



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 191 OF 2007

JOHN MIRITI KIRAITHE.....PLAINTIFF

VERSUS

KABUBURA KIBURURU MUCHIRI.....DEFENDANT

JUDGMENT

The Plaintiff's case

The Plaintiff instituted the suit by way of a Plaint dated 27th June 2007 wherein he averred that on 8th January 2003, he and the Defendant entered into a contract for sale of $\frac{1}{4}$ of an acre of land comprised in parcel of land known as L.R. No. Nairobi/Block 110/240 at a consideration of Kshs. 800,000/-. The Plaintiff averred that out of the purchase price, he has already paid Kshs. 600,000/- and that it was agreed that the balance of the purchase price would be paid by the end of 2007, failing which the parties would rescind the contract.

It is the Plaintiff's averment that since 25th May 2007 the Defendant has refused to receive and acknowledge the balance of the purchase price with the aim of frustrating the contract since he stood to lose the part payment by the end of 2007 if the balance would not have been paid. It was averred that the property is registered jointly in the name of the Defendant and Mary Gathoni Karanja and that the latter had already executed the transfer documents but the Defendant has refused to execute the same in his favour.

On the foregoing, the Plaintiff prayed for orders that:

1. An order for specific performance of the contract entered into by the parties on 8th January 2003 and that the Plaintiff be allowed to pay the balance of the purchase price while the Defendant be compelled to sign the relevant documents to complete the transfer of $\frac{1}{4}$ of the land known as Nairobi/Block 110/245 to the Plaintiff.
2. In the alternative the court do order the Deputy Registrar, High Court of Kenya to execute the transfer document on behalf of the Defendant.
3. Further in the alternative the Court does order the parcel of land known as Nairobi/Block 110/245 to be sub-divided into 2 portions of $\frac{1}{4}$ acre each and thereafter $\frac{1}{4}$ acre to be transferred to the Plaintiff.
4. Any other just relief that they Court may deem fit.

The Plaintiff swore a witness statement on 20th July 2011 wherein he reiterated the contents of the Plaintiff. In evidence, the Plaintiff testified that the suit property measures $\frac{1}{2}$ an acre and is jointly owned by Mary Gathoni Karanja and the Defendant, and that he entered into an agreement for the purchase of $\frac{1}{4}$ acre belonging to the Defendant. Subsequently, that the Defendant entered into an agreement dated 23rd January 2003 for the purchase of $\frac{1}{4}$ acre belonging to Mary Gathoni Karanja and paid a consideration of Kshs. 500,000/-. The Plaintiff testified that he deposited the remainder of the purchase price of Kshs. 200,000/- with his advocates but that the Defendant has declined to receive it.

In support of his claim, the Plaintiff produced as exhibits supporting documents comprising: a copy of the title deed of the suit property; a copy of the sale agreement between himself and the Defendant dated 8th January 2013; copies of receipts and an acknowledgement note signed on 4th August 2004 by the Defendant acknowledging receipt of Kshs. 220,000/- as part payment towards the purchase of a portion of the suit property; a copy of a sale agreement dated 22nd January 2003 between the Defendant and Mary Gathoni Karanja for the purchase of her share of the property and an acknowledgement note signed by Mary Gathoni Karanja on 4th November 2004 confirming receipt of the full purchase price from the Defendant; and a copy of an undated transfer form executed by Mary Gathoni Karanja transferring her portion of the property to the Plaintiff and Defendant.

On cross-examination, the Plaintiff maintained that the transaction was done at the advocate's office where the Defendant signed the agreement and accepted part payment of the purchase price. In re-examination, the Plaintiff stated that he and the Defendant both went to the advocates office and expressed what they had agreed on which was reduced to writing. Further that the Defendant utilized the part payment received from him to pay Mary Gathoni Karanja for the purchase of her share.

Albert Kamunde, Advocate (PW2) swore a witness statement on 12th July 2011 and gave oral evidence. His evidence is that acting on the Defendant's instructions, he prepared a sale agreement dated 8th January 2003 between the Plaintiff and Defendant whereby the Plaintiff was purchasing the Defendant's portion of the suit property measuring $\frac{1}{4}$ an acre at a consideration of Kshs. 800,000/-, and a second sale agreement dated 22nd January 2003 between the Defendant and Mary Gathoni Karanja where the Defendant was purchasing the latter's portion measuring $\frac{1}{4}$ an acre at a consideration of Kshs. 500,000/-.

It was the testimony of the witness that he witnessed the exchange and receipt of Kshs. 600,000/- being part payments of the transaction between the Plaintiff and Defendant and full payment of Kshs. 500,000/- paid by the Defendant to Mary Gathoni Karanja, which she acknowledged and subsequently executed a transfer. Further, that the Defendant paid the firm legal fees covering the two transactions. It was his evidence that the said transfer was left undated because the Plaintiff was yet to settle the balance of the purchase price.

PW2 further testified that on 25th May 2007 and 7th June 2007, the Plaintiff accompanied by the Defendant, came to the firm with the balance of Kshs. 200,000/- ready to settle the outstanding balance. However, that the Defendant on both occasions declined to accept the balance stating that he was willing to transfer $\frac{1}{8}$ and not $\frac{1}{4}$ as earlier agreed, on the basis that the value of the plot had since appreciated. PW2 confirmed that the firm is in possession of the original title deed surrendered by the Defendant and original transfer document executed by Mary Gathoni Karanja in favour of the Plaintiff and Defendant.

The Defendant's Case

The Defendant filed his Defence on 21st August 2007, wherein he denied the averments made by the Plaintiff. The Defendant admitted that the suit property is registered jointly in his name and Mary Gathoni Karanja but refuted the claim that he entered into a sale agreement or received Kshs. 600,000/-. The Defendant did not file a witness statement, list of documents nor give oral evidence.

The Submissions

The suit was further canvassed by way of written submissions. Kaburu Miriti & Co. Advocates on behalf the Plaintiff filed submissions dated 4th December 2014, wherein counsel submitted that it is the Defendant who breached the terms of the agreement by declining to receive the balance of the purchase price, and in that regard the Plaintiff is entitled to the prayers sought. The Defendant filed submissions dated 23rd January 2015. It was his submission he owned the suit property jointly with Mary Gathoni Karanja who agreed to transfer her portion to him. The Defendant admits that the sale agreement for the transaction was prepared by Albert Kamunde, Advocate. It is his submission that he paid the purchase price in installments with proceeds from sale of milk, grade cows, goats, as well as proceeds from his kiosk and completed payments on 4th November 2004.

The Defendant submitted that the Advocate and the Plaintiff colluded to defraud him of his property claiming that he never entered into a sale agreement or received money from the Plaintiff. It was his submission that as at the 8th January 2013 when he allegedly entered into a sale agreement with the Plaintiff, he had no capacity to sell the property. Further that the suit property being agricultural land, consent of the land control board was a mandatory requirement for such a transaction to be valid. The Defendant prayed that the original title documents in the Advocate's possession be released to him to enable complete the transfer process.

The Issues and Determination

The Court having considered the pleadings and evidence by the parties finds that there are three issues that require to be determined:

1. Whether the Defendant had capacity to sell the suit property
2. Whether the sale agreement between the Plaintiff and Defendant is void for want of consent from the Land Control Board
3. Whether the Plaintiff is entitled to the Relief sought.

Whether the Defendant had capacity to sell the suit property

The Defendant submitted that it would not be possible for him to enter into a sale agreement with the Plaintiff on 8th January 2003 before he purchased Mary Gathoni Karanja's portion on 22nd January 2003, as he had no capacity at the time to enter into such a transaction.

Section 91 of the Land Registration Act provides for meaning and incidents of co-tenancies. Sub-section (5) and (6) specifically provide for tenants in common as follows:

(5) If land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and the on the death of a tenant, the deceased's share shall be treated as part of their estate.

(6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.

The law provides that consent must be obtained from the co-tenant before a transaction takes place. From the evidence adduced by PW1 and PW2, the Defendant obtained funds to buy off Mary Gathoni Karanja's portion from the proceeds of the sale of his portion to PW1. Subsequently, Mary sold off her portion and executed the transfer. There is no evidence to suggest that the Defendant's co-owner (Mary Gathoni Karanja) withheld consent denying the Defendant from disposing off his portion. The conduct of the parties suggest that the transaction was authorized.

Whether the sale agreement between the Plaintiff and Defendant is void for want of consent from the

Land Control Board

The Defendant maintains that consent from the Land Control Board must be sought and obtain in accordance with Section 6 of the Land Control Act in view of the suit property being agricultural land. The question arises as to how a court ascertains that the property in dispute is agricultural land within the meaning of Section 6 of the Land Control Act. Angote J. in the case of **Emily HawatuKalivoo v Joshua Katana Kiponda & Another, [2013] eKLR** observed that, **“the issue as to whether the suit property is agricultural land as defined by section 2 of the Land Control Act, Cap 302 can only be ascertained either from the pleadings or the evidence”**.

Nothing was mentioned in evidence as to whether the property is agricultural land. Both sale agreements did not make reference to property being in a controlled area thus requiring consent from the Land Control Board. However, on perusal of the copy of title to the suit property availed by the Plaintiff, Part A which is the property section states that it is to be used for residential purposes only

Section 2 of the Land Control Board Act defines agricultural land as follows:

“2. In this Act, unless the context otherwise requires - 'agricultural land' means-

(a) land that is not within-

(i) a municipality or a township; or

(ii) an area which was, on or at any time after 1st July, 1952 a township under the townships ordinance (now repealed); or

(iii) an area which was, on or at any time after the 1st July, 1952, a trading centre under the Trading Centres Ordinance (now repealed); or

(iv) a market

(b) land in the Nairobi area or in any municipality, township or urban centre that is declared by the Minister, by notice in the Gazette, to be agricultural land for the purposes of this Act, other than land which, by reason of any condition or covenant in the title thereto or any limitation imposed by law, is subject to the restriction that it may not be used for agriculture or to the requirement that it shall be used for a non-agricultural purpose.”

From the foregoing proviso, it is my finding that by reason on the condition stated in the title, transactions affecting the suit property do not require consent from the Land Board.

Whether the Plaintiff is entitled to the Relief sought.

The Plaintiff contends that he is willing, ready and able to complete the purchase. Evidence led by PW1 and corroborated PW2 is that the PW1 on two occasions in 2007 handed over the balance of the purchase price to the Defendant who decline to receive it on the basis that he was only willing to part with 1/8 as opposed to the agreed ¼ of the suit property.

In **Mangi v Munyiri & Another [1991] eKLR** it was held that a claim for specific performance is not granted as a matter of course. Being an equitable remedy, the court has to consider all the circumstances including the conduct of the parties and whether in all the circumstances an applicant is entitled to equitable relief.

In addition, in **Openda v Ahn, [1984] KLR 208** the Court of Appeal held inter alia that a condition precedent for specific performance of an agreement is that the purchaser must pay or tender the purchase price to the seller or such persons as he directs at the time and place of completing the sale. The respondent did not have to tender physically the balance of the purchase price and interest if the appellant

had clearly refused to accept it by so acting waived that requirement. The principles to be considered in granting an order for specific performance were also summarized by Maraga J. (now JA.) in **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited Civil Case 190 of 2005 [2006] eKLR**

The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

The Defendant has denied entering into a sale agreement for a portion of the suit property. He however did not call any evidence to controvert the evidence by PW1 and PW2 of the sale agreement dated 8th January 2003 he is said to have entered into dated in the presence of the two witnesses. The said sale agreement was produced in evidence by the Plaintiff. He also did not bring any evidence to controvert the evidence by the Plaintiff that he received Kshs 600,000/= as part payment of the purchase price from the suit property.

Lastly, the Defendant did not bring any evidence of his averment that he bought the ¼ acre belonging to Mary Gathoni Karanja from sale proceeds from his farm. In the premises this Court has no option but to find that the Plaintiff did enter into a sale agreement with the Plaintiff on 8th January 2008 for the sale of the suit property, and that he received Kshs 600,000/=. Further, the Court finds that the Plaintiff has been ready and willing to complete the sale agreement as shown by his deposit of the purchase price with their Advocate.

This Court therefore finds that the Plaintiff has proved his case on the balance of probabilities and is entitled to the orders sought. The Court however observed that the Defendant appeared not able to meet the costs of his defence, and in the circumstances finds that it may not be equitable to compel him to pay the costs of this suit.

This Court accordingly finds judgment for the Plaintiff and orders as follows:

1. That the contract entered into by the Plaintiff and Defendant on 8th January 2003 be forthwith performed by the parties. The Plaintiff shall within 30 days of the date of this judgment pay the balance of the purchase price of Kshs 200,000/= to the Defendant and the Defendant shall thereupon forthwith sign the relevant documents to complete the transfer and subdivision of ¼ acre of the land known as Nairobi/Block 110/245 to the Plaintiff.
2. That upon default and/or refusal by the Defendant the Plaintiff shall deposit the said balance of the purchase price of Kshs 200,000/= in Court for collection by the Defendant, and the Nairobi Environment and Land Court Deputy Registrar shall thereupon execute any necessary transfer and subdivision forms and/or vesting orders in respect of ¼ acre of the land known as Nairobi/Block 110/245 in favour of the Plaintiff.
3. Each party shall bear their own costs of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___20th___ day of ___March___, 2015.

P. NYAMWEYA

JUDGE