REPUBLIC OF KENYA

IN THE HGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENTAL & LAND DIVISION

ELC NO. 611 OF 2012

DAVID MUIGAI NG'ANG'A..... PLAINTIFF

-VERSUS-

EMBAKASI RANCHING COMPANY LIMITED.....1ST DEFENDANT

SAMUEL MWANGI THUITA.....2ND DEFENDANT

JUDGMENT

Introduction and Litigation History

1. The suit herein was filed on 18th September, 2012. The Plaint sought the following prayers:-

a. An Order of specific performance against the Defendants.
b. Compensation for loss of use of land.
c. Costs o
d. An injunction restraining the Defendants by themselves, servants, agents and or employees from entering, occupying, subdividing, alienating, selling or dealing with the suit land in any manner likely to prejudice the interest of the Plaintiff in and within the parcel of land known as P4388 situate in Ruai.
e. f the suit
f. Interest on (c) & (d) above
g. Any other relief the court deems fit in the circumstances.

2. On the same day the Plaintiff also filed a notice of Motion seeking prohibitory injunctive orders against the Defendants. The said application was heard and determined exparte on 7th November, 2012 when the Defendants by themselves, servant's, agents and or employees were restrained from entering, sub-diving occupying alienating selling or conducting any business whatsoever in and within parcel of land known as Embakasi Ranching Block C, pending the hearing and determination of the suit. The court then also directed the Plaintiff to set the main suit down for hearing.

3. In the meanwhile, the Plaintiff had on 21st September, 2012 filed an amended plaint including an additional prayer which read as follows:

"a) In the alternative compensation for breach herein by the current market value of the suit property".

4. The Defendants despite being served with all the court process did not enter appearance. Neither did the Defendants file a defence. In consequence and pursuant to Order 10 Rule 9 of the civil Procedure Rules, the Plaintiff was on 7th November, 2013directed by the Deputy Registrar to list the suit for formal proof. On 6th October, 2014 the case was set down for formal proof.

5. In a nutshell, the Plaintiff's case from the pleadings is that the Plaintiff entered into an agreement with the 1st Defendant to purchase 25 plots of land collectively known as Embakasi Ranching Block C. The Agreement was not to be reduced into writing but convinced that it would, the Plaintiff paid the aggregate sum of Kshs. 5,025,000/= to the Defendants. The amount constituted both the purchase price as well as the stamp duty, registration fees and disbursements. Thereafter the Plaintiff pushed for the drafting and execution of the sale agreement by the 1st Defendant to no avail. To the Plaintiff he had an equitable interest in `the property and was entitled to the prayers sought in the amended plaint.

The Evidence

6. The case proceeded as an undefended case under Order 10 Rule 9 of the Civil Procedure Rules. Only the Plaintiff and a second witness an officer from the Plaintiff's bankers, testified.

7. The Plaintiff testified as PW1. He gave evidence that he was familiar with the 2nd Defendant who was the chairman of the 1st Defendant company. One morning during the month of April, 2011 the 2nd Defendant telephoned him and let him know of the 2nd Defendant's financial woes. The 2nd defendant showed the Plaintiff 25 share certificates for 25 Plots. All the certificates were in the 2nd Defendant's name. That same morning the 2nd Defendant went and showed the Plaintiff the 25 plots. The Plaintiff testified further that he had dealt previously with the 2nd Defendant. A draft sale Agreement was prepared but was never signed by the Defendants. The Plaintiff further testified that the 2nd Defendant with whom he was familiar was under pressure financially. So the parties simply went to the Plaintiff's bankers, Equity Bank Ltd, and transferred Kshs. 4,400,000/= to the 2nd Defendant. A bankers draft for Kshs. 625,000/= was also prepared in favour of the 1st Defendant. This was the transaction fees. The bankers draft was given to the 2nd Defendant. Thereafter the Plaintiff visited the 1st Defendant's offices and was told the 2nd Defendant had all the documents. The then even fenced the 25 plots but the fencing posts were removed. He then demanded completion but his never happened.

8. The Plaintiff availed documents to support his claim. He produced the funds transfer forms for the Kshs. 4,400,000/=. He also produced a copy of the bankers draft for Kshs. 625,000/= in favour the 1st Defendant. The Plaintiff also produced a statement of account reflecting debits of Kshs. 4,400,000/= and Kshs. 625,000/= both on 7th February, 2011. Finally the Plaintiff produced demand letters directed at the defendants by Adere & Co. Advocates dated 10th May, 2012 and by Gikera & Co. Advocates dated 12th September 2012.

9. The Plaintiff's second witness was Samuel Muthondu Mweiga. He testified on 20th November, 2014 following court summons issued at the instance of the Plaintiff. He stated that he is a cash officer with Equity Bank Ltd. He was familiar with the Plaintiff and in 2011 when still stationed at the Community branch of the Plaintiff's bankers, specifically on 7th February, 2011 he processed an internal transfer of Kshs. 4,400,000/= in favour of the 2nd Defendant from the Plaintiff's account. He also confirmed that on the same day the Plaintiff also purchased a bankers draft of Kshs. 625,000/= in favour of the 1st Defendant. The Plaintiff's account was debited with both sums. On a question by the court, PW2 however could not confirm if the bankers cheque was ever

presented by the 1st Defendant for payment by Equity Bank Ltd.

Submissions

10. The Plaintiff's counsel Ms. Munyaka submitted that the Plaintiff had proved its case to the required standard. She submitted that there was offer acceptance, consideration and intention to bind the parties in their dealings. According to the Plaintiff's Counsel the Defendants were in breach of a binding contract and the court consequently had jurisdiction to order the Defendants to specifically perform their part of the contract and transfer the suit property to the Plaintiff tint the alternative, if the court could not grant specific performance the court was obligated to make an order for payment of Kshs. 5,025,000/= as damages by both defendants to the Plaintiff. Besides, the Plaintiff's Counsel also submitted that the Plaintiff had made out a case for compensation at market value of the property as the Plaintiff had "made major developments to the property and therefore the value had escalated on account of its occupation by the Plaintiff".

11. Reliance was placed by the Plaintiff's Counsel on the two cases of **David Ongiti Ombete & Another –v- Lilian Isigi Muyeshi & 3 others [2014]eKLR t**o support the contention that the Plaintiff was entitled to compensation on the basis of the market value of the property. For the same proposition, the Plaintiff also relied on the case of **Emily Chege –v- Patrick Mayeri [2014]eKLR**.

Determination

12. With the foregoing outline of the pleadings, litigation history, evidence and submissions and of course the relevant law I must now decide the suit.

13. The core issue is whether the Plaintiff is entitled to an order of specific performance. That is what the Plaintiff sought as a substantive relief beside the preservatory order of injunction. There is no doubt that this court sitting as a court of equity has jurisdiction generally to grant orders for specific performance of contracts for the sale of or disposition of interest in land. This is so where the parties meet the requisite demands of both statute and common law as far as contracts for the disposition of interest in land are concerned.

14. The common law requirements of an enforceable contract include majorly the offer and acceptance by the parties, the consideration, the intention to be bound and certainty. From the evidence of the Plaintiff as well as PW2, these critical ingredients were met. The Plaintiff had an offer by the 2nd Defendant to purchase the suit property only described as 25 plots on Block C Embakasi Ranching. He accepted the offer, orally so. The Plaintiff and the 2nd Defendant agreed on a purchase price. The Plaintiff paid the full purchase price of Kshs. 4,400,000/=.

15. There is evidence, uncontroverted that the amount was paid by way of wire transfer to the 2nd Defendant on 7th February, 2011. Both the Plaintiff and PW2 testified to like effect under oath. Documentary evidence corroborating the same was presented by PW2 pursuant to the provisions of Chapter VII of the Evidence Act (Cap 80) Laws of Kenya. I have no reason at all to doubt the payment of Kshs. 4,400,000/= to the 2nd Defendant.

