Plaintiff: ……...……..…..……

Defendants: ……..……..……..……

Counsel for Plaintiff: ……..……

Counsel for Defendant: ……..……