



REPUBLIC OF KENYA



**Kogei v Mongo (Environment & Land Case E003 of 2023)
[2024] KEELC 6433 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6433 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
ENVIRONMENT & LAND CASE E003 OF 2023
L WAITHAKA, J
SEPTEMBER 25, 2024**

BETWEEN

CLIFFORD KIPKORIR KOGEI PLAINTIFF

AND

ROBERT KOIMA MONGO DEFENDANT

RULING

Introduction

1. On 23rd November 2023, this court issued a temporary injunction restraining the defendant, hereinafter referred to as the applicant, by himself, his agents and/or servants from selling, transferring, charging and/or conducting any dealings contrary to the plaintiff's interests in the parcel of land known as Lembus/Kabimoi/160, hereinafter referred to as the suit property.
2. In granting the plaintiff (now respondent) the above relief, the court took into account that there exists a sale agreement executed between the plaintiff and the respondent over the suit property.
3. One of the terms of the sale agreement/contract executed between the plaintiff and the defendant/applicant is that;
 - “ 3. The sum of Kshs.600, 000/- (six hundred thousand only) shall be paid on or before the 31st March 2013 after the vendor (respondent) will have transferred the said parcel”.
4. The vendor did not transfer the suit property to the plaintiff/respondent within the time stipulated in the sale agreement and at all. Consequently, the plaintiff/respondent did not pay the balance of the purchase price amounting to Kshs. 600,000/-.



5. In what appears to be an attempt by the defendant/applicant to secure his right to payment of the balance of the purchase price, in the event that the plaintiff/respondent wins this case, the defendant/applicant filed the notice of motion, dated 11th July 2024 through which he seeks the following orders:-
 1. That the plaintiff/respondent be ordered to deposit Kshs. 600,000/- in court being the balance of the purchase price within seven (7) days from the date of filing the application, 11/7/2024;
 2. That in default it be construed that the plaintiff/respondent defaulted in the sale agreement dated 5th March 2012.
 3. That the plaintiff/respondent be condemned to pay the costs of the application.
6. The application is supported by the affidavit of the defendant/applicant, Robert Koima Mongo, sworn on 11th July, 2024.
7. As can be discerned from the grounds on the face of the application and the averments contained in the supporting affidavit, the defendant/applicant is afraid that the plaintiff/respondent may not be able to meet his contractual obligation of paying the balance of the purchase price in the event he wins the case against the applicant.
8. In reply and opposition to the application, the plaintiff /respondent, through his replying affidavit sworn on 16th July 2024, has deponed that the defendant/applicant is guilty of non-disclosure of material facts in that on 6th November 2012, when they appeared before the Land Control Board he, the defendant/applicant, changed the terms of the sale agreement by applying for consent to subdivide the suit property instead of consent to transfer it to him yet he had bought the whole of it and that the alleged breach of the sale agreement by himself is attributable and blamable on the defendant/applicant who failed to transfer the suit property to him as provided for in the sale agreement.
9. Terming the application misguided, frivolous, vexatious, fatally defective and an abuse of the court process, the plaintiff/respondent depones that he is a man of means and that he is willing to comply with such conditions/directions as the court may give at the conclusion of the case.
10. The plaintiff/respondent further depones that the defendant/applicant has not complied with clause 3 of the sale agreement executed between them and contends that he does not deserve the orders sought.

Analysis and Determination

11. As pointed out herein above, by a sale agreement dated 5th March 2012, the parties to this application entered into a sale agreement in respect of the suit property. Through the sale agreement, the parties provided for their rights and obligations in respect of the transaction. In that regard, the parties inter alia agreed that the balance of the purchase price would be paid on or before 31st March 2013. However, as a pre-condition for payment of the balance of the purchase price, the defendant/applicant was required to have transferred the suit property to the plaintiff/respondent.
12. The defendant/applicant failed to fulfil his part of the bargain to transfer the suit property to the plaintiff/respondent within the time provided in the sale agreement and at all.
13. Having failed to fulfil his part of the bargain, which was to transfer the suit property to the plaintiff/respondent, the defendant applicant cannot be heard to claim that the plaintiff/applicant is in breach of the terms of the sale agreement when he himself is the cause of the breach.
14. It has not been demonstrated that the plaintiff may not be able to meet his contractual obligations. In any event, it is not the duty of this court to make contracts or amend them for the parties. The duty



of the court is merely to interpret the contract. In that regard, see the case of Pius Kimaiyo Langat V Cooperative Bank of Kenya Ltd 2017 Eklr, where the court held: -

“...it is not the business of courts to rewrite contracts between parties as the said parties are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved”.

15. In the case of Housing Finance Company of Kenya V Gilbert Kibe Njuguna HCCC No.1601 of 1999 (unreported) the court stated: -

“... Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the mind. If it appears to court that one party varied terms of the contract without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the court will say no to the enforcement of such contract.”

16. In the case of National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd & Another (2001) e KLR the Court of Appeal held: -

“Save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party escape from a bad bargain.”

17. I have carefully considered the defendant/ applicant’s instant application. Through the application, the applicant seeks to escape from what appears to have been a bad bargain. Unfortunately, he has not demonstrated existence of any exceptional circumstances that would warrant this court to release him from his bad bargain.

18. The upshot of the foregoing is that the notice of motion dated 11th July 2024 has no merit. Consequently, I dismiss it with costs to the plaintiff/respondent.

19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ITEN THIS 25TH DAY OF SEPTEMBER, 2024.

L. N. WAITHAKA

JUDGE

Ruling delivered virtually in the presence of:-

Mr. Sirma holding brief for Mr. Kipkenei for Defendant/ Applicant

Mr. Masinde holding brief for Mr. Kipsamo for the Plaintiff/Respondent

Court Assistant: Ian

