



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.41 OF 2014

GRACE WAMBUKU KAMAUPLAINTIFF

VERSUS

BUSINESS SHADE LIMITED.....DEFENDANT

CONSOLIDATED WITH

ELC NO.46 OF 2014

PETER WANGAI MARARO.....PLAINTIFF

VERSUS

PETER WACHIRA KARIUKI.....1ST DEFENDANT

GRACE WAMBUGU KAMAU.....2ND DEFENDANT

DAVID WAMBUGU KAMAU3RD DEFENDANT

JOHN NICHOLUS GITHAKWA.....4TH DEFENDANT

CHARLES NGANGA NDUNGU.....5TH DEFENDANT

JUDGMENT

(Suit seeking specific performance of certain property; plaintiff seeking specific performance on a property not in the agreement but on what she claims was shown to her; plot allegedly shown to her and the plot in the agreement sold to other parties; specific performance not available; damages in lieu of specific performance; quantification of such damages; such damages quantified at time of judgment and not time of contract, judgment entered for the plaintiff for current value of the suit property).

A. INTRODUCTION AND PLEADINGS

1. This is a consolidated judgment in respect of two suits. The first, that is ELC No. 41 of 2014, was commenced by way of a plaint that was filed on 14 February 2014 by Grace Wambuku Kamau against Business Shade Limited. In that case, Grace Wambuku averred that on 6 February 1999, she purchased from Business Shade Limited at a cost of Kshs. 1,200,000/=, four plots bearing the numbers 4,5, 9 and

10, to be excised from the land parcel LR No. 17/197. She pleaded that these plots were pointed out to her by one Peter Wachira Kariuki, a director of the defendant, in the company of a surveyor, and that she was issued with a beacon certificate for the plots which were consolidated as Nakuru Municipality Block 17/228/7. She pleaded that on 8 January 2014, her son visited the plot and was shocked to find it fenced and she brought the fence down with the assistance of her children. She later learnt that the said plot has been sold to other parties. In her suit, she has sought the following orders :-

(a) A declaration that the land parcel Nakuru Municipality Block 17/228/7 belongs to her.

(b) An order of permanent injunction to restrain the defendant from interfering with the said property.

(c) Any other suitable relief and costs.

2. The second case, that is ELC No. 46 of 2014, was filed on 17 February 2014. The plaintiffs in this case are Peter Wangai Mararo and Jennifer Wanjiru Wangai. The defendants are Peter Wachira Kariuki, Grace Wambuku Kamau, David Nduati Kamau, John Nicholas Githakwa, and Charles Nganga Ndungu. The case of the plaintiffs in this suit is that they purchased the land identified as Plot No. 1 measuring 1 acre, within the land parcel Nakuru Municipality Block 17/228 from the 1st defendant through a sale agreement entered into on 17 March 2013. They paid the sum of Kshs. 5,000,000/= after which they took possession. It is averred that the transaction was to be completed after the land was surveyed and the Plot No. 1 excised and transferred into their names upon which the balance of Kshs. 3,000,000/= was to be paid. It is pleaded that on 8 January 2014 and 10 February 2014, the 2nd, 3rd, 4th and 5th defendants entered the said land and demolished the perimeter wall. It happens that the 2nd defendant is the plaintiff in ELC No. 41 of 2014, and the 3rd, 4th and 5th defendants are her sons, and it will be recalled that in her pleadings, she did aver that she pulled down the fence to the property with the assistance of her sons. The plaintiffs in ELC No. 46 of 2014 have thus sought orders to have the 2nd-5th defendants permanently restrained from the property in dispute; a declaration that the Plot No.1 measuring 1 acre on the land parcel Nakuru Municipality Block 17/228 belongs to them; an order that the transfer of title be effected to them plus costs and any other relief the court may grant.

3. It was apparent that the plaintiff in the suit ELC No. 41 of 2014, and the plaintiffs in ELC No. 46 of 2014, laid claim to the same parcel of land and therefore the two suits were consolidated.

4. In his statement of defence, Mr. Peter Wachira Kariuki, who is also the director of Business Shade Limited, pleaded inter alia that his company sold 4 plots out of a land parcel Nakuru Municipality Block 17/197 to Grace Wambuku, the plaintiff in ELC No. 41/2014, and that he also sold the land Nakuru Municipality Block 17/228/7 to the plaintiffs in ELC No. 46/2014. He pleaded that these parcels of land are separate and distinct. He further pleaded that Grace Wambuku was unable to complete payment for the plots that she purchased, and as a consequence, her sale was revoked, and that she is free to claim her refund less 10% being the penalty for breach of the agreement.

