



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 63 OF 2015

BETWEEN

ANDREW KIPROP RONOH.....APPELLANT

AND

VITALIS SUNGUTI LIGARE.....1ST RESPONDENT

ISAAC KEMBOI.....2ND RESPONDENT

(An Appeal from the judgment of the High Court of Kenya, Environment and Land Court at Eldoret, (Ombwayo, J.) dated 24th April, 2015
in ELC NO. 176 OF 2013)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the Environment and Land Court (Ombwayo, J.) whereby the court entered judgment for the appellant against the 1st respondent herein for Shs.3,250,000/= and 20% of the purchase price and costs of the suit and rejected the appellant's other claims.

[2] On 28th March, 2013, the appellant herein filed a suit against the two respondents. He averred in the plaint, *inter alia*, that by a sale agreement dated 7th March, 2012, the 1st respondent agreed to sell to him land title No. **Uasin Gishu/Tapsagoi Sett. Scheme/173** measuring approximately 7.0 Hectares for a consideration of Shs.3,500,000/=; that the appellant paid Shs. 3,200,000/= to the 1st respondent who acknowledged receipt thereof; that the title was deposited for safe custody with **M/S Kiboss-Kibet & Co. Advocates** who drew the agreement; that the appellant was to clear the balance of Shs. 300,000/= on 4th January, 2013, which was the completion date and receive the completion documents to effect a transfer and that the 1st respondent disappeared without trace upon receipt of the first instalment of the purchase price. The appellant further averred that the 2nd respondent was in possession of the land which he was utilizing; that the 2nd respondent was reluctant to give up vacant possession and that he is ready and willing to complete the transaction.

He sought an order of specific performance, an order of injunction to restrain the 1st respondent from disposing of the land; an order of permanent injunction to restrain the 2nd respondent from continuing to use the land and in the alternative, an order of restitution and interest at commercial rates; costs of the suit and interest.

[3] The Court granted leave to serve the 1st respondent with summons to enter appearance by substituted service – that is, by advertisement in a newspaper. The 2nd respondent was personally served. Neither the 1st respondent nor the 2nd respondent entered appearance. The 2nd respondent appeared in person at the hearing of an interlocutory application which was later abandoned. Again, the 1st respondent was served with hearing notice by substituted service but he did not attend the hearing. The 2nd respondent did not also attend the hearing of the suit.

[4] At the trial, the appellant gave evidence and produced the agreement of sale dated 7th March 2012 and a copy of the Title Deed issued to the 1st respondent on 25th October, 1995. He prayed for an order of specific performance.

[5] The trial Judge made findings that; that the respondents were aware of the existence of the suit and of the hearing date; that the land in

dispute is still registered in the name of the 1st respondent; that no application for consent of the Land Control Board was made; that failure to make an application for consent was in contravention of **Section 6** of the Land Control Act and that **Section 7** of the Land Control Act provides for refund of the purchase price.

The trial Judge allowed the alternative prayer for an order of restitution and gave judgment for the appellant against the 1st respondent for Shs. 3, 250,000/= and 20% of the purchase price and the costs of the suit.

[6] The grounds of appeal fault the learned Judge for not granting an order of specific performance in the unique circumstances of the case and for failing to grant an order of injunction. The appellant prays that the appeal be allowed, an order of specific performance be granted; that the registrar of this Court be ordered to execute the documents of conveyance on behalf of the 1st respondent and that the time for obtaining the consent of the Land Control Board be extended.

[7] **Mr. Songok**, learned counsel for the appellant submitted, amongst other things, that the learned Judge failed to consider that the consent of the Land Control Board could not be obtained as the 1st respondent had disappeared; that the 1st respondent deposited the title deed with the advocate; that the 1st respondent received over three quarters of the purchase price and that the order for refund of purchase price was not practical as the 1st respondent had disappeared. The 2nd respondent attended the hearing of the appeal and submitted that the land belonged to **Zablon Karani** who died in 2015; that in 2007, he leased the land which was vacant from the deceased; that he continued to pay rent to **Catherine Karani**, the deceased's young wife and that he does not know the 1st respondent.

[8] In this appeal, the appellant is contending that the remedy of specific performance should have been granted. The authors of **Halsbury's Laws of England, Vol. 44(1) 4th Edition – Re issue** state at para. 801:-

“In early times a court of equity assumed jurisdiction to compel a party to a contract to perform his part of the contract when damages recoverable at law were not an adequate remedy. The remedy of specific performance is thus in contrast with the remedy by way of damages for breach of contract, which gives pecuniary compensation for failure to carry out the terms of the contract. The remedy is special and extraordinary in its character, and the court has a discretion either to grant it or to leave the parties to their rights at law. The discretion, however, is not an arbitrary or capricious one; it is to be exercised on fixed principles in accordance with previous authorities. The Judge must exercise his discretion in a judicial manner.”

The principles governing the grant of specific performance include the principle that equity follows the law and that the remedy is supplementary to legal remedies and on ground of inadequacy of the legal remedies. If the contract contains a penalty clause, **paragraph 816** of the same treatise states:

“Where a contract contains a penalty clause, the party entitled to performance has his rights in law upon the contract for the money payable under the clause, and also his right in equity to specific relief; he can, at his discretion, obtain either form of relief, but he cannot obtain both.”

[9] By **Section 6 (1)** of the Land Control Act, a sale, transfer, amongst other transactions affecting agricultural land is void for all purposes unless the Land Control Board has given its consent in respect of the transaction. As provided by **Section 8 (1)** of the same Act, an application for consent should be made within six months of the making of the agreement provided that the High Court has power to extend the period for any sufficient reason.

[10] The agreement of sale contained a penalty clause which states:-

“THAT whoever breaches this agreement will pay 20% of the purchase price and damages therein.”

[11] The learned Judge had discretion to grant an order of specific performance or to enforce the penalty clause in the agreement of sale. The court invoked the penalty clause for the reason that specific performance could not be granted in the absence of the consent of the Land Control Board to the transaction.

The appellant admitted that the respondent had not given him possession of the land. There was no evidence that the appellant had expended any other money in furtherance of the contract of sale. The decree to recover the decretal sum was executable as the appellant could attach and sell the same land.

We are satisfied that this is a case where equity should follow the provisions of the Land Control Act and that damages under the contract were an adequate remedy in the circumstances.

The only error that we can detect is that the learned Judge failed to award interest which was claimed.

[12] For the fore-going, the appeal is dismissed; save that the award of Shs.3,250,000/= and 20% of the purchase price shall carry interest at court rates from the 24th April, 2015, when the judgment appealed from was delivered.

We make no order of costs as between the appellant and the 1st respondent. Similarly, we make no orders as to costs as between the appellant and 2nd respondent who did not defend the suit or attend the hearing in the lower court.

Orders accordingly.

Dated and Delivered at Eldoret this 17th day of May, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR