



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 75 OF 2013

STEPHEN KIBET MALAKWEN ::::::::::::::::::::::::::: PLAINTIFF

VERSUS

BENSON GATECA MBUGUA ::::::::::::::::::::::::::: DEFENDANT

J U D G E M E N T

INTRODUCTION

1. The Plaintiff is a Human Resource Manager with Kenya Seed Company Ltd Kitale. The defendant is a businessman based at Kitale town. On 3/2/2009 the plaintiff entered into a written agreement with the defendant in which the defendant agreed to sell to the plaintiff a portion of LR NO. 2116/94/XVI measuring 0.528 of an acre at Milimani Estate. The plaintiff paid the entire purchase price of Kshs.900,000/= and took possession and has since constructed a residential house which was hearing completion as at the time he testified in this case.

2. It was a term of the sale agreement that the defendant was to facilitate subdivision and transfer the sold portion to the plaintiff. The plaintiff has been urging the defendant to meet his part of the agreement in vain prompting the plaintiff to file this suit in which he seeks an order of specific performance of the agreement of 3/2/2009.

PLAINTIFF'S CASE

3. The plaintiff testified that he paid Kshs.500,000/= upon execution of the agreement on 3/2/2009. The balance of Kshs.400,000/= was paid in two installments. The first instalment of the balance was made 26/2/2009 when the plaintiff paid Kshs.250,000/=. The second and last instalment of the balance of the purchase price was made on 28/2/2009 when the plaintiff paid Kshs.150,000/=. All the payments were made before a lawyer and the defendant acknowledged receipt of the payments.

4. The plaintiff testified that he has been urging the defendant to carry out subdivision and transfer the sold portion to him but the defendant has neglected to do so. The plaintiff wrote two demand letters to the defendant to meet his part of the agreement but the defendant did not even respond to the demand letters prompting the plaintiff to file this suit against him.

DEFENDANT'S CASE

5. The defendant in his evidence conceded that he indeed sold part of his land to the plaintiff and that the plaintiff has paid him fully. He stated that he has been unable to complete the transaction because the surveyor who had been given the task of undertaking sub-division has not done so. He testified that he has already cleared the land rent due to the Government but that he has not received a receipt from the Lands office. He testified that he cleared all rates which were due to the then Kitale Municipal Council and that he is ready and willing to complete the transaction.

ANALYSIS OF EVIDENCE AND THE LAW

6. I have gone through the pleadings, the evidence by the defendant and the plaintiff as well as submissions by their counsel. There is no contention that there was a sale agreement between the plaintiff and the defendant. The agreement was produced as exhibit 1. There is also no contention that the plaintiff made full payment of the purchase price. Kshs.500,000/= was paid upon execution of the agreement. The balance of Kshs. 400,000/= was paid in two instalments. The first instalment of Kshs.250,000/= was made on 26/2/2009. The second instalment of the balance was made on 28/2/2009. The acknowledgement notes signed before an advocate were produced as exhibit 2 and 3 respectively.

7. The defendant contends that an order of specific performance should not be issued as he is ready and willing to meet his obligation under the contract. He contends that the sale agreement had no time limit within which the contract was to be completed. In support of this contention, the defendant's counsel relied on the dissenting Judgement of **Justice (Retired) A. B Shah in Civil Appeal No. 165 of 1996 between Gurder Singh Birdi and another -Versus Abubakar Madhbuti**. The defendant's Counsel also relied on a **High Court Case from Malindi being Civil Suit No. 85 of 2001 between William Kazungu Karisa -Versus- Cosmas Angore Chanzeru**.

8. In response to the defendant's contention that time was not of essence, the plaintiff's counsel submitted that once demand letters were delivered to the defendant asking him to comply with his part of the contract, time became of essence. The plaintiff relied on a **court of Appeal decision in Sagoo – Vs- Dourado (1983) KLR 365 as well as Cassam – Vs- Sachania (1982) KLR 191**. The plaintiff also relied on a decision from the **Supreme Court of Uganda between Manzoor and Baram [2003] 2 EA 580**.

9. I have gone through the decisions relied on by the respective parties and the question which arises for determination is whether time was of essence in the contract and whether an order of specific performance can issue in the circumstances. It is clear from the sale agreement of 3/2/2009 that the parties did not make time to be of essence. It is on this ground that the defendant is arguing that orders of specific performance should not be given as he is ready and willing to perform his part of the bargain. In the **case of Sagoo -Vs- Dourado** it was held that in contracts of all types, time will not be considered of the essence unless;-

(i) The parties expressly stipulate that conditions as to time must be strictly complied.

(ii) The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered of essence, and/or

(iii) A party who has been subjected to unreasonable delay gives notice to the party in default making time of essence.

10. In the present case the defendant is the one who was to ensure that all steps are made to enable the plaintiff get registered as owner of the portion which he bought. The steps included ensuring that the land is subdivided so that the plaintiff's portion is curved out of the main land. This was to be possible after the defendant made all payments due to the Government in rents and rates due to the relevant authorities. The defendant has not done any of these actions in furtherance of fulfillment of part of his bargain. Though the defendant claims that it is the surveyor who has let him down, he was not demonstrated that he has paid the requisite land rents and rates. He claimed in his evidence that he paid land rent but has not received a receipt for the same. He also claimed to have paid Kshs.155,000/= being rates to the defunct municipality of Kitale but he did not show anything to prove that that was the case. The agreement was entered into on 3/2/2009. When the plaintiff noticed that the defendant was not keen on meeting his part of the bargain, the plaintiff through his lawyer wrote a letter dated 6/3/2013 giving him 14 days to comply. The plaintiff again wrote to the defendant another letter dated 11/6/2013. These two letters were produced as exhibit 6 and 7 respectively. These two letters were delivered to the defendant. The defendant in his defence testimony in court acknowledged receipt of the two letters but said that he did not act on the same and had no reason for not acting on them. These two letters constituted valid notices which made time of essence. These two letters were issued in the year 2013. This was five years after the date of the agreement. I find that delay of a period of 5 years is unreasonable in the circumstances. The plaintiff took immediate possession of the portion sold to him. He has put up a massionette on the same. The defendant conceded that the plaintiff has indeed constructed on his portion of land. The plaintiff has every right to ask the court to compel the defendant to meet his part of the bargain.

DETERMINATION

11. The defendant in his defence testimony stated that he is not opposed to the plaintiff's claim. His defence as filed is a sham. There is nothing in this case which will disentitle the plaintiff from an order of specific performance. I find that the plaintiff has proved his case on a balance of probabilities. An order of specific performance of the agreement for sale dated 3/2/2009 is hereby issued. If the defendant will not willingly comply, the Deputy Registrar is hereby empowered to sign all documents necessary to give effect to the agreement of 3/2/2009. The plaintiff shall have costs of this suit.

Dated, signed and delivered at Kitale on this 1st day of December, 2014.

E. OBAGA

JUDGE

In the presence of Mr Samba for plaintiff and Mr Kidiavai for defendant. Court clerk – Isabella.

E. OBAGA

JUDGE

01/12/2014