B . EVIDENCE OF THE PARTIES

5. Grace Wambuku Kamau (Grace), the plaintiff in ELC No. 41/2014, is a fairly old lady who is about 78 years now. She testified that she was informed that Peter Wachira (Wachira) (1st defendant in ELC No. 46/2014) was selling an acre of land in Milimani estate in Nakuru which she was interested in purchasing. She met Mr. Wachira on 6 February 1999 and he then showed her the land. They thereafter proceeded to Mr. Wachira's office where she signed a sale agreement. According to her, they never went to see an Advocate to draw the agreement. She was given a copy of the title deed and she started paying for the land. They also went to a surveyor who issued her with a beacon certificate. She thereafter took possession of the land and allowed a neighbor to till it for 5 years. She later asked her to vacate as she planned to develop the land. She deposited building materials although she did not embark on developments. It is later that she found a fence on the land and she pulled it down with the assistance of her children. After this act, the 1st plaintiff in ELC No. 46/2014, Mr. Peter Mararo (Mararo) emerged and claimed that the plot belonged to him. They proceeded to the police station and she tried calling Mr.

Wachira in vain. She asserted that what she bought and what was shown to her was a plot in the land parcel Nakuru Municipality Block 17/228 which conformed to the copy of title deed that was given to her. She was also categorical that she paid the purchase price according to their agreement.

6. In cross-examination, she testified inter alia that she purchased four plots totaling one acre which were to be carved out of the land parcel No. 228. She stated that it was Mr. Wachira who showed her the beacons and at the time she was accompanied by her son, one Kimani. She testified that it was her sons, Githakwa and Nduati, who negotiated the transaction with Mr. Wachira. They are based abroad and they used to pay the purchase price. The money would be sent to her and she would then make payment to Mr. Wachira. She at some point stated that by 30 May 1999, she had finished paying for the plot, although she changed this evidence to say that she had not finished paying. When the surveyor pointed out to her the plot, she was with her son Macharia without the presence of Mr. Wachira, although she stated that he is the one who handed over the surveyor to her. In re-examination, she testified that even after 30 May 1999 she continued paying Mr. Wachira, who accepted payments.

7. PW-2 was one Alex Njoroge Karanja who now lives in Kilifi. He is nephew to Grace. He testified that in the year 1999, he was working at Nakuru as a salesman with a motor dealing company. One of her co-employees was Ann Wachira, the wife of Mr. Wachira. Ann informed her that they were selling some plots in Milimani through their company Business Shade Limited. He developed an interest and he went and saw the plots. He could not however raise the purchase price of Kshs. 1.2 Million and he then informed his aunt, Grace, of the availability of the plots. Grace came to their office and discussed with Ann who later called her husband. He came with a photocopy of the land parcel No. 17/228. His aunt then went with Ann and Mr. Wachira to view the property but he did not accompany them. Later his aunt entered into an agreement to purchase the plot. He testified that the land that was being sold was not out of the land parcel No. 17/197 but out of the land parcel No.228.

8. In cross-examination, he did affirm that he saw the land that was being sold although he did not do a search of the property. The land being purchased was one acre to be divided into four plots to be in the names of the children of Grace. He testified that he ploughed on the land in the year 2000. He stated that the title deed shown to them was for the land parcel No. 228 and that he was informed that the 1 acre being bought would be carved out of this land. He stated that when he went to the land with Wachira, this is what was pointed out, although no beacons were shown to him and he was not shown the full boundaries of the land. He did not accompany his aunt when the land was shown to her.

9. PW-3 was one Joseph Omondi K'Oloo. He is a Field Assistant with the survey firm of M/s Muritu & Associates. In the year 2002, their firm was engaged to undertake survey work on the land parcel Nakuru Municipality Block 17/228. He recalled showing Grace the beacons and they issued her with a beacon certificate to the plot described as Portion No. 7 out of the land parcel Nakuru Municipality Block 17/228. In cross-examination, he testified that he did not know why Grace wanted to be shown this particular parcel of land. That was an issue that she sorted out with their office and his task was only to point out to her the particular portion No. 7. He testified that his instructions from their office were to show her this portion and he was not privy to other background information.

10. PW- 4 was Julius Nicholas Githakwa, sued as 4th defendant in the suit ELC No. 46/2014. He is son to Grace and lives in Johannesburg in South Africa where he is a businessman. His brother David Nduati (David) (3rd defendant) lives in Windhoek, Namibia. The 5th defendant is their uncle. He testified that in the year 1999, while in South Africa, PW-2 called him and informed him that there was a good plot of land on sale. He purchased a ticket for his brother, Nahashon Kimani Kamau, who came and saw the land and advised that it was prime. He also advised that it was in four portions equivalent to one acre. Each portion was being sold at Kshs. 300,000/= thus a total of Kshs. 1,200,000/=. An agreement was then entered into and signed on 6 February 1999. The money was paid in the following installments :-

(i) Kshs. 90,000/= on 6 February 1999;

(ii) Kshs. 230,000/= on 6 April 1999;

- (iii) Kshs. 20,000/= on 23 April 1999;
- (iv) Kshs. 230,000/= on 31 May 1999;
- (v) Kshs. 50,000/= on 31 May 1999;
- (vi) Kshs. 250,000/= on 2 June 1999;
- (vii) Kshs. 20,000/= on 23 December 1999;
- (viii) Kshs. 40,000/= on 23 August 2003;
- (ix) Kshs. 78,000/= on 7 January 2006.

