



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC NO. 81 OF 2013**

**HARRISON KAMAU GIKAMBU ALIAS KAMAU MORRIS.....PLAINTIFF**

**VERSUS**

**DANIEL KIRAGU GITAU.....DEFENDANT**

**JUDGMENT**

The plaintiff brought this suit against the defendant by way of a plaint dated 10<sup>th</sup> September 2013. The plaint was orally amended on 5<sup>th</sup> October 2015. In the amended plaint, the plaintiff sought the following reliefs:-

- a. An order that the defendant do complete the sale transaction that the plaintiff and the defendant had entered into by settling the balance of the purchase price in the sum of Kshs 335,000/-.
- b. Interest on (a) above at court rates with effect from 1989 until payment in full.
- c. In the alternative to (a) and (b) above, an order that the defendant be evicted forthwith from LR No. Dagoretti/Mutuini/1379.
- d. A permanent injunction restraining the defendant by himself or through his agents, representatives, employees, servants and/ or any other persons claiming through him from interfering with the plaintiff's quiet enjoyment of LR No. Dagoretti/Mutuini/1379.
- e. Costs of the suit.
- f. Any other relief that the court may deem fit and just to grant.

The Plaintiff averred that at all material times he was the registered owner of all that parcel of land known as **LR No. Dagoretti/Mutuini/262** measuring about 1.6 acres (hereinafter referred to only as "**Plot No.262**"). In the year 1989, he sold to the defendant a portion of the said parcel of land measuring 0.25acres at a consideration of Kshs 400,000/-. Pursuant to this sale transaction, the defendant paid him a sum of Kshs 50,000/- as a deposit and a further sum of Kshs 15,000/- in part payment of the purchase price. He averred that following these payments, he permitted the defendant in good faith to take possession of the said portion of Plot No.262 that was sold to him. The plaintiff averred that upon taking possession of the said portion of Plot No. 262, the defendant failed, refused and/or neglected to complete the sale agreement by paying the balance of the purchase price amounting to Ksh.335,000/-.

The defendant was served with the summons to enter appearance and he entered appearance on 18<sup>th</sup> December, 2013 through the firm of Kangethe and Mola advocates. The said firm of advocates did not however file a statement of defence on behalf of the defendant. On 26<sup>th</sup> February 2014, the plaintiff requested for interlocutory judgement against the defendant in default of defence and was directed to set down the suit for hearing.

When the suit came up for hearing on 5<sup>th</sup> October 2015, the plaintiff gave evidence and did not call any witness. The plaintiff (PW1) testified that in the year 1989, his mother became ill and he decided to sell to the defendant a portion of Plot No. 262 measuring 1.6 acres (hereinafter referred to as “**the suit property**”) at a consideration of Kshs 400,000/-. He told the court that the defendant paid him a total sum of Kshs 65,000/- out of which Kshs 50,000/- was paid as a deposit upon the execution of the agreement for sale and a further sum of Ksh.15,000/- was paid subsequently. The plaintiff stated that the defendant failed to raise the balance of the purchase price and intimated to him that he would sell one of his parcels of land to enable him clear the debt. The plaintiff stated that the defendant failed to obtain permission from his family members to sell the said parcel of land from which he expected to obtain the balance of the purchase price with the result that the defendant was completely unable to pay the said balance of the purchase price. The plaintiff stated that he had allowed the defendant to take possession of the suit property pending the payment of the balance of the purchase price and that the defendant has neither paid the balance of the purchase price nor vacated the suit property. He contended that the defendant should either pay the balance of the purchase price together with interest or move out of the suit property. He produced as exhibit, a copy of the certificate of title in respect of Plot No. 262 that was issued in his favour on 5<sup>th</sup> April 1967.

The plaintiff stated that pending the completion of the sale transaction that he entered into with the defendant, he subdivided Plot No.262 into three portions namely, LR. Numbers Dagoretti/Mutuini/1377, 1378 and 1379. The portion of Plot No. 262 that he had sold to the defendant (the suit property) and from which he has sought the defendant's eviction was given land reference number Dagoretti/Mutuini/1379(hereinafter also referred as “the suit property”) after the said subdivision. He produced as exhibit a copy of the title deed dated 13<sup>th</sup> April 2015 for the said LR No. Dagoretti/Mutuini/1379 (the suit property). He told the court that he had returned the original title deed for the suit property to the land office for correction of his name in the register from Kamau Morris to Harrison Kamau N. Gikambu. He produced in court, a copy of the receipt dated 10<sup>th</sup> September 2015 that was issued to him by the department of lands for the fees that he paid for correction of name.

I have considered that plaintiff’s claim as pleaded and the evidence that was produced by him in support of the claim. The issues that arise for determination are; whether the plaintiff had entered into an agreement for sale of the suit property with the defendant, whether the defendant breached the said agreement and whether the plaintiff is entitled the reliefs sought. As I have stated at the beginning of this judgement, the defendant entered appearance but did not file a statement of defence. The effect of this is that all averments of fact set out in the plaint as concerns the agreement for sale that the plaintiff is said to have entered into with the defendant were not controverted. The defendant did not also tender any evidence at the trial. The evidence that was given by the plaintiff as concerns the said agreement for sale was similarly not controverted. The fact that the plaintiff had entered into an agreement for sale of the suit property with the defendant is therefore not disputed. The terms of the said agreement are also not disputed. The same also applies to the breach by the defendant of the terms of the said agreement for sale. What the court needs to determine is the appropriate relief if any that the plaintiff is entitled to in the circumstances. The plaintiff has sought an order for specific performance and in the alternative an order for the eviction of the defendant from the suit property. With regard to specific performance, the plaintiff has sought an order to compel the defendant to complete the agreement for sale of the suit property by paying the balance of the purchase price in the sum of Kshs.335,000/-.

It is settled law that an order for specific performance is discretionary. I have noted that the alleged agreement for sale between the plaintiff and the defendant was made in the year 1989. This suit was brought 24 years later in the year 2013. It would not be appropriate in my view having regard to the time that has lapsed since the agreement was made to make an order for specific performance. I am also of the

view that the plaintiff's claim as far as it seeks specific performance of the agreement for sale that was made in 1989 is time barred under the provisions of section 4(a) of the Limitation of Actions Act which provides that actions founded on contract may not be brought after the end of 6 years from the date on which the cause of action accrued.

As an alternative to the prayer for specific performance, the plaintiff has sought an order for the eviction of the defendant from the suit property. This alternative claim is based on the tort of trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, **Clerk & Lindsell on Torts, 18<sup>th</sup> Edition at page 923**. The plaintiff told the court in his evidence that he permitted the defendant to take possession of the suit property awaiting the payment by the defendant of the balance of the purchase price for the said property. In the circumstances, the defendant entered and occupied the suit property with the plaintiff's permission. The question that begs for an answer is whether the mere fact that the defendant did not fulfill his part of the agreement for sale makes him a trespasser on the suit property? I don't think so. I am of the view that unless the said agreement was rescinded and a demand made upon the defendant to vacate the suit property, his occupation of the said property that was gained lawfully remained lawful. The plaintiff has not called upon this court to declare the agreement for sale that he entered into with the defendant rescinded. What he has sought is an order for specific performance. As I have stated above, his claim for specific performance is time barred. I am of the view that even if the plaintiff had sought rescission of the said agreement for sale, such claim would meet the same fate. An action to rescind a contract cannot be maintained after a period of 24 years from the date when the contract was made. Although the suit was not defended, a court of law cannot entertain a claim which is time barred. The final relief sought by the plaintiff was an injunction. This was a supplementary relief. It was dependent on outcome of the first two main reliefs. Since the said reliefs have been held not to be maintainable, the prayer for injunction must similarly fail. There is no basis upon which the injunction sought can issue.

The upshot of the foregoing is that the plaintiff's suit against the defendant is time barred and legally untenable. The same is accordingly dismissed with no order as to costs.

**Delivered, Dated and signed at Nairobi this 29<sup>th</sup> Day of January, 2016**

**S. OKONG'O**

**JUDGE**

**In the presence of**

**N/A for Plaintiff**

**N/A for Defendant**