16. There certainty also existed the intention to be bound. A whirlwind movement by the Plaintiff and the 2nd Defendant together with the 1st Defendant's officers confirmed this. The 2nd Defendant was apparently the beneficial owner of the suit property. He held the share certificate. On the morning of 7th February, 2011 he accompanied the Plaintiff from the Plaintiff's house to the site where the suit property is situate. Then to the 1st Defendants offices. Then to the Plaintiff's banker where the Plaintiff paid monies and the Defendant received the same, all in a flash. Certainly, it was a collosal sum by all standards but having received the same the 1st Defendant bound himself.

17. Finally there was also certainty as to the suit property sold and bought. The property is unregistered. It could be easily traced and transacted. Upon execution of a sale contract, which was all that was left, the 2nd Defendant could have completed his part of the bargain. The 2nd Defendant would not have done anything else, save perhaps execute a special power of Attorney alongside the sale contract. The rest then would have been with the 1st Defendant to ensure the suit property was ultimately registered in favour of the Plaintiff.

18. Then however a rather unfamiliar story unfolded to the Plaintiff. His trusted friend, the 2nd Defendant in the Plaintiff's own testimony refused or neglected to execute the Sale Contract prepared by the Plaintiff's counsel. The story must have been unfamiliar because the Plaintiff did not seem to understand the repercussions of the absence of a written and executed Sale Agreement.

19. Section 3 of the Law of Contract Act (Cap 23) and Section 38 of the Land Act have fairly identical provisions in so far as disposition of interest in land is concerned. I will re print provisions the latter statute as it was enacted late in terms of time. The Section reads as follows:

> *"38. (1) 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 –*
b. *Is in writing;*
c. *Is signed by all the parties thereto; and*
d. *The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.*

> *(2) Subsection (1) shall not apply to a contract made in the course of a public auction nor shall anything in the subsection affect he creation or operation of a resulting implied or a constructive trust"*.

20. The section is clearly is obligatory. It effectively means that it matters not that all the critical ingredients of a contract are met, when it comes to disposition of interest in land it must be in writing signed by both parties in due authentication thereof and duly witnessed by a third party. Despite the Plaintiff's prodding, that never happened in the instant case. The noncompliance with the provisions of Section 3 of the Cap 23 and Section 38 of the Land Act does not mean that the contract is void or voidable. It is simple that it cannot be enforced against a party who has not signed an agreement. Effectively, the court would not have any jurisdiction to make an order for specific performance. The contract lacked the statutory ingredients and the court's jurisdiction to enforce the same was taken away by that technical defect. For that reason alone the Plaintiff's claim for specific performance would fail as the jurisdiction to order specific performance is based on valid and enforceable contracts being in existence. It will not be ordered if contract suffers from some defect such as informality, mistake or illegality: see **Chitty on Contracts 23rd Ed. Vol. 1 paragraph 1522**. The Plaintiff had a contract good in substance but unenforceable in law.

21. Would the Plaintiff be entitled to compensation in the form of the value of the suit? Loss of bargain is a well-known concept and aspect of compensation in land transaction contracts which fall through by reason of a one party's default: see **Surrey County –v- Bredero Homes [1992] 3All ER 302, Bains –v- Fothergill [1874]1 All ER 83, Malhorta –v- Chaudhry '1979]1 All ER 186** and **Seven Seas Property –v- Ali Essa & Another [1993]3 All ER 577**. The premise, in my view must however only exist when there is jurisdiction. In the instant case such jurisdiction by reason of non-compliance with the provisions of Section 3 of the Law of contract Act or Section 38 of the Land Act, 2012 is lacking. The two cases relied upon by the Plaintiff for the proposition that the defaulting vendor ought to be condemned to pay damages, in the market value of the property sold are easily and factually distinguishable in these respects. In both the case of **David Onjili Ombere –v- Lilian Isigi Muyeshi [2014] eKLR** and **Emily Chonje –v- Patrick Mangeli Yusto [2014] eKLR** the parties had executed binding sale contracts in compliance with the statutory requirement as to writing.

22. Besides in this case no evidence was led to illustrate that the Plaintiff was in actual possession of the suit property at any material time. Such allegation only came in the form of submissions by counsel and as has been said, umpteen times, submissions do not substitute evidence: see **Douglas Odhiambo Apel –v- Telkom Kenya Ltd [2014] eKLR and also Moi –v- Mwangi & Another [2014] eKLR.**

23. I would in the circumstances not allow any damages akin to either general damages or special damages for that matter.

24. It is evident that justifiably the Plaintiff ought to be back where he was before the contract. There has been failed consideration not because of the Defendants failure but also due to statutory demands. In such instances a claimant is entitled to recoup from a defendant who has received from the claimant when there is total failure of consideration. The uncontroverted evidence on record is that the Plaintiff paid to the 2nd Defendant, then the beneficial owner of the suit property, the amount of Kshs. 4,400,0000/= on 7th February, 2011. Documentary evidence provided by the Plaintiff and PW2 confirmed this. The 2nd Defendant in turn failed to deliver on his part of the promise. He is in equity duty bound to refund the Plaintiff this amount. There is no reason why he should continue holding on to the same now that it is absolutely obvious that the transaction will not take place.

25. I find that the Plaintiff has made out a case for a refund of this sum. He is entitled to a restitutionary remedy. Coupled with the earlier finding that there is no room for an order of specific performance to be made, I would enter judgment for the Plaintiff against the 2nd Defendant in the principal sum of Kshs. 4,400,000/= by way of restitution.

26. With regard to the amount of Kshs. 625,000/= which was allegedly paid to the 1st Defendant as transaction costs, I am unable to find in favour of the Plaintiff. Even though the Plaintiff led evidence that a bankers cheque for Kshs. 625,000/= was issued by the Plaintiff bankers in favour of the 1st Defendant, no evidence was led to show that this cheque was actually delivered to the 1st Defendant. The Plaintiff, also despite calling his bankers to testify in his favour through PW2 did not show that the bankers draft was actually presented for payment by the 1st Defendant. In my view, the Plaintiff's bankers who testified at trial ought to have positively identified the transactional payment to the 1st Defendant.

27. The nature of a bankers draft is such that when it is issued the payee does not receive the proceeds thereof until presentment and actual payment. The Plaintiff's account could have and was indeed debited with the equivalent Kshs. 625,000/= on 7th February, 2011. That amount was not paid to the 1st Defendant as banking practice dictated that the Plaintiff's bankers appropriated the equivalent amount until the bankers cheque was presented by the payee or the payees' bankers for payment. No evidence was led to show that sort of transaction. The possibility that the cheque was never presented for payment is a stalk as the possibility that it was presented for payment. It was for the Plaintiff to present evidence for him to succeed: see **Sections 107 and 108 of the Evidence Act**. He did not and the claim for the amount for Kshs. 625,000/= can only fail. It fails as it was not enough to simply present a copy of the cheque.

Conclusion

28. I have dealt with the two main issues in this case. The third issue is the peripheral one of costs. It is evident that the culpable party was the 2nd Defendant. The 1st Defendant played actually no role in the intended sale let alone the collapse thereof. I would definitely award the costs of the suit to the Plaintiff who has succeeded in recouping the purchase price.

29. I make therefore the following orders in summary:

a. There will be judgment in favour of the Plaintiff against the 2nd Defendant in the sum of Kshs. 4,400,000/= in refund of the purchase price.

b. The said amount will attract interest at the simple court rates of 14% p.a effective the date of filing suit until full payment.

c. The Plaintiff will have costs of the suit to be paid by the 2nd Defendant.

d. The suit against the 1st Defendant is dismissed but with no orders as to costs.

30.Decree accordingly.

Dated, signed and delivered at Nairobi this 16th day of January, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff/Applicant

..... for the Defendants/Respondents