11. When this last payment was made, a receipt was issued which was written "final payment". He stated that on 13 March 2002, the seller took David and his mother to see the land. He himself did not personally meet the seller nor the surveyor. In the year 2003, they drew building plans wherein they proposed to build four residential houses. They bought materials and shipped a container from China. In the meantime, they allowed some person to plough the land pending developments. In January 2014, he was informed by his mother and brother that a fence had been erected on the plot. On 10 February 2014, he flew from Johannesburg to visit the site and he did see the fence which they proceeded to pull down and directed 5 lorries to deposit building stones. Mr. Mararo emerged and the matter was reported to the police but they were advised that their issue was a civil matter. He testified that the plot they were shown is what they claim, and in his view, the plot LR No. 17/197 is the same as the land parcel Nakuru Municipality Block 17/228/7.

12. In cross-examination, he did testify that the agreement that his mother had, shows the land parcel Nakuru Municipality Block 17/197. He also agreed that the receipts that he held show that payment was being made for the land parcel Block 17/197. He stated that he has never seen the mother title to the land parcel No. 197. He admitted that they never fenced the land. He affirmed that he was in South Africa when the transactions were done and the site visited. He also conceded that their sale agreement shows the Plots No. 4, 5, 9 and 10 and not a Plot No. 7. He agreed that the sale agreement showed that the balance was to be paid by 30 May 1999 by which time they had not paid the full purchase price. They paid in full about the year 2003 but he asserted that there was no cancellation of the agreement.

13. PW-5 was David Nduati Kamau. Just like PW-4 before him, he did testify that they were informed of a plot on sale by PW-2 and they sent their brother, Nahashon Kimani Kamau to see the plot together with their mother and a decision was made to purchase the plot. In the year 2002, he came to Kenya, and together with his mother, they went to see Mr. Wachira who gave them a copy of the mother title (which was to Block 17/228) and also directed the survey firm of M/s Muritu & Associates to show them the land. It is then that they were issued with a beacon certificate. He took this to a Mr. Baraza, their appointed architect, and building plans were drawn, showing that development was to be within Block 17/228 portion No. 7. In the year 2012, they were given a note for payment of rates and the note showed the land parcel Nakuru Municipality Block 17/228/7. In the year 2014, they saw that a fence had been put up which resulted in the complaint to the police. While they were at the police station, it is then that he discovered that the agreement they had indicated the land parcel No. 197. He thought that Mr. Wachira took advantage of the age and illiteracy of their mother to indicate the wrong plot.

14. In cross-examination, he conceded that what was in their agreement were Plots No. 4,5,9 and 10 and not any plot described as portion No.7. He was not aware of a sketch plan of the plots No. 4,5,9 and 10. He agreed that he was not present when their mother was shown the land and when the agreement was drawn, although he did state that in the year 2000, Mr. Wachira showed them the ground. According to him, the property was bought by Business Shade and Muiru Properties from the registered proprietor, one Al Nasher.

15. PW-6 was Harrison Kamau Muritu. He is the Administration Manager of Muritu & Associates. He

testified that their firm did a subdivision of the land parcel Nakuru Municipality Block 17/228 into 7 portions pursuant to instructions received from Muiru Properties. Mr. Wachira held the portion No. 7 which measured one acre. He testified that Mr. Wachira came to their office so as to have Grace shown this plot. The same was shown to her and a beacon certificate issued. He stated that their firm never dealt with the land parcel Nakuru Municipality Block 17/197 and they have never dealt with Business Shade Limited on any other property.

16. In cross-examination, he testified that out of the 7 portions carved out of the land parcel No. 228, 6 went to Muiru Properties and one to Business Shade Limited. He affirmed that it was Muiru Properties who instructed them to do the subdivision. They did not do any further subdivision to this portion No.7. He stated that titles to the subdivisions are yet to issue. He confirmed that the property that they subdivided was not Nakuru Municipality Block 17/197. When she came to be shown the land, Grace did not carry with her the sale agreement and he was not aware of it.

17. PW- 7 was Charles Ndungu Nganga, the 5th defendant in the case ELC No. 46/2014. He is a cousin to Grace. He testified that in the year 1999, Grace and her sons informed him that they wished to enter into a sale agreement. He escorted them to an Advocate, Mr. Kaniaru, to draw an agreement and he left them there. He was of the view that Grace was purchasing a plot from the land parcel Nakuru Municipality Block 17/228. In the year 2014, he was informed by Grace that the land had been fenced. In cross-examination, he affirmed that the agreement showed the land parcel Nakuru Municipality Block 17/197 but stated that what was being bought was Nakuru Municipality Block 17/228 since that is the copy of title that he saw. He stated that this was also the plot shown to them.

18. With the above evidence, the plaintiff in ELC No. 41/2014 closed her case.

19. On his part, Mr. Peter Wangai Mararo (Mararo), testified that in the year 2013, he was looking for about an acre of land to put up a hotel. He got wind that Mr. Wachira was selling some land and he approached him. The land was in the larger land parcel Nakuru Municipality Block 17/228 which was in the name of Al Nasher and was being subdivided into 7 portions. Mr. Wachira showed him a sale agreement indicating that he had purchased one portion of land, the other 6 portions having been sold and developed. They thereafter entered into an agreement on 17 April 2013 at a consideration of Kshs. 9 Million. He has so far paid the sum of Kshs. 6 Million and he stated that the balance is payable upon transfer. He took possession and fenced the land but his fence was pulled down by Grace and her sons in January and February 2014. He reported to the police after which he filed suit. In cross-examination, he testified that he has made some late payments on his sale agreement but these were received. When he went to see the land, he stated that the same was bushy, had no cultivation and no fence. There were no beacons demarcating this portion that he purchased.

20. Mr. Peter Wachira Kariuki (Wachira) testified that he is a businessman dealing in real estate under Business Shade Limited. He testified that he intended to sell 4 plots of land to Grace and that is how the sale agreement dated 6 February 1999 was drawn. He stated that she was buying the four plots out of the land parcel Nakuru Municipality Block 17/197. He testified that the parcel No. 197 is land measuring 4 acres and he proposed to subdivide it into 16 equal portions. Grace was therefore buying 4 of these portions which were numbered Plots No. 4,5,9 and 10. He testified that the original owners of the Plot No. 197 were Trustees of Sammaly Women Group, and Business Shade Limited had an agreement with them to purchase this land. They put down a deposit of 10% and hoped to raise the balance from the sale of the subdivisions. He stated that the persons they sold land to could not raise the buying price in time and they lost the purchase. So that he did not lose his 10% deposit, he quickly looked for another buyer who purchased the whole of the 4 acres from the Group.

21. He testified that according to their agreement, Grace was to complete payment on 30 May 1999 but was not able to do so and their agreement therefore lapsed. He denied that he showed Grace a plot within the land parcel Nakuru Municipality Block 17/228 as he had not acquired this property by then. He denied that he took her to this plot accompanied by a person from Muritu & Associates. He agreed selling a plot out of this land parcel to Mr. Mararo and they have a written agreement and he wondered why Mr. Mararo sued him. He explained that they purchased this property jointly with Muiru Properties on 4 June

2001 and he produced the sale agreement. The said property is two acres and they were to share it on a 50:50 basis, each to hold one acre. He testified that Muiru Properties subdivided its one acre share into several plots but his share was left intact. It was Muritu & Associates who did the subdivision. He refuted the claim that the two properties, No. 197 and No. 228 were the same, as one measured 4 acres and the other 2 acres, although the two are adjacent to each other and only separated by a road. He testified that the Plot No. 228 is registered in the name of Al Nasher Numan. He pointed out that the sale to Grace was in the year 1999 yet they purchased the property No. 228 in the year 2001, and therefore he could not have sold what he had not acquired. He testified that he had a discussion with PW-2 and the sons of Grace and he cordially agreed to get them another plot. He got them two plots in Stem area, but their relationship broke down when PW-2 bypassed them as agents, and went directly to the seller. He stated that he was willing to refund what was paid as contained in the agreement.

22. In cross-examination, he confirmed that his wife worked with PW-2 at some point. He also confirmed that in 1999, he showed the property to PW-2. He stated that he never showed Grace the property and only met her for the first time at the advocate's office when drawing the agreement. He testified that he never dealt with Muritu & Associates as it was Muiru Properties who had engaged them. He refuted ever giving Grace a copy of the title but did give a copy to PW-2. He stated that according to their agreement, all the money was to be paid by 30 May 1999 which was not done although he did admit continuing to receive money after this date. He conceded that he never wrote to Grace to inform her that he had cancelled their agreement and never issued the receipts on a without prejudice basis. He testified that it was in July 2000 that his agreement with the Women Group was rescinded and the property was purchased by a Mr. Shah on 14 July 2000. He testified that they mutually agreed with PW-2 that he would get them another property. He denied engaging Muritu & Associates to show Grace the property. He could not explain how Grace got hold of a copy of the title to the land parcel No. 228 of which he has the original, and denied that it was him who gave her a copy of the same. He denied inserting the wrong plot number in the agreement of sale and stated that Grace was accompanied by his sons who are educated.

C. SUBMISSIONS OF COUNSEL

23. In his submissions, Ms. Nancy Njoroge, learned counsel for the plaintiff in the case ELC No.41/2014, submitted inter alia that there is no dispute that her client entered into an agreement on 6 February 1999. She submitted that despite the agreement stating that the full purchase price was to be paid by 30 May 1999, this term was varied by the parties as the vendor continued receiving the purchase price, and the last payment was made on 7 January 2006. She submitted that if there was any breach, the vendor would have notified her client and she pointed out to the fact that the vendor never made any attempt to refund the money paid. She submitted that Mr. Wachira never submitted any letter authorizing him to sell the land parcel No. 197 from Sammaly Women Group. She wondered where her client could have got a copy of the title deed to the land parcel No. 228 if it was not given to her by Mr. Wachira. She submitted that Mr. Wachira sold and showed her client the parcel No. 228 and that he took advantage of her age to insert a different parcel number. She wondered why he sold the land parcel No. 197 to Mr. Shah in the year 2000 yet continued receiving money from her client after this date. She asked this court to see Mr. Wachira as a fraudster who receives money from one person then changes his mind to sell the same land to another person at a higher price. She asked that Business Shade should be ordered to transfer the land to her client. She relied on the case of *Radia vs Transocean (Uganda) Ltd (1985) KLR 300*.

24. On his part, Mr. Mbatia, learned counsel for the plaintiff in ELC No. 46/2014, submitted inter alia that his client purchased a one acre plot of land from the land parcel No. 228. He pointed out that the sale agreement that Grace has is for the parcel No.197 and that the receipts she produced bear this land parcel number. He submitted that Grace failed to conduct due diligence and has only herself to blame.

25. Mr. Ikua, for Business Shade Limited and Mr. Wachira, submitted that in her pleadings, the plaintiff has averred that she purchased four plots being Nos. 4, 5, 9 and 10 to be excised from the land parcel No. 197 and that she has pleaded further that these plots were consolidated into the land parcel Nakuru Municipality Block 17/228/7. He submitted that his client only acknowledges the sale of the Plot No.197 and not the Plot No. 228 and that Grace failed to pay in accordance with the agreement. He pointed at what he considered to be material contradictions in the evidence of the plaintiff whom he considered to be

confused or not knowing anything about the sale transaction. He submitted that she failed to demonstrate that the Plot No. 197 and the Plot No. 228 are one and the same. He submitted that they lied to court when stating that they were shown the Plot No. 228 when all their documents indicated the Plot No. 197. He pointed out that they did not conduct a search nor get a map for the area, or their own surveyor, to verify the land before buying it. He submitted that the surveyors pointed out to Grace what she wanted to be shown and they could not have shown her anything else as she did not carry with her a copy of her agreement. He submitted that his clients could not have sold the land parcel No. 228 in the year 1999 as they did not own it having purchased it in the year 2001. He submitted that the agreement is documented and no oral evidence should be introduced. He relied on the cases of ***Kiplagat Kotut vs Rose Jebor Kipngok (Eldoret ELC No. 691 of 2012)***; ***IEBC & Another vs Stephen Mutinda Mule & Others (Nairobi HCCA No. 219 of 2013)*** and ***Kinyanjui Kamau vs George Kamau Njoroge (Nairobi HCCA No. 132 of 2005)***.

D. ANALYSIS AND DECISION

26. I have considered the pleadings, the evidence and the submissions of counsel. In my view, the following issues are open for consideration :-

(i) Did the plaintiff in ELC No. 41/2014 purchase the land parcel Nakuru Municipality Block 4/197 or a portion of the land parcel Nakuru Municipality Block 4/228 ?

(ii) Which land parcel was the plaintiff shown ?

(iii) Can the plaintiff in ELC No. 41/2014 claim ownership of a portion of the land parcel Nakuru Municipality Block 4/228 ?

(iv) Who is entitled to own the plot No. 7 in Nakuru Municipality Block 4/228 ?

(v) Do the parties have any remedies against Business Shade Limited and Peter Wachira ?

(vi) What are the final orders ?

Issue 1 : Did the plaintiff in ELC No. 41/2014 purchase the land parcel Nakuru Municipality Block 4/197 or a portion of the land parcel Nakuru Municipality Block 4/228 ?

27. Let me start by saying that it is trite law that agreements for sale of land are supposed to be reduced into writing and indeed can only be enforced if they are in writing. This is spelt out in Section 3 (3) of the Law of Contract Act, Cap 23, Laws of Kenya, which is drawn as follows :-

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.

(4) Subsection (3) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive

trust.

28. The parties in the suit ELC No. 41/2014, that is Grace Wambuku and Business Shade Limited, did indeed have a contract that was reduced in writing. This being an agreement which the law requires to be in writing, the provisions of Section 97 and 98 of the Evidence Act, Cap 80, Laws of Kenya, apply. The said provisions of the law are drawn as follows :-

97. Written contracts and grants

(1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

(2) Notwithstanding the provisions of subsection (1) of this section—

(a) wills admitted to probate in Kenya may be proved by the probate;

(b) when a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

(3) Subsection (1) of this section applies equally to cases in which contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

(4) Where there are more originals than one, one original only need be proved.

(5) The statement, in any document whatever, of a fact other than the facts referred to in subsection (1) of this section, shall not preclude the admission of oral evidence as to the same fact.

98. Evidence of oral agreement

When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 97 of this Act, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms:

Provided that—

(i) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law;

(ii) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved, and in considering whether or not this paragraph of this proviso applies, the court shall have regard to the degree of formality of the document;

(iii) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved;

(iv) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of such documents;

(v) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved, if the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract;

(vi) any fact may be proved which shows in what manner the language of a document is related to existing facts.

29. It will be seen that under Section 97 and 98 above, where the contract is required to be in writing and it is indeed reduced into writing, the terms of the contract are supposed to be deduced from the document itself and not from oral averments. The terms of the contract are those which are indicated in the document and it is this document which will reveal the subject matter of the contract, the purchase price, and other terms thereof.

30. In our case, we do have the agreement dated 6 February 1999. It is what is indicated in that agreement which will provide the subject matter of the agreement and other terms of agreement. We cannot, by dint of Section 97 and 98 of the Evidence Act, import other items into the agreement which are not contained in the said document. This is indeed what was decided in the case of ***Kiplagat Kotut vs Rose Jebor Kipngok*** cited by Mr. Ikua.

31. From the agreement tendered, the subject matter that was being sold is indicated to be the Plots Nos. 4, 5, 9 and 10 out of the land parcel Nakuru Municipality Block 17/197, which the vendor, Business Shade Limited, in the same agreement, warranted that they are the lawful purchasers of the same and that they have caused it to be subdivided into sixteen plots. The agreement indicates that the purchase price was to be Kshs. 300,000/= per plot thus a total of Kshs. 1, 200,000/=. The sum of Kshs. 180,000/= was to be paid on execution of the agreement which sum was acknowledged by the vendor, and the balance was to be paid as follows :-

(a) Kshs. 420,000/= on or before 20 March 1999.

(b) Kshs. 600,000/= on or before 30 May 1999.

32. With regard to possession, the same was to be given upon payment of the entire purchase price and whoever was in breach was to pay the other party 10% of the purchase price.

33. In her pleadings, the plaintiff did plead that she purchased the plots No. 4, 5, 9 and 10 out of the land parcel LR 17/197. She however in the same pleadings claimed that she was shown the beacons and issued with a beacon certificate for the land parcel Nakuru Municipality Block 17/228. What I will follow, is what is noted in the sale agreement, which shows that what was being sold was to be derived from the land parcel Nakuru Municipality Block 17/197. I have no agreement where the plaintiff purchased any plot of land out of the land parcel Nakuru Municipality Block 17/228 and the plaintiff cannot now purport to import the land parcel No. 228 into an agreement of sale over the land parcel No. 197. I am afraid that the plaintiff has to live with the fact that she purchased the land parcel No. 197 and not the land parcel No. 228. The plaintiff cannot now be heard to say that the vendor took advantage of her age or illiteracy. She signed an agreement for the land parcel No. 197 and she is bound by that. The question of her age and/or illiteracy are irrelevant, but even if I was to consider the same, she indeed was accompanied by persons who are educated when going to sign the agreement.

34. My holding on the first issue is that the plaintiff aimed to purchase four plots which were supposed to be carved out of the land parcel Nakuru Municipality Block 17/197 and never purchased or aimed to purchase any land out of the land parcel Nakuru Municipality Block 17/228.

Issue (ii) Which land parcel was the plaintiff shown and does this vitiate the agreement ?

35. On this point, I have conflicting evidence. The plaintiff in ELC No. 41/2014 avers that she was shown land which ended up being within the land parcel No. 228 and not the land parcel No. 197. On the other hand, the vendor asserts that he showed the buyer the land parcel No. 197 which is what was noted in the agreement.

36. Having considered the demeanor of the witnesses, I believe that the vendor showed the plaintiff the wrong parcel of land and I also believe that he gave to the plaintiff, the title deed to the plot No. 228 and not the Plot No. 197. All the same, it was incumbent upon the plaintiff to conduct due diligence so as to satisfy herself that what is noted in the agreement conforms to what is on the ground. It should however not be construed that I am saying that a vendor is free to point out the wrong parcel of land to a purchaser. The vendor also has a duty to act in good faith and point out what is supposed to be sold, but that does not absolve the purchaser of the duty to conduct due diligence. The purchaser needed to confirm for herself that what was being sold to her conforms with what is on the ground, which she appears never to have done. Once she was handed over a title deed to the land parcel No. 228, and not parcel No. 197, she should immediately have seen that this title deed is different from what was in their agreement and this ought to have put her into inquiry, which she never did. The receipts that were issued to her also indicated that she was purchasing portions of the land parcel No. 197 and not the parcel No. 228.

Issue (iii) Can the plaintiff in ELC No. 41/2014 claim ownership of a portion of the land parcel Nakuru Municipality Block 4/228 ?

37. My short answer to this question is that the plaintiff cannot claim ownership of any portion of the land parcel No. 228. I say so for the simple reason that she has no agreement for the purchase of this land which she can seek to enforce. The agreement that she had was over the land parcel No. 197 and I cannot import a term, into that agreement, which goes contrary to what the parties expressly agreed. Even if the plaintiff was shown a different plot of land, she can only enforce what is in her agreement and nothing else.

Issue (iv) Who is entitled to own the plot No. 7 in Nakuru Municipality Block 4/228 ?

38. I have nothing before me that would vitiate the sale of the Plot No. 7 to Mr. Mararo. The sale agreement that he has is indeed being performed by the parties. Mr. Mararo never complained before this court that the vendor is not performing his part of the agreement and he seemed to be comfortable with the manner in which the agreement is being performed. In as much as Mr. Mararo named Mr Wachira as defendant, I really do not think that he has a dispute with him in so far as that agreement is concerned. I am of the view that his claim for a declaration and for the title to be transferred to him is premature as he has not alleged any breach against the vendor. But if in future he wishes to enforce his agreement with Mr. Wachira and/or Business Shade Limited, he is certainly free to do so but I do not think that he has any valid claim at the moment against Mr. Wachira. However, he certainly does have a claim against the plaintiff in ELC No. 41/2014 for the simple reason that I have held that Grace, the plaintiff in that suit, has not demonstrated to me that she has any proprietary rights over any portion of the land parcel No. 228. I will grant the orders of permanent injunction against the 2nd - 5th defendants in the suit by Mr. Mararo but I decline to issue any orders in his favour against the 1st defendant for the reason that I am of opinion that his suit against the 1st defendant is premature as their contract is still being performed. I cannot however blame him for enjoining the vendor to his suit, as he faced a scenario where probably, there was a sale of the same plot to more than two persons.

Issue (v) Do the parties have any remedies against Business Shade Limited and Peter Wachira ?

39. The two plaintiffs in the suit ELC No. 46/2014 (Mararo and his wife) have no claim against Peter Wachira or Business Shade Limited. Their claim against Mr. Wachira is dismissed, but as I have said, there was reason for their joinder and I will not make any orders on costs. In her suit, Grace Wambuku wished to have a declaration that the parcel of land Nakuru Municipality Block 17/228 portion No. 7 belongs to her. She cannot get this order since as I have mentioned earlier, she does not have any

agreement for sale over this parcel of land.

40. In his evidence, Mr. Wachira was of opinion that Grace Wambuku breached their agreement by making late payments and was of the view that all that she is entitled to is a refund, less 10% damages. It is indeed true that Grace did not pay the purchase price as agreed. However, it does appear to me that the vendor waived the late payments and did not consider the contract as repudiated solely based on the late payments received. He indeed continued receiving money as late as the year 2006 and he is now estopped from claiming that the purchaser breached the contract by making late payments. If the late payments were an issue, the vendor would simply have informed the purchaser that he has repudiated the contract owing to the late payments but he did not.

41. I am in fact amazed, if not appalled, that Mr. Wachira continued to receive money from the plaintiff without informing her that the land parcel No. 197 is no longer available. He did state that the said land was sold by the owners in the year 2000 yet he still collected money from the plaintiff. Strictly, the purchaser having done her part, is entitled to enforce the agreement by seeking an order of specific performance, but it is clear that the said prayer cannot be granted for the simple reason that this land was never in the first place owned by Mr. Wachira or his company, as they never acquired it from the original owner. What Mr. Wachira and Business Shade were involved in was selling land which they never owned but only hoped to own. In my view, they breached a fundamental condition of the sale agreement, as they warranted that they were the lawful purchasers of this land while in fact they had not yet purchased it but only hoped to do so. In my opinion, it is actually Business Shade Limited who breached the contract by not transferring to Grace Wambuku, the four plots of land that she purchased out of the land parcel No. 197. I am not persuaded that Grace was in any breach, since the late payments that she made were waived, as I have explained above, while all this time, Mr. Wachira led the purchaser to believe that the four portions of land out of the parcel No. 197 were available.

42. I have already mentioned that Grace Wambuku cannot get the remedy of specific performance. What then is the most appropriate remedy for the case? The position of the defendant is that the plaintiff ought to get her refund less 10% for breach of contract on the argument that she is the one who breached the contract. My position is that it is the defendant who breached the contract and not the plaintiff and therefore it is the plaintiff who deserves to be compensated. What is stipulated in the contract is that a party in breach will pay 10% damages, but to me, this is an inadequate remedy as it is common knowledge that property values have increased exponentially. The remedy of specific performance would have been the best remedy, but as I have explained, this is not a remedy possible to grant.

43. Given this scenario, the most appropriate remedy in the circumstances is to award damages in lieu of specific performance. This is a long held jurisdiction of the court of equity with its roots being the Chancery Amendment Act of 1858 (popularly referred to as 'the Lord Cairns' Act') which empowered the Chancery Court to award damages which hitherto were a domain of the common law. Section 2 of that statute provides as follows:-

“In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to

or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct.”

44. The Lord Cairns' Act was repealed by the Statute Law Revision and Civil Procedure Act 1883 but the power to award damages in equity was entrenched as revealed in the House of Lords decision in the case of **Leeds Industrial Cooperative Society vs Slack (1924) All ER 259**, (which concerned the award of damages in lieu of an injunction) where Lord Finlay remarked at p265 that:- *“Though the Act is gone, the law which it laid down still exists, and this case, like many others of the same kind, has throughout, from beginning to end, been dealt with on this view”*. The current position in England on the award of

damages in lieu of injunction or specific performance is based on statute, but it cannot be argued that the said jurisdiction does not exist in the general law of equity as demonstrated by this case.

45. Unlike common law damages which are quantified at the time of breach, the reasoning being that the plaintiff had a duty to mitigate, equitable damages are quantified at the time of judgment. Thus when an award of damages in lieu of specific performance is being made, the sum of damages will be the current value of the property that was to be conveyed. This principle was applied in the English case of **Wroth & Another vs Tyler (1973) 1 All ER 897**. In the said case, the purchaser had contracted to purchase a house for £6,000. The vendor defaulted. At the time the deal was to close, the property was worth £7,500, and at the time of trial, the property was worth £11,500. The Court assessed damages as at the date of trial. Megarry J, in deciding the case remarked as follows at p919 :-

"Today, to purchase an equivalent house they need £5,500 in addition to their £6,000. How, then, it may be asked, would the award today of £1,500 damages place them in the same situation as if the contract had been performed ? The result that would have been produced by paying £1,500 damages at the date of the breach can today be produced only by paying £5,500 damages, with in each case the return of the deposit. On facts such as these, the general rule of assessing damages as at the date of the breach seems to defeat the general principle, rather than carry it out."

Wroth vs Tyler (*supra*) was followed by the Supreme Court of Canada in the case of **Semelhago vs Paramadevan (1996) 2SCR 415**. The simplified facts of the case were that the appellant vendor refused to close a transaction for the sale of residential property to the respondent purchaser. The latter sued for specific performance and, in the alternative, damages in lieu thereof. In the interim, property values rose, in the event that if damages were assessed as at the time of contract, the respondent would not recover the increase in the value of the property he had agreed to purchase. The court held that the proper date of assessment of the damages would be the date of trial.

46. It should always be remembered that the aim of making an award of damages for breach of contract is to put the injured party into the position in which he would have been had the contract been performed in so far as that is possible by the payment of money. This will not be possible by having the plaintiff herein paid the sum of money that she paid in the year 1999 even if that sum is increased by 10% as damages. Since specific performance is a remedy that would have issued, but cannot, given the circumstances that have arisen, the proper remedy to make is to award damages in lieu of specific performance and the said damages will have to be the current value of the property that was sold to the plaintiff. I therefore award the plaintiff damages, being the current value of the property that she purchased, that is the value of one acre of the land parcel Nakuru Municipality Block 17/197, or the value of comparative land, and I direct that the current value be assessed by the Government Valuer within 14 days of this judgment. I direct the said valuer to table before this court the said valuation report so that this court may make specific the award made to the plaintiff.

47. The defendant could have escaped all this by informing the plaintiff much earlier that the property that she purchased was no longer available. But he did not, and led the plaintiff to believe that the contract would still be performed. That was quite unbecoming conduct on his part. It does appear that at some point, when confronted, he tried to mitigate by offering another property to the plaintiff, but reneged because of personal, if not petty differences, between him and the son or nephew of the plaintiff. His behavior cannot be excused' whichever way one looks at it, and frankly, I have little sympathy for him when asking him to pay the current value of the property .

48. I believe that I have dealt with all issues in this case and I now make the following final orders :-

(i) In respect of the case ELC No. 41/2014, I enter judgment for the plaintiff against the defendant and make an award of damages in lieu of the order of specific performance, the damages being the equivalent of the current market value of the property that the plaintiff intended to purchase or the value of a comparative premise.

(ii) I order the Government Valuer, Nakuru District, to proceed and give the current value

of an acre of land in the parcel Nakuru Municipality Block 17/197 or land equivalent to the said property and provide the report within 14 days of service of this judgment or decree.

(iii) In respect of the case ELC No. 46/2014, I do hold that the plaintiffs' case against the 1st defendant is premature since their contract is still being performed, but the plaintiff is entitled to the order of permanent injunction against the 2nd-5th defendants.

(iv) On costs, I award the plaintiff the costs in the suit ELC No. 41/2014 as against the defendant Business Shade Limited, but in respect of the case ELC No. 46/2014, I make no orders as to costs.

48. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 12th day of October 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In the presence of : -

Mr. Kairu holding brief for Ms. Nancy Njoroge for the plaintiff in ELC No.41/2014 and for the 2nd – 5th defendants in ELC No.46/2014.

Mr. Mbatia for the plaintiff in ELC No.46/2014.

Ms. Rop holding brief for Mr. Ikua for the defendant in ELC No.41/2014 and 1st defendant in ELC No. 46/2014.

Court Assistant : Carlton Toroitich